

## Chapter 2

### Previous inquiries and reform processes

2.1 There have been a number of reviews of retail tenancy legislation at both state and Commonwealth level, including three parliamentary inquiries:

- House Standing Committee on Industry, Science and Technology, *Small business in Australia: Challenges, problems and opportunities*, January 1990;
- House Standing Committee on Industry, Science and Resources, *Finding a Balance: Towards Fair Trading in Australia*, May 1997; and
- Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure, A review of Australia's retailing sector*, August 1999.

2.2 In the last decade, the Productivity Commission (PC) has also considered retail tenancy leases in three reports:

- *The Market for Retail Tenancy Leases in Australia* (August 2008);
- *Economic Structure and Performance of the Australian Retail Industry* (December 2011); and
- *Relative Costs of Doing Business in Australia: Retail Trade* (September 2014).

2.3 In their 2008 report, the PC described the market for retail tenancies as being 'dynamic and complex' with around 290,000 retail tenancy leases at the time, and up to 58,000 entered into each year. Around one-fifth of tenancy leases were in shopping centres.<sup>1</sup>

2.4 In the 2008 and 2011 PC inquiries, retailers that made submissions raised the following areas of concern about retail tenancy leases:

- large differences between rental costs of anchor tenants and smaller specialty retailers in shopping centres;
- the significant differences in the cost of retail rents in Australia compared to the United States;
- the use of turnover data in shopping centres to set rents at 'excessive' levels;
- shop fit-out requirements in leases, particularly the inability of retailers to negotiate competitive quotes for the work undertaken;
- standard lease terms, although prescribed in most state and territory legislation, do not provide sufficient security and are insufficient to gradually amortise capital costs over time;

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

- the limited negotiating power of retail tenants in shopping centres when renegotiating a lease;
- landlords exploiting their bargaining power when a lease expires by seeking unreasonable and often 'excessive' rent increases;
- retailers' lack of security of tenure during 'lease hold over' periods; and
- the lack of publicly available information relating to shopping centre rents.<sup>2</sup>

2.5 The 2008 PC report noted, however, that 'across the economy, large and small firms in all sectors trade without special regulation detailing the terms of their business relationship'. The PC reached the following conclusion:

The Commission did not find strong evidence that the difference in the size of market participants in the retail tenancy sector distorts the efficient operation of the market. 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.<sup>3</sup>

### ***Recommendations of the 2008 PC report***

2.6 The PC observed that the state and territory legislation 'has been continually reviewed, amended and expanded' in attempts to 'improve security of tenure and reduce the uncertainties of retail tenancy leases'. In the PC's view, this has resulted in 'complex and prescriptive, and to some extent, arbitrary rules'.<sup>4</sup> The 2008 report stated that the retail tenancy market 'is working reasonably well overall', and that 'further attempts to prescribe lease terms and conditions would not improve outcomes'.<sup>5</sup> The

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2 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 262.

3 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, pp. xxv–xxvi.

4 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 264.

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

PC concluded that the operation of the market and a reduction in costs could be achieved by:

- reducing information imbalances and assisting efficient decision making by further improving transparency, disclosure and dispute resolution;
- reducing the prescriptiveness of legislation and moving to a retail lease framework that is nationally consistent; and
- adopting 'a more focused approach to the shopping centre segment of the market'.<sup>6</sup>

2.7 The 2008 PC report recommended that:

- state and territory governments should improve transparency and accessibility of lease information in the retail tenancy market—for example, by encouraging the inclusion of a one page summary of all key lease terms and conditions in retail lease documentation;
- in addition, state and territory governments should require a standard one page lease summary is available made on a publicly accessible website;
- the consistency and administration of lease information across jurisdictions should be improved;
- a voluntary national code of conduct for shopping centre leases, enforceable by the Australian Competition and Consumer Commission (ACCC), should be introduced;<sup>7</sup>
- unnecessarily prescriptive elements of retail tenancy legislation should be removed and a nationally consistent model legislation for retail tenancies established; and
- state and territory governments should consider relaxing planning and zoning controls that limit competition and restrict retail space and its utilisation.<sup>8</sup>

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

7 The PC recommended that the code should include provisions for 'standards of fair trading, standards of transparency, lodgement of leases, information provision and dispute resolution', although it should 'avoid intrusions on normal commercial decision making in matters such as minimum lease terms, rent levels, and availability of a new lease'.

