Almost a decade on — A (Reid) report card on retail leasing

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In May 2007 it will be 10 years since the House of Representatives Standing Committee on Industry, Science and Technology released its report, Finding a Balance — Towards Fair Trading in Australia (the Reid Report). The report considered a number of business conduct issues in Australia in relation to small business banking transactions, franchising and retail tenancy. This article considers the impact of the Reid Report on retail leasing law in the past decade.

In June 1996, the House of Representatives Standing Committee on Industry, Science and Technology was asked to investigate and report on a number of business conduct issues in Australia, particularly the relationship between small/medium businesses and larger enterprises. The ensuing report, Finding a Balance — Towards Fair Trading in Australia, was disseminated throughout the Australian business community in May 1997. The report, generally referred to as the Reid Report, focused on business relationships in retail leasing, franchising and banking. It also considered related issues involving misuse of market power.

The Reid Report made significant and, potentially, far reaching recommendations which, in the committee’s view, could assist in addressing issues raised during the enquiry. This was particularly the case with retail leasing. However, despite significant legislative and judicial developments at both State and federal level concerning retail leasing since the Reid Report, it is debateable whether some situations regarded as problematic by the committee have been addressed in a practical sense. Therefore, with almost 10 years of hindsight, it is timely to examine what has come of the Reid Report’s recommendations in relation to retail leasing: the successes, the shortcomings and the continuing developments.

In the writer’s view, the Reid Report’s pivotal recommendations impacting upon retail tenancy; the formulation of a uniform leasing code and a statutory provision prohibiting unfair conduct in small business transactions, have been, for the most part, ignored. The Code has not eventuated and the unfairness

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1 The committee is generally referred to as the Reid Committee after the Honourable Bruce Reid MP, the Chairman of the committee.
2 The Terms of Reference were received from the Hon Geoff Prosser MP, Minister for Small Business and Consumer Affairs, 26 June 1996.
3 The Report was released in May 1997.
4 A reference to the Honourable Bruce Reid MP, the Chairman of the committee.
6 Ibid, Ch 3.
7 Ibid, Ch 5.
8 Ibid, Ch 4.

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provision, re-cloaked in the form of unconscionable conduct, has arguably done little to directly address the type of concerns raised before the Reid Committee. While the States and Territories have been proactive in addressing many of the issues raised in the Reid Committee through retail tenancy legislation, the jurisdiction by jurisdiction approach remains troublesome as retail tenancy laws vary, at times significantly, across the country, and, in the absence of a harmonised national system, or a centralised retail leasing regime, will continue to do so.

The Reid Committee — terms of reference

The Reid Committee was asked to investigate and report on:

- the major business conduct issues arising out of commercial dealings between firms, including, but not limited to, franchising and retail tenancy; and
- the economic and social implications of the major business conduct issues, particularly whether certain commercial practices might lead to sub-optimal economic outcomes.

The committee was also asked to examine whether the impact of the business conduct issues identified were sufficient to justify government intervention.

Chapter 2 of the report focused on retail leasing. Commencing with the emotive, and often criticised, quotation; ‘... it is war out there between the retailers and the owners and managers’. The chapter outlined the major issues raised in submissions to the committee regarding the relationship between owners, centre managers and tenants. The publicity surrounding the report, which was particularly adverse to shopping centre owners and operators, focused considerable attention on the retail tenancy sector.

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9 Section 51AC.
10 See the discussion below.
11 The Terms of Reference stated that any recommendations would be made by taking into account, but were not limited by, the existing common law, existing State and Commonwealth legislative protections and international developments in the regulation of business conduct. In so doing, the committee was authorised to examine options and make recommendations on strategies to address business conduct issues arising out of dealings between firms in commercial relationships. The committee’s brief included a consideration of factors, including the potential application of voluntary codes of conduct, industry self regulation and dispute resolution mechanisms. This was said to authorise a consideration of alternatives to legislation and court-based remedies, and mechanisms to support these measures and legislative remedies.
12 This statement has been criticised in a number of PCA and SSCA publications.
13 The quotation was taken from evidence by Ms Yvonne Valentin, Commercial Manager, Laubman and Pank Optometrists (WA): Finding a Balance, above n 5, Transcript of Evidence, p 442.
14 Stephen Lowy, Managing director, Westfield America, International Shopping Centre Conference, April 1998: Last year, shopping centres discovered that, in some quarters, we had a perception problem ... the fair trading debate was heated and sensationised, with only rare moments of cool-headed common sense. Once or twice it verged on the bizarre with shopping centre owners and managers accused of causing everything from business failure to marriage breakdown. For their audience — politicians and the media — it was an easily digestable package. It had victims, it had power plays and it had lots of human
A pivotal recommendation by the committee was the drafting of a Uniform Retail Tenancy Code (URTC) by the Australian Competition and Consumer Commission (ACCC) in consultation with industry participants. The URTC was to be submitted to the Council of Australian Governments with a view to the adoption of uniform retail tenancy law around Australia. The committee also recommended that the Minister request the ACCC to approve the URTC for underpinning in the Trade Practices Act 1974 (Cth) (TPA) thus permitting the courts to take into account provisions of the URTC in determining whether or not business conduct had been unfair. As will be discussed later in this article, the Code has not eventuated.

Chapter 6 of the Reid Report discussed legislative protection against unfair conduct. Recommendation 6.1 provided that the TPA should be amended to include a provision prohibiting unfair conduct in business transactions. However, a provision dealing with unfairness was not adopted and, instead, an unconscionable conduct standard was utilised.

The Reid Report also identified several areas where there were particular concerns regarding retail tenancy. The committee made a number of recommendations regarding issues involving:

- Sitting tenants, including security of tenure at the end of a lease and assignment,
- Calculation of rental,
- Lease documents and disclosure,
- Changes in tenancy mix, and,
- Redevelopment and relocation.

Finally, it is significant that the Reid Committee emphasised the importance...
of access to justice and education in matters involving small business, including retail tenancy.\textsuperscript{20}

\textbf{Legislative and judicial developments since the Reid Report}

\textbf{Commonwealth}

In the immediate aftermath of the Reid Report, the recommendations were endorsed by the Council of State Ministers. However, several pivotal recommendations were not supported at Commonwealth level.

\textbf{New Deal Fair Deal 1997}

The Federal Government responded to the Reid Report through the \textit{New Deal}, \textit{Fair Deal} package of legislative reforms. The government planned to achieve the objective of strengthening the position of small business through, inter \textit{alia};

\begin{itemize}
  \item the inclusion of a new statutory provision in the TPA which gave small business access to protection against unconscionable conduct,
  \item allowing industry-designed codes of practice in whole or in part to be legally underpinned and be made mandatory under the TPA and enforced by the ACCC, and
  \item permitting the ACCC to take representative actions on behalf of small business for misuse of market power by big business.\textsuperscript{21}
\end{itemize}

A provision prohibiting unfair conduct was not endorsed. Instead, the Federal Government decided to use the expression ‘unconscionable conduct’. The decision was made, ‘in order to build on the existing body of case law which has worked with respect to consumer protection provisions of the Act, and which will provide greater certainty to small businesses in assessing their legal rights and remedies’.\textsuperscript{22} Section 51AC, unconscionable conduct in small business transactions, was inserted into the TPA in July 1998.\textsuperscript{23}

\textbf{Fair Market or Market Failure 1999}

In 1999, the Joint Select Committee on the Retailing Sector released its report, \textit{Fair Market or Market Failure}. Although the committee’s focus was the retail grocery industry, there was considerable discussion regarding retail tenancy. In Recommendation 5, the committee endorsed the drafting of a retail industry code of conduct by the ACCC in consultation with retail industry groups and

\textsuperscript{20} \textit{Finding a Balance}, above n 5, Ch 7, Recommendations 7.1–7.4.
\textsuperscript{22} Ibid.
\textsuperscript{23} Act No 36, 1998, Sch 2(2).
other relevant parties. The focus of the Code, which in the committee’s view should be mandatory, would regulate conduct associated with vertical relationships throughout the supply chain.

The Federal Government disagreed with this recommendation. A preference was expressed for industry to take ownership of self-regulatory schemes with minimal government involvement. Referring to the Codes of Conduct Policy Framework booklet and Prescribed Codes of Conduct, Policy Guidelines on making industry codes of conduct enforceable under the Trade Practices Act, it was noted that the regulatory option of mandatory codes would only be exercised where voluntary self-regulation has failed and where the market failure or social policy objectives addressed in a code are serious enough to warrant enforcement of the code at law. In the government’s view, this had not yet been established in the retail tenancy area.

**The Dawson Review 2003**

The Review of the Competition Provisions of the Trade Practices Act 1974 (Cth) (the Dawson Review), was tabled in January 2003. The focus of the review was Pt IV of the TPA, however, some areas relevant to the Reid Report, particularly regarding s 46, the misuse of market power provision, were considered. Nevertheless, despite the relationship between unconscionable conduct and s 46, the review did not regard s 51AC to be within the committee’s terms of reference. The Review Committee’s only concession to the debate surrounding s 51AC was to recommend that the ACCC should consider issuing guidelines on its approach to Pt IVA. A further recommendation likely to impact upon retail leasing was the endorsement by the Review Committee of collective bargaining in some small business transactions.

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25 Released in March 1998 by the then Minister for Customs and Consumer Affairs, the Hon Warren Truss MP.
30 Dawson Review, above n 28.
31 Gardini, above n 29, at 273.
32 Noting the consequences of imbalances between the bargaining position of large and small business, the Review Committee decided that collective bargaining by a number of competing small businesses may be necessary if they are to achieve bargaining power to balance that of the big businesses with which they have to deal. While acknowledging that at one level this practice may lessen competition, the committee noted that in some instances collective bargaining may be in the public interest, so long as the countervailing power is not
Senate Economic References Committee 2004

The most recent consideration at Commonwealth level of, inter alia, small business tenancy issues, was the Senate Economic References Committee’s inquiry into and report on whether the TPA adequately protects small businesses from anti-competitive or unfair conduct. The ensuing report, The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business was tabled on 1 March 2004.

The report examined a number of small business issues, particularly the dilemma as to the effectiveness of s 46 after the Boral and Rural Press decisions. In relation to unconscionable conduct in business transactions, the committee examined several pertinent issues including:

- The efficacy of s 51AC,
- The possible inclusion of a provision dealing with ‘fairness’ instead of unconscionable conduct,
- Unilateral provisions in contracts,
- Standard form contracts, and
- Secrecy provisions regarding rental.

A contentious subject of discussion was the impact of s 51AC on the landlord/tenant relationship. Several submissions pointed to a lack of complaints made and action taken by the ACCC. However, there were varying opinions as to the reasons behind this seeming dearth of activity. Some submissions stated that, rather than indicating a greater satisfaction in the industry, the reason was that unconscionability required the satisfaction of such a high legal standard that only the most malevolent conduct would be caught. Therefore, some tenant interests argued that s 51AC would, like s 51AA, be interpreted narrowly and leave little room for the provision to operate. Therefore, it was suggested, s 51AC should be amended to proscribe ‘unfair, harsh or unconscionable conduct’.

Other submissions, including those made on behalf of the Law Council of Australia and also those representing shopping centre interests, were generally of the view that it was too premature to assess the success or otherwise of s 51AC and its State and Territory equivalents. There was also a view that an unfairness standard would be too vague and cause business uncertainty.

The majority of the committee did not regard significant amendment of s 51AC as appropriate. The drawing down of s 51AC into many State and Territory jurisdictions meant there may be more impact on the retail tenancy situation than suggested by the lack of activity on the part of the ACCC.

excessive. The committee favoured the introduction of a notification process for small business seeking to bargain collectively with larger businesses when such a course was in the public benefit.

