



Australian Government

Senate Economics Committee Inquiry into the Need for a National Approach to Retail Leasing Arrangements

**Treasury Submission
2014**

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EXECUTIVE SUMMARY

1. The Treasury thanks the Senate Economics References Committee for the opportunity to contribute to the Inquiry into the Need for a National Approach to Retail Leasing Arrangements.
2. Retail leases are currently governed by detailed state and territory legislation and regulations. Much of this framework was developed to address the imbalance of bargaining power faced by small tenants operating in shopping centres. Other parts of the retail tenancy market — including tenants and landlords that operate outside shopping centres and large chain stores operating inside shopping centres — are likely to see much more balanced bargaining power, but are often also subject to regulation.
3. An imbalance in bargaining power is not in itself evidence of market failure that would warrant government intervention, nor is such an imbalance likely to be meaningfully improved by prescriptive legislation.
4. Where that imbalance of bargaining power is taken advantage of to support conduct that is unconscionable, or that unreasonably exploits the difference in bargaining power or difference in information available to prospective tenants, there are arguments to support government intervention to reduce that conduct, subject to an analysis of costs and benefits. The Commonwealth *Competition and Consumer Act 2010* already provides protections for tenants against conduct in trade or commerce that is unconscionable, conduct that is misleading and deceptive, and representations that are false or misleading. The ACCC has taken action against retail landlords who have engaged in alleged unconscionable, misleading, or deceptive conduct.
5. The current Competition Policy Review, led by Professor Ian Harper, is also examining competition laws; the industry codes framework; protections against unfair practices and unconscionable conduct, particularly relating to small business; and barriers to competition stemming from planning and zoning regulation. A draft report will be published in September 2014 and a final report will be provided to Government by the end of March 2015.
6. There is an economic argument for the harmonisation of retail tenancy laws and regulations to reduce compliance costs and red tape for landlords and tenants that operate across borders. Such a process of harmonisation could be led by the states and territories, and does not necessarily require Commonwealth involvement.
7. Were it considered necessary for the Commonwealth to legislate in this area, the industry codes framework under the *Competition and Consumer Act 2010* may provide one option, though its reliance on the corporations power may leave some gaps in coverage.
8. Imbalances of bargaining power between shopping centres and tenants may be lower in some cases were there a more liberal approach taken by states and territories to planning and zoning regulation.

1. CONTEXT

The Terms of Reference for the Senate Economics References Committee's inquiry into a national approach to retail leasing arrangements states as its focus 'to create a fairer system and reduce the burden on small to medium businesses with associated benefits to landlords'.¹

Retail leases are currently governed by state and territory legislation and regulations. The legislation and regulations governing retail leases typically prescribe certain terms within contracts and outlaw other terms. They also attempt to control the process by which leases are negotiated, by the imposition of information and disclosure requirements, and provide for low-cost mediation in order to attempt to resolve disputes before they become expensive court hearings.

The following legislation and regulations govern retail tenancy leases in each state and territory:

- Australian Capital Territory – *Leases (Commercial and Retail) Act 2001*;
- New South Wales – *Retail Leases Act 1994*;
- Northern Territory – *Business Tenancies (Fair Dealings) Act 2003*;
- Queensland – *Retail Shop Leases Act 1994*;
- South Australia – *Retail and Commercial Leases Act 1995*;
- Tasmania – *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998*;
- Victoria – *Retail Leases Act 2003*; and
- Western Australia – *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

Much of this state-based framework was developed to address the imbalance of bargaining power faced by small tenants operating in shopping centres.² Initial concerns regarding imbalances in bargaining power were exacerbated with the growth in the importance of shopping centres (from 1991-92 to 2005-06 the percentage of total retail space provided to shopping centres increased from 28 per cent to 38 per cent).³ Shopping centre landlords may enjoy greater bargaining power in part through the geographic monopoly power they hold; the sharing of common facilities, services; and associated costs between tenants creates a more complex operating environment.