8 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, pp. xvii–xxxv. The adoption of uniform retail tenancy legislation around Australia was earlier recommended in 1997 by the House of Representatives Standing Committee on Industry, Science and Resources in its report *Finding a Balance: Towards Fair Trading in Australia* (see p. 25 of that report), and again in 1999 by the Joint Select Committee on the Retailing Sector in its report *Fair Market or Market Failure?: A review of Australia's retailing sector* (see p. xxii of that report).

### ***Government response to the 2008 PC report***

2.8 The then government responded to the 2008 PC report in August 2008, emphasising that the Commonwealth had a limited role in the retail tenancy market. Nevertheless, their response:

- offered in-principle support to the harmonisation of state and territory retail tenancy legislation;
- recognised the merit in, and offered in-principle support for, a national code of conduct for shopping centre leases as an alternative to prescriptive legislation;<sup>9</sup> but
- did not support a recommendation regarding the removal of restrictions on commercial decision making in retail tenancy legislation that the PC considered did not improve operational efficiency, compared with the broader market for commercial tenancies.<sup>10</sup>

### ***2011 and 2014 PC reports***

2.9 The PC revisited retail tenancy leasing in a broader 2011 inquiry. The PC noted that complaints similar to those received in 2008 were again lodged. However, it concluded that planning and zoning regulation 'appears to be the root cause of many of the problems that arise in retail tenancy'. It noted that, given the distortions and constraints stemming from planning and zoning, additional refinements to retail tenancy regulations were 'unlikely to result in significant improvements to the operation of the retail tenancy market given the distortions and constraints arising from planning and zoning regulation'.<sup>11</sup> The PC found:

There is scope to improve the retail tenancy market by removing unnecessary restrictions on competition and constraints on the supply and location of retail space through the reforms to planning and zoning regulation...Implementing these reforms would potentially increase competition between shopping centre landlords, and reduce the bargaining

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9 However, the response indicated that this was a matter for the states and territories and, in the then government's view, such a code 'should not be an additional layer of regulation and should only be pursued if the current legislative arrangements are to be reformed'. Australian Government, *Commonwealth Government Response to the Productivity Commission Inquiry: The Market for Retail Tenancy Leases in Australia*, August 2008, [www.industry.gov.au/smallbusiness/Support/Documents/GovtResponsetoTheMarketforRetailTenancyLeasesInquiry.pdf](http://www.industry.gov.au/smallbusiness/Support/Documents/GovtResponsetoTheMarketforRetailTenancyLeasesInquiry.pdf) (accessed 18 July 2014), p. 2.

10 The response argued that 'there is a need to distinguish between retail and commercial tenancies given the importance of location for retailers. However any provisions, apart from those that offer location safeguards, that detract from operational efficiency generally or unduly apply compliance costs for small business should be reviewed as part of the harmonisation of state and territory laws'. Australian Government, *Commonwealth Government Response to the Productivity Commission Inquiry: The Market for Retail Tenancy Leases in Australia*, August 2008, p. 2.

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

power of landlords vis-à-vis their tenants, by improving tenants' ability to relocate close by and preserve their business after lease expiry.<sup>12</sup>

2.10 In 2014, the PC again examined retail tenancy, as part of a broader inquiry into retail trade.<sup>13</sup> The 2014 PC report recalled the 2008 findings, stating:

Further improvements to the operation of retail tenancy markets in line with the acknowledged best practices suggested by the Commission in its 2008 study should remain a priority for state and territory governments. The key areas for reform include improving transparency, disclosure and dispute resolution, supporting a move to less prescriptive legislation, and ensuring greater national consistency.<sup>14</sup>

2.11 Drawing also from its 2011 research, the 2014 PC report maintained the view that 'many of the problems in the retail tenancy market could be addressed by relaxing planning and zoning controls that limit competition and restrict the availability of retail space'.<sup>15</sup>

### ***Other reviews currently underway or recently concluded***

#### ***Queensland***

2.12 The Queensland retail tenancy legislation was reviewed between 2011 and 2013. The statutory report on the review was tabled on 25 November 2014 during the introduction of the Retail Shop Leases Amendment Bill 2014. The bill, which gives effect to the outcomes of the review, was referred to the state's Legal Affairs and Community Safety Committee for detailed consideration.<sup>16</sup>

2.13 The principle objectives of the review were to:

- improve the efficiency and effectiveness of the *Retail Shop Leases Act 1994*;
- reduce red tape for tenants and landlords and leave appropriate matters to commercial negotiation or education, rather than legislating;
- continue to address imbalance in accessing information and negotiating power, while not interfering with commercial arrangements or outcomes;

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

13 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade, September 2014*, p. 135.

