Productivity Commission

INQUIRY INTO THE MARKET FOR RETAIL TENANCY LEASES IN AUSTRALIA

Submission
by

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This submission is concerned entirely with exploring key mechanisms for promoting an efficient market for retail leases in Australia. The market for retail leases plays a key role in the Australian economy. Since much of the retailing in Australia still occurs through rented space, the rent paid by a retailer is a key cost of doing business. If the market for retail leases is not working efficiently, then that has an impact on a retailer's cost of doing business. An inefficient market for retail leases distorts competition in the retail sector and distorts the pricing of retail space. An inefficient market for retail leases adds inflationary pressure on consumer prices and in turn the economy.

Unfortunately, the draft report fails to get to the heart of the inefficiencies present in the market for retail leases in Australia. With all due respect, many parts of the report are superficial in their analysis of key inefficiencies in the market for retail leases. In the absence of rigorous economic analysis of key market failures and inefficiencies within the market for retail leases a considerable shadow is cast over the draft report.

The promotion of competition for the benefit of consumers should be the guiding principle for all economic regulators. Regrettably, several key problems in the market for retail leases where not assessed by reference to how consumers would benefit from reforms to ensure the most efficient and competitive market for retail leases in Australia.

What are the key problems leading to an inefficient market for retail leases?

These can be conveniently summarized as follows:

- A lack of transparency in relation to rents;
- A lack of contestability in relation to shopping centres;
- Ineffective laws to deal with anti-competitive price discrimination by landlords; and
- Ineffective laws to stop abuses of unethical conduct by landlords;

A lack of transparency in relation to rents

In any market the lack of transparency in the price of goods or services represents a significant market failure. In this case market failure arises because prices are not determined by an open and transparent process. Markets fail where prices are determined by secret deals, information asymmetries or abuses of market power that inflate or distort prices.

Markets operate most efficiently where all participants are fully informed. Conversely, markets are the least efficient where secrecy surrounds pricing within that market or the market is characterized by information asymmetries.

Given that the efficient operation of the price mechanism is essential for the efficient operation of markets, any tampering, secrecy or lack of transparency surrounding pricing within that market should ring very loud alarm bells. Such alarm bells should be ringing very loudly within the market for retail leases in Australia.

The mandatory registration of leases offers the most efficient mechanism for promoting transparency in relation to rents. Mandatory registration of leases in today's information technology environment should be very easy and quite cheap. We can search the internet for the price of almost anything, but we can't do that for retail space. Where does a small retailer get that information? They can approach commercial providers, but those databases are typically limited by the inconsistent levels of registration across Australia. Why can't a person be allowed to access lease data directly from Government databases?

Shopping centre owners have considerable information at their disposal and may even share that information amongst themselves. The small retailer may only have access to a faction of the information possessed by the shopping centre owner. How can the small retailer negotiate efficiently in that environment, especially at lease renewal?

A number of proposals are presented in this Submission that would promote transparency of rents and enable small retailers to make informed decisions regarding the level of rent they are being asked to pay and, in particular, to see how that compares to::
(i) rents paid by anchor tenants and large retailers in the shopping centre; and
(ii) rents paid by the same type of small retailers in other shopping centres operated by the same shopping centre owner or manager. This information would be required to be included in a disclosure document provided to a tenant. Under the proposals, the anchor tenant or large retailer and the same type of small retailers in other centres would not be named thereby overcoming any confidentiality issues.

In this way, small retailers would be able to make an informed assessment up front of rents they are being asked to pay as compared to the levels of rent paid by comparable tenants in other shopping centres, as well as the levels of rent paid by the anchor tenants in the shopping centre. Both of these pieces of information would be extremely relevant to the potential viability or otherwise of the small retailer's business. For example, if the small retailer was paying a rent higher that a comparable tenant in another shopping centre, the small retailer would seriously need to consider whether the higher rent in this shopping centre is justifiable and whether the small retailer's business will be viable given the higher rent.

