Chapter 3
Principal issues

Introduction

3.1 In this chapter, the committee considers the following matters—definition of retail premises and who should be covered by retail leasing arrangements; the first right of refusal to renew lease; minimum leases terms and fit-outs; rent adjustments; bank guarantees; provision of sales data; a national lease register; disclosure of incentives; and dispute resolution.

Definitions of 'retail premises'

3.2 Definitions of 'retail premises' vary across state and territory jurisdictions, and can be based on rent thresholds, ownership structure (i.e. public companies) and floor space. The various state and territory retail tenancy legislation contain exclusions from coverage which are included in the definitions of 'retail premises' and/or in the definition of 'retail shop' and/or in the definition of 'retail lease'.[1]

3.3 The Shopping Centre Council of Australia (SCCA) represents Australia's major owners, managers and developers of shopping centres and held the view that the 'coverage of retail tenancy legislation should be strictly confined to small retail businesses which may need regulatory protection.' It argued that such legislation should not extend to 'those businesses which are capable of looking after themselves in negotiations with landlords.'[2]

3.4 The Australian National Retailers Association (ANRA), representing large national retailers, supported the contention that retail leasing arrangements should only cover small/medium retailers, as retailers operating out of large stores, such as ANRA members were comfortable negotiating with landlords.[3] While recognising the merit in having a 'nationally harmonised approach' to retail leasing, ANRA suggested:

> …any such framework should exclude large retailers and instead focus on the relationship between smaller retailers and landlords as this is the area where market-failure is most likely to occur.[4]

3.5 Both SCCA and ANRA expected that limiting the coverage of retail tenancy legislation would minimise unnecessary and restrictive red tape on both lessors and lessees.[5]

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1 SCCA, answers to questions on notice no. 2, p. 10.

2 SCCA, answers to questions on notice no. 2, p. 10.

3 ANRA, *Submission 20*, p. 1.

4 ANRA, *Submission 20*, p. 1.

5 SCCA, answers to questions on notice No. 2, p. 10; ANRA, *Submission 20*, p. 1.

Floor size, rent thresholds and public listing

3.6 The Victorian Small Business Commissioner noted that the definition of 'retail premises' in the Victorian Retail Leases Act (RLA) is quite broad, as recent Tribunal and Court decisions have confirmed. He noted that:

> This broad definition has meant that many more businesses have benefited from the affordable, effective and timely [alternative dispute resolutions] services provided by my office under the RLA Vic than may have occurred if a narrower definition of retail premises applied.[6]

3.7 With regard to exemptions from a retail leasing regulatory framework, ANRA advised that its members favoured a store size limit, such as 1000 square metres used in NSW, over exclusions for publicly listed companies. It explained:

> …some jurisdictions use listing status as a proxy for size of the retailer (i.e. all publically listed companies are excluded).[7]

3.8 ANRA recommended that any public listing exemption should be in addition to, rather than in place of, a store based exemption. ANRA noted a small number of retailers, such as Best & Less, have large format stores but are privately owned.[8]

3.9 The SCCA recommended that a 'harmonised' definition of 'retail premises' should be based on the definition contained in section 3 of the NSW Retail Lease Act. The NSW Retail Lease Act excludes a range of retail premises from coverage of the Act:

- premises that have a lettable area of 1,000 square metres or more;
- premises used wholly or predominantly for the carrying on of a business on behalf of a landlord;
- cinemas, bowling alleys, skating rinks; premises in an office tower that forms part of a retail shopping centre where these are not used for retail purposes; and
- businesses exempted by regulation.[9]

3.10 In discussing the potential for nationally consist coverage of leasing laws, Mr Trevor Evans, National Retail Association (NRA), stated that 'floor space is obviously not a perfect measure to use, but the 1,000 square metre threshold that is currently used in states such as NSW and Victoria probably is our best chance of getting consistency'.[10] Mr Evans noted:

> Options that refer to things like dollars, turnover sales or FTEs to try to measure the size of businesses are particularly fraught because businesses

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6 Victorian Small Business Commissioner, *Submission 4,* p. 2.

7 ANRA, *Submission 20,* p. 2.

8 ANRA, *Submission 20,* p. 2.

9 SCCA, answers to questions on notice no. 2, p. 11.

10 Mr Trevor Evans, Chief Executive Officer, NRA, *Committee Hansard,* 13 February 2015, p. 2.

> can change to either side of those thresholds during the term of a lease. Ownership models are also particularly fraught. If you are going to start to divide companies in terms of listed or non-listed, or maybe even whether they are private or government run service providers, you do tend to set up a two-tier system competing for the same space in a lot of instances. There are also huge flaws given the existence of very large, privately owned retailers. There are also issues around what you do with foreign owned retailers, which are increasingly a presence in the Australian retail landscape.[11]