Concerns were raised in the 1990 report *Small Business in Australia: Challenges, Problems and Opportunities* by the House Standing Committee on Industry, Science and Technology; which preceded development of much of the state and territory regulation in this area. It stated that 'the disparity in bargaining power between small retailers and a shopping centre landlord can result in a landlord abusing his more powerful position by including unfair conditions into leases offered to

1 Senate Economics References Committee, *The need for a national approach to retail leasing arrangements*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Retails_leasing/Terms_of_Reference.

2 Productivity Commission, *Inquiry Report*, The Market for Retail Tenancy Leases in Australia, No. 43, 31 March 2008, page 247.

3 Productivity Commission, *Inquiry Report*, The Market for Retail Tenancy Leases in Australia, No. 43, 31 March 2008, page 18.

smaller retailers.⁴ As a result, it suggested an industry-wide standard to inform negotiations and to protect the right of landlord and tenant.⁵ Submissions to the report also argued that the process of attracting major retailers to shopping centres to act as anchor tenants by offering low rents meant that smaller retailers were paying disproportionately high rents.⁶

The parliamentary debates and second reading speeches for the original retail tenancy Acts suggest that legislation sought to provide a more equitable bargaining position between large landlords and their small retail tenants.⁷ For example, evidence provided in the 1999 Joint Select Committee on the Retailing Sector report *Fair Market or Market Failure* suggested that specialty shops in shopping centres often pay a substantially higher rate for their floor space than the anchor tenant.⁸ The Joint Select Committee also reiterated the widely held concern amongst retail lessees of a lack of transparency with regard to the cost of floor space rent.⁹ Commonly, landlords require access to the turnover records of their tenants, which can inform rent negotiations. But other tenants and prospective tenants have limited knowledge of typical rents; which may limit their ability to make informed decision in relation to rental estimates over the period of their lease.¹⁰

Where there is a large landlord in a shopping centre and many small tenants competing for limited retail space, landlords can potentially offer contracts on a 'take it or leave it' basis, which could facilitate unfair practices. Market tensions can also arise when retailer expectations of performance or lease renewal are not realised, or when there is differences in information held by lease parties on centre performance.¹¹

These imbalances of bargaining power typically take place in shopping centres. Yet many retail landlords and tenants do not operate in centres. The market for retail tenancies also extends to negotiations in shopping strips. Even within shopping centres, landlords may have leases with large chain stores, for which we are not aware of convincing evidence of systemic imbalance of bargaining positions.¹² Current trends of note include the increasing presence of pop-up retail stores, using flexible leasing opportunities, and a shift away from reliance on traditional anchor tenants such as department stores, especially in sought-after CBD properties.¹³

An imbalance in power does not necessarily imply market failure — in the sense of retail tenancy space being allocated inefficiently or inappropriate investments being made leading to excessive business failure — which would require government regulation. There is a degree of competition in

4 House Standing Committee on Industry, Science and Technology Inquiry report, *Small business in Australia: Challenges, problems and opportunities*, 31 May 1990, page xxvii.

5 House Standing Committee on Industry, Science and Technology Inquiry report, *Small business in Australia: Challenges, problems and opportunities*, 31 May 1990, page xxvii.

6 House Standing Committee on Industry, Science and Technology Inquiry report, *Small business in Australia: Challenges, problems and opportunities*, 31 May 1990, page 101.

7 Productivity Commission, *Inquiry Report, The Market for Retail Tenancy Leases in Australia*, No. 43, 31 March 2008, page 40.

8 Joint Select Committee on the Retailing Sector report, *Fair Market or Market Failure, A review of Australia's retailing sector* (the Baird Report), 1999, page 76.

9 Joint Select Committee on the Retailing Sector report, *Fair Market or Market Failure, A review of Australia's retailing sector* (the Baird Report), 1999, page xxiii.

10 W D Duncan, *Toward a Uniform Retail Tenancy Code for Australia – Punching at Shadows?*, Australian Business Law Review, vol 28, no. 4, Aug 2000, page 246.