Transparency of comparable rents by comparable tenants in other shopping centres

Transparency regarding the rent paid by comparable tenants in other shopping centres operated by the same shopping centre owner or manager could be achieved efficiently, while totally avoiding confidentiality issues. Such disclosure should specify the rent paid by the comparable tenant as well as listing the type and amount of any lease incentives given directly or indirectly to that comparable tenant. The following table is an example of the way the information could be presented in disclosure documents provided to tenants in a shopping centre:

Anonymous Shopping Centre No.1 Specify: - State/Territory and - If City/Regional	Specify Rent paid by a comparable tenant per sq metre	List type and amount of any lease incentives given directly or indirectly to that comparable tenant
Anonymous comparable tenant A		
Anonymous comparable tenant B		
Anonymous comparable tenant C		

Anonymous Shopping Centre No.2 Specify: - State/Territory and - If City/Regional	Specify Rent paid by a comparable tenant per sq metre	List type and amount of any lease incentives given directly or indirectly to that comparable tenant
Anonymous comparable tenant A		
Anonymous comparable tenant B		

A table modeled on the above would be prepared for each shopping centre operated by the same shopping centre owner or manager and would be required to be included in a Disclosure document to each tenant thereby

allowing the tenant access to information on comparable rents and lease incentives paid by comparable tenants in other shopping centres operated by the same shopping centre owner or manager.

Transparency of rents paid by anchor and large tenants in the particular shopping centre

Similarly, the small retailer should be aware of the rent paid by anchor/large tenants in their shopping centre as the small retailer may be competing with the anchor/large tenants for some or all of its business. Small retailers need to be fully aware of the nature and extent of any competitive disadvantage that they may be under in comparison to the anchor/large tenants as a result of the lower rents paid or incentives received by the anchor/large tenants. While small retailers may be aware that anchor/large tenants pay a lower rent, small retailers need to know the full magnitude of the differences in rent between anchor/large tenants and small retailers. Consequently, it is critical from a transparency point of view that there be full disclosure of rents paid by anchor/ large tenants and the types and amounts of any lease or other incentive payments given directly or indirectly to anchor/large tenants.

Such disclosure can be made anonymously thereby totally avoiding any confidentiality issues. It is the disclosure of the level of rent and other incentives received by the anchor and large tenants that is relevant to an efficient markets and not the identity of the particular anchor or large tenant. The following is an example of the way the information could be presented in disclosure documents provided to tenants in a shopping centre:

Name of Shopping Centre:

	List Rent paid by anchor/large tenant per sq metre	List type and amount of any lease incentives given directly or indirectly to that anchor/large tenant
Anonymous Anchor/large tenant A		
Anonymous Anchor/large tenant B		
Anonymous Anchor/large tenant C		
Anonymous Anchor/large tenant D		
Anonymous Anchor/large tenant E		

Transparency relating to disputes and litigation

Transparency relating to disputes between existing and past tenants with the shopping centre owner or manager would provide potential tenants would considerable information about the operation of the shopping centre and, in particular, about the owner's or manager's management style and performance. Such disclosure would enable potential tenants to review the number and nature of disputes and litigation involving the shopping centre owner and manager. This would enable potential tenants to assess if the shopping centre has underlying problems or whether the owner's or manager's performance is lacking in some way.

Indeed, a high level of disputes may indicate that the shopping centre is not a harmonious place in which to operate or that there are issues about the treatment of tenants within the shopping centre. High levels of disputes may also indicate that the shopping centre is performing below expectations and this is leading to high levels of debt recovery actions by the shopping centre or to large number of claims against the shopping centre for misleading or deceptive conduct. Disclosure relating to litigation involving the shopping centre owner or manager needs to cover all litigation relating to the operation or management of all shopping centres in which the owner or manager is involved across Australia.

A precedent for disclosure of information relating to litigation is provided by Item 4.1 of the Disclosure Document required under the Mandatory Franchising Code of Conduct:

4 Litigation

4.1 Details of:

(a) current proceedings by a public agency, criminal or civil proceedings or arbitration, relevant to the franchise, against the franchisor in Australia alleging:

(i) breach of a franchise agreement; or

(ii) contravention of trade practices law; or

(iii) contravention of the Corporations Law; or

(iv) unconscionable conduct; or

(v) misconduct; or

(vi) an offence of dishonesty; and

Transparency relating to leases not renewed or surrendered

Transparency relating to the number of leases not renewed or surrendered and the reasons for these events where known to the shopping centre owner or manager is essential if a potential tenant is to determine whether the shopping centre owner or manager is engaging in any "churning" within the shopping centre. Churning occurs where shops throughout a shopping centre go through a cycle of tenants failing or not being renewed with the space then

falling empty and being offered to new tenants who may then subsequently also fail thereby repeating the cycle. Churning may put a potential tenant on notice that the rents paid by small retailers are unsustainably high thereby contributing or causing the failure of such small retailers. Churning may also put a potential tenant on notice that the shopping centre is underperforming thereby contributing or causing the failure of small retailers within the shopping centre.