3.11 The recent Queensland government review of retail tenancy legislation resolved to progress an amendment in the Retail Shop Leases Amendment Bill 2014 to exclude leases for floor areas of 1000 square meters or more. The statutory report stated:

> Amendment progressed on basis of predominant [reference group] view that it will significantly reduce unnecessary regulation of the Queensland retail sector, with minimal impact on small to medium business; and will align with other jurisdictions, including NSW and WA.[12]

3.12 The Queensland review also considered excluding leases where the tenant is a listed corporation/subsidiary. It noted that the exclusion of listed companies, and their subsidiaries would align with Victorian, WA, SA and NT legislation. Nonetheless, it resolved not to progress an amendment in the Retail Shop Leases Amendment Bill 2014 as it did not have predominant reference group support and there were implications for the existing entitlement of franchisees to claim compensation for business disruption from the retail landlord under section 43(1) of the Act.[13]

Statutory Rent Thresholds in South Australia

3.13 South Australian Lease Management, a professional services real estate business, noted that SA retail tenancy legislation includes a rent threshold, whereby leases are excluded from the Act where rent is greater than $400,000 per annum.[14] Both South Australian Lease Management and the Jewellers Association of Australia raised concerns that while leases may start with rent under the threshold, they can be

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11 Mr Trevor Evans, Chief Executive Officer, NRA, *Committee Hansard*, 13 February 2015, p. 2.

12 Queensland Government, 'Appendix 4- Statutory Report', *Report on statutory review of the Retail Shop Leases Act 1994*, p.1 ; see also 'Attachment 2; Statutory Review: Retail Shop Leases Act 1994 Queensland, Reference Group Report, Table of Recommendations and Outcomes', pp. 8–9. The ACT and NT legislation also includes a floor area exclusion.

13 Queensland Government, 'Appendix 4- Statutory Report', *Report on statutory review of the Retail Shop Leases Act 1994*, pp. 4–5 ; see also 'Attachment 2; Statutory Review: Retail Shop Leases Act 1994 Queensland, Reference Group Report, Table of Recommendations and Outcomes', pp. 10–11.

14 South Australian Lease Management, answers to questions on notice no. 4, p. 4.

outside of the threshold at the end of the lease and lose all the benefits of preferential rights at the end of the lease.[15]

3.14 South Australian Lease Management explained that it has 'many situations now where our clients entered into leases several years ago with rights of renewal with commencing rent under $400,000 but as result of rent reviews are now in excess of $400,000'.[16] This was of particular concern as tenants were no longer covered by the SA Act at the time of lease renewal, and were no longer covered by preferential rights of renewal.[17]

3.15 Jewellers Association of Australia proposed that either the rent threshold should be increased, or a ruling be made that if a lease, when negotiated, was under the Act, it should remain under the Act and vice versa.[18]

3.16 The Law Institute of Victoria noted that in Victoria, under the *Retail Tenancies Act 1986* (Vic) and the *Retail Tenancies Reform Act 1998* (Vic), premises that exceeded 1000 square metres were not regulated. It suggested, however, that this threshold 'proved difficult to apply and interpret and gave rise to a significant amount of litigation'. The Law Institute of Victoria advised that the current Victorian Act:

> …limits its application to retail premises with an annual rent not exceeding $1 million (exclusive of GST) (see: s 4(2) of the Victorian Act and its regulations). This ceiling has not created difficulties or confusion in its application and is generally regarded as infinitely preferable to the floor area limit that applied under the earlier legislation.[19]

Committee view

3.17 The committee is of the view that harmonisation of retail leasing would be of great benefit to both landlords and lessees but appreciates that this is a matter for the states and territories.

3.18 With regard to how to determine which retailers should fall within the regulatory framework, the committee notes the various definitions and arguments on whether floor space or rent threshold should be one of the main determinants. It also notes concerns about the possibility of a lease coming under the legislation at the commencement of the lease but falling outside the regulatory framework due to rent rises during the term of the lease. The committee supports the contention that should a lease be covered by legislation on being entered into, it should remain covered by that legislation until the lease is terminated.

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15 South Australian Lease Management, answers to questions on notice no. 4, p. 4; Jewellers Association of Australia, *Submission 6*, p.5.

