

# SHOPPING CENTRE

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COUNCIL OF AUSTRALIA

**SUBMISSION TO THE REVIEW OF  
THE TRADE PRACTICES ACT 1974**

**THE SHOPPING CENTRE COUNCIL OF AUSTRALIA**

## SHOPPING CENTRE COUNCIL OF AUSTRALIA

### 1. Executive Summary

There is throughout Australia established State and Territory legislation concerning retail tenancies.

The legislation is industry specific and contains extensive provisions for regulating retail leasing.

The legislation also contains provisions enabling retail tenants to claim compensation from owners for misrepresentation. These provisions are presently being extended to include compensation for unconscionable conduct.

The general approach in the State and Territory legislation is to seek to resolve retail tenancy disputes by easily accessible and cost efficient mediation. In the event mediation is not successful the party is able to refer the matter to experienced retail tenancy tribunals for a prompt and cost efficient determination.

The Shopping Centre Council of Australia strongly supports this approach.

It is in the interests of tenants and owners to have disputes addressed immediately and, where required by the parties, to have the assistance of independent experienced mediators. In the small number of cases where this does not resolve the dispute a specialised retail tenancy tribunal is available to determine the issue.

Parts IVA and V of the Federal Trade Practices Act 1974 provide legal remedies to consumers. These Parts also apply to retail tenants and overlap with the compensation provisions in the State and Territory retail tenancies legislation.

The Terms of Reference of the Review include identifying, where justified, improvements to the Trade Practices Act and its administration.

It is considered that the overlapping of causes of action and the administration of the Federal Trade Practices with State and Territory retail tenancy legislation should be addressed by the Review and improvements made to the Act and its administration.

## **2. The Shopping Centre Council of Australia**

The Shopping Centre Council of Australia is the retail property policy arm of the Property Council of Australia. It represents a large number of owners and managers of shopping centres in Australia.

The Council's eighteen members are AMP Henderson Global Investors, Byvan, Centro Properties Group, Colonial First State Property Group, Deutsche Asset Management, Gandel Group, Intro International, Jones Lang LaSalle, Leda Holdings, Lend Lease Retail, Macquarie CountryWide Trust, McConaghy Holdings, MCS Property, Perron Group, Queensland Investment Corporation, Stockland Trust Group, Westfield Holdings, Yu Feng Group.

### **3. Retail Tenancies**

#### **3.1 State retail tenancy legislation**

The various States and the Australian Capital Territory have enacted retail tenancy legislation throughout Australia.

The industry specific legislation is as follows:

- Retail Leases Act 1994 (NSW)
- Retail Tenancies Reform Act 1998 (Vic)
- Retail Shop Leases Act 1994 (Qld)
- Retail and Commercial Leases Act 1995 (SA)
- Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)
- Leases (Commercial and Retail) Act 2001 (ACT)

Tasmania has a code of practice - the Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 - and the Tasmanian Government has recently received a report recommending this be replaced by specific retail tenancy legislation. The Northern Territory has received a report from a working party recommending the introduction of retail tenancy legislation.

Over the last ten years the States and Territory have continually reviewed and revised their retail tenancy legislation.

Following the introduction of s51AC into the Trade Practices Act in 1998 the States and Territory gave consideration to the incorporation of a similar provision in their legislation.

The introduction was delayed pending the Federal Government passing the Trade Practices Amendment (Operation of State and Territory Laws) Act 2001. This Act enabled the States and Territories to amend their retail tenancy legislation to extend the jurisdiction of the retail tenancy tribunals to consider matters involving unconscionable conduct. This was done to provide to retail tenants a low cost and easily accessible tribunal to deal with their concerns.

New South Wales had been waiting since 1998 to proclaim the legislation and did so soon after the above Act was passed. Section 62B of the Retail Lease Act 1994 (NSW) is substantially the same as s51AC. Queensland has also proclaimed Sections 46A and 46B of the Retail Shop Leases Act 1994 (Qld), which is also substantially the same as s51AC. Victoria and Western Australia are in the process of passing similar legislation.

The Trade Practices Amendment Act provided for the concurrent operation of the Trade Practices Act and the State and Territory laws. No provision was made for the consequential overlapping in administration and causes of action.

### **3.2 Scope of State retail tenancy legislation**

The State and Territory retail tenancy legislation are not uniform but generally are very similar. The legislation covers, among others, the following areas:

- Alternative dispute resolution;
- Compensation to tenants for disturbance during shopping centre redevelopment or in the case of compulsory relocation;
- Definition of expenses allowed to be charged as outgoings and a requirement for an audited statement of outgoings to be provided to the tenant;
- Mandatory disclosure requirements prior to signing of the lease;
- Minimum terms of lease;
- Notice to be given of renewal or termination of a lease;
- Outlawing of key money;
- Procedural requirements of rent reviews;
- Right of the lessor to refuse approval for assignment of a retail lease;
- Rights of tenants to form tenants associations in shopping centres.