35 ACCC Submission, ARA and FTC submissions.
36 Gardini, above n 29, at 273.
37 For example, submissions from the Fair Trading Coalition and the ARA.
38 For example, submissions from Telstra and the SCCA.
Regarding the possible inclusion of a consideration of harshness or unfairness it was noted that:

harsh conduct is often a normal part of tough competitive dealing, and that the concept of ‘unfair conduct’ is much less legally certain than the concept of ‘unconscionable conduct’. It is not clear that either of these proposed additions would enhance protection for small business under the Act, and as a result the committee does not support their inclusion.\(^{40}\)

Several submissions also suggested that s 51AC should extend to proscribe a number of specific activities; unilateral variation of contracts, unilateral termination of contracts and the presentation of standard form contracts.

The committee noted that, at times, unilateral contracts and standard form contracts can be pro-competitive and commercially beneficial to both parties.\(^{41}\) Therefore, the committee did not recommend the prohibition of such clauses. However, the committee did recommend that a reference to unilateral contracts be specifically included as a factor to which a court could refer in ss 51AC (3) and (4)\(^{42}\) to ascertain whether conduct had been unconscionable.

Regarding price secrecy provisions,\(^{43}\) the committee did not support compulsory disclosure of rental terms, although did object to arrangements preventing such disclosure.\(^{44}\) As a solution, the committee noted that retail tenants who adopt collective bargaining notification arrangements proposed in the Dawson Report\(^{45}\) should be able to freely share information about their rental process and conditions. However, if this process failed to deliver satisfactory outcomes over time, the government should consider the adoption of a mandatory code.\(^{46}\)

While the Federal Government’s response to the Senate inquiry was generally positive, several of the recommendations regarding Pt IVA were

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Practices Act 1974). The committee also recommended that the Commonwealth should work with its State and Territory counterparts to harmonise retail tenancy laws.\(^ {40}\)

Ibid, at ES E 22.

Ibid, at ES E27. The committee noted that in circumstances where the terms are well known and agreed by both parties, the committee was of the view that standard form contracts were beneficial and indeed saved time and money when such transactions were conducted regularly. Proscription of standard form contracts would remove these time and cost saving benefits. These comments are noteworthy given the support in the Reid Committee and other enquiries for a standard form lease.\(^ {42}\)

The Effectiveness of the Trade Practices Act 1974, above n 39, at E 29-30

Recommendation 8:

The committee recommends that subsections 51AC(3) and 51AC(4) of the Act be amended to include whether the supplier (in s 51AC(3)) or acquirer (in s 51AC(4)) imposed or utilised contract terms allowing the unilateral variation of any contract between the supplier and business consumer, or the small business supplier and acquirer.\(^ {43}\)

The Effectiveness of the Trade Practices Act 1974, above n 39, at E34.

Such arrangements inhibit rather than support an informed market for retail tenancies.\(^ {44}\)

In Recommendation 11 the committee also endorsed the Dawson Review’s recommendation regarding collective bargaining.\(^ {45}\)


Although the committee concurred with the skepticism expressed by a number of small business representatives about the extent to which voluntary codes of conduct can address entrenched problems within particular industries, the committee did not support the general use of codes as a substitute for sensible regulation.
constrained. On the positive side, the government agreed\(^{47}\) that s 51AC(3) and (4) of the TPA be amended to include reference to unilateral rights of variation.\(^{48}\) Recommendation 11 concerning collective bargaining was also endorsed.\(^{49}\)

On the other hand, the government refused to support the recommendation regarding secret pricing in retail tenancy matters.\(^{50}\) In the government’s view, it is a fundamental principle of the law of contract that parties are free to negotiate the terms of the contract including a lease. Prohibiting secrecy clauses would violate this principle of contract law.

Any anticipation of significant federal intervention was undermined too with the government’s response concluding that the regulation of retail tenancy arrangements was a matter for the State and Territory governments rather than the Commonwealth Government.

To date, achieving the amendments recommended by the Dawson Committee and the Senate References Committee has been slow. The Trade Practices Legislation Amendment Bill (No 1) 2005, the Federal Government’s response to the Dawson Review, was introduced into parliament in 2004, prior to the Federal Election. The Bill lapsed when the parliament was prorogued. The Bill passed through the Senate in October 2005 but has not yet received assent. To date, the collective bargaining provisions have not passed through parliament and have been made the subject of a Private Members Bill.\(^{51}\)

In the writer’s view, the Commonwealth has retreated from the recommendations of the Reid Report. The two pivotal recommendations relating to retail leasing — a URTC and a prohibition of unfair conduct — have not been embraced. Despite the URTC’s fundamental importance to the Reid Committee’s blueprint for a national leasing regime, and its support in the 1999 *Fair Market or Market Failure* report, in 2006 there seems little prospect of a Code. The Commonwealth’s preference in this area is for the States and Territories to continue to administer retail tenancy law throughout Australia. Section 51AC has been introduced, however, the reference in this provision is to unconscionable conduct, a different, and more onerous, legal standard to unfairness. Also, as will be discussed below, other Commonwealth initiatives such as the ‘drawing down’ of s 51AC into some State and Territory retail tenancy legislation does not address the seeming inability of lessees to

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48 Thus, adopting Recommendation 8.
49 Government Response, above n 27, p 12. The government also accepted the recommendation that Pt IVA apply to all governments.
50 The Federal Government also refused to accept Recommendation 7 that s 51AC(9) and (10) be repealed so that there would be no financial limit on the operation of the section. The government stated that the intention of s 51AC was to limit the sections operation to small business. They did recognise, however, that the $3 million limit was too low and recommended that it be raised to $10 million.
51 Collective bargaining has now become the subject of a private members Bill before parliament: Trade Practices Amendment (Collective Bargaining for Small Business) Bill 2005 introduced by Mr Joel Fitzgibbon, ALP, into the House of Representatives, 12 September 2005; second reading adjourned 28 November 2005 (NB: 20 June 2006 — Resumption of debate from 28 November 2005). Order of the day will be removed from the Notice Paper unless re-accorded priority on the next sitting Monday after 14 August 2006. To date this has not occurred.
establish the requisite unconscionability standard required to trigger s 51AC or its equivalents.\textsuperscript{52}

**Legislative developments in the States and Territories**

Since the Reid Report, there have been extensive legislative developments in retail tenancy throughout Australia at State and Territory level. There have been several reviews, significant amendment to legislation and, in some cases, the adoption of new retail leasing legislation. There has also been significant progress towards greater consistency of legislation between jurisdictions.

The Queensland legislation, the Retail Shop Leases Act 1994 (Qld), has been the subject of significant examination and amendment since the Reid Report. Two amendment Acts were passed in 1999\textsuperscript{53} and 2000\textsuperscript{54} and the Act has been impacted upon by several other pieces of amending legislation. A 2003 discussion paper and the resultant policy review paper in September 2004 led to the Retail Shop Lease Act Amendment Bill 2005. These amendments took effect from 3 April 2006. These recent amendments have increased the degree of consistency between the Queensland legislation and that of New South Wales and Victoria.

New South Wales has a strong track record of progressive legislation regarding retail leasing. Indeed, the Retail Leases Act 1994 (NSW) received favourable comment in many areas of the Reid Report’s considerations. However, there has been considerable amendment since the Reid Report and, after the release of a discussion paper in 2003, there have been amendments to the legislation in 2004\textsuperscript{55} and significantly in 2005\textsuperscript{56} with the latest amendments taking effect from 1 January 2006.

Victorian retail tenancy law has seen two repeals and re-enactments. After initially being regulated by the Retail Tenancies Act 1986 (Vic), new retail tenancy laws were implemented in 1998\textsuperscript{57} and amended in 2001.\textsuperscript{58} After a major review in 2001, the Retail Leases Act 2003 (Vic) came into effect on 1 May 2003.\textsuperscript{59} Significant portions of the legislation were amended again in 2005\textsuperscript{60} with the amendments taking effect as of 23 November 2005.\textsuperscript{61}

In the Australian Capital Territory, the Leases (Commercial and Retail) Act 2001\textsuperscript{62} commenced operation on 1 July 2002. To date, there have been 11 republications of the legislation primarily to take amendments into account, the latest taking effect from 2 July 2006.\textsuperscript{63}

Tasmania’s Fair Trading (Code of Practice for Retail Tenancies)

\textsuperscript{52} The difficulty in establishing a case of unconscionable conduct under s 51AC will be discussed below.
\textsuperscript{53} Retail Shop Leases Amendment Act 1999.
\textsuperscript{54} Retail Shop Leases Amendment Act 2000.
\textsuperscript{55} Retail Lease Amendment Act 2004 (NSW).
\textsuperscript{56} Retail Lease Amendment Act 2005(NSW).
\textsuperscript{57} Retail Tenancies Reform Act 1998 (No 14 of 1998).
\textsuperscript{58} Retail Tenancies Reform (Amendment) Act 2001 (No 63 of 2001).
\textsuperscript{59} Retail Leases Act 2003 (No 93 of 2003).
\textsuperscript{60} Retail Lease Act Amendment Act 2005 (No 63 of 2005).
\textsuperscript{61} Note that some leases remain subject to the provisions of the 1998 legislation.
\textsuperscript{62} No 18 of 2001.
\textsuperscript{63} RP 10 and 11 — Republication for commenced expiry.
Regulations 1998\textsuperscript{64} has been operational since 1 September 1998. This legislation has also been the subject of review. In 2002, 34 recommendations were made for amendments to the Code. However, to date, these amendments have not come to fruition and it is likely that the legislation will become the subject of review in late 2006 and the Tasmanian legislature will soon enact new retail leasing legislation.\textsuperscript{65}

The Retail and Commercial Leases Act 1995 (SA) commenced on 30 June 1995\textsuperscript{66} and has also been the subject of several amending Acts. The SA legislation features amendments regarding preferential rights for sitting tenants and a casual leasing code of conduct which have not generally been adopted elsewhere.\textsuperscript{67}

Western Australia introduced significant amendments in 1998.\textsuperscript{68} A further review was commenced in late 2002 and the ensuing report, released in March 2003, comprised 61 recommendations. To date, only some of the recommendations, in particular the unconscionable conduct provision, have been incorporated into a Bill.

The Business Tenancies (Fair Dealings) Act 2003 (NT) was based predominantly on the NSW legislation and came into effect on 1 July 2004.