16 South Australian Lease Management, answers to questions on notice no. 4, p. 4.

17 South Australian Lease Management, *Submission 3*, p. 5.

18 Jewellers Association of Australia, *Submission 6*, p. 5.

19 Law Institute of Victoria, *Submission 7*, p. 2.

First right of refusal for tenants to renew leases

3.19 Retail tenancy legislation in South Australia and the Australian Capital Territory includes provisions for preferential rights for tenants to renew or extend a shopping centre lease.[20] Preferential rights provisions are intended to increase security of tenure of sitting tenants while balancing the rights of the owner. As such, the provisions contain exemptions on providing preferential rights for a number of reasons. For example, if the landlord wishes to change the tenancy mix or if renewal of the lease would substantially disadvantage the landlord.[21]

3.20 The Restaurant and Catering Industry Association explained the imbalance in the bargaining position between tenants and landlords when renewing leases. It stated:

> The imbalance often results from the additional investment restaurant owners make above and beyond rent paid, including funds contributed to fit out, marketing, and the generation of goodwill. This means that at the time of lease renegotiation, it can sometimes be more critical for the operator to re-secure the lease than the landlord.[22]

3.21 The 2008 PC report took the view that preferential rights provisions were an example of overly prescriptive legislation. The report stated that:

> …the provisions are highly qualified so as not to reduce the rights of a landlord over leased premises. They are therefore likely to be ineffective in adding to tenant's security of tenure. To the extent that the provisions have had an impact, they may hinder a landlord in choosing a tenant who (in the landlord's commercial judgement) would make best use of the retail space. This would potentially lower productivity.[23]

3.22 Tribe, Conway & Company Solicitors argued that granting first right of refusal should be the result of negotiations between landlords and tenants, and that:

> A lease is a contract between a landlord and tenant for the use of the landlord's property for a fixed period, and on fixed conditions. The lease does not, and should not, create a right or expectancy of occupation by the tenant after the end of the fixed period.[24]

3.23 The Property Law Committee of the Law Society of New South Wales stated:

> A right of first refusal is often premised on the basis that it provides a tenant with a greater security of tenure. However, in the [Property Law]

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20 Minter Ellison, *Retail Tenancy Legislation Compendium*, ed. 6, 17 April 2014, p. 32, www.minterellison.com/files/Uploads/Documents/Publications/Reports%20Guides/RG_2013_RetailLeasingCompendium_[BNE130050].pdf (accessed 16 July 2014).

21 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. 50.

22 Restaurant and Catering Industry Association, *Submission 2*, p. 2.

23 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. 234.

24 Tribe, Conway & Company Solicitors, *Submission 1*, p. 1.

> Committee's view, security of tenure is better assisted by requirements for both parties to the lease to give adequate notice to each other of their future intentions such that appropriate negotiations can begin well prior to the end of the current lease.[25]

3.24 The Law Institute of Victoria stated that they were neither in favour nor opposed to the creation of statutory rights to renew leases. Even so, they noted that:

> …the *Retail and Commercial Leases Act 1995* of South Australia, which gives shopping centre tenants a statutory first right of refusal, also allows for the parties to exclude the right where the lease contains a 'certified exclusionary clause'. Where there is an ability to exclude the statutory right, it seems likely that many landlords would wish to do so. The difficulty in drafting a clause giving effect to the statutory right is to ensure that the right does not operate unfairly against the landlord's fundamental right to determine the use to which its property is put.[26]

3.25 In its submission to the inquiry, the Commercial and Property Law Research Centre, Queensland University of Technology stated:

> We see no point in purporting to give a preference to sitting tenants if ultimately, as is the case, the lessor has the final say about whether to renew the lease. There is marginal benefit in a lessee notifying a lessor that the lessee desire a further term (in the absence of an option to renew) but it is doubtful whether there is any benefit in legislating for this to occur. The Queensland position (s 46AA) reduces a lessor's ability to negotiate a new lease with an alternative prospective lessee once notification to an existing lessee is given. Conversely, we see benefit in a lessee knowing as soon as practicable that they are not going to be preferred as a lessee for a further term. It would seem that these practices would be regulated by the marketplace in all events as it would be without any statutory regulation. These types of provisions in all jurisdictions are 'toothless tigers'.[27]

3.26 The Law Council of Australia did not support an automatic first right of refusal. They argued that first right of refusal should not be the subject of national legislation, rather it is a matter that should be negotiated between parties. The Law Council also noted:

> In some jurisdictions there are already requirements in the legislation for a landlord to notify the tenant of their intentions at the end of the lease term, with an automatic extension of the lease being available in certain circumstances.[28]

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25 Law Society of New South Wales, *Submission 9*, pp. 2–3.

26 Law Institute of Victoria, *Submission 7*, p. 1.

27 Commercial and Property Law Research Centre, Queensland University of Technology, *Submission 12*, p. 6.

28 *Submission 25*, p. 4; see ss 44 and 44A of the *Retail Leases Act 1994* (NSW).