In addition the legislation contains provisions that permit a tenant to claim compensation for any misrepresentations by the owner or agent. These provisions are now being extended to include compensation to the tenant for unconscionable conduct.

### **3.3 Differences in State and Territory legislation**

There are differences in the State and Territory legislation.

These differences often reflect the particular State and Territory concerns about particular matters in their State or Territory. Whilst uniformity is desirable, it is recognised that there may be different local concerns that require a different legislative treatment.

What is significant is that the States and Territory regard retail tenancy as a matter in which they should be actively involved, both in regulating leasing and in resolving tenancy disputes.

The States and Territory have established statutory bodies to deal with retail tenancy disputes.

### **3.4 State and Territory dispute resolution process**

#### **Mediation**

The dispute resolution process for retail tenancies differs in the States and Territory. Mediation is, however, generally required before instituting proceedings before the relevant retail tenancy tribunal.

New South Wales and Queensland have taken the lead with mediation. The NSW Retail Tenancy Unit was established by the Department of State and Regional Development to mediate disputes about retail shop leases. It is empowered to mediate any dispute concerning a retail shop lease arising under the Retail Leases Act 1994 (NSW).

In the period from September 1994 to August 2001 the Retail Tenancy Unit dealt with 966 formal mediations of retail tenancy disputes. To put this in context less than 0.6% of retail tenancies in shopping centres in New South Wales resulted in disputes serious enough to be referred to the Retail Tenancy Unit for mediation.

The Retail Tenancy Unit advises that 82% of the 966 formal mediations were successfully resolved. If we add the retail tenancy matters which are resolved between the parties and those resolved by the Unit informally, only a very small percentage are left for determination by the Retail Tenancy Tribunal. This suggests the system is working well and is a success.

Attached to the hard copy of this submission is information about mediation published by the Retail Tenancy Unit.

#### **Specialist retail tenancy tribunals**

In New South Wales the Retail Leases Division of the Administrative Decisions Tribunal hears retail tenancy claims for either owners or tenants arising under the Retail Leases Act 1994 (NSW).

There is a strong emphasis before the Tribunal in an early resolution of retail tenancy disputes. As soon as the Tribunal receives an application, the Retail Tenancy Unit is notified. If the Unit has not been notified in the matter, wherever practical, it is referred to the Unit. An officer of the Unit often attends hearings. In most cases, the Tribunal actively seeks to generate options for early resolutions.

A judicial member of the Tribunal hears most matters. Where an unconscionable conduct claim is made a panel of three, including two non-judicial members with lessee or lessor backgrounds, hears the matter.

In the year ended 30 June 2001 the number of applications filed before the Retail Leases Division was 107. Many of the applications were for interim orders arising from circumstances such as lockouts of the tenant for alleged non-payment of rent. Often interim orders returned possession to the tenant on the basis that it pays the disputed rent with the matter referred for mediation to the Retail Tenancy Unit. Most of these disputes did not return to the Tribunal. This pattern is reflected in the number of final orders made during the year ended 30 June 2001 - a total of 20 orders made, 5 of which recorded a settlement between the parties.

Of all matters brought before the Retail Tenancy Division of the New South Wales Administrative Decisions Tribunal only one application was resolved in a period exceeding twelve months. The majority of matters were resolved in less than six months.

In practice the Tribunal is regarded as the most appropriate place for resolution of retail tenancy disputes which cannot otherwise be resolved by mediation.

In our view the New South Wales system works well and provides tenants with an immediate and readily accessible method of having their retail leasing disputes resolved. Experience has shown that it is in the interests of tenants and owners to have complaints promptly resolved. Complaints that are not addressed immediately tend to end in court, which is not in the interests of either party.

Queensland also has a well-established and effective dispute resolution system.

Victoria also has a dispute resolution system. Attached is relevant information. The Victorian Government has resolved to introduce a new dispute resolution system based on the New South Wales and Queensland model and draft legislation in Victoria is expected to be made public within a month.

### **3.5 Overlapping**

Overlapping occurs in the causes of action provided in the Trade Practices Act and the State and Territory retail tenancy legislation. There is also overlapping in the administration of the respective Acts.

A limited provision for controlling overlapping at the State level is contained in s76 of the Retail Leases Act 1994 (NSW).

A suitable Federal provision is required to prevent overlapping of causes of action and administration so that retail tenancy disputes can be quickly and finally resolved in one jurisdiction in the most cost efficient manner.