11 Productivity Commission, *Inquiry Report, The Market for Retail Tenancy Leases in Australia*, No. 43, 31 March 2008, page xxii.

12 For instance, see: Productivity Commission, *Inquiry Report, Economic Structure and Performance of the Australian Retail Industry*, No. 56, 4 November 2011, page 264.

13 IBISWorld Industry Report OD5255: *Shopping Centre Operators in Australia*, July 2014, page 8.

the shopping centre industry for tenants, and this is increasing.¹⁴ Information gaps also exist, and some prospective tenants may misunderstand the nature of the business prospect offered by retail landlords and the ability for them to build goodwill in the business over time. Were this imbalance of bargaining power to facilitate behaviour that is unconscionable, or that unreasonably exploits the difference in bargaining power or difference in information available to prospective tenants, there are arguments to support government intervention to reduce that conduct, subject to an analysis of costs and benefits.

While there are ongoing concerns about the imbalance of power in retail tenancy arrangements, it has also been argued that the current framework of state and territory legislation and regulation is not always warranted or effective and its prescriptive nature is excessively constraining the market and subtracting from the productivity of the sector.¹⁵

In particular, the Productivity Commission's 2008 inquiry found that:¹⁶

'Overall, the market is working reasonably well — hard bargaining and varying business fortunes should not be confused with market failure warranting government intervention to set lease terms and conditions. Generally,

- there is no convincing evidence that systemic imbalance of bargaining position exists outside of shopping centres;*
- in larger shopping centres, there is stiff competition by tenants for high quality retail space and competition by landlords for the best tenants, reflected by relatively low vacancy rates and high rates of lease renewals;*
- the more desirable tenants and shopping locations are able to negotiate more favourable lease terms and conditions;*
- the incidence of business failure in the retail sector is not exceptional compared to other service activities; and*
- formal disputes are relatively few and widely dispersed both geographically and according to shopping formats.'*

The Productivity Commission was also critical of the highly prescriptive nature of state and territory retail tenancy legislation; its growing volume; and widening differences between jurisdictions.¹⁷ In particular, it noted that 'aspects of the (retail tenancy) legislation have constrained the market, lowered productivity and added to compliance and administrative costs'.¹⁸ It argued that, given the

14 IBISWorld Industry Report OD5255: *Shopping Centre Operators in Australia*, July 2014, page 19.

15 Productivity Commission, *Inquiry Report, The Market for Retail Tenancy Leases in Australia*, No. 43, 31 March 2008, page XVI.

16 Productivity Commission, *Inquiry Report, The Market for Retail Tenancy Leases in Australia*, No. 43, 31 March 2008, page XXV.

17 Productivity Commission, *Inquiry Report, The Market for Retail Tenancy Leases in Australia*, No. 43, 31 March 2008, page XVI.

18 Productivity Commission, *Inquiry Report, The Market for Retail Tenancy Leases in Australia*, No. 43, 31 March 2008, page XVI.

characteristics of the market and the legislative structure in place, 'further attempts to prescribe lease terms and conditions would not improve outcomes'.¹⁹

Examples of overly prescriptive provisions cited in the Productivity Commission's 2008 report include in areas of:²⁰

- Minimum lease terms, which reduce market flexibility;
- Options for preferential right to renew or extend a lease, which can reduce the rights of a landlord over leased premises;
- Lease assignment, which can potentially introduce inefficiencies and may depart from common law; and
- Outgoings inclusions, which are likely to unduly restrict commercial negotiations.

2. COMPETITION AND CONSUMER ACT 2010 – THE ROLE OF THE COMMONWEALTH

There is no Commonwealth legislation regulating retail leases. However, the generic provisions for regulating trade and commerce contained in the *Competition and Consumer Act 2010* (CCA) apply to retail tenancy industry participants, including the Australian Consumer Law (ACL), which is Schedule 2 of the CCA.

The ACL provides a range of protections for consumers, many of which also apply in the context of business to business conduct and agreements. The ACL is mirrored in state and territory consumer protection laws and is governed by an intergovernmental agreement that requires the agreement of the Commonwealth and four states or territories (including at least three states) to make amendments.