The State and Territory legislation, while still not harmonised, has become increasingly consistent in operation. This is particularly the case with the legislation in Queensland, New South Wales, Victoria and the Northern Territory. However, some significant differences still exist between the States and Territories legislation.\textsuperscript{69}

The drawdown of s 51AC of the TPA into State and Territory retail tenancy legislation has occurred in several jurisdictions.\textsuperscript{70} The drawdown has been generally consistent with a prohibition on landlords and tenants engaging in unconscionable conduct and a list of factors to which the courts may refer in making such a determination. However, while Queensland,\textsuperscript{71} New South Wales\textsuperscript{72} and the Northern Territory\textsuperscript{73} generally adhere to the provisions of s 51AC, the Victorian,\textsuperscript{74} ACT,\textsuperscript{75} Tasmanian\textsuperscript{76} and, it is anticipated, the WA,\textsuperscript{77}

\begin{footnotesize}
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\item \textsuperscript{64} SR 1998 No 118.
\item \textsuperscript{65} Interview with representative of Tasmanian Registrar, 4 March 2006.
\item \textsuperscript{66} Although ss 63–66 did not commence until 16 September 1996.
\item \textsuperscript{67} Although a National Code of Conduct for Casual Leasing is expected in 2006, this Code has been the subject of negotiation within the industry. The Code will be voluntary and, unlike South Australia, will not be enshrined in State legislation. The Code will require the approval of the ACCC.
\item \textsuperscript{68} Commercial Tenancy (Retail Shops) Agreements Act Amendment Act 1998.
\item \textsuperscript{69} Several of these differences will be explored below.
\item \textsuperscript{70} Queensland, New South Wales, Victoria, Australian Capital Territory, Tasmania and the Northern Territory.
\item \textsuperscript{71} Sections 46A(1), (2), 46B.
\item \textsuperscript{72} Section 62B.
\item \textsuperscript{73} Sections 79, 80.
\item \textsuperscript{74} Sections 77(1), (2), 78(1), (2). Note that these provisions are also contained in the Fair Trading Act 1999 (Vic).
\item \textsuperscript{75} Section 22.
\item \textsuperscript{76} Clause 3(1), (2).
\item \textsuperscript{77} It is anticipated that the unconscionable conduct provisions of the TPA replicate s 77 of the Victorian Retail Leases Act 1994 with certain limited exceptions and variations.
\end{itemize}
\end{footnotesize}
legislation differs in some respects from s 51AC. For example, the Victorian legislation lists more factors for the court to consider in determining whether conduct is unconscionable. The legislation in the Australian Capital Territory and Tasmania seems to have a slightly wider ambit, referring to, respectively, ‘unconscionable or harsh and oppressive’ conduct and ‘harsh, unjust or unconscionable’ conduct. South Australia has not adopted an unconscionability provision to date, although vexatious conduct is prohibited pursuant to s 75. In Western Australia, a particular stumbling block has been the introduction of the unconscionability provision. After being passed by the Legislative Assembly, the Retail Tenancy and Fair Trading Amendment Bill 2005 (WA) experienced some delays but was expected to pass through the Legislative Council in mid-2006. However, in June 2006, the Opposition introduced a proposal to define ‘unconscionable’ for the purposes of the provision. The proposal was resisted by the government, primarily because no other jurisdiction had utilised a definition and there was concern that this may place limitations on a court. After consideration by a parliamentary committee, the Bill was returned to the Legislative Assembly for consideration of amendments.

**How have the States and Territories dealt with retail leasing issues raised in the Reid Report?**

As legislative developments relating to retail leasing matters have been largely initiated by the States and Territories, it is useful at this stage to examine how such legislation has addressed specific issues identified by the Reid Committee concerning retail leasing.

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78 For example, in Victoria s 77(2) refers to the list of factors taken from s 51AC and also includes (l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; and (m) the extent to which the landlord unreasonably used information about the turnover of the tenant’s or a previous tenant’s business to negotiate the rent; and (n) the extent to which the landlord required the tenant to incur unreasonable fit out costs. It appears WA will adopt an identical provision. In the Australian Capital Territory, ‘good faith’ is omitted and a criteria to act honestly is included: s 22(2)(i).

79 Retail Leases Act 2003 s 77(2)(l): the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; and (m) the extent to which the landlord unreasonably used information about the turnover of the tenant’s or a previous tenant’s business to negotiate the rent; and (n) the extent to which the landlord required the tenant to incur unreasonable fit out costs.

80 Section 22.

81 Clause 3(1).

82 The Opposition moved an amendment to insert into the Bill a definition of unconscionable conduct proffered by Professor Frank Zumbo, being:

‘unconscionable conduct’ includes any action in relation to a contract or to the terms of a contract that is unfair, unreasonable, harsh or oppressive, or is contrary to the concepts of fair dealing, fair-trading, fair play, good faith and good conscience.

The Hon Anthony Fels (Nationals), Hansard, 9 May 2006 who proposed this amendment p 2290b onward. An amended version was put forward on 22 June 2006.


84 As suggested by the Legislative Council, 22 June 2006.

85 The WA Parliament will not sit again until August 2006.
Security of tenure

Many submissions to the Reid Report concerned the predicament of sitting tenants\textsuperscript{86} who could not extend the term of their lease upon expiry. Clearly, no security of tenure exists beyond the term of a tenant’s lease although the parties have always had the opportunity to negotiate options and renewal between themselves. However, even at the time of the Reid Report, legislation in several Australian jurisdictions provided for a minimum lease term of five years. In some cases, legislation also provided a timeframe for renewal applications.\textsuperscript{87}

Several submissions contended that sitting tenants were particularly vulnerable in two situations. The first was where the tenant was involved in negotiations for a renewal of the lease at the end of the term. Clearly, a tenant without any legal right to a new lease would be at a significant bargaining disadvantage vis a vis the landlord. It was contended that a landlord could impose higher rents or onerous conditions on tenants as the price of keeping their premises.\textsuperscript{88} The second situation involved circumstances where a tenant was desirous of selling their business and needed to obtain the landlord’s consent to assignment of the lease to the proposed assignee.

A variety of options were presented to the Reid Committee regarding the issue of security of tenure for sitting tenants\textsuperscript{89} with the submission by the Independent Retailers Association (IRA) for a ‘partnership’ approach\textsuperscript{90} receiving endorsement from the committee.\textsuperscript{91} There was recognition that, if a scheme protecting the tenant’s security of tenure was adopted, issues such as the rights of property managers to remove underperforming tenants,\textsuperscript{92} the method of rent determination for a subsequent term\textsuperscript{93} and how compensation would be determined in circumstances of redevelopment would need to be addressed. The committee was also of the view that tenants should not be permitted to contract out of their right to a minimum five year term but that tenants be provided an opportunity for surrender on pre-determined terms and conditions before the end of the minimum five year term.\textsuperscript{94}

The issue of casual leasing was also discussed. While the committee

\textsuperscript{86} A sitting tenant is a tenant that is already in occupation of demised premises pursuant to a lease.

\textsuperscript{87} Discussed below.

\textsuperscript{88} Submissions to the Reid Committee from individual tenants and tenant organisations asserted that sitting tenants needed time, in many instances beyond the initial lease term, to recover the set up costs and see a return on their investment: \textit{Finding a Balance}, above n 5, paras 2.68–2.72, particularly para 2.70.

\textsuperscript{89} \textit{Finding a Balance}, above n 5, para 2.86, Submissions by Micro Business Consultative Group No 74, Professor Alan Middleton No 162, United Retailers Association No 111.2, Independent Retailers of Australia No 192.

\textsuperscript{90} In comparison to the PCA’s ‘negotiations’ approach.

\textsuperscript{91} \textit{Finding a Balance}, above n 5, para 2.87, Independent Retailers Association Submission No 192. The proposal involved an initial lease term of five years followed by a statutory five year option which was exercisable at the tenant’s discretion. At the end of the tenth year, the tenant would have a right of first refusal in relation to further extending the lease.

\textsuperscript{92} \textit{Finding a Balance}, above n 5, para 2.88.

\textsuperscript{93} The committee were of the view that it would be fair for rent to be reviewed to market at the time of lease renewal for the second and any subsequent five year terms: \textit{Finding a Balance}, above n 5, para 2.89.

\textsuperscript{94} \textit{Finding a Balance}, above n 5, para 2.90.
acknowledged that some retailers would not want to be bound by a five year term,\textsuperscript{95} members were cognisant of complaints that some permanent tenants had been kept on short or temporary leases for significant periods of time, sometimes indefinitely.\textsuperscript{96} Therefore, the committee decided that casual leasing should only be permitted at the lessee’s request in clearly circumscribed circumstances.

Ultimately, Recommendation 2.4 stated:

The Committee recommends that the Uniform Retail Tenancy Code provide:

- (a) for minimum lease terms of five years;
- (b) for sitting tenants to have the option of lease renewal for a further five year term;
- (c) for sitting tenants to have a right of first refusal of the lease for subsequent five year periods; and
- (d) for the option of casual leasing in clearly defined circumstances but only at the request of the lessee.

The Committee further recommends that parts (b), (c) and (d) of this recommendation extend to tenants under existing leases.

(a) Minimum five year terms

Retail tenancy legislation has fulfilled this recommendation\textsuperscript{97} in all States and Territories except Queensland.\textsuperscript{98} Therefore, the term of a retail lease, including options, must be at least five years. Where a lease has been granted for a term of less than five years, statute in New South Wales,\textsuperscript{99} Victoria,\textsuperscript{100} South Australia\textsuperscript{101} and the Northern Territory\textsuperscript{102} decrees an automatic extension of the lease term to five years. In comparison, in Western Australia\textsuperscript{103} and the Australian Capital Territory,\textsuperscript{104} a lease granted for less than five years will not be automatically extended. However, the legislation

\textsuperscript{95} Ibid, para 2.92.
\textsuperscript{96} Ibid, para 2.91 regarding practices utilised by a number of landlords, particularly, it was alleged, Westfield.
\textsuperscript{97} Even at the time of the Reid Report most jurisdictions required five year minimum lease terms. In 2006, the relevant provisions are: NSW s 16(1); Victoria s 21; ACT s 104; Tas cl 10(3), (4); SA ss 20A, 20B; WA s 13(1); NT s 26(1).
\textsuperscript{98} Queensland is the only State which does not stipulate a minimum term. However, where a lease does not contain an option the tenant does have a right to request a renewal and the lessor is under an obligation to respond in an approved form stating the terms on which the lease will be renewed. Refer generally to s 46.
\textsuperscript{99} Section 16(2). Note that as of 1 January 2006, s 6A provides that the Retail Leases Act will apply to tenancies which are comprised of successive short-term leases, the total terms of which exceed 12 months, unless the right to the five year term is waived through the s 16 certificate procedure.
\textsuperscript{100} Section 21(2), (2A), (3).
\textsuperscript{101} Part IVA term of lease and renewal, s 20B.
\textsuperscript{102} Section 26(1), (3).
\textsuperscript{103} In Western Australia, an option to extend the lease will arise immediately upon the expiry of the term of the lease and ceases on the day which is not later than five years after the commencement of the original term: s 13(1), (6), (7). An unusual interpretation of the WA legislation has led to recommendations for amendment. While a tenant with a lease of less than five years can extend the lease to the five year minimum term, problems have been experienced in circumstances where a tenant’s initial lease exceeds five years. The prohibition on the landlord to terminate the lease before expiry of the five year term only applies to leases which are of less than five years duration. Therefore, where a lease term exceeds five years, landlords can terminate the lease, without the permission of the State
provides the lessee with a right to extend the lease to a five year term. The Tasmanian provision states the lease must be at least five years but does not appear to set out any consequences for failure to comply. 105

Although the minimum five year term is a priority in most of the retail leasing legislation, it can, in limited circumstances, be avoided. Most jurisdictions list factors which may preclude the operation of the statutory option to extend the lease to the five year period. 106 The most significant of these provisions is the certification procedure available in some jurisdictions. A lease for less than five years can be entered into where a certificate is obtained stating that the minimum term requirements have been explained to the lessee and the lessee agrees to a lesser term. Such certificate must be issued by a lawyer, 107 or other nominated person, 108 not acting for the landlord, or in Victoria, the Small Business Commissioner. 109

Provisions of the extended lease

Where the lease is extended to the five year minimum term, the States and Territories again differ as to the conditions of the new lease. In the absence of a provision determining rental for an additional period, in New South Wales the lessor may change the rental from the date of commencement of the extended period and then annually in line with the Sydney Consumer Price Index. 110 In Victoria 111 and Western Australia, 112 the lease is taken to provide for a rent review to be made on the basis of the current market rent of the premises as at the beginning of the new term. In the Australian Capital Territory, the terms of the lease for the extended period will be the same as the prior lease unless the landlord and tenant agree otherwise or a relevant order is made by the Magistrates’ Court. 113 South Australia, Tasmania and the Northern Territory do not elaborate on the terms of the extended lease.

