Chapter 4
National Approach

Introduction

4.1 A number of submissions supported the transition to a national regulatory framework governing retail tenancy in Australia—some strongly; some in-principle; and some with qualifications. In this chapter, the committee considers the scope and potential for introducing national retail leasing arrangements.

Support for a national regulatory framework for retail tenancy

4.2 The Law Council of Australia broadly supported a transition to a national approach to the regulation of retail leasing. It recognised, however, that under the Constitution, responsibility for retail leasing laws resides with the states and territories.[1]

4.3 Likewise, the Law Society of New South Wales supported the transition to a national approach to retail leasing. It noted that such a move would benefit landlords and tenants who operate in more than one jurisdiction.[2] The Property Law Reform Alliance drew attention to the inefficiencies, delays, frustrations, and cost to trade and commerce caused by discrepancies in property laws between jurisdictions, which 'needlessly complicate the leasing of property'. The result, according to the Alliance, is 'money and time being wasted'.[3]

4.4 The Commercial and Property Law Research Centre gave in-principle support to greater standardisation of the retail leasing process. Indeed, it was of the view that harmonisation of retail leasing arrangements was 'long overdue'. It suggested that time and resources were 'being wasted on jurisdictions playing catch-up with one another'.[4]

4.5 NRA supported a national approach,[5] as did ARNEC which agreed with the view that favoured having a consistent approach to retail leasing across Australia.[6] ARA wanted government to assist retailers facing a difficult operating environment through a more standardised national retail leasing system. It suggested that the cost benefits from standardisation to national retailers were significant.[7] ANRA on the other hand supported a nationally harmonised approach to retail leasing for small

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1 Law Council of Australia, *Submission 25*, pp. 3–4.

2 Law Society of New South Wales, *Submission 9*, p. 1.

3 Property Law Reform Alliance, *Submission 21*, p. 1.

4 Commercial and Property Law Research Centre, Queensland University of Technology, *Submission 12*, p. 2.

5 NRA, *Submission 11*, p. 1.

6 ARNEC, *Submission 22*, p. 1.

7 ARA, *Submission 24*, p. 3.

retailers but not large retailers.[8] SCCA also supported a system of national regulation of retail tenancies but with an important proviso—'only if such regulation was in place of, and not in addition to the present system of state and territory regulation'.[9] Indeed, it wanted to see a winding 'back of the current regulatory overreach of the state and territories'.[10]

4.6 Transworld Enterprises, argued that a consistent national approach to leasing would reduce legal requirements and cost, as well as ensuring a level playing field, noting they 'currently have to seek legal advice from multiple law firms located within the states in which we operate because the law is so confusing and contradictory across state lines'.[11]

4.7 Mr Evans, NRA, also noted that there were a number of places where small businesses operated across different jurisdictions, such as Canberra, the Victoria–New South Wales border and the Queensland–New South Wales border.[12]

Resistance to change

4.8 Ms Anna McPhee, ANRA, noted a number of these issues have already been 'prosecuted in numerous inquiries and reviews over many years. Recommendations to support changes have been made, yet change has not been forthcoming quickly.'[13] Mr Lonie, NRA, made the point that:

> …in all of the reviews, any changes that have been made—and I am talking about across all jurisdictions—have always been on those subjects that have been agreed. There has always been outstanding issues that have been left in abeyance, and they just continue to roll on. It is largely because the various stakeholders had—I do not say opposing views—varying views.[14]

4.9 The Restaurant and Catering Industry Association also expressed concerns regarding likelihood of a slow policy process to nationalise retail leasing arrangements, noting the recent example of changes relating to menu surcharges in the consumer law and consumer regulations, which took three years to complete because of the processes of the Ministerial Council and secretariat.[15]

4.10 The Restaurant and Catering Industry Association questioned whether a national approach to retail leasing arrangements would necessarily create a fairer system and reduce the burden on small to medium businesses, contending that several

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

9 SCCA, *Submission 17*, p. 7.

10 SCCA, *Submission 17*, p. 4.

11 Transworld Enterprises, *Submission 27*, p. 1.

12 Mr Trevor Evans, Chief Executive Officer, NRA, *Committee Hansard*, 13 February 2015, p. 4.

13 Ms Anna McPhee, Chief Executive Officer, ANRA, *Committee Hansard*, 13 February 2015, p. 3.

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

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

attempts to harmonise state-based regulation in the past had led to more onerous outcomes for individual small business.[16]