Specific provisions of the ACL relevant to retail tenancy include:

- Part 2-1 prohibits conduct in trade or commerce that is misleading or deceptive, or likely to mislead or deceive. These protections apply to business to business transactions;
- Part 2-2 prohibits conduct in trade or commerce which is unconscionable in all the circumstances in connection with the supply or acquisition of goods or services (section 21) and details a range of factors to which courts may have regard in considering such matters. These protections apply to business to business transactions, except where the supply is to a listed public company. Part 2-2 also prohibits conduct in trade or commerce that is unconscionable within the meaning of the unwritten (or common) law (section 20), which applies to all business to business transactions;

¹⁹ Productivity Commission, *Inquiry Report, The Market for Retail Tenancy Leases in Australia*, No. 43, 31 March 2008, page XVI.

²⁰ Productivity Commission, *Inquiry Report, The Market for Retail Tenancy Leases in Australia*, No. 43, 31 March 2008, page 234.

- Part 2-3 provides protections against unfair terms in standard form consumer contracts. These currently do not extend to business to business contracts, but the Commonwealth Government indicated it intends to extend the protections to the small business sector as part of the *Real Solutions Small Business Policy* document, and in 2013 the Commonwealth, state and territory consumer affairs ministers agreed to consider such an extension through the Legislative and Governance Forum on Consumer Affairs. Consumer Affairs Australia New Zealand released a consultation paper on 23 May 2014 and submissions closed on 1 August 2014; and
- Part 3-1 prohibits, in trade or commerce, false or misleading representations in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services. These protections apply to business to business transactions.

In recent years, the ACCC has taken action against retail landlords who have engaged in alleged unconscionable, misleading, or deceptive conduct. In certain cases, the ACCC have also pursued retail landlords on grounds of misleading or deceptive conduct or false representation.

Case name	Elements of retail tenancy arrangement
<i>ACCC v Leelee Pty Ltd</i> (1999) FCA 1121	The landlords consented to, or gave approval for, another tenant to infringe on the exclusive menu entitlements conferred by the landlord on one of its tenants. Further, they specified the price at which its tenant sold their dishes in a manner which unfairly discriminated against, or inhibited, the tenant's ability to determine the prices at which its dishes were sold in competition with another tenant.
<i>ACCC v Samton Holdings Pty Ltd & Ors</i> (2000) FCA 1725 ²¹	<p>The landlords proposed an arrangement in which a lease was to be extended outside the option renewal period on the condition that an additional \$70,000 was paid by the tenant to the landlord. This strategy avoided the prohibition against 'key-money' payments under state legislation.</p> <p>The landlord was held not to have acted unconscionably. The court was of the view that the tenants were business people who were in a difficult situation because of their own failure to exercise the option to extend the lease in time and who, as a result, had made a considered commercial decision to pay the landlords the additional \$70,000. The use of superior bargaining power to drive a hard bargain, the court held, is unlikely of itself to be unconscionable conduct.</p> <p>On appeal, the three Appeal judges agreed with the Trial judge's decision that the landlord had not acted unconscionably, and the tenants did not suffer any special disadvantage, as they were experienced business persons.</p>