Assessment

With the exception of Queensland, a minimum term of five years has been achieved. However, some points should be noted. Firstly, an extension of a lease is not guaranteed. Such extension will not be permissible if any of the disentitling factors are applicable. Secondly, and most importantly, the parties can contract out of the provisions. The Reid Committee were of the view that tenants should not be permitted to contract out of their right to a minimum five

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104 In the ACT, there is a right to extend the lease term up to five years however this right must be exercised not later than 90 days after expiry of the lease: s 104(3).
105 See cl 10(3).
106 NSW s 16(4), (5); Vic s 21(2), (2A), (3); ACT s 104(7); Tas cl 10(4); SA s 20B(3); WA s 13(2), (7b); NT s 26(2), (5), (6).
107 NSW s 16(3), (3A); ACT s 104(6); Tas cl 10(4); SA s 20B(3)(c); NT s 26(4).
108 The NSW legislation also refers to a licensed conveyancer.
109 Section 21(5), (5A), (6).
110 Section 21A.
111 Section 21(7).
112 Sections 11(2) and 13(5)(b).
113 Section 105 LCRA.
year term and a preferable approach was that tenants be allowed to surrender leases on pre-determined terms and conditions before the end of the five year period.\textsuperscript{114} Clearly, the certification procedures provide the safeguard of independent legal advice to a tenant considering conceding their position, however the ability to contract out of a minimum five year term may leave a tenant vulnerable and does not comply with the views of the committee.

Varying considerations regarding the five year minimum term can be found elsewhere in some legislation. For example, in Victoria, the unconscionable conduct provision states that, where the tribunal is considering whether a landlord has engaged in undue influence or unfair tactics for the purposes of s 77(2)(d), it may consider whether the tenant had agreed to a lease term of less than the minimum period provided under the legislation.\textsuperscript{115}

In New South Wales, the recent amendments to the retail tenancy legislation and supporting documentation have emphasised the importance of education and awareness of tenants regarding the five year minimum term. In so doing, the disclosure statement will emphasise a tenant’s rights to a five year minimum term.

\textbf{(b) and (c) Rights of renewal}

As discussed, a matter of particular concern raised by tenant submissions in the Reid Report was the lack of security of tenure at the end of the term. This conundrum underlines the problems in balancing the rights of retailers and shopping centre owners.

The Property Council of Australia (PCA) argued before the Reid Committee that lessors have a fundamental property right emanating from the ownership and substantial capital investment in their properties.\textsuperscript{116} On the other hand, the Australian Retailers’ Association (ARA) emphasised the investment made by the tenant in setting up the premises and their contribution to the centre as a whole.\textsuperscript{117} Tenant representatives also contended that some tenants had been forced to leave premises where landlords either refused outright to renew their leases or imposed onerous conditions, such as rental described as ‘exorbitant’, as the price of a new lease.\textsuperscript{118}

\textsuperscript{114} Finding a Balance, above n 5, para 2.90.
\textsuperscript{115} Section 77(2)(d)(ii) (amended by No 82/2005 s 32(2)).
\textsuperscript{116} Finding a Balance, above n 5, para 2.26. In the submission by the Property Council of Australia it was noted at p 2:

\begin{quote}
The capital risk of the property is assumed by the owner and exists before during and after the retailer occupies the premises. It is inherently wrong that a retailer who takes no capital risk in the real estate should demand the rights beyond the term of the lease.
\end{quote}

\textsuperscript{117} The ARA noted that tenants contributed to the centre marketing funds, enhanced the retailers’ brand and provided an estimated 30% of the capital cost of a shopping centre through the comprehensive fit outs required by lessors: ARA, Discussion Paper, October 1997, Improving Australia’s Retailing Environment — Addressing the Vulnerability of the Sitting Tenant, para 2.7.

\textsuperscript{118} Such concern were noted in the Reid Report. Similarly, in a submission by the ARA to the 2001 Review of the Victorian Retail Tenancies Legislation it was claimed that there was substantial evidence that existing lessees were vulnerable to exploitation at lease end because of the inequitable bargaining position that may exist between the lessor and the lessee.
Measures addressing the sitting tenant issue

Recommendation 2.4(b) of the Reid Report stated that pursuant to the URTC, sitting tenants should have the option of lease renewal for a further five year term (after the initial five year term) and (c) have a right of first refusal for subsequent five year periods. It seems that under the Code these provisions would have been compulsory and therefore would have provided a considerable boost to a tenant’s security of tenure. To date, these recommendations have not been comprehensively adopted. In 2006, most shopping centre leases do not contain an option to renew. Similarly, rights of first refusal have not been embraced for even an extension of a lease after the initial five years, let alone after the first 10 years.

The security of tenure issue has remained controversial. In October 1997, the ARA, released a discussion paper titled Improving Australia’s Retailing Environment — Addressing the Vulnerability of the Sitting Tenant. The PCA, and later the Shopping Centre Council of Australia (SCCA), has continued to argue that incidents where sitting tenants were refused an extension of their lease or where large, unjustified rent increases were imposed, were the exception rather than the rule and most renewals proceed with the minimum of fuss. These latter arguments were supported to a considerable degree by market analysis undertaken on behalf of the SCCA.

In the 2003 Review of Commercial Tenancy in Western Australia it was noted that there was no indication that arbitrary refusals were commonplace and that it would be counterproductive for landlords to refuse to renew the leases of profitable tenants. However, bare economic data does not reveal whether tenants regarded the increases as justifiable. Several submissions to the Senate Economics Committee in 2003 again raised the sitting tenant issue and the matter still retains the interest of the ACCC.

The Australian States and Territories have approached the security of tenure issue in three ways: negotiation for renewal or extension, preferential rights to renewal and through the operation of the unconscionability provisions.

Negotiation for renewal or extension

Legislation in most jurisdictions provides for a process of negotiation with the lessor, regulated by specified procedures and timelines. Indeed, in New South Wales (s 44(1)), Victoria (s 64(2)), South Australia (s 20f) — Note this requirement does not apply in circumstances where the lease contains a right of renewal or the tenant has preferential rights: s 20f(a) and (b)) and the Northern Territory (s 60), a retail tenant must be provided with a minimum of six months and no longer than 12 months notification prior to the expiration of a lease whether a new lease will be offered and the terms and conditions of the new lease. In Tasmania this time stipulation is not less than three months before expiry of the lease (cl 29(2)) while the ACT stipulates that such notification is given in writing.
South Wales a lessor is prohibited from advertising the availability of retail premises during the term of an existing lease unless certain negotiations have taken place.

Generally, an offer of a renewal must be held open for a stipulated period of time. If the landlord does not give the requisite notification, legislation decrees that the lease may be extended. During such an extension a tenant may terminate the lease by providing one month’s notice.

Despite these provisions, there is clearly no obligation on the landlord to grant a new lease to the tenant. While such provisions address the issues of disclosure and deadlines, the ARA has criticised such provisions as they do not address the issue of the nature of the terms associated with the renewal.

**Preferential rights**

South Australia and the Australian Capital Territory have adopted provisions which provide a tenant with preferential rights to a new lease, subject to certain qualifications. Preferential rights do not equate with a right of renewal. The preferential rights are not absolute and the landlord can enter into a lease with another tenant in listed circumstances, for example, where the landlord is desirous of changing the tenant mix or where there have been breaches of the lease by the tenant.

The ACT legislation provides the tenant with the opportunity to contract out of the provision if

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124 Section 44A(1) by written or broadcast advertisement.
125 Section 44(1). For example, that the landlord has offered the tenant a renewal or extension of the lease pursuant to the legislation which has not been accepted by the tenant and the landlord has advised that negotiations are concluded without result (s 44A(1), (1)(a)). Other provisions state:
   - s 44(1)(b) the lessor by written notice informs the lessee that the lessor does not propose to offer the lessee a renewal or extension of the lease and there are no arrangements to allow the lessee to remain in possession of the shop, or (c) the lessee by written notice informs the lessor that the lessee does not wish to enter into negotiations for the renewal or extension of the lease or that the lessee wishes to withdraw from the negotiations, or (d) the lessee has vacated or agrees in writing to vacate the shop, or (e) the lessee consents in writing to publication of the advertisement.
126 NSW s 44(2) one month; Vic s 64(3) 60 days; ACT s 107 one month after the request; SA s 20(1) one month; Tas pursuant to cl 1.29(2), (6)(c) (7); WA s 13B(2) 30 days; NT s 60.
127 Consequences where the landlord fails to notify the tenant as required: NSW s 44(3); Vic s 64(4)(5); Qld s 46AA(4), (4A); SA s 20(1); ACT s 107; In the Northern Territory, the lessee is empowered to serve their own notice (s 60). Generally, the lease will be extended until six months after the landlord gives the notification required so long as the tenant has requested an extension in writing before the expiry of the lease. Compare Tasmania cl 29(6)(7) and WA s 13B(1)–(3).
128 NSW s 44(4). Note the separate stipulations regarding shorter leases.
129 Section 20D.
130 Section 108. This provision applies to leases entered into on or after 1 July 2002.
132 SA s 20D(a)(b); ACT s 108(b)(c). Note the other circumstances where the preferential rights may be undermined.
there is an acknowledgement that they have received legal advice and have not been acting under undue influence in agreeing to the exclusion.\textsuperscript{133}

\textbf{Unconscionable conduct}

In Queensland, New South Wales, Victoria, Tasmania, the Northern Territory\textsuperscript{134} and, it is anticipated, Western Australia,\textsuperscript{135} preferential rights are not granted to a sitting tenant and recourse, if any, must be through the unconscionability provisions. Some jurisdictions specifically state that the failure to renew or extend a lease will not amount to unconscionable conduct.\textsuperscript{136} Presumably, this would refer to a ‘mere’ refusal which was not tainted in some other, arguably unconscionable, way.\textsuperscript{137}

\textbf{Assessment}

The Reid Report’s recommendations to strengthen security of tenure for tenants have not reached fruition. The closest the retail leasing legislation has come with regard to the recommendations is the preferential rights clauses in South Australia and the Australian Capital Territory. However, clearly the preferential rights are more tenuous than rights of first refusal or rights of renewal. Also, to date, there have been no cases involving a landlord’s refusal to renew in South Australia. The five year terms of leases entered into immediately after the commencement of the provisions have now expired and there has been no litigation regarding the provisions. There has been no litigation involving the ACT provision to date, however, the initial five year period is yet to expire.

The use of the unconscionable conduct provisions places the onus on the sitting tenant to establish that the landlord’s failure to renew the lease was unconscionable. This again is contrary to the Reid Committee’s deliberations as the intention was clearly directed towards legislative protection for the sitting tenant. It would appear that considering the sitting tenant issue via the unconscionability provisions contemplates that the failure to renew or extend a lease \textit{without more} will not be considered to be unconscionable conduct. It would seem contrary to the intention behind the unconscionability provisions if there was a refusal to extend which was not, for example, in good faith or was the result of malevolent conduct on the part of the landlord.