4.11 The Law Society of South Australia argued that a national approach to retail leasing arrangements was unnecessary, would be of little benefit and 'would more likely create additional red tape and costs for small and medium businesses'.[17] It was also concerned that:

> …the policies and legislation of the more populous States (NSW/VIC) would be likely to form the basis of any national law and any subsequent revisions of such law, hence limiting the ability of South Australia to determine its own policies and laws suitable for South Australian business.[18]

4.12 Dr Matt Harvey, noted that under the Constitution, property law is a state rather than a Commonwealth matter. As such Dr Harvey suggested:

> …a co-ordinated approach between the States in this area…with the assistance of the Commonwealth, rather than trying to graft a Commonwealth scheme on top of the State systems.[19]

4.13 The Queensland Government advised the committee that its review of retail tenancy laws had considered 'opportunities to align with key eastern seaboard states where appropriate to enhance operational efficiency and legal certainty for stakeholders operating across jurisdictions'.[20]

4.14 Treasury noted that there was an economic argument for the harmonisation of retail tenancy legislation to reduce compliance costs and red tape for landlords and tenants that operate across borders.[21]

Commonwealth legislation

4.15 As retail tenancy legislation is primarily a state and territory matter, there is no Commonwealth legislation regulating retail leases. However, the generic provisions contained in the *Competition and Consumer Act 2010* to regulate trade and commerce apply to the retail tenancy industry.[22]

4.16 Unless the states and territories agree to surrender their powers in this area to the Commonwealth, there are constitutional issues with regards to the Commonwealth's capacity to legislate on retail leasing.

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16 Restaurant and Catering Industry Association, *Submission 2*, p. 1.

17 Law Society of South Australia, *Submission 13*, p. 1.

18 Law Society of South Australia, *Submission 13*, p. 1.

19 Dr Matt Harvey, *Submission 18*, pp. 2–3.

20 Queensland Government, *Submission 23*, p. 1.

21 Treasury, *Submission 15*, p. 1.

22 Treasury, *Submission 15*, p. 5.

4.17 If the Commonwealth were to regulate retail tenancies, the industry codes framework under the *Competition and Consumer Act 2010* (CCA) may apply. However, any move towards a mandatory code such as the Franchising Code could be problematic. The industry codes framework under Part IVB of the CCA relies on the Commonwealth's Corporations power (section 51(xx) of the Constitution). In principle, the Commonwealth legislation could apply to contracts between two corporations, or in relation to agreements involving at least one corporation, but would not be able to regulate tenancy relations between non-corporate entities. Furthermore, any new restrictions on existing leases may be an acquisition of property (under section 51(xxxii) of the Constitution) and would need to be done on just terms.[23]

4.18 Treasury noted that any Commonwealth legislation could be extended if all states and territories agreed to refer their powers of retail tenancy legislation to the Commonwealth. Alternatively, the states could cover gaps in Commonwealth legislation by agreeing to implement equivalent state legislation, which was the case with Australian Consumer Law.[24]

Voluntary national code of conduct for shopping centre leases

4.19 Alternatively, the PC 2008 report recommended that state and territory governments, in conjunction with the Commonwealth, should cooperate to introduce a voluntary national code of conduct for shopping centre leases, enforceable by the ACCC. The code should:

- include provisions for standards of fair trading, standards of transparency, lodgement of leases, information provision and dispute resolution; and
- avoid intrusions on normal commercial decision making in matters such as minimum lease terms, rent levels, and availability of a new lease.[25]

4.20 The PC 2008 report recommended that the introduction of a national code of conduct should coincide with the repeal of the parts of state and territory regulation that seek to govern conduct, contract terms and conditions in rent.[26] This recommendation has not been implemented.

4.21 The SCCA advised that they would support a system of national regulations only if such regulation were in place of, not in addition to, the present system of state and territory regulation. They also stated that they would not support a national approach that:

- reflected the states and territories tendency to regulate what should be commercial contractual negotiations between a landlord and a tenant, such as lease terms; or

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23 Treasury, *Submission 15*, p. 10.