3.27 ANRA were opposed to provisions for a minimum requirement included in agreements for a first right of refusal. In its view if a tenant wants to have a first right of refusal, this can be negotiated in the initial contract period.[29]

3.28 The Australian Retailers Association (ARA), representing a wide variety of retailers, argued that there should be a first and last right of refusal by a sitting tenant on any rental offering, stating:

> We believe that such a mechanism will force the landlord to meet the real market value for the demised premises and not take advantage of a veiled threat or misrepresentation of the true facts as to an alternative tenant for the tenancy. We also believe this mechanism will create an environment conducive to bargaining in good faith, fair disclosure and transparent undertakings.[30]
>
> The ARA also see this mechanism as being a solution to the problem experienced by a retailer whereby a sitting tenant effectively gives up a large percentage of goodwill of the business to the landlord (via increased rent) as a defence to the threat that a third party will take over the lease at a higher rent without having to purchase the goodwill of the existing business.[31]

Minimum lease terms and store fit-outs

3.29 South Australian Lease Management noted that a typical fit-out in a retail shop with an area of about 100 square metres costs in the range of $200,000 to $300,000. It noted:

> If the lease term is only five years that investment in fitout must be written off over the five year term. If the fitout costs $250,000 and interest is 8% the annual expense to the retailer will be approximately $60,000.[32]

3.30 Both the SCCA and the NRA supported the removal of the five-year minimum term for retail leases. They noted that when the five-year minimum lease term was introduced, five-year terms increasingly became the only lease term available to tenants.[33]

3.31 Mr Michael Lonie, NRA, explained that there was a minimum five-year lease period across most jurisdictions. Since Queensland removed the minimum term in 1994,[34] the NRA has observed that it is far easier to get a seven-year or an eight-year

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29 ANRA, *Submission 20*, p. 2.

30 ARA, *Submission 24*, p. 4.

31 ARA, *Submission 24*, p. 5.

32 South Australian Lease Management, *Submission 3*, p.7.

33 SCCA, answers to questions on notice no. 2, p. 2; NRA, answers to questions on notice no. 1, p. 3.

34 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. 49.

lease, which enables the tenant to amortise a large investment and have a minimum left at the end of the lease term.[35]

3.32 Mr Brian Scarborough, South Australian Lease Management, commented that he was unaware of 'any jurisdiction anywhere that provides an out for a tenant who is trapped in a long-term lease and cannot afford the rent'.[36] The SCCA noted that small neighbourhood shopping centres commonly offer options leases, for example a three year lease with two three year options. It noted that options leases are less common in large regional shopping centres because:

> …the vacancy rates that exist in neighbourhood centres are usually much greater than exist in regional shopping centres. The most recent figures for 2014 published by JLL [Jones Lang LaSalle], for example, show vacancies in regional shopping centres were only 1.4% while in neighbourhood centres they were 4.2%. It follows that the market bargaining position of prospective tenants in neighbourhood centres is much stronger than those in regional centres.[37]

Rent adjustment

3.33 The Restaurant and Catering Industry Association advised that the results from its benchmarking surveying indicated that:

> In determining lease arrangements, a majority of businesses indicate rent reviews are based on CPI increases (57.9 per cent), market review (19.8 per cent) or a mix of both (13.2 per cent). However, 9.1 per cent of businesses indicated rent reviews are determined based on turnover data.[38]

3.34 The National Footwear Retailers' Association put forward the view that initial rent arrangements should be based on fair market value per square metre with annual rent increases based on CPI.[39]

3.35 The Law Council of Australia submitted that the NSW legislation could provide a desirable model for national harmonisation with regards to rent reviews. It noted that the NSW legislation provides for market rent reviews both during the term of the lease and upon renewal, and also allows valuers access to information regarding incentives.[40]

3.36 Tribe, Conway & Company Solicitors expressed the view that landlords and tenants should be free to negotiate their own commercial arrangements with prescriptive regulations. They maintained that market rent reviews, CPI (consumer

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35 Mr Michael Lonie, NRA, *Committee Hansard*, 13 February 2015, p. 3.

36 Mr Brian Scarborough, South Australian Lease Management, *Committee Hansard*, 13 February 2015, p. 14.

37 SCCA, responses to questions on notice no. 2, p. 2;

38 Restaurant and Catering Industry Association, *Submis*sion 2, p. 2.

39 National Footwear Retailers' Association, *Submission 10*, p. 1.

40 Law Council of Australia, *Submission 25*, p. 5.

price index) adjustments and similar adjustments in annual rent were fair methods for keeping pace with inflation.[41]

Bank guarantees

3.37 Most tenants provide their landlord with some form of security in case the tenant fails to meet the requirements of the lease. According to SCCA:

> It is entirely appropriate for a landlord to be provided with some form of security from a tenant in the event lease terms are broken.[42]

3.38 Landlords and tenants usually agree to either a cash bond or a bank guarantee as a form of security. Indeed, a bank guarantee, which is issued by a bank and held by the landlord, is a common tool that provides the landlord with security against the tenant defaulting under the lease.[43]

3.39 A number of submitters argued that there should be some regulation surrounding bank guarantees. For example, the Restaurant and Catering Industry Association argued that there should be explicit guidelines about when bank guarantees can be drawn down, including requirements for informing tenants. It proposed 30 days as the reasonable timeframe for return of funds.[44]