In the writer’s view, this use of the unconscionable conduct provisions is problematic. As will be discussed below, tenants endeavouring to establish unconscionable conduct are faced with a difficult task and, it seems, only the

\textsuperscript{133} Section 108(e).
\textsuperscript{134} QLD s 46A, 46A(3)(c); NSW s 62B, 62B(6); Vic ss 77, 78, 79(b); Tas cl 3(1), (2)(b); NT ss 78, 79(c).
\textsuperscript{135} In WA, the Review of the Commercial Tenancy (Retail Shops) Agreement Act in 2003, p 131, considered the SA and ACT legislation but recommended that it was undesirable at that stage for preferential rights to be utilised.
\textsuperscript{136} For example, in Victoria, s 79(b) states that a person is not to be taken for the purposes of s 77 or s 78 to engage in unconscionable conduct in connection with a retail premises lease merely because the person fails to renew the lease or enter into a new lease; Qld s 46A(3)(c); NSW s 62B(6); NT s 81(b). No such provision is found in the ACT legislation. In Tasmania cl 3(2) states that unconscionable conduct may include the threat by a property owner: (b) not to renew a lease unless the tenant; (i) agrees to a proposal of the property owner; or (ii) is prepared to pay a rental in excess of the market value rent.
\textsuperscript{137} ACCC v Leelea Pty Ltd (2000) ATPR 41-742.
most onerous types of conduct will be regarded as offending the unconscionability provisions. This proposition is underlined by the strong views of some members of the High Court regarding the landlord’s right to refuse to grant a new lease in *CG Berbatis Pty Ltd v ACCC*. Although this case involved s 51AA rather than s 51AC, the views of the court regarding a landlord’s rights regarding their property would seem equally applicable to an assessment of unconscionable conduct under s 51AC.

**(d) Casual leasing and security of tenure**

Since the Reid Report, the influx of casual tenants, particularly in relation to competing businesses and the assessment of outgoings, have raised concerns among established tenants. To date, South Australia is the only State to confront the issue through the introduction of the Casual Mall Licensing Code. Recently, the SCCA, the ARA and other members of the retail industry have developed a national code for casual mall leasing which will be forwarded to the ACCC for approval in mid-2006. The Code will be a voluntary Code but will not be subject to Pt IVB of the TPA.

**(e) Application to existing leases**

The operation of amendments to the legislation has been prospective. Therefore, this recommendation of the Reid Committee has not been addressed.

**Lease assignment**

The Reid Committee considered difficulties experienced by tenants regarding assignment before, during and after the sale of a business. The first concern was in relation to the veracity of representations made during the purchase of certain retail businesses. As a result, enhanced disclosure obligations upon the assignor of a business were regarded as desirable. A second concern was the reluctance, in some cases, of property managers or landlords to permit tenants to assign their leases, thus delaying or, at times, preventing sales of business. The committee acknowledged the conflicting interests in this situation as property managers and/or landlords had a right to veto unsuitable tenants while tenants may wish to liquidate their

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139 Shorter leases are permitted pursuant to retail leasing legislation and can be agreed to through the certification procedure.
140 The Code applies to all casual mall licensing in retail shopping centres in South Australia and purports to clarify the rights and obligations of landlords and existing lessees where casual mall licensing is utilised: see, generally, E Webb, ‘Casual Mall Leasing — A Co-ordinated Approach’ (2003) 10 APLJ 64.
142 *Finding a Balance*, above n 5, paras 2.95–2.106.
143 Ibid, paras 2.97–2.98.
144 Ibid, paras 2.97–2.99.
business. Thirdly, the committee considered provisions in some leases which provided that the lessee continued to be liable under the lease, even after assignment to another party. Recommendation 2.5 stated:

The Committee recommends that the Uniform Retail Tenancy Code:

(a) require lessees assigning their leases to provide a disclosure statement to prospective purchasers showing all relevant information on the financial position of the business and the rights and obligations of the business as a tenant, including information on rental rebates, rental holidays, and any other financial incentives applying at the time of assignment or in the previous five years;

(b) specify the grounds on which a lessor can withhold consent to the assignment of a retail lease; and

(c) provide that:

(i) purchasers of a trading retail outlet be given a new lease by the property management, when all parties agree; or

(ii) (as a fallback option) all rights and responsibilities pursuant to a retail lease pass to the new tenant on assignment of a lease, unless otherwise agreed in writing between the assignor and assignee.

Disclosure

In 2006, State and Territory legislation provides guidance regarding the requisite level of disclosure required during an assignment of a lease. The legislation differs according to the obligations on one or all parties, time stipulations and the form of any disclosure statement. Prior to seeking consent to assignment, a tenant in New South Wales, Victoria, Australian Capital Territory, South Australia or the Northern Territory must provide the assignee with an updated copy of any disclosure statement provided to the tenant by the landlord. Any subsequent changes to the information in the disclosure statement of which the tenant should be aware must be disclosed. In some jurisdictions, the tenant can request that the

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145 Refer generally to Finding a Balance, above n 5, para 2.96 regarding the experiences in the Box Hill Shopping Centre and the discussion in ACCC v Leelee Pty Ltd (2000) ATPR 41-742.

146 Finding a Balance, above n 5, citing the example by Mr Len Rathmann, WA Council of Retail Associations, para 2.102.

147 State and Territory legislation sets down procedures which should be followed when a tenant seeks consent to assignment. Generally, the parties cannot contract out of these provisions. Subject to some minor differences between jurisdictions, the legislation provides that a request for the landlord’s consent to an assignment of the lease should be made in writing. The tenant may then be required to provide the landlord with such information regarding the proposed assignee as is reasonably required by the landlord. A landlord must deal expeditiously with a request for consent to an assignment of the lease and will be deemed to have consented to the assignment where the tenant has complied with any specific provisions and/or has not responded within a stipulated period of time. Refer Qld ss 22B, 22C; NSW s 41, 41(b); Vic s 61; ACT ss 93–96; Tas cl 28; SA s 45; WA s 10; NT s 55.

148 For example: NSW s 41(b); Vic s 61(5); ACT s 93(1); SA s 45(b); NT s 56(a).

149 NSW s 41(b); Vic s 61(5); ACT s 93(1); SA s 45(b); NT s 56(a).
landlord provides the said disclosure statement to the assignee.\footnote{150}{NSW s 41(c); SA s 45(c).}

If the assignment is in connection with the lease of a retail shop that will continue to be an ongoing business, a tenant in New South Wales, Victoria or the Northern Territory must provide the landlord and proposed assignee with an assignor’s disclosure statement.\footnote{151}{NSW s 41(b); Vic s 61(3), (5A); NT s 56(e).}

The NSW provisions provide for the most comprehensive disclosure for prospective assignees. In addition to the updated disclosure statement, the assignor must provide to the assignee the information stipulated in Sch 2A.\footnote{152}{Although the disclosure statement does not need to be in the prescribed form.}

Such information includes sales figures and relevant information as to the trading performance of the retail shop for the past three years,\footnote{153}{Or for such period as the lease has been in operation if that period is less than three years. Note pursuant to cl (g), the total (aggregate) sales figure for the past three years, or such lesser period as the lease has been in operation are to be disclosed.} whether the lessor has conferred any rent concessions or other benefits on the assignor during the term of the lease\footnote{154}{If so, the concessions and benefits conferred on the assignor must be disclosed: cl (f).} and the existence of any notices, encumbrances and/or legal proceedings affecting the property. As of 1 January 2006, information must also be provided on the expiry dates of major lessees, intended future tenancy mix and more details regarding administration and cleaning costs. The Northern Territory adopts the same procedure and the assignor’s disclosure statement is almost identical however there is no reference to the trading figures for any previous time nor current legal proceedings.\footnote{155}{Disclosure in other jurisdictions is not as comprehensive. In Victoria, an assignee must be provided with an updated disclosure statement and Pt 6 of the disclosure statement must be completed.\footnote{156}{Section 56(d).} The assignor is required to provide business records for the previous three years. In Queensland, Pt 8 of the disclosure statement refers specifically to assignment and requires the lessee to reveal details of any defaults or breaches.\footnote{157}{Sections 22B, 22C financial certificate.} A legal and business advice certificate must be provided.\footnote{158}{Sections 22B, 22C.} In South Australia, there is no obligation to provide a disclosure statement upon assignment, however, where the business is ongoing and the assignor is desirous of being released from liability subsequent to the assignment, a disclosure statement which does not contain any false or misleading material must be provided.\footnote{159}{Sections 45A.} Similar comments apply to Tasmania.\footnote{160}{Clause 6.} The WA legislation presently does not contain provisions relating to disclosure statements upon assignment, however the provision of such statements was recommended in the 2003 review.\footnote{161}{Recommendation 44, pp 117–18.} }

\footnote{150}{NSW s 41(c); SA s 45(c).}
\footnote{151}{NSW s 41(b); Vic s 61(3), (5A); NT s 56(e).}
\footnote{152}{Although the disclosure statement does not need to be in the prescribed form.}
\footnote{153}{Or for such period as the lease has been in operation if that period is less than three years. Note pursuant to cl (g), the total (aggregate) sales figure for the past three years, or such lesser period as the lease has been in operation are to be disclosed.}
\footnote{154}{If so, the concessions and benefits conferred on the assignor must be disclosed: cl (f).}
\footnote{155}{Disclosure in other jurisdictions is not as comprehensive. In Victoria, an assignee must be provided with an updated disclosure statement and Pt 6 of the disclosure statement must be completed.\footnote{156}{Section 56(d).} The assignor is required to provide business records for the previous three years. In Queensland, Pt 8 of the disclosure statement refers specifically to assignment and requires the lessee to reveal details of any defaults or breaches.\footnote{157}{Sections 22B, 22C financial certificate.} A legal and business advice certificate must be provided.\footnote{158}{Sections 22B, 22C.} In South Australia, there is no obligation to provide a disclosure statement upon assignment, however, where the business is ongoing and the assignor is desirous of being released from liability subsequent to the assignment, a disclosure statement which does not contain any false or misleading material must be provided.\footnote{159}{Sections 45A.} Similar comments apply to Tasmania.\footnote{160}{Clause 6.} The WA legislation presently does not contain provisions relating to disclosure statements upon assignment, however the provision of such statements was recommended in the 2003 review.\footnote{161}{Recommendation 44, pp 117–18.}}
Consent to assignment

The Reid Committee referred to ‘disturbing’ evidence regarding assignment and the consequences for tenants who were unable to assign their leases due to the alleged recalcitrance of the landlord’s representatives. The committee noted that legislation in New South Wales, South Australia and the Australian Capital Territory already achieved a fair balance by: ‘providing guidance on a range of circumstances in which a lessor could reasonably withhold consent — for example, if the proposed lessee intends to change the use of the shop or has retailing skills inferior to the sitting tenant.’

In most jurisdictions in 2006, a landlord is only entitled to withhold consent in certain specified circumstances. The grounds on which the landlord can refuse consent are generally similar across the jurisdictions, being:

- The tenant proposes to change the use of the shop,
- The assignee has inferior retailing skills and/or financial resources to the assignor or the landlord is of the view that these factors will prevent the assignee from meeting their obligations under the lease,
- Non-compliance with relevant assignment procedures by the tenant,
- The proposed assignor has not provided business records for the previous three years to the assignee.

In the Australian Capital Territory, where the landlord refuses to consent and the reason is not one of the listed circumstances, the onus is on the lessor to establish that the refusal is reasonable. In Western Australia, there is a minimal specification that the tenant can assign the lease subject to the landlord’s right to withhold consent to an assignment on reasonable grounds.