21 Note: Decision affirmed on appeal: *ACCC v Samton Holdings* [2002] FCA 62; (2002) 117 FCR 301.

Case name	Elements of retail tenancy arrangement
<i>ACCC v Westfield Shopping Centre Management Co. (Qld) Pty Limited (2001)</i> ²²	<p>Westfield made it a condition of the settlement of private litigation that former tenants must sign a deed of release containing a 'release of liability' clause, requiring former tenants not to commence, recommence or continue any action in connection with the subject matter of their private litigation, including any administrative or governmental investigation against Westfield.</p> <p>The ACCC alleged that Westfield acted unconscionably by imposing unnecessary conditions in circumstances where there was a significant difference in the relative bargaining strengths of the parties.</p> <p>The ACCC considered that the condition might have impeded the tenants from approaching or assisting the ACCC in any investigation into Westfield's conduct. Westfield acknowledged that the condition may have discouraged the tenants from approaching or assisting the ACCC, although this effect was not intended. Westfield provided an undertaking to the Federal Court of Australia that, in future, it will not use a specific release of liability clause when entering into settlement agreements with retail tenants.</p>
<i>ACCC v Suffolk Parke Pty Ltd (2001)</i> FCA 5159	<p>A master franchisee had leased premises to a sub-franchisee. The ACCC alleged the master franchisee acted unconscionably by refusing permission for its tenant (also sub-franchisee) to sublet a separate part of shop premises when on two prior occasions it had not objected to such subleasing.</p> <p>In 2002, the court declared that Suffolk Parke had acted unconscionably toward its tenant and had breached the Franchising Code of Conduct by refusing to attend mediation. The court's orders included that Suffolk Parke Pty Ltd and its director compensate the franchisee.</p>
<i>ACCC v CG Berbatis Holdings Pty Ltd (2003)</i> 214 CLR 151; 197 ALR 153 (2003); [2003] HCA 18 (<i>Farrington Fayre Case</i>)	<p>The ACCC alleged that the landlords had engaged in unconscionable conduct against three tenants of the shopping centre by requiring the tenants to cease litigation against the landlords before their leases would be renewed.</p> <p>The High Court found that the respondents had not engaged in any unconscionable conduct because it considered that the tenants were not labouring under any special disadvantage as required by section 51AA (Schedule 2 section 20 of the CCA).</p>

²² Note: Case spanned from 2001-04, when settled on a without admissions basis. For example, *ACCC v Westfield Shopping Centre Management Co (Qld) Pty Ltd [2003]* FCA 744 brought into issue quantum of damages, and was referred to mediation, with settlement on a no admissions basis reached 2004.

Case name	Elements of retail tenancy arrangement
<i>ACCC v Avanti Investments Pty Ltd (2003)</i> ²³	The court declared by consent that Avanti Investments engaged in unconscionable conduct when it made farmers sign new agreements over time that significantly reduced the amount of water available to the farmers, while representing to the farmers that the new agreements were the same as their original agreements (which they were not). The court also declared that Avanti Investments engaged in misleading or deceptive conduct and made false or misleading representations about the land leased by the farmers.
<i>ACCC v Dukemaster Pty Ltd [2009] FCA 682</i>	The landlord of a shopping centre was found to have engaged in misleading and deceptive conduct in representing to a tenant that the rent for a shop in a food court was reasonable and below market value. The landlord was also found to have engaged in unconscionable conduct in connection with the negotiation of the renewal of leases for several tenants via the conduct of its General Manager.

The CCA also provides for industry codes under Part IVB to be prescribed that impose regulations on corporations within particular industries. Industry codes are co-regulatory measures, designed to achieve minimum standards of conduct by participants in an industry where there is an identifiable problem to address. Examples include the Franchising Code of Conduct, the Horticulture Code of Conduct, and the Oil Code. These industry codes also provide for low cost dispute resolution services.

Was Commonwealth regulation of retail tenancies to be considered, the industry codes framework may provide a means for regulating retail tenancies, to the extent that retail tenancies could be considered an 'industry' and the Commonwealth's corporations power is considered adequate.

The guidelines on prescribing industry codes indicate that, before an industry code is to be prescribed, regard should be given to:²⁴

- Identification of a problem within an industry, and the capability of existing regulation at the national, state and territory levels to address the problem;
- Effectiveness of any industry self-regulatory measures;
- Other regulatory options, including the effectiveness of the CCA to address the problem;
- The goals of a prescribed code, particularly whether it would enhance the wellbeing of the Australian people; and

²³ Note: Proceedings commenced 2001 - ACCC v Avanti Investments Pty Ltd and Giuseppe Rocco Barbara FCA (SA) Proceeding no s51.

²⁴ Policy Guidelines on Prescribing Industry Codes, 17 May 2011. Accessible at <<http://archive.treasury.gov.au/documents/2035/PDF/Policy%20Guidelines%20on%20Prescribing%20Industry%20Codes.pdf>>.