Potential tenants also need to be aware of the reasons why leases have not been renewed. Where the number of leases not renewed is high, a potential tenant is put on notice that their lease is unlikely to be renewed at its expiry, particularly if the shopping centre owner or manager does not adequately explain the reasons why there is such a high rate of non-renewal of leases. This will emphasize the importance of negotiating a lease of sufficient duration to be able to obtain a return on their investment.

A precedent regarding such events as the non-renewal or cessation of operations is provided by Item 6.4 of the Disclosure Document required under the Mandatory Franchising Code of Conduct:

> 6.4 For each of the last 3 financial years and for each of the following events — the number of franchised businesses for which the event happened:
>
> (a) the franchise was transferred;
>
> (b) the franchised business ceased to operate;
>
> (c) the franchise agreement was terminated by the franchisor;
>
> (d) the franchise agreement was terminated by the franchisee;
>
> (e) the franchise agreement was not renewed when it expired;
>
> (f) the franchised business was bought back by the franchisor;
>
> (g) the franchise agreement was terminated and the franchised business was acquired by the franchisor.
>
> *Note* An event may be counted more than once if more than 1 paragraph applies to it.

Transparency relating to increases in rents imposed on lease renewal

Potential tenants should also be told upfront about the level of rent increases that the shopping centre owner or manager has imposed on tenants renewing leases in the shopping centre. A table should be provided to potential tenants of the rent increases imposed on tenants who have renewed their leases in the particular shopping centre in the previous three to five years. Similarly, a potential tenant should also be provided with information regarding any conditions that were imposed by the shopping centre owner that required the expenditure of money by the renewing tenant as a condition of the lease renewal.

The level of rent increases and any conditions requiring the expenditure of money as a condition of the lease renewal are critical pieces of information as

they would give the potential tenant an idea of the possible rent increases it would face if the tenant subsequently sought and obtained a renewal of the lease. While of course the level of rent increases and conditions imposed in previous years are only indicative, they do provide the potential tenant with a very clear picture of what *may* happen at renewal time. The potential tenant needs to have the complete picture of the risks and rewards involved with leasing space in a shopping centre. Transparency in relation to possible rent increases and imposition of conditions requiring the expenditure of money is critical to giving potential tenants this complete picture.

Such transparency would avoid any confidentiality issues by simply not identifying the particular tenant that was renewed. The table would merely specify the rent increases and imposition of conditions as they relate to each anonymous tenant renewed in the particular year. The following table is an example of the way the information could be presented in disclosure documents provided to tenants in a shopping centre:

Name of Shopping Centre:

	In relation to each lease renewed in 2005 specify (i) the level of rent increase or decrease; and (ii) any conditions requiring the expenditure of money as a condition of the lease renewal	In relation to each lease renewed in 2006 specify (i) the level of rent increase or decrease; and (ii) any conditions requiring the expenditure of money as a condition of the lease renewal	In relation to each lease renewed in 2007 specify (i) the level of rent increase or decrease; and (ii) any conditions requiring the expenditure of money as a condition of the lease renewal
Anonymous renewing tenant A			
Anonymous renewing tenant B			
Anonymous renewing tenant C			
Anonymous renewing tenant D			
Anonymous renewing tenant E			

Anti-competitive Price Discrimination

While anti-competitive price discrimination is a form of anti-competitive conduct intended to be covered by s 46 of the *Trade Practices Act*, it remains a problem area given the current ineffectiveness of s 46. Indeed, the repeal of s 49 of the *Trade Practices Act* in 1995 was premised on s 46 being adequate to deal with anti-competitive price discrimination. Unfortunately, s 46 has failed to live up to expectations in this regard.