Ongoing liability

The Reid Committee noted the problem of ongoing liability for an assignee and any guarantors after a lease was assigned. Most States and Territories have addressed this issue through legislation as suggested in Recommendation 2.5(c)(ii). In New South Wales, Victoria and the Northern Territory, assignors will be released from liability after the assignment so

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162 Finding a Balance, above n 5, para 2.96.
163 Ibid, para 2.96 regarding the experiences in the Box Hill Central Shopping Centre.
164 Ibid, para 2.100.
165 NSW ss 39–41; Vic s 60; Qld ss 50, 50A; ACT s 100; WA s 10; note additional provisions regarding refusal on other grounds; SA s 43; Tas cl 28; NT s 53.
166 NSW s 39; Vic ss 60; SA s 43; Tas cl 28; NT s 53(a); ACT s 100.
167 NSW s 39; Vic s 60; ACT s 100; SA s 43; Tas cl 28; NT s 53.
168 NSW s 41; SA s 45; Vic s 60; Tas cl 28; NT s 53.
169 Vic s 60.
170 ACT s 100.
171 WA s 10.
172 Finding a Balance, above n 5, paras 2.103–2.105.
173 This was referred to by the Reid Committee as a ‘fallback’ position: Finding a Balance, above n 5, para 2.106.
174 In some jurisdictions this may extend to guarantors and covenantors.
long as the disclosure statements are provided pursuant to the legislation and those disclosure statements do not contain information that is false, misleading or incomplete.\textsuperscript{175} Western Australia relieves assignors and guarantors from liability upon assignment.\textsuperscript{176} In South Australia, continuing liability of an assignor and guarantor of the assignor does not cease immediately upon assignment but will extinguish within two years, and in some cases a shorter period,\textsuperscript{177} if the disclosure requirements in the legislation are satisfied.\textsuperscript{178} In Tasmania, the position is a little more complex and depends on whether there has been a change to the terms of the lease upon assignment, such change having been made with the agreement of the assignor and guarantor. If so, the assignor and guarantor will remain liable. If there has not been a change in the terms of the lease upon assignment, except in relation to rental, the assignor and guarantor will be released from liability.\textsuperscript{179}

\textbf{Assessment}

Do the disclosure obligations cover the information regarded as desirable by the Reid Committee? The committee recommended that information should be provided regarding the financial position of the assignor, its rights and obligations, details of rental rebates and rental holidays and any other financial incentives applying at the time of the assignment or within the previous five years. The NSW and NT provisions go furthest towards satisfying the recommendations of the Reid Committee regarding the provision of information on the financial position of the business. The exception is the reference to a five year period regarding business records. In New South Wales, the period is limited to three years and the Northern Territory does not refer to this matter. Otherwise, although disclosure to assignees has been enhanced, it has not reached the levels thought desirous by the Reid Committee.

Unconscionable conduct provisions could arguably be utilised in the event of a significant failure to disclose, for example, s 51AC(3)(a), (c), (d), particularly (i), and (k) and the equivalent provisions. Another possibility is through the misleading or deceptive conduct provisions of the TPA or the retail leasing legislation.\textsuperscript{180}

Regarding consent to assignment, it would seem that, on the face of it, the State and Territory provisions provide sufficient protection for a tenant against the unreasonable withholding of consent. The reasons consent can be refused are unambiguous and restrained. All jurisdictions state that the lessor must deal expeditiously with a request for consent and if the lessor fails to do so

\textsuperscript{175} NSW s 41A; Vic s 62; NT s 58.
\textsuperscript{176} As yet the WA legislation does not contain provisions requiring disclosure statements on assignment. This was a recommendation in the 2003 review: Recommendation 44.
\textsuperscript{177} Discharge from any liability under the lease on and after the first to occur of the second anniversary of the assignment; the date on which the lease expires; or if the lease is renewed or extended following the assignment, the date on which the renewal or extension commences.
\textsuperscript{178} Section 45A.
\textsuperscript{179} Clause 28.
\textsuperscript{180} Note NSW has recently enhanced the misleading or deceptive conduct provisions in the RLA.
they will be taken to have consented to the assignment. However, there can always be instances where consent is withheld and allegations of unconscionable conduct can arise. In such a case, arguably s 51AC may be utilised. Finally, in relation to liability beyond the assignment, it seems the ‘fall back’ position has been adopted throughout Australia.

**Rental**

Rental was another significant matter considered by the Reid Committee. The committee considered whether the retail property market was overvalued, thus causing artificially high rentals, and also examined a number of business conduct issues relating to retail rents. These issues included the disparity in rentals between specialty tenants themselves, between specialty tenants and anchor tenants and the sitting tenant’s vulnerability during a rent review. The fairness of market rent reviews and the landlord’s access to and use of tenant’s turnover in relation to rent review were also discussed.

**Availability of rental information and its impact upon rental values**

An accurate determination of rental requires, presumably, all participants to have equal access to market information. In the retail leasing sector, landlords have access to such market information through private lease registers prepared by organisations such as UrbisJHD. Such information can rarely be accessed by tenants. This asymmetry places tenants under a serious disadvantage during rental negotiations and any subsequent litigation.

In 1997, the Reid Committee identified the asymmetry of information between landlords and tenants regarding data relevant to assessing rental as problematic. While acknowledging landlord concerns regarding the commercial sensitivity of such information, the committee agreed with evidence advocating greater transparency in relation to rents paid in all

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181 Time limitations vary between States and Territories from 21 days in Tasmania, 28 days in WA, Vic and the ACT (the latter subject to any extensions requested by the landlord pursuant to the Act) and 42 days in NSW, SA and the NT.

182 Rental was the most important issue for specialty retail tenants after security of tenure: Finding a Balance, above n 5, para 2.107

183 Finding a Balance, above n 5, para 2.110.

184 Ibid, para 2.136, the committee noted that; ’In short, specialty rents are the maximum amounts that can be obtained from the retailer in rent negotiations; retail shopping centres have no intrinsic “price”.’

185 Given allegations of considerable rent increases imposed at the end of some terms, the sitting tenant’s situation at the end of a lease was also discussed.

186 Finding a Balance, above n 5, paras 2.124–2.125. The committee were advised that the determination of market rental usually involved a procedure whereby the landlord and tenant appointed a valuer and a joint determination was reached. However, while the landlord’s valuer would have access to all pertinent information, the tenant’s valuer could request, but was not guaranteed access to, such information.

187 Finding a Balance, above n 5, para 2.126.

188 S Garmstrom and D Lovell, Australian Institute of Valuers and Land Economists, Transcript of Evidence, pp 689–90. Note too the suggestion presented by valuer interests that the
retail shopping centres. In the committee’s view, this could be achieved by relevant information being provided to valuers upon undertakings of confidentiality. It was also concluded that retail tenants should not be bound to secrecy provisions in relation to rents paid. As a result, Recommendation 2.6 stated:

The Committee recommends that the Uniform Retail Tenancy Code provide for accredited retail property valuers to have access — on a non-disclosable basis — to relevant Tenancy Schedules of shopping centres, showing the total occupancy costs for each tenant in the centre and the value of any concessions or rebates given, for the purposes of valuing retail property or providing advice on market rent reviews.

In 2006, most jurisdictions require that the landlord must provide valuers, within a stipulated time, with all information which will assist in the valuation. Failure to do so can result in a sanction. For example, in Victoria a landlord must supply the valuer with information about leases for retail premises located in the same building or retail shopping centre to assist the valuer to determine market rent in the premises.

The possibility of formulating a lease register which provides rental information pertinent to a rent review has been given consideration in some jurisdictions. In Western Australia, the establishment of a lease register was the subject of Recommendation 31 of the 2003 review. At present, the matter is again under consideration. In June 2006, the Minister agreed to establish a committee of review to inquire into whether a lease register can be established in Western Australia.

market for retail tenancies would operate more efficiently if there was a compulsory register of rentals or a public display of total occupancy cost schedules, in all centres: COSBOA, Submission No 65.

189 Finding a Balance, above n 5, paras 2.126–2.128.
190 Ibid, para 2.129.
191 For example, Vic s 37(4); Qld s 30; Tas cl 21; WA s 11(7); ACT s 29(1)(e).
192 For example, New South Wales.
193 The recommendation was met with considerable opposition from shopping centre interests who noted that:

The purpose of reviewing this matter is to make information available to valuers who do not currently have access. Even if valuers do have access to rental information, they are not told confidential details such as lease incentives and turnover figures. A public register will create an incentive for undesirable dealings not recorded in writing;


194 A committee to include government agencies, the Small Business Development Corporation, the Valuer General, the Department of Land Information and others, as well as relevant business groups, including the Shopping Centre Council of Australia, the retail tenants association and others, so that they may properly consider the needs and the issues relating to this issue: Hansard, 22 June 2006.
Disparity of rents, the role of turnover rental and the calculation of market rental

The Reid Committee commented upon the ‘massive disparity’ between rentals paid by anchor tenants and specialty stores. Tenancy schedules obtained by the committee confirmed disparities between anchor and specialty tenants. The tenancy schedules also revealed considerable variation between rental paid by specialty tenants depending upon location, layout, size and anticipated profitability.

Several tenant submissions objected to landlord access to the tenant turnover figures which, it was alleged, enabled landlords to estimate the maximum rent a tenant could afford to pay upon a rent review.

Finally, methods utilised to calculate market rental and the fairness of the calculation of market rental were other areas of concern considered by the committee. Recommendation 2.7 stated:

Recognising rent will always be a matter for negotiation between landlord and tenant, the Committee recommends the Uniform Retail Tenancy Code provide that:

(a) the disclosure statement set out clearly the method by which rent is to be calculated for the term of the lease without provision for review or for unpredictable increases; (b) market rent review only be permitted on renewal of a lease; and (c) the level of market rent on lease renewal be determined by an independent accredited valuer, with costs shared between the parties.

In summary, Recommendation 2.7 provided for greater disclosure obligations that would assist a tenant in preparing for increases in rental. Market rent reviews would only be upon renewal and such rent would be determined by an independent valuer. This recommendation addressed concerns about unexpected rent increases and the objectivity of the rental assessment. Reference was made to the process by which independent valuation could be made. It is noteworthy that the committee did not make a recommendation for a standard formula for rent calculation but instead chose to suggest that legislation should establish ‘procedural rules for rent negotiation’.

Developments

Several of the issues raised in relation to rent during the Reid Report have continued to be contentious. This is particularly so in the case of price secrecy and the information available to accurately assess and compare the calculation of rental between premises. In the Fair Market or Market Failure report the committee noted:

195 Legislation in all jurisdictions contains provisions defining turnover rent and setting down the requisite procedures for notification etc: Qld s 9; NSW s 20(1); Vic s 33(4); Tas cl 15; SA s 24; ACT s 64; WA s 7(4); NT s 32(1).
196 Because of their ability to draw customers to a centre, anchor tenants are essential to a centre’s successful operation. Therefore, significant benefits could be negotiated with the landlord, including reduced rental. An anchor tenant’s rental was largely based on turnover whereas specialty tenants rental was predominantly linked to market. Therefore, it seemed, specialty retailers were ‘subsidising’ anchor tenants.
198 Ibid.
the cost of floor space is probably the largest business cost, after labour and product
costs, for any retail business. The evidence clearly indicates that specialty shops in
shopping centres often pay a substantially higher rate for their floor space than the
anchor tenant. The committee accepts that there may be good reasons for this.
However, so that prospective specialty shop tenants can make a proper assessment
of their ability to compete with other tenants, the committee believes that they
should be able to access information about the net rental being paid by other
tenants.199

In 2004 the Senate Economics Committee recommended the abolition of
price secrecy provisions, however, as discussed, the government response
refused to agree with this recommendation.200

In 2006, State and Territory retail leasing legislation addresses, to varying
degrees, many of the concerns raised and the recommendations made in
relation to rent review in the Reid Report.201

Disclosure
A considerable amount of information pertaining to rental is contained in the
disclosure statements. State and Territory legislation decrees that the lease has
to state the time when rent reviews are scheduled to occur and the method by
which the rent review calculation will be made.202

Turnover
Legislation in most jurisdictions appears to have heeded the comments of the
Reid Committee as to the misuse of specialty tenant’s turnover203 figures. In
some jurisdictions there is an obligation of confidentiality on the landlord
regarding turnover figures which only permits disclosure in certain specified
circumstances204 while, elsewhere, disclosure of turnover rental figures is
permitted only where rent is determined in whole or in part by reference to
turnover.205 In most States and Territories there can be no termination of a
lease by a landlord for inadequate sales. Such information could be gleaned
from turnover figures.206