3.40 The SCCA was not aware of any administrative issues that have arisen as a result of the use of bank guarantees as a form of security, but noted that although it did not agree with the view that bank guarantees need to be regulated, it would not object to a timeframe being included in regulation. The SCCA recommended that bank guarantees be paid by the lessor within 90 days of the expiry of the lease assuming, that the tenant has not exercised an option to renew and has complied with all make good obligations.[45]

Provision of sales data

3.41 The Restaurant and Catering Industry Association argued that given the cyclical nature of the hospitality industry, the use of turnover data when determining rent reviews could make it more difficult for operators to balance leasing costs over the life of the lease.[46] It was concerned about the lack of transparency in how this information was used across multiple tenant arrangements, particularly in shopping centres. It also noted:

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41 Tribe, Conway & Company Solicitors, *Submission 1*, p. 2.

42 SCCA, *Submission 17*, p. 19.

43 SCCA, *Submission 17*, p. 19.

44 Restaurant and Catering Industry Association, *Submission 2*, p. 3.

45 SCCA, *Submission 17*, p. 20.

46 Restaurant and Catering Industry Association, *Submission 2*, p. 2.

> Rarely do landlords grant struggling tenants rent concessions following a review of turnover data, yet rents are revised upwards based on favourable earnings recorded.[47]

3.42 The SCCA advised the committee that a code of practice governing the provision of sales information by retailers was being developed by the Shopping Council of Australia, the National Retail Association, the Australian Retailers Association and the Pharmacy Guild, which would ensure that the use of sales information would no longer be a contentious issue within the industry.[48]

3.43 At the public hearing on 13 February 2015, however, the committee heard from witnesses that the process had stalled.[49] The SCCA explained:

> A series of meetings were held during 2014 and a Draft Code of Practice on the Reporting of Sales and Occupancy Costs in Australian Shopping Centres has been prepared. This Draft Code has been endorsed in principle by the SCCA and the National Retail Association. The Australian Retailers Association wishes to hold further discussions and to include some of its members. That meeting is currently being arranged.[50]

Improving transparency, disclosure and dispute resolution

National lease register

3.44 The Restaurant and Catering Industry Association supported the findings of the PC 2008 report recommendation that a register summarising the financial arrangements of a lease(s) should be made publically available (and in a downloadable format).[51] National Footwear Retailers' Association also supported a national register.[52]

3.45 Leasing Information Services (LIS) uses publicly available registers to provide tenants and industry representatives with leasing information. It advised that it was able to provide extensive data on the states with legal requirements to register leases entered into for over three years. However, as WA, SA Victoria and Tasmania did not currently require lease registration, LIS were unable to provide a national service.[53]

3.46 LIS argued there was an information asymmetry that benefited landlords, particularly in shopping centres, and decreased the bargaining power of tenants.

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47 Restaurant and Catering Industry Association, *Submission 2*, p. 3.

48 SCCA, *Submission 17*, p. 26.

49 Mr Angus Nardi, Executive Director, SCCA, *Committee Hansard*, 13 February 2015, p. 13; Mr Michael Lonie, NRA, *Committee Hansard*, 13 February 2015, pp. 3, 9.

50 SCCA, answers to questions on notice no. 2, p. 9.

51 Restaurant and Catering Industry Association, *Submission 2*, p. 3.

52 National Footwear Retailers' Association, *Submission 10*, p. 2. See also Australian Lease & Property Consultants Pty Ltd, *Submission 26*, p. 8.

53 LIS, *Submission 8*, p. 4.

Because landlords have all sales and rental information for all tenants, and tenants only have their own sales and leasing data, tenants generally lack vital information to make informed and enabling decisions. This asymmetry was a serious economic issue, leading to 'price distortions due to the fact that one party possesses more or better information than the other.'[54]

3.47 Transworld Enterprises, a family owned jewellery retailer, expressed the view that the lease registers that exist in Queensland and NSW were of 'no value from a retailer's point of view'. It argued:

> They fail to include incentives, or any ancillary benefits and by their very nature are misleading. They are at odds with the governments mandate to provide clear and honest data when the reality is quite the opposite.[55]

3.48 The Law Institute of Victoria did not believe mandatory registration of leases would achieve the results desired by its proponents 'because the information relating to 'real' (as opposed to 'effective') rent, rent holidays, landlord incentives and the like, will not be contained in the registered instrument but would be contained in a collateral document.' Put succinctly, 'landlords do not like disclosing this information'.[56]

3.49 It also observed that until 2012, the Victorian Act contained a provision that required the landlord to provide prescribed information to the Small Business Commissioner. However, this provision was repealed as it 'increased compliance costs without serving any purpose as the Act did not specify the purpose or purposes to which the information might be put'.[57]

3.50 The Law Society of New South Wales commented that given the Victorian experience, the adoption of a national lease register would be unnecessary.[58]

3.51 The Australian Registrars National Electronic Conveyancing Council (ARNEC), the Law Council of Australia, and the Property Law Reform Alliance all submitted that a separate national lease register was neither desirable nor warranted. Instead, it expressed the view that the existing 'Torrens Land Title System' was the most appropriate register and that the system had worked effectively in Australia for more than 150 years.[59]

3.52 The Torrens title system is a long standing, proven and well regarded method of recording and registering land ownership and interests. Established in the 1850s in

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54 LIS, *Submission 8*, pp. 8–9.