While it is clear that price discrimination occurs in the market for retail leases within shopping centres, there is no rigorous economic analysis in the draft report of the impact of that price discrimination on the level of competition between large and small business retailers in that shopping centre. For example, if the rent paid by large retailers is a fraction of the rent paid by a small retailer, then that small retailer is unable to provide any competitive constraint on the large retailer for the benefit of consumers.

Sure, large retailers may compete with one another, but with small retailers at a substantial competitive disadvantage because of the much higher rents they pay, large retailers need not compete as aggressively on price as they would have if small retailers were able to provide a competitive constraint on the large retailers. With shareholder pressure on all large retailers to show record profits and to grow profit margins, lower rents may be pocketed by the large retailers rather than being passed them onto consumers. Clearly, there is a very real danger that price discrimination in the market for retail leases in shopping centres is deterring or preventing competitive conduct within that market in a way that is substantially detrimental to consumers. In short, price discrimination can be anti-competitive in that a small retailer is simply unable to compete effectively and consumers are denied the benefits of vigorous competition between large and small retailers. Needless to say, if small retailers are unable to be competitive because of the much higher rents they pay in comparison to large retailers, there is a further and very real danger that they will go out of business.

Given the dangers to competition posed by price discrimination, rigorous analysis is needed regarding the level and impact of price discrimination in the market for retail leases in shopping centres. There needs to be an understanding of how the lower rents paid by large retailers are cross-subsidized by the higher rents paid by small retailers.

Obviously, the lower the rents paid by large retailers in a shopping centre, the higher the rents that the shopping centre needs to charge small retailers in order for the shopping centre to be viable. Clearly, there is a level of rent across the centre that needs to be received by the shopping centre in order for it to be viable and, therefore, the lower the rents paid by large retailers, the higher the rents that need to be paid by small retailers to make up the shortfall from the large retailers. In view of the inevitable cross-subsidy being paid by small retailers to fund the lower rents paid by large retailers, it is essential that we understand the impact of the price discrimination on the level of competition in shopping centres. This requires an assessment of whether

large retailers and/or shopping centres are exerting market power in a way that distorts rents in shopping centres in an anti-competitive manner.

Where anti-competitive price discrimination is found, it should be dealt with under the *Trade Practices Act*. Given the continued ineffectiveness of s 46 it may be appropriate to amend the *Trade Practices Act* to deal specifically with anti-competitive price discrimination. A number of international precedents are available including the United States *Robinson-Patman Act of 1936* and s 50(1)(a) of the Canadian *Competition Act*:

> **50.** (1) Every one engaged in a business who
>
> (*a*) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity, …
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

As well as s 18 of the United Kingdom *Competition Act 1998*:

> **18.** - (1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in-
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> …
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; …

A lack of contestability in relation to shopping centres

Efficient markets require low barriers to entry and contestability within those markets. In relation to shopping centres, there are high barriers to entry from zoning laws which prevent or deter new entrants to that market and, in turn, allow shopping centres to extract monopoly rents. There needs to be rigorous economic analysis of the use of zoning laws to deter competition in relation to shopping centres.

In particular, a rigorous economic analysis needs to be undertaken of the number and nature of objections lodged by shopping centre owners to proposed developments. This analysis should also extend to the number and nature of objections lodged by major retailers to proposed developments. Such a rigorous economic analysis would provide a complete picture of whether shopping centres and major retailers are using zoning laws in an anti-competitive manner to raise barriers to entry and stifle competition to the substantial detriment of consumers. An anti-competitive use of zoning laws prevents the market for shopping centres being contestable thereby allowing shopping centre owners to exploit their monopoly power to the substantial detriment of consumers.

Indeed, using zoning laws to raise barriers to entry and prevent entry in the market for shopping centres allows shopping owners to extract higher rents than they would have been able if the market for shopping centres was contestable and efficient. An inefficient market for shopping centres means that the higher rents extracted because of a shopping centre's monopoly position are passed onto consumers and, more dangerously for the economy, such monopoly rents push up inflation.

Stronger laws to stop unethical conduct by landlords

With s 51AC of the *Trade Practices Act* approaching its tenth anniversary it is opportune to reflect on that law's inability to provide a clear standard of ethical conduct. While s 51AC held great promise of becoming the benchmark for appropriate standards of ethical conduct, the Courts have stood in the way of this happening. Indeed, the onerous interpretation given by the Courts to s 51AC means that s 51AC has largely fallen into disuse. It is simply too difficult and expensive to bring s 51AC cases.