24 Treasury, *Submission 15*, p. 10.

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

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

- saw any greater encroachment of regulation than currently exists—for example, to require the disclosure of incentives or side agreements.[27]

4.22 The SCCA also questioned whether the states would agree to repeal their legislation if a national system was introduced. They also doubted this would be satisfactory to retailer associations which have historically opposed the repeal of state legislation. It stated:

> A national code is therefore more likely to create an additional layer of regulation, not a uniform system. If so it is also likely to lead to 'jurisdiction shopping' and legal disputes over inconsistencies between the national code and state/territory legislation.[28]

National Retail Tenancy Working Group

4.23 Following the PC 2008 report, COAG requested that the Small Business Ministerial Council (SBMC) commence work to improve transparency and consistency between the retail tenancy regulations of different jurisdictions.[29] A National Retail Tenancy Working Group (National Working Group) was established by COAG in the third quarter of 2008. The Working Group had a broad representation from federal and state governments, various retail industry associations, small business, the property sector and legal groups.[30] The stated objective for COAG's retail tenancy reform was as follows:

> Achieve greater national consistency, fairness and transparency in retail tenancy markets across jurisdictions, through the use of:
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> - national disclosure statements; and
> - consistent data collection and reporting.[31]

4.24 Following the 2008 PC report, the National Working Group undertook work on:

- nationally consistent reporting—the project was led by NSW and aimed to 'identify mechanisms and standards for nationally consistent reporting to each jurisdiction on the incidence of tenancy enquiries, complaints and dispute resolution'; and
- inconsistent retail tenancy terminology between the various states and territories—the project was intended to identify common terms (and their

27 SCCA, *Submission 17*, p. 6.

28 SCCA, *Submission 17*, p. 6.

29 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 265.

30 National Retail Association, answers to questions on notice no. 1, p. 1.

31 COAG Council on Federal Financial Relations, 'Current Implementation Plans for COAG Deregulation Reforms: Retail Tenancy Reform (start date 10 September 2010)', www.federalfinancialrelations.gov.au/content/Content.aspx?doc=related_agreements.htm (accessed 15 July 2014).

simple meaning) that would be used nationally in reference to retail tenancy leases.[32]

4.25 The Working Group only had one meeting with all stakeholders to develop a national disclosure statement, organised by one of the major accounting firms. The NRA noted:

> Following the meeting the late Michael Redfern from the Melbourne legal firm Russell and Kennedy was given the task of producing a draft for further discussion. The draft was produced in December 2008 and circulated. The rigid format of the statement meant that the majority of the larger landlords could not integrate it with their systems without substantial costs.[33]

4.26 In July 2009, a model national disclosure statement was endorsed by the SBMC. In 2011, it was reported that New South Wales, Queensland and Victoria implemented this statement from 1 January 2011.[34]

4.27 The NRA advised the committee that the Working Group did not meet again. Mr Lonie, National Retail Association explained that there was little or no consultation. He stated:

> …when it was dropped on the table there were many things in there that the Shopping Centre Council, in terms of the actual draft, could not work with—I am talking about within their systems. And there were many things in there that we sought as retailers that were not there. So it fell over.[35]

4.28 The 2011 PC report recommended that previous efforts to reform the regulatory environment be progressed:

> COAG should ensure that all current National Retail Tenancy Working Group projects are fully implemented. It should also re-examine the outstanding recommendations from the Commission's 2008 retail tenancy report with a view to expanding the work plan of its National Retail Tenancy Working Group.[36]

4.29 Treasury advised that the final meeting of the Working Group was held on 22 March 2012 as it had resolved 'that there were no new or existing retail lease projects to warrant the continuation of the working group and that it should cease.' Treasury also advised that the Working Group agreed that:

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32 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 268.

33 National Retail Association, answers to questions on notice no. 1, p. 1.

34 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 267.

35 Mr Michael Lonie, NRA, *Committee Hansard*, 13 February 2015, p. 4.

36 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 259.

> …the Small Business Officials Group (comprising Commonwealth and state government officials) and the Small Business Commissioner's Group, now Chaired by the Australian Small Business Commissioner Mr Mark Brennan, provided sufficient mechanisms to finalise existing projects and handle any future retail tenancy issues.[37]

4.30 The 2014 PC report noted that the National Working Group was ultimately 'unable to achieve national harmonisation on a number of key retail tenancy issues' and has now been disbanded.[38] Treasury informed the committee that, the Working Group's core model disclosure statement project could be closed as it had been implemented to the extent possible.[39] In this regard, it should be noted that when it was implemented in 2011, only NSW, Queensland and Victoria had signed up to the uniform disclosure statement.