In Victoria, the obligation of confidentiality on the landlord regarding
turnover information is reinforced through s 77 where the misuse of turnover
information is a factor the court can have regard to when determining whether
the landlord has engaged in unconscionable conduct.207 The court may
consider the extent to which the landlord unreasonably used information about
the turnover of the tenant’s or a previous tenant’s business to negotiate the

199 Fair Market or Market Failure, above n 24, para 5.124.
200 Government Response, above n 27, p 12.
201 Indeed, many States had provisions to this effect at the time of the Reid Committee.
202 Qld s 27; NSW s 18; Vic s 35(1); ACT s 47; Tas cl 12(1); NT s 28(1); WA s 11.
203 The Acts define turnover rental and list specific exclusions. There are also processes set out
in the Acts which must be complied with for turnover rental clauses to be valid. See Qld ss 9,
25; NSW s 20; Victoria s 33, especially s 33(6) and note s 34 in the event of non-compliance
with s 33; ACT ss 48, 61–64, 129; Tas cl 15; SA s 24; NT s 32(1); WA s 7(2)–(4).
204 Qld s 26; NSW s 50; Vic s 67; SA s 51; NT s 66.
205 WA ss 7, 8; ACT s 129 and confidentiality provisions s 129(2); Tas cl 10(b) but note too
reference to confidentiality in cl 10(7).
206 NSW s 58; Vic s 73; ACT s 142; Tas cl 36; NT s 58.
207 Section 77(2)(m).
rent. Western Australia will also include this provision in its unconscionability provision. 208

Timing of reviews to market

No jurisdiction has adopted the recommendation that reviews of market rental should only take place upon renewal. However, some jurisdictions place limitations on the number and timing of rent reviews. For example, statute in New South Wales, Tasmania and South Australia prohibits changes to the base rent209 within 12 months of the lease being entered into or any previous change to the rent unless such is by a specified amount or percentage. 210 In comparison, in Queensland211 and again in Tasmania, a rent review will be invalid in circumstances where there is more than one review per 12 month period. 212

Assessment of market reviews

Although not subject to a specific recommendation, a concern for the Reid Committee was that lessors could require lessees to pay the greater of two or more amounts of rental and the utilisation of ratchet clauses. State and Territory legislation now contains provisions to the effect that a rent review can only be calculated on the basis of one formula. The legislation lists a number of bases for calculation, for example, a fixed percentage, reference to CPI, current market rent or agreed formula. 213 In some cases, where the relevant rent review clause does not specify a method of calculation, the provision will be regarded as void and statute provides a process for agreement or determination. 214 In Western Australia, a rent review provision will be rendered void unless the lease specifies a single basis on which the review is to be made. 215 In New South Wales, South Australia, Australian Capital Territory and Tasmania the legislation states that rent review clauses will be void where there are certain discretions regarding the calculation of rental such as two methods of calculation for a change in base rental or where rent can be increased to the higher of two or more amounts, depending on the type of calculation utilised. 216 The use of ratchet clauses to prevent rent falling on a market review is prohibited in all jurisdictions. 217

Victoria and the Northern Territory place responsibility on the landlord to conduct the rent review as early as practicable within the time stipulated in the

208 Recommendation 5.
209 Defined NSW s 18(1); SA s 22(1); Tas cl 12.
210 NSW s 18(2); Tas s 12(5); SA s 22.
211 Applicable to leases entered into after 30 April 1999.
212 Section 27(9). In such circumstances the rental remains the same as before s 27(7); Tas cl 12(5).
213 Qld s 27(5); NSW s 18; Vic s 35(2); ACT s 50; SA s 22; Tas cl 12(2); NT s 28(2).
214 Qld s 27; NSW s 18; Vic s 35(6), (7), (8); ACT s 47; Tas cl 12; SA s 22; WA s 11; NT s 28(7), (8).
215 Section 11(1).
216 Qld s 27; NSW s 18; Vic s 35(6), (7), (8); ACT s 47; Tas cl 12; SA s 22; WA s 11; NT s 28(7), (8).
217 Qld ss 27, 36; NSW s 18; Vic s 35(3); Tas cl 12(8); SA s 22, note WA prohibits provisions which prohibit increases or increases in rental: s 11(2)(c); NT s 28(3) (subject to listed exceptions).
lease. In circumstances where the landlord does not comply the tenant may initiate the review.\textsuperscript{218}

\textbf{Calculation of market rental}

All State and Territory legislation contains provisions dealing with the calculation of market rental, usually referred to as ‘current market rent’.\textsuperscript{219} Generally, the legislation contains provisions to the effect that where a lease provides for rent to be changed to current market rent, the lease is taken to include certain criteria.

The current market rent is the rent that would reasonably be expected to be paid for the shop, as determined by criteria stated in the various pieces of legislation. Generally, valuers in all jurisdictions are instructed to examine the terms and conditions of the lease and the rental which would be reasonably expected to be paid for the shop if it was unoccupied and being offered for rental for its current permitted use.\textsuperscript{220} Also, some jurisdictions make specific reference to certain matters which can be considered, or disregarded. For example, in some cases\textsuperscript{221} the valuer is required to also take into account incentives and rental concessions, whereas some jurisdictions\textsuperscript{222} stipulate that the value of any goodwill cultivated by the lessee during the tenancy or the value of the lessee’s fixtures and fittings on the retail shop premises is not to be considered.\textsuperscript{223} The Queensland legislation also permits reference to outgoings and to submissions from the lessor and/or lessee regarding market rent.\textsuperscript{224,225} In some jurisdictions there are obligations of confidentiality on the valuer regarding information revealed.\textsuperscript{226}

As discussed above in relation to Recommendation 2.6, the Reid Committee was concerned about the information provided to valuers. Most legislation makes provision for, in the absence of an agreement between the landlord and tenant, assistance in reaching a compromise through the appointment of a specialist retail valuer (SRV),\textsuperscript{227} agreed upon by the landlord and tenant.\textsuperscript{228} In the absence of such agreement, some jurisdictions permit the SRV to be appointed by a person nominated by the legislation.\textsuperscript{229} In Tasmania and Western Australia, if the parties cannot reach agreement either the landlord or the tenant can request an independent valuation. There is a degree of choice as to the form the independent valuation can take.\textsuperscript{230}

\textsuperscript{218} Vic s 35(5); NT ss 28(5), 28(6).
\textsuperscript{219} Qld ss 27–29; NSW s 19; Vic s 37; ACT s 52; Tas Sch 1 cl 13; SA s 23; WA s 11; NT s 29.
\textsuperscript{220} Vic ss 37(2); NSW s 19; Qld s 29; Tas cl 13 App A; SA s 23; WA s 11(2)(a); ACT s 29.
\textsuperscript{221} In NSW, Victoria and the Northern Territory.
\textsuperscript{222} For example in NSW, SA and Victoria.
\textsuperscript{223} Vic s 37(2); NSW s 19; Qld s 29; Tas cl 13 App A; SA s 23; WA s 11(2)(a); ACT s 29.
\textsuperscript{224} And other prescribed matters: ss 20(a)(ii), (iii), 29(b)(c).
\textsuperscript{225} Vic s 37(2); NSW s 19; Qld s 29; Tas cl 13 App A; SA s 23; WA s 11(2)(a); ACT s 29.
\textsuperscript{226} For example, Victoria s 38.
\textsuperscript{227} SRV are defined in the legislation. SA refers to ‘Independent Valuer’.
\textsuperscript{228} SA s 23.
\textsuperscript{229} For example, the Registrar, Chief Executive, Small Business Commissioner or Commissioner of Business Tenancies or ADT.
\textsuperscript{230} For example, one valuer agreed by both parties, or two valuers one nominated by each party. In the event of disagreement or the failure of one party to select a valuer, a valuer can be
Assessment

Predictably, rental was one of the more contentious, and complex, issues considered by the Reid Committee. In the writer’s view, negotiation regarding the review of rental remains hampered to some extent by asymmetry of information, although legislation in several jurisdictions requiring landlords to provide information to valuers is a positive development. Price secrecy provisions are likely to remain and such lack of information will continue to inhibit accurate assessment of rental values. The introduction of lease registers containing information relevant to rental determination is likely to remain controversial.

Recommendations regarding the disclosure of rental information seem to have been heeded and comprehensive information is now available to tenants thus minimising the risk of unexpected increases in rental.

Concerns regarding turnover information appear to have been reduced through the imposition of obligations of confidentiality and prohibitions of termination for inadequate sales. Arguably, however, the access to such figures could still enable landlords to calculate maximum rental the tenant could pay, a common allegation before the Reid Committee. The Victorian initiative to include the misuse of turnover figures in the unconscionability provision gives weight to this alleged problem, however proving such misuse may be an arduous task. Reviews to market have become more streamlined, however it is doubtful that specialty tenants will ever be permitted to move to turnover rental.

Merchant associations

Merchant associations are tenant organisations formed within shopping centres to provide information and marketing support for tenants within the centre.231 They are usually quite informal groups and their existence and form varies from centre to centre.232

Submissions to the Reid Report contained allegations of tenants being reluctant to join or participate in merchants’ associations for fear of repercussions from centre management. Indeed, some submissions alleged that tenants were frightened to be seen talking to each other because of the possibility of reprisal.233 The committee expressed concern about the perceived attitude of some centre managers towards tenant associations and were of the view such organisations should be encouraged. Recommendation 2.8(a)–(c) stated:

The committee recommends that the Uniform Retail Tenancy Code provide:

appointed by, in Tasmania, the Director of Consumer Affairs in consultation with the President of the Institute of Valuers and Land Economists (cl 21) and in WA by the State Administrative Tribunal (s 11(3)–(5)).


232 Ibid.

233 Finding a Balance, above n 5, para 2.186, discussing the Box Hill Centre. Ms Mary Caruana, Transcript, p 183, noted that centre management deliberately went out of its way to discourage a meeting in the food court by ordering security to lock the doors and turn off the lights.
(a) for the establishment of merchants’ associations in shopping centres;
(b) that all tenants in a shopping centre belong to the merchants’ association in that centre;
(c) for Articles of Association of merchants’ associations to be appended to the standard retail lease . . .

To date, State and Territory legislation does not contain stipulations requiring the establishment of merchants’ associations. Most, but not all, legislation states that a tenant cannot be discouraged or prevented from or disadvantaged as a result of joining a merchants’ association.234 It is not mandatory for tenants to join a merchants association. Indeed, some jurisdictions prohibit compulsory membership.236 Articles of association of merchants’ associations are not habitually annexed to a lease but reference is made to the existence or otherwise of merchants’ associations in disclosure statements in several jurisdictions.237 In the Australian Capital Territory, conduct which interferes with or discriminates against a tenant’s participation in a merchant association can amount to harsh or oppressive conduct.238

**Assessment**

Although the recommendations have not been generally adopted, the legislation now contains, on the face of it, comprehensive safeguards for tenants who wish to participate in merchants’ associations. However, the influence of a merchants’ association will depend on the willingness to participate of members and therefore the role of such associations will vary from centre to centre. Anecdotal evidence continues to circulate about centre management undermining tenant activism in centres.239

**Outgoings and promotions**

Retail tenants are almost invariably required to contribute to the centre’s outgoings and promotional activities. There may also be a requirement to contribute to a ‘sinking fund’.