Section 51AC: What are its problem areas?

From the outset, it is clear that s 51AC suffers from the following limitations:

- There is no statutory definition of "unconscionable conduct;"
- The list of factors provided in s 51AC do not define what is "unconscionable" for the purposes of s 51AC; and
- There is a monetary cap of $10 million on the cases that can be brought under s 51AC.

While the previous Government made a number of amendments to s 51AC in its dying days,[1] it is clear that the amendments are cosmetic and fail to address underlying concerns with the operation of s 51AC. For example, the previous Government added a "new" factor to the non-exhaustive list of factors that the court may have regard to in determining whether there is breach of s 51AC of the *Trade Practices Act 1974*. That factor would "allow" the Court to consider:

> "(ja) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services;"

The inclusion of a "new" factor dealing with a contractual right to vary unilaterally a term or condition of a contract adds nothing meaningful to s 51AC as the court is already able to consider any matter that it considers relevant to determining whether conduct is unconscionable under s 51AC.

It would be misleading to suggest that the insertion of a "new" factor to the non exhaustive list in s 51AC is necessary to allow the Courts to have regard to that factor in future cases. Similarly, it would be misleading to suggest that in the absence of such a "new" factor the Courts could not have regard to the factor.

It is important to note that the listing of factors in s 51AC does not elevate those factors to a definition of unconscionable conduct. Indeed, it would also be misleading to suggest that the factors included in s 51AC provide a definition of what is "unconscionable" under s 51AC. The question of whether

[1] See *Trade Practices Legislation Amendment Act (No. 1) 2007*.

or not conduct is unconscionable under s 51AC is considered by reference to the individual circumstances of the case having regard to all matters considered relevant by the Court irrespective of whether or not those matters are listed in s 51AC. So under s 51AC the listed factors may be considered by a Court, but so can factors not listed also be taken into account if the Court considers them to be relevant.

In short, the addition of a factor in s 51AC does not better define the term "unconscionable conduct" but merely makes a cosmetic change to the list. Importantly, adding or subtracting factors to s 51AC as currently drafted would not impact on what the Courts consider to be "unconscionable" as the Courts have defined the term independently of the factors in s 51AC.

Promoting ethical business conduct: A way forward

The following represent a variety of statutory alternatives to promoting ethical business conduct:

- Inserting a statutory definition of the term "unconscionable;"

- Inserting a statutory list of examples of the types of conduct that would ordinarily be considered to be "unconscionable;"

- Enacting a new legislative framework within the Trade Practices Act to deal with unfair contract terms in business to business contracts involving small retail tenants; and

- Enacting a statutory duty of good faith;

Inserting a statutory definition of the term "unconscionable"

The insertion of a definition of "unconscionable" in s 51AC would be an obvious way to provide clear statutory guidance as to what is meant by the term as it is used in s 51AC.[2] Importantly, the insertion of a statutory definition in s 51AC would send a clear parliamentary signal to the Courts that the concept is not only broader than the present judicial interpretation of the concept, but that s 51AC is intended to promote ethical business conduct. Such a definition would set out a non-exhaustive benchmark for assessing conduct to determine whether or not it goes beyond what is reasonably necessary to protect the legitimate interests of the parties involved. This would not in any way interfere with the driving of a "hard" bargain, but rather would provide clear statutory guidance as to what is considered to be unethical. Currently, in the absence of a statutory definition in 51AC of the term "unconscionable" the Courts are being left to define the term and, in

[2] See Zumbo F., "Commercial Unconscionability and Retail Tenancies: A State and Territory perspective," (2006) *Trade Practices Law Journal*, Vol. 14, p 165 at p. 171 – 172.

doing so, are taking such an onerous view of what constitutes "unconscionable" that s 51AC is falling into disuse.