- A rigorous benefit-cost analysis.

Where effective, a generic legislative framework is to be preferred to detailed and prescriptive industry-specific regulation. A generic legislative framework facilitates a clear understanding of obligations throughout the economy and so has the potential to keep compliance costs lower. The compliance costs of more detailed regulation can include both direct costs associated with understanding and acting in accordance with the laws, the potential for detailed laws to restrict businesses from entering into mutually beneficial agreements, and the potential for compliance costs to create barriers to entry into regulated industries.

3. HARMONISATION OF STATE AND TERRITORY LAWS

There has been a long history of calls for the harmonisation of retail tenancy laws. This includes, the House of Representatives Standing Committee on Industry, Science and Technology report *Small Business in Australia, Challenges, Problems and Opportunities* (1990); the House of Representatives Standing Committee on Industry, Science and Resources report *Finding a balance: towards fair trading in Australia* (1997 – the Reid Report); the Productivity Commission report *The Market for Retail Tenancy Leases in Australia* (2008); and, the Productivity Commission report *Economic Structure and Performance of the Australian Retail Industry* (2011).

There is a strong economic argument for the harmonisation of retail tenancy laws and regulations. Many shopping centre operators run centres across multiple jurisdictions, with market players like Westfield being well-known, well-established national brands, which are highly successful at drawing popular retail tenants. Four players account for over 40 per cent of revenue in the shopping centre industry, giving the market a medium level of concentration,²⁵ with firms who dominate the industry managing a number of shopping centres across the country.²⁶ These include Scentre Group, CFS Retail Property Trust, GPT Group, and Federation Centres. Many of the chain stores that occupy a significant amount of rental space in shopping centres are also large businesses that operate across jurisdictions. A degree of harmonisation across states and territories may be expected to reduce compliance costs and cut red tape for these businesses. Arguably, with state and territory retail tenancy laws often being similar in substance, the diversity of detailed rules or regulations may give rise to unnecessarily high compliance costs with insufficient offsetting benefits in terms of better quality regulation.

On the other hand, there is a general argument that devolving responsibility for regulation to the lowest level of government practical allows more flexible approaches to improving outcomes.²⁷ Generally, regulation by sub-national government is to be preferred where: they are likely to have greater knowledge about the needs of the citizens and businesses; proximity to the electorate imposes discipline on policy design; or mobility of individuals and businesses imposes a reasonable degree of intergovernmental competition.²⁸

Progress towards harmonisation of retail tenancy laws and regulations could proceed through multilateral state and territory negotiations. Harmonisation may be possible without any movement

25 IBISWorld Industry Report OD5255: *Shopping Centre Operators in Australia*, July 2014, page 17.

26 IBISWorld Industry Report OD5255: *Shopping Centre Operators in Australia*, July 2014, page 21.

27 This is known as the principle of subsidiarity. For instance, see: Productivity Commission Annual Report 2004-05, *Productive Reform in a Federal System*, page 3.

28 Productivity Commission Annual Report 2004-05, *Productive Reform in a Federal System*, page 3.

towards Commonwealth legislation in the area. There have been previous attempts to harmonise certain aspects of retail tenancy legislation through the National Retail Tenancy Working Group (NRTWG).

The NRTWG was established in 2008 as a mechanism to establish communication between jurisdictions on retail tenancy matters and foster national harmonisation. The NRTWG included representatives from Victoria, New South Wales (NSW), Queensland, South Australia, Western Australia (WA) and Tasmania. The NRTWG identified deliverable projects arising from the Government response to the Productivity Commission's 2008 inquiry. The projects aimed to achieve greater national consistency and harmonisation in retail tenancy markets across jurisdictions, and included:

- Development and implementation of a core national disclosure statement — the NRTWG developed a core national model disclosure statement in 2009-2010, which was implemented by Victoria, NSW and Queensland on 1 January 2011. WA agreed to implement the core model national disclosure statement to the extent possible, as part of their retail leases legislation review. The review resulted in a range of amendments, including requiring landlords to provide additional information in the disclosure statement provided to tenants.
- Establishing a nationally consistent data collection and reporting — the NRTWG developed national data standards to aid consistent data reporting on the incidence of retail lease inquiries, complaints and disputes, which jurisdictions agreed to implement to the extent possible ready for the first reporting period 1 July 2011 – 30 June 2012; and
- Establishing nationally consistent terminology — the core national model disclosure statement developed by the NRTWG includes a one page summary of key lease terms and conditions.