4.31 The SCCA observed that there is currently commonality in disclosure statements between Queensland and New South Wales. While Victoria had signed up for commonality originally, there are now four Disclosure Statements to be used depending on the particular circumstance. The Disclosure Statements listed are for:

- non-shopping centre retail premises;
- shopping centre retail premises;
- renewal of a lease; and
- assignment of a lease with an ongoing business.[40]

4.32 The NRA suggested that despite the failed initiative, this was an area where there was general consensus. Mr Evans stated:

> If you could do one thing in one day, I would recommend that you reprosecute the focus on getting uniformity in the disclosure statements. That is probably the easiest thing to do. It is probably the one which would lead to the biggest immediate gains in the reduction of regulations. That would have to be a COAG led approach. But, unlike the last time COAG attempted it, it has to make sure that all of the stakeholders are around the table.[41]

4.33 Lease1, a commercial lease negotiator, and the SCCA agreed that there is potential for consensus around a harmonised disclosure statement.[42] They noted:

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37 Treasury, answers to questions on notice no. 5, p. 3.

38 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade*, September 2014, http://www.pc.gov.au/inquiries/completed/retail-trade/report/retail-trade.pdf (accessed 11 February 2015), p. 135.

39 Treasury, answers to questions on notice no. 5, p. 3.

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

41 Mr Trevor Evans, Chief Executive Officer, NRA, *Committee Hansard*, 13 February 2015, p. 4.

42 Lease1, *Submission 19*, p. 3; SCCA, answers to questions on notice no. 2, p. 10

> This also requires an amendment to legislation in some states to introduce a provision similar to section 114(1) of the NSW Retail Leases Act which gives some flexibility in departing from the layout of the prescribed disclosure statement provided it contains the relevant information.[43]

4.34 While Treasury noted that a process of harmonisation could be led by the states and territories, it did not necessarily require Commonwealth involvement.[44] Mr Evans, NRA, observed that:

> … leaving it to each of the jurisdictions individually around the country has led to some movements towards harmonisation and consistency but has led to, probably, just as many new variations arising as they held their individual reviews. The places where they were willing to move towards consistency was only the areas where all of the parties around the table were unanimous in their views. There has been no willingness to take on any of the issues where there is some difference of opinion between the parties on either sides of a lease. So we do think national leadership is probably called for to try to get things to the next step. We have probably gained as much from the moves towards consistency as we are likely to gain through leaving it to each of the state jurisdictions. The COAG process or a nationally led process is probably what is needed to take things to the next level. But…you have got to make sure that you include all of the participants of industry when you undertake that process.[45]

4.35 The 2014 PC report noted that the disbanding of the National Retail Tenancy Working Group in 2012 would make progress towards more consistent retail tenancy law more difficult.[46]

Recommendation 2

4.36 **The Committee recommends that National Retail Tenancy Working Group be re-established to develop a national disclosure statement, taking note of the lessons learnt from its previous attempts, and ensuring vital stakeholders are actively involved in any consultation processes.**

Recommendation 3

4.37 **The Committee recommends that the Commonwealth take on a greater leadership role in encouraging the states and territories to move towards a harmonised approach through the COAG process.**

Conclusion

4.38 With the retail sector providing 1.7 million jobs Australia-wide and supporting over $120 billion in economic activity across all sectors in Australia,[47] the

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

44 Treasury, *Submission 15*, p. 1.

45 Mr Trevor Evans, Chief Executive Officer, NRA, *Committee Hansard*, 13 February 2015, p. 4.

46 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade*, September 2014, p. 137.

importance of retail leasing arrangements—in particular small to medium businesses—cannot be overstated.

4.39 The committee notes that the 28 written submissions and the evidence provided at the public hearing demonstrates the potential for national harmonisation of retail tenancy law and that the sector is actively considering solutions.

4.40 The committee notes that the issues surrounding retail leasing arrangements are essentially matters for state and territory jurisdictions, and affirms a leadership role for the federal government. The committee encourages the Minister for Small Business to work through COAG in cooperation with the state and territory governments towards a fairer system and a reduction of the burden on small to medium businesses with regard to retail leasing arrangements. The committee encourages the Minister to consider the issues raised by submitters to the committee's inquiry.

Senator Sam Dastyari

Chair

47 Australian Retailers Association, *Submission 24*, p. 3.