Inserting a statutory list of examples of the types of conduct that would ordinarily be considered to be "unconscionable"

An alternative to inserting a statutory definition of "unconscionable" would be to recast the exiting list of factors under s 51AC to represent *examples* of conduct that would ordinarily be considered to be "unconscionable." Currently, the factors can be considered or dismissed at the Court's discretion and as mere factors certainly cannot be seen to define what is unconscionable. Recasting the factors into examples of unconscionable conduct would provide considerable and practical statutory guidance as to what is meant by the term "unconscionable." The following draft provision sets out how a statutory list of examples could be drafted:

> "Without in any way limiting the conduct that the Court may find to have contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the ***business consumer***), the following will, in the absence of evidence to contrary, be regarded as unconscionable for the purposes of subsection (1) and (2):
>
> - the supplier used its superior bargaining position in a manner that was materially detrimental to the business consumer; or
> - the supplier required the business consumer to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; or
> - the suppler was aware and took advantage of the business consumer's lack of understanding of any documents relating to the supply or possible supply of the goods or services; or
> - the supplier exerted undue influence or pressure on, or engaged in unfair tactics against, the business consumer or a person acting on behalf of the business consumer; or
> - the supplier's conduct towards the business consumer was significantly inconsistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; or
> - the supplier failed to comply with any relevant requirements or standards of conduct set out in any applicable industry code; or
> - the supplier unreasonably failed to disclose to the business consumer:
>   - any intended conduct of the supplier that might affect the interests of the business consumer; or
>   - any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); or

- the supplier was unwilling to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; or
- the supplier exercised a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services in a manner that was materially detrimental to the business consumer; or
- the supplier acted in bad faith towards the business consumer."

Enacting a new legislative framework to deal with unfair contract terms in business to business contracts involving small businesses

Providing for greater judicial scrutiny of unfair contract terms would go a long way to promoting ethical business conduct. Such scrutiny of unfair contract terms is currently lacking and unfortunately can act as a green light to unethical landlords that are intent on including contract terms that go beyond what is reasonably necessary to protecting the landlord's legitimate business interests. In such circumstances, a new legislative framework is needed to deal with unfair contract terms. Such a framework would help promote greater judicial scrutiny of unfair contract terms and could be based on the United Kingdom[3] and Victorian[4] legislation for dealing with unfair terms in consumer contracts.[5]

Such a framework should have the following features;

- A clear definition of an unfair contract term;
- include a comprehensive listing of potentially unfair contract terms which provides clear statutory guidance to consumers, businesses and the Courts regarding the types of terms considered to be unfair;
- contain an ability to prescribe particular terms or classes of terms as "unfair" so that widespread consumer detriment can be prevented in advance and without the need to separately pursue each individual use of the unfair term or terms;
- impose a penalty for using a prescribed unfair term as a necessary deterrent against the use of terms recognized as being unfair;
- have a well resourced Government enforcement agency to respond to allegedly unfair contracts terms in a timely and pro-active manner to minimize the actual or potential detriment arising from the term;

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[3] The UK legislation was implemented first and is now found in the *Unfair Terms in Consumer Contracts Regulations 1999*. These Regulations came into force on 1st October 1999.

[4] The Victorian legislation is found in Part 2B of the *Fair Trading Act 1999* and came into force on 9 October 2003.

[5] For a discussion of the operation of the United Kingdom and Victorian legislation see Zumbo, F., (2005), "Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?" *Trade Practices Law Journal*, Vol. 13, pp. 70 - 89; Zumbo, F., (2005), "Dealing with Unfair Terms in Consumer Contracts: The search for a new regulatory model," *Trade Practices Law Journal*, Vol. 13, pp. 194 - 213; and Zumbo, F., (2007), "Promoting Fairer Consumer Contracts: Lessons from the United Kingdom and Victoria", *Trade Practices Law Journal*, Vol. 15, pp. 84-95.

- provide guidance and education to both businesses and consumers to maximize awareness and understanding of the legislative framework;
- allow for enforceable undertakings to be provided to Government agency to enable matters to be resolved quickly and without recourse to the Courts;
- allow for advisory opinions by Government enforcement agency to enable particular businesses and industries to seek specific guidance in advance of using terms considered at risk of being viewed as unfair;
- allow for advisory opinions by quasi-judicial body to provide businesses or the Government enforcement agency the opportunity to secure a binding opinion as to the whether or not a particular term is unfair; and
- allow for private enforcement of the framework to enable those affected parties to recover any loss or damage arsing from an unfair contract term.