55 Transworld Enterprises, *Submission 27*, p. 2.

56 Law Institute of Victoria, *Submission 7*, p. 3; see also Law Society of New South Wales, *Submission 9*, p. 4.

57 Law Institute of Victoria, *Submission 7*, p. 3.

58 Law Society of New South Wales, *Submission 9*, p. 4.

59 ARNEC, *Submission 22*, p. 2; Law Council of Australia, *Submission 25*, p. 5; Property Law Reform Alliance, *Submission 21*, p. 12.

South Australia, it has since been adopted throughout Australia and overseas in countries such as England, Ireland, Malaysia, Singapore, and Canada.[60]

3.53 The Law Council of Australia submitted:

> The adoption of a Uniform Torrens Title Act, would allow for a uniform and consistent approach for registering leases, whilst respecting the rights of each state and territory to maintain their own Torrens register.[61]

3.54 The Property Law Reform Council argued further that best practice outcomes could be achieved through a Uniform Torrens Title Act which included an emphasis on registration of retail leases in existing land titles registries.[62]

3.55 The NRA supported the development of a Uniform Torrens Title Act, which was outlined in the Law Council of Australia's submission.[63] It agreed that this would achieve a uniform and consistent approach across all jurisdictions for the registrations of leases while at the same time, respecting the right of each state to maintain their own Torrens register.[64]

3.56 Both the NRA and the Law Council of Australia recommended the NSW Land Titles Office Register as the best model for any national lease register, where all leases with a term greater than three years must be registered.[65]

3.57 The SCCA was opposed to the establishment of any separate state government sponsored lease register, beyond those required under property law, as this would inevitably involve an administrative burden and cost to landlords.[66]

3.58 The NRA raised concerns about who would be responsible for maintaining and updating a separate national register. It stated:

> Retail leases are the domain of the states which oversee property rights with no national body operating in that jurisdiction, therefore the creation of such a register would not only be costly but would quickly become outdated due to the speed at which leases expire or are dissolved.[67]

Full disclosure of incentives

3.59 The most common form of incentive is for the landlord to contribute to the expense of a fit out, or allowing a period where the rent is free or discounted.

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60 Victorian Department of Transport, Planning and Local Infrastructure, 'Torren Title', http://www.dtpli.vic.gov.au/property-and-land-titles/land-titles/torrens-titles (accessed 2 March 2015)

61 Law Council of Australia, *Submission 25*, p. 5.

62 Property Law Reform Council, *Submission 21*, p. 2.

63 NRA, answers to questions on notice, p. 2; Law Council of Australia, *Submission 25*, p. 5.

64 NRA, answers to questions on notice, p. 2.

65 NRA, answers to questions on notice, p. 2; Law Council of Australia, *Submission 25*, p. 5.

66 SCCA, *Submission 17*, p. 21.

67 NRA, *Submission 11*, p. 6.

3.60 Mr Scarborough, South Australian Lease Management, gave an example of how substantial such incentives could be. He recalled being present at a board meeting of a group he was representing during a discussion on market rents and the sharing of information on the rents being paid. He explained:

> One question was asked of a party who had just finished negotiating a lease as to what level of rent they were paying. Tt said between $2,000 and $2,100 per square metre. They said that seems relatively expensive and asked if there was an incentive involved. There was a very large incentive. It was about $150,000. We said, 'If we had not asked you that question and you were not required to give that out, we would be believing that the market rent was in the range of $2,000 to 2,100 when it is actually not.' The incentive of $150,000 offset the cost of the fit-out enormously; instead of having to fund a $200,000 fit-out over five years, they only have to fund $50,000. Amortising at seven or eight per cent...it changes dramatically the actual market value of the rent.[68]

3.61 South Australian Lease Management argued that it 'should be illegal for incentives to be hidden from public view to deceive the market and everyone involved in it'.[69] Mr Scarborough stated:

> It blindsides the entire market in terms of capital value of the investment property for the investors and the amount of market rent the tenants pay for it when they are competing for the space.[70]

3.62 The Jewellers Association of Australia agreed with this contention that incentives should be publically available. Mr Colin Pocklington elaborated on the Association's concerns:

> ...let's say there is a lease for $100,000 and the landlord says, 'Let's make it $120,000 but we'll give you a few months rent free. The net result for that tenant is the same, but the supposed market value is revalued by 20 per cent.[71]

3.63 The Jewellers Association of Australia noted that publishing such arrangements would be a distortion of the real market figure, and that governments providing this data on lease registers in NSW and Queensland and were 'therefore providing inaccurate information to the market.[72]

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68 Mr Brian Scarborough, South Australian Lease Management, *Committee Hansard*, 13 February 2015, p. 17.

69 South Australian Lease Management, *Submission 3*, p. 7.

70 Mr Brain Scarborough, South Australian Lease Management, *Committee Hansard*, 13 February 2015, p. 17.

71 Mr Colin Pocklington, Jewellers Association of Australia, *Committee Hansard*, 13 February 2015, p. 20.

72 Mr Toby Bensimon, Jewellers Association of Australia, *Committee Hansard*, 13 February 2015, p. 18.

3.64 Likewise, Transworld Enterprises argued that the state sanctioned NSW and Queensland lease registers were of no value from a retailer's point of view:

> They fail to include incentives, or any ancillary benefits and by their very nature are misleading. They are at odds with the governments' mandate to provide clear and honest data when the reality is quite the opposite.[73]

3.65 Interestingly, the Law Council of Australia informed the committee that it recognised that the negotiation of the terms of any retail tenancy requires 'confidential discussions as to the financial arrangements'. Even so, its Property Law Group Executive Committee had not yet reached a consensus view as to whether it was 'practical and enforceable to require "full" disclosure of incentives'. The Committee was interested, however, in 'debating and considering the matter further'.[74]

3.66 The Law Society of New South Wales noted that market reviews may not reflect the true market rent without access to information relating to incentives. However, it did not believe that any legislative attempts to mandate the full disclosure of incentives would succeed as they would be difficult to enforce and most likely 'give rise to onerous prescriptive requirements'.[75]

3.67 Similarly, the NRA, while supporting the full disclosure of incentives to a prospective tenant, it did not support full disclosure to third parties. It stated:

> Due to the confidential nature of incentives as agreed between parties, it is not in the best interests of either landlords or tenants to be obliged to fully disclose incentives. Such incentives should be protected from public accessibility.[76]

3.68 SCCA opposed any requirement for the disclosure of information that was considered to be 'commercial-in-confidence'. It agreed with the view of the Productivity Commission that:

> …lodged lease information should not necessarily include information on incentives and 'side deals'. Such a requirement would be difficult to enforce and would not significantly add to market information.[77]

Dispute resolution processes

3.69 As noted in chapter 2, retail tenancy dispute resolution processes exist at both state and territory level, and through the Australian Competition and Consumer Commission (ACCC) at a national level.

3.70 The period following the 2008 PC report saw the proliferation of small business commissioners who can, among other things, assist with retail tenancy

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73 Transworld Enterprises, *Submission 27*, p. 2.

74 Law Council of Australia, *Submission 25*, p. 6.

75 Law Society of New South Wales, *Submission 9*, p. 4.

76 NRA, *Submission 11*, p. 6.

77 Shopping Centre Council of Australia, Submission 17, p. 21; Productivity Commission, *Inquiry Report: The Market for Retail Tenancy Leases in Australia*, No.43, 31 March 2008, p. 253.

disputes. NSW appointed a small business commissioner in July 2011, followed by Western Australia in December 2011 and South Australia in 2012. These states joined Victoria as jurisdictions with a dedicated office for promoting a fair operating environment for small business (Victoria's commissioner was established in 2003).[78]

3.71 The NRA argued that while the various state dispute resolution processes can generally be followed in an affordable, effective and timely manner, the processes still vary from state to state. The NRA observed that:

> Some states are providing better service than others, and achieving a better success rate with either the formal mediation process or intervention between the parties by the relevant authority at an early stage.[79]

3.72 The NRA explained further:

> On the difference in some of the mediation processes, some states have tribunals which work very effectively. Others basically operate with a magistrate's court. These have a different style of evidence that is led. It is often more costly and more time-consuming.[80]

3.73 Mr Angus Nardi asserted that the SCCA was a strong supporter of mediation and expressed the view that the growth of small business commissioners across the county has been very positive.[81]

3.74 Mr Paul Giugni, SCCA, noted that since the role of the Small Business Commissioner was established, South Australia had embraced mediation: He noted:

> It is different now, and what is happening with the Small Business Commissioner is that they are trying to tackle many matters, before even mediation. Actually, a lot of matters are not even going to mediation at the moment. The Small Business Commissioner is trying to get people on the phone and resolve things there, and they quote very high levels [of success].[82]

3.75 The Council of Small Business Australia explained that the services of small business commissioners add good faith to the areas of retail leasing. In its view:

> These commissioners are being given more and more power to bring businesses together to resolve disputes. This then removes the capacity for bigger businesses to stall legal processes and stone wall activities until the smaller business can no longer participate. The small business commissioners will bring the issue under their jurisdiction and create an environment of openness and transparency.[83]

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78 Senate Economics Legislation Committee, *Small Business Commissioner Bill 2013*, April 2013, pp. 13–15.