14 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade, September 2014*, p. 138.

15 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade, September 2014*, p. 138.

16 Department of Justice and Attorney-General, Queensland Government, 'Review of the *Retail Shop Leases Act 1994*', <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/review-of-the-retail-shop-leases-act-1994> (accessed 28 January 2015).

- align with the position in other jurisdictions (where this improves the Act) for enhanced operational efficiency and legal certainty for landlords and tenants operating across jurisdictions; and
- clarify the meaning of provisions in the Act, as appropriate.<sup>17</sup>

2.14 While the review identified areas for clarification, improvement and red tape reduction, it also found that:

...generally the provisions of the Act remain appropriate in providing a framework for addressing imbalance in negotiating power and access to information between major shopping centre landlords and small retail tenants through mandatory minimum standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.<sup>18</sup>

2.15 The Queensland Parliament was dissolved on 6 January 2015 and the bill automatically lapsed. A new bill may be introduced in the next Parliament.<sup>19</sup>

#### *New South Wales*

2.16 The NSW legislation is currently being reviewed by the NSW Small Business Commissioner. A discussion paper was issued in November 2013 and submissions closed in February 2014.

2.17 The discussion paper identified the following reasons for the review:

- the Registrar of Retail Tenancy Disputes and the Office of the NSW Small Business Commissioner (the OSBC) had identified a number of problems in administering provisions of the Act;
- the NSW Government had received stakeholder submissions that there were continuing or emerging problems within the retail leasing market which were not adequately addressed by the provisions of the Act;
- the commitment to reducing red tape for businesses and some changes to the Act intended to reduce unnecessary regulatory burdens and costs to businesses;
- recent changes in the retail sector including the growth of online sales and a relative decline in traditional bricks and mortar retail stores meant that certain provisions of the Act may no longer be appropriate; and

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17 Queensland Government, *Report on statutory review of the Retail Shop Lease Act 1994*, November 2014, p. 2.

18 Queensland Government, *Report on statutory review of the Retail Shop Lease Act 1994*, November 2014, p. 10.

19 Legal Affairs and Community Safety Committee, 'Retail Shop Leases Amendment Bill 2014 (Lapsed)', <https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/RSLAB2014> (accessed 28 January 2015).

- the NSW Government had considered recent reviews and legislative changes to the equivalent retail leases legislation in other jurisdictions, including Victoria, Queensland and Western Australia.<sup>20</sup>

2.18 The review is currently being finalised, and the findings have not been released.<sup>21</sup>

#### *South Australia*

2.19 The SA Government is currently conducting a review of the *Retail and Commercial Leases Act 1995*. The Small Business Commissioner released an issues paper in December 2014, the closing date for submissions was 13 February 2015.<sup>22</sup>

#### *Competition Policy Review (Harper Review)*

2.20 The Australian Government's Competition Policy Review (Harper Review) was announced on 4 December 2013, and the final terms of reference were released on 27 March 2014. The Harper Review released a Draft Report in September 2014 and is due to provide its final report to government by the end of March 2015.<sup>23</sup>

2.21 The Harper Review is a 'root and branch' review of Australia's competition laws and policy. It is examining the competition provisions and special protection for small business in the law, and the effectiveness of the framework for industry codes of conduct protections against unfair and unconscionable conduct.<sup>24</sup>

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20 NSW Small Business Commissioner, *2013 Review of the Retail Leases Act 1994*, November 2013, [http://www.smallbusiness.nsw.gov.au/\\_data/assets/pdf\\_file/0011/34976/Retail-Discussion-Paper-Web.pdf](http://www.smallbusiness.nsw.gov.au/_data/assets/pdf_file/0011/34976/Retail-Discussion-Paper-Web.pdf) (accessed 29 January 2015).

21 Advice from the Office of the NSW Small Business Commissioner, 13 March 2015.

22 South Australian Small Business Commissioner, *Issues Paper – December 2014*, [http://www.sasbc.sa.gov.au/files/270\\_sasbc-2014-058\\_rcla\\_issues\\_paper\\_final\\_19\\_december\\_14.pdf?v=554](http://www.sasbc.sa.gov.au/files/270_sasbc-2014-058_rcla_issues_paper_final_19_december_14.pdf?v=554) (accessed 23 February 2015).

23 Australian Government, 'Competition Policy Review', <http://competitionpolicyreview.gov.au/> (accessed 29 January 2015).

24 The Treasury, *Submission 15*, p. 11.