Three main concerns were raised in the Reid Report regarding outgoings and promotions.240 These concerns related to:

- The fairness of charging tenants for the management and operation of the shopping centre,
- The tenants lack of control over expenditure on outgoings and promotions, and

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234 Qld s 49; NSW s 60; Vic s 75; Tas cl 37; SA s 60; NT s 133.
235 Or similar organisation, for example, in the Victorian legislation a Chamber of Commerce. There are no equivalent provisions in WA, however, pursuant to the Retail Shops and Fair Trading Amendment Bill 2005, the WA legislation will be amended to provide that a landlord must not take any action to discourage or prevent a tenant from forming or joining a merchants’ association. The Act will also be amended to prohibit a landlord from discriminating between tenants who form or join a merchants’ association and those who do not.
236 For example, Queensland s 49.
237 For example, Queensland and NSW, Victoria and the NT.
238 ACT s 22(3)(a), (b).
239 Interviews conducted with retail tenants in Sydney and Perth, April 2006.
240 Finding a Balance, above n 5, para 2.174.
The scarcity of documentation kept by centre management regarding expenditure on outgoings and promotions thus leaving open the possibility of fraud.241

Upon request by the Reid Committee, several leasing corporations provided what were, at the time, their most recent audited statements of outgoings and promotions for certain centres.242 Although costs were generally apportioned according to gross lettable area occupied, it was noted that in many cases the lessor paid the anchor tenant’s contribution.243 The reports were ‘highly aggregated’ and the committee noted a reluctance to document the calculation of variable outgoings.244 A lack of access for tenants to documentation underpinning the calculation of outgoings and promotions was of concern to the committee.245

The committee considered whether it would be appropriate for the merchants’ associations to monitor outgoings. It was suggested that the merchants’ associations could operate like a strata title body corporate.246 Recommendation 2.8 stated:

The Committee recommends that the Uniform Retail Tenancy Code provide:

(d) for the merchants’ association to approve the annual budget of variable outgoings and promotions levies at an annual general meeting; and

(e) for each tenant to be provided with detailed quarterly statements of expenditure on outgoings and promotions and audited annual statements.

The proposal regarding a role for the merchants’ associations in approving the outgoings budget met with considerable opposition from landlords who were of the view that the responsibility rested with them through their ownership of the centre.247 Another proposed option was introduction of ‘grossed up rents’. In such a case, negotiated rents include outgoings and therefore property managers have an incentive to contain costs.248

Developments

Outgoings have continued to be a contentious area and have been the subject of submissions to the various government enquiries.249 In 2002, the ARA developed a Draft Outgoings Code of Conduct which adopted a number of the suggestions in the Reid Report. It was proposed that the Outgoings Code be a voluntary code of conduct complimenting the various Australian State and Territory retail tenancy legislation.250 The Code was not intended to be declared as either a prescribed voluntary or mandatory code under Pt IVB of

242 Ibid, para 2.175.
243 Ibid, para 2.176.
244 Ibid, para 2.183.
245 Ibid, para 2.183.
246 Ibid, para 2.189.
247 AMP; ibid, para 2.90.
248 PCA; ibid, para 2.194.
249 For example, in the 2001 review of the Victorian tenancy legislation and before the 2003 Senate Economics Committee.
the TPA. The Code was rejected by the SCCA and negotiations have not proceeded. Grossed up rents remain on the agenda and, in the absence of an outgoings code, may be a possible solution to the ongoing outgoings issue.

A significant feature of State and Territory innovations since the Reid Report is a clarification of the items which can be recouped as outgoings. Definitions of outgoings in most jurisdictions state clearly that such expenses must be directly attributable to the operation, maintenance or repair of the premises. Some jurisdictions impose a standard of reasonableness on these expenses.

Generally, the legislation contains specific references as to which items can and cannot be regarded as outgoings. For example, in some jurisdictions land tax is recoverable, in some cases with a limitation while in other jurisdictions it is not recoverable as an outgoing. Other matters which are specifically excluded in some jurisdictions include expenditure of a capital nature, depreciation, contributions to a sinking fund, insurance premiums for loss of profits, lessors contribution to merchants’ associations or advertising and payment of interest and charges on amounts borrowed by the lessor or on unrelated land. Again, the States and Territories vary as to whether the tenant is liable for costs associated with the preparation of the lessor’s lease.

The payment of management fees by the tenants was a matter of contention before the Reid Committee. Some legislation places limits on the recovery of

251 2.1 The objects of the Code were to:
- promote equitable and transparent cost recovery practices
- provide a simple, accessible and non-legalistic dispute resolution mechanism for industry participants in the event of a dispute
- establish a uniform reporting standard for Outgoings

252 ARA submission to the Senate Economics Committee 2003, p 2.
253 Queensland s 7; NSW s 3; ACT s 71; SA s 3; WA s 12(3) ‘operating expenses’; NT s 5.
254 See, eg, Queensland, NSW and the ACT.
255 The jurisdictions vary according to whether land tax is regarded as an outgoing. In Tasmania pursuant to cl 18 and the ACT s 70 land tax is recoverable as an outgoing. In NSW s 26 and WA s 12(1g) recovery is limited to a single holding basis. Qld s 7(3)(a), Vic s 30 and SA s 30 exclude land tax from outgoings.
256 Qld s 7(3)(b); NSW s 23; Vic s 41; SA s 13(2); NT s 43; Tas cl 18(2)(a); ACT s 76.
257 NSW s 24; Vic s 42; SA s 13(3); NT s 44; Tas cl 18(2)(b), (4); ACT s 77.
258 Qld s 7(3)(c); NSW (note specific provisions re sinking funds) ss 25, 25A, 25B; Vic s 43 (re sinking funds) s 35; WA s 12(2).
259 Qld s 7(3)(e); Tas cl 18(2)(e).
260 Qld s 7(3)(f).
261 NT s 38(2); Tas cl 18(2)(c).
262 Qld s 27(3)(f); NSW s 24A; Vic s 44; NT s 45.
263 NSW s 24B; Vic s 45; NT s 34(1), (2).
264 Queensland s 48. The lessee does not have to pay for preparation costs but can be required to pay charges such as stamp duty and registration: NSW s 45(1), 45(4) and Victoria s 51 does not permit recovery but cf Vic on assignment. In the ACT s 23 and Tasmania cl 8 each party is responsible for their own costs. South Australia states that half the costs may be recovered by the landlord plus stamp duty, registration etc. WA allows recovery of reasonable expenses (s 9(2)(c)) as does the NT (s 23) so long as this was revealed in the disclosure statement.
management fees. For example, the NSW legislation now requires that landlords provide a breakdown of contributions regarding the administration of the centre, other fees paid to a management corporation and enhanced information regarded with cleaning costs.

Regarding the auditing of outgoings and promotion funds, subject to some variation, in 2006 the legislation generally requires the landlord to provide the tenant with an estimate of outgoings, an outgoings statement and an audited annual statement. The legislation goes into a significant amount of detail in relation to the contents of the outgoings statement and auditors report. The legislation generally has adopted enhanced documentation regarding the calculation of outgoings and promotions and there are considerable obligations on lessors in relation to audited statements. Further, in New South Wales, tenants can make a written submission to the auditor as to the accuracy of a landlord’s proposed outgoings statement.

In several jurisdictions, limitations are also placed on the use of monies contributed to sinking funds.

Assessment

Legislation in several jurisdictions has addressed concerns raised in the Reid Report regarding outgoings and promotions. Indeed, some jurisdictions have gone further. For example, the contentious issue of fit-outs, which was mentioned in the Reid Report but was not the subject of a recommendation, has been addressed in New South Wales where there is a limitation on the amounts a landlord can insist a tenant expend on a fit out. However, despite greater safeguards regarding outgoing and promotion funds arguably this will remain a contentious issue and perhaps a better course would be to move away from the present regime towards utilising grossed up rentals.

Lease documentation — Terms and disclosure

The Reid Committee examined two difficulties regarding lease documentation. The first was that obtaining legal advice on individual leases...
was a time consuming and costly exercise. The second was the nature and quantity of information which had to be disclosed by the lessor prior to the lessee entering into the lease.

Some tenants who gave evidence or made submissions before the Reid Committee alleged they had not been well informed by their legal advisors. The legal fraternity responded stating that lengthy, individualised documents take a considerable time to advise on. The possibility of introducing a standard ‘plain’ English lease was mooted. Recommendation 2.9 stated:

The committee recommends that the Uniform Retail Tenancy Code provide:

(a) for a standard form ‘plain English’ retail lease, also published in community languages . . .

(b) for mandatory pre-contract disclosure of all factors likely to affect the viability of lessees — including all items currently required to be included in a statutory disclosure statement under the NSW Retail Leases Act 1994.

(a) A standard lease

In Towards a Uniform Retail Tenancy Code for Australia — Punching at Shadows,274 Professor Duncan outlined the potential difficulties in introducing a ‘standard’ lease applicable to all retail tenancies.275 Clearly, reaching agreement on the form and content of a standard lease would be an enormous task given the difficulties which would, no doubt, be encountered in drafting a document acceptable to all parties which could be utilised in all jurisdictions.

To date, there are no standard leases prescribed by legislation in the States and Territories. In New South Wales, a standard lease has been developed in consultation with the retail and property groups. It is not compulsory to use this form of lease. The Victorian legislation provides that standard retail leases may be approved by the Small Business Commissioner.276

An alternative is the use of standard format clauses. In the Australian Capital Territory, such clauses will apply unless the lease provides otherwise.277 In the 2003 WA review, Recommendation 8 called for the Minister to prescribe by regulation, from time to time, standard format clauses that address special areas of concern. A variety of standard format clauses were proposed278 with a priority being a redevelopment and relocation clause. The committee recommended that such clauses were a guide only and not compulsory.

274 Duncan, above n 197, at 257.
275 Ibid, at 257. Professor Duncan has noted that, given the differences in legislation between jurisdictions and between the leasing corporations, ‘standard’ leases it would be ‘impossible to settle the constitution of the standard lease unless the instrument was so watered down so as to be of little effect’ and ‘even if this could occur, given the different location, nature and configuration of each shopping centre, there would have to be a provision for additional clauses to suit any particular establishment and this would to a large extent abrogate the effect of the recommendation’.

276 Section 84(d).
277 Section 20(3).
Of course, major lessors develop standard form leases for their centres which retain a considerable degree of consistency but which reflect variations in legislation from jurisdiction to jurisdiction. However, such leases have been the subject of criticism due to the alleged ‘one-sidedness’ of the documents and the ‘take it or leave it’ attitude of some landlords. This issue was discussed in the 2004 Senate Economics Committee Report, however no intervention was recommended. The committee concluded that where the terms are well known and agreed by both parties, standard form contracts were beneficial and saved time and money when such transactions were conducted regularly. Proscription of standard form contracts would remove these time and cost saving benefits.

**Assessment**

A standard lease utilised throughout Australia is unlikely to eventuate. The problems associated with such a project, given the differences in the legislation throughout the States and Territories, would conspire to diminish the effectiveness of such a lease. Also, without compulsion, it is unlikely that landlords would dilute rights contained in their individualised leases. Finally, as recently discussed in the Senate Economics Committee Report, there could be some disadvantage to such interference.

Standard clauses which provide a guide to best practice in the industry, especially with regard to contentious areas such as relocation may be a compromise position.

**Mandatory pre-contractual disclosure**

The Reid Report also discussed disclosure statements at length. The committee was of the view that provisions in State and Territory legislation should require full disclosure of all matters relevant to the tenant’s decision to enter into the lease. Particular difficulties were identified regarding disclosure of accurate information regarding tenancy mix and redevelopment as such matters are in the future and may not be in the comprehension of the landlord at the time a particular lease is signed. However, it was acknowledged that it is extremely important for tenants to know whether, during the term of a lease, they may have to face additional competition within the centre, or may be moved to another location to cater for a redevelopment.

Disclosure statements have been adopted in all States and Territories and defined in the legislation. The relevant procedure