79 NRA, *Submission 11*, p. 3.

80 Mr Michael Lonie, NRA, *Committee Hansard*, 13 February 2015, p. 3.

81 Mr Angus Nardi, Executive Director, SCCA, *Committee Hansard*, 13 February 2015, p. 8.

82 Mr Paul Giugni, SCCA, *Committee Hansard*, 13 February 2015, p. 10.

83 Council of Small Business Australia, *Submission 5*, p. 2.

3.76 The SCCA highlighted the success of small business commissioners with regards to dispute resolution:

- NSW—the website for the office of the Small Business Commissioner notes that 'mediation is so successful that about 94 per cent of all matters referred to us for mediation are resolved prior to having a court decide the matter';
- Victoria—the Victorian Small Business Commissioner reported that in 2012-13 that they received 1,103 applications for dispute resolution related to the Retail Leases Act. Of these, only 594 progressed to mediation and the success rate was 80.3 per cent; and
- South Australia—the SA Small Business Commissioner reported that only 27 per cent of formal cases received related to the Retail and Commercial Leases Act and that 88 per cent of all formal cases are successfully resolved. Further, they report that 98 per cent of disputes are resolved prior to mediation.[84]

3.77 The Victorian Small Business Commissioner noted that since 2003 it had consistently achieved a mediation settlement rate across all legislative areas of around 80 per cent. He stated:

> The successful and efficient provision of these services is unaffected by the specific provisions of that law, or whether it is the same as, or different from, other State laws.[85]

3.78 Further, the Victorian Small Business Commissioner has the power under the Victorian Act to appoint Specialist Retail Valuers where parties cannot agree on market rent. Victorian Small Business Commissioner stated:

> In 2013-14, 103 appointments were made, similar to the previous year. Similar to our [alternative dispute resolution] service, this process provides a means by which parties can gain independent resolution of their rental dispute without the need to litigate. The valuer does charge the parties its market based fee, on a 50%- 50% basis, compared with the subsidised fee charged for mediation.[86]

3.79 According to the Victorian Small Business Commissioner, its success and the success of other Small Business Commissioners 'in resolving retail tenancy disputes and keeping businesses out of litigation suggests similar alternative dispute resolution services would be of benefit to landlords and tenants in States and Territories which do not currently offer similar services'.[87]

3.80 The Law Institute of Victoria submitted that the Victorian provisions for dispute resolution should be considered as a model for any national regulation. From its perspective:

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84 SCCA, answers to questions on notice no. 2, p. 11.

85 Victorian Small Business Commissioner, *Submission 4*, p. 2.

86 Victorian Small Business Commissioner, *Submission 4*, p. 2.

87 Victorian Small Business Commissioner, *Submission 4*, p. 2.

> The Retail Leases Act 2003 (Vic) (Victorian Act) provides for disputes to be the subject of alternative dispute resolution through the Office of the Small Business Commissioner before the issue of a proceeding, and this process is considered in Victoria to be a very efficient and cost-effective approach to early dispute resolution (see: Part 10 of the Victorian Act and in particular ss 86 and 87).[88]

3.81 The Law Society of New South Wales argued that the importance of affordable, effective and timely retail lease dispute resolutions processes cannot be underestimated. The Law Society of NSW noted the jurisdictional limit set for a claim may be too low:

> Jurisdiction for retail lease disputes is shared between the New South Wales Civil and Administrative Tribunal ("NCAT") and the New South Wales Supreme Court. Whether or not NCAT's current jurisdictional monetary limit of $400,000 should be increased is one of the issues raised in the NSW Discussion Paper…the Law Society's Dispute Resolution Committee is concerned that the jurisdictional limit of $400,000 for hearing retail leasing disputes in NCAT is too low given the typical quantum of claim and considers that the jurisdiction should be increased to $750,000, so that parties may avoid commencing proceedings in the Supreme Court.[89]

3.82 The NRA also submitted that the limit on the amount of claim under the Act should be set at $750,000 across all jurisdictions.[90]

Committee view

3.83 Evidence indicated strongly that the establishment of a small business commissioner is a positive move toward achieving an effective dispute resolution system that is affordable, less onerous for small retailers and less time consuming. Indeed, the results being achieved through the work of these commissioners show that many disputes are being settled in some cases even before mediation begins and definitely before a dispute proceeds to the courts.

Recommendation 1

3.84 **The committee recommends that the Australian Government give due recognition to, and wherever possible support, the work of the small business commissioners with the aim of strengthening of their role and encouraging the establishment of small business commissioners in all states and territories.**

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88 Law Institute of Victoria, *Submission 7*, p. 2.

89 Law Society of New South Wales, *Submission 9*, p. 3.

90 NRA, answers to questions on notice no.1, p. 1.