Enacting a statutory duty of good faith

While any statutory definition of "unconscionable" could usefully rely on the concept of good faith as a means of ensuring the Courts take a broader approach to s 51AC than their presently onerous and very legalistic approach to the section, an alternative would be to enact a stand-alone statutory duty of good faith. Either way, the concept of good faith offers considerable potential as a mechanism for promoting ethical business conduct. Indeed, this is readily apparent from the growing judicial attention and support given to an implied duty of good faith in commercial contracts, especially in New South Wales.[6]

A convenient summary of the nature and scope of an implied duty of good faith was recently provided by Gordon J in *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd*:[7]

> 146 Specific conduct has also been identified by various courts as constituting '*bad faith*' or a lack of '*good faith*' including:
> (1) acting arbitrarily, capriciously, unreasonably or recklessly: e.g. see Viscount Radcliffe in *Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415 at 1422-23 cited by Gyles J in *Goldspar* at [173]; and *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288 at [65];
> (2) acting in a manner that is oppressive or unfair in its result by, for example, seeking to prevent the performance of the contract or to withhold its benefits: *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288 at [65]-[66];

[6] See for example *Renard Constructions (ME) Pty Limited v Minister for Public Works* (1992) 26 NSWLR 234; *Alcatel Australia Limited v Scarcella* [1998] NSWSC 483 (16 July 1998*); Burger King Corporation v Hungry Jack's Pty Limited* [2001] NSWCA 187: *Overlook v Foxtel* [2002] NSWSC 17 (31 January 2002); and *Vodafone Pacific Ltd & Ors v Mobile Innovations Ltd* [2004] NSWCA 15 (20 February 2004).
[7] [2007] FCA 1066 (23 July 2007).

> (3) failing to have reasonable regards to the other party's interests: *Overlook Management BV v Foxtel Management Pty Ltd* (2002) ACR 90–143 at [67] …
> (4) failing to act 'reasonably' in general. …

Clearly, the concept of good faith has not only received strong judicial support, but now has reached the point in Australia where its nature and scope is being defined with an increasing degree of precision. Consequently, there is a ready body of law on which a statutory duty of good faith could quite readily and usefully draw upon in seeking to promote ethical business conduct.

Conclusion

In summary this submission has canvassed a variety of initiatives and proposals that would promote a competitive and ethical market for retail leases for the benefit of Australian consumers. A competitive and ethical market for retail leases is essential if Australia is to keep inflation as low as possible. With the market failures and inefficiencies found in the market for retail leases in Australia, it is essential that Australia has a world's best *Trade Practices Act* to deliver real benefits to Australian consumers. Sadly, Australia's *Trade Practices Act* is severely lacking in key areas such as the prevention of abuses of power by landlords, and the prevention of unethical conduct by landlords towards small tenants.

In calling for the strengthening of the *Trade Practices Act* one must immediately dispel a number of ill-founded concerns expressed by the opponents of such strengthening. Firstly, the changes proposed in this Submission are not about protecting small retailers from competition. The essence of our economic system is competition. It is competition that is to be protected. This requires that the market for retail leases be efficient.

Secondly, the opponents of a strengthening of the *Trade Practices Act* will say that changes will bring uncertainty. Well, they would say that given that they know that key provisions of the *Trade Practices Act* are currently not working and giving them the green light to potentially behave anti-competitively or unethically. Today the opponents of changes have certainty that they can behave anti-competitively or unethically. But changes to the *Trade Practices Act* would remove the certainty they currently have to behave anti-competitively or unethically.

So, yes, we have certainty at the moment, but that certainty relates to fact that key provisions of the *Trade Practices Act* are not working to promote competition and ethical conduct in the market for retail leases in Australia. That certainty regarding the current failure of the *Trade Practices Act* to stop anti-competitive or unethical conduct tells us that we need change and we need it urgently. Of course, such changes need to be carefully drafted. Carefully drafted changes to the *Trade Practices Act* will ensure that everyone

is certain about how those new laws are intended to operate in stopping anti-competitive or unethical conduct.

Finally, it is not only effective laws that are needed against anti-competitive and unethical conduct, but there is a pressing need for additional mechanisms to promote the timely and cost effective resolution of disputes. Consideration should be given to the establishment of a retail tenancy advocate or ombudsman, who would be available to identify and deal with emerging trends or problem areas long before they threatened the efficient operation of the market for retail leases in Australia.