The NRTWG last met in March 2012 and agreed that there are no existing/new retail lease projects to warrant the continuation of the working group and that the NRTWG should cease.

Alternatively, these multilateral state and territory negotiations could proceed with an objective of agreeing Commonwealth legislation or regulation that would replace existing state and territory provisions.

Were this approach to be taken, consideration would need to be given to the constitutional powers of the Commonwealth. The industry codes framework under Part IVB of the CCA relies on the Commonwealth's corporations power (section 51(xx) of the Constitution). This may be sufficient to impose binding obligations on corporations, or in relation to agreements involving at least one corporation, but would not be able to regulate tenancy relations between non-corporate entities. If legislation separate from the CCA were pursued, alternative heads of power including the territories power (section 122) or the trade and commerce power (section 51(i)) may also have some limited relevance. Nevertheless, there are potential coverage gaps. 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.

The coverage of any Commonwealth legislation could be extended if all States refer their powers over retail tenancy regulation to the Commonwealth, or cover gaps by agreeing to apply the Commonwealth legislation through equivalent state legislation, as was the case, for example, with the Australian Consumer Law.

4. PLANNING AND ZONING REGULATION AND THE HARPER REVIEW OF COMPETITION POLICY

The imbalance of bargaining power between shopping centres and tenants stems, in part, from the control that shopping centres have over prime retail locations. Some imbalance of power is inevitable when shopping centres negotiate with smaller chain stores: economies of scale make much larger numbers of shopping centres unlikely to be commercially viable; and the collective nature of the retail sector means that shopping centres, in effect, act as an agent for the tenants collectively in dealings with individual retailers.

Nevertheless, this imbalance of bargaining power would be lower in some cases were there a more liberal approach taken to planning and zoning regulation. The Productivity Commission noted in its 2011 report that by implementing reforms to planning and zoning restrictions, it 'would potentially increase competition between shopping centre landlords, and reduce the bargaining power of landlords *vis-à-vis* their tenants, by improving tenants' ability to relocate close by and preserve their businesses after lease expiry'.²⁹ By increasing competition in this way and addressing the imbalance in bargaining power directly, the Productivity Commission stated that it is likely that the prescriptiveness in State and Territory retail tenancy legislation could be wound back over time, thus lowering compliance costs to the sector and reducing the differences in State and Territory retail legislation.³⁰

On 27 March 2014, the Government announced the final terms of reference for the 'root and branch' competition policy review. The review is independent, led by Professor Ian Harper, and assisted by an expert panel. It is examining the competition framework to ensure that it continues to play a role as a significant driver of productivity improvements and that the current laws are operating as intended and are effective for all businesses, big and small. The Harper Review will publish a draft report in September 2014, before providing a final report to the Government by the end of March 2015.

The Review is examining the competition provisions and the special protections for small business in the law to ensure that efficient businesses, both big and small, can compete effectively and have incentives to invest and innovate for the future. Further, it is considering whether the framework for industry codes of conduct (with reference to State and Territory codes where relevant) and protections against unfair and unconscionable conduct, provide an adequate mechanism to encourage reasonable business dealings across the economy — particularly in relation to small businesses.

29 Productivity Commission, *Inquiry Report, Economic Structure and Performance of the Australian Retail Industry*, No. 56, 4 November 2011, page 259.

30 Productivity Commission, *Inquiry Report, Economic Structure and Performance of the Australian Retail Industry*, No. 56, 4 November 2011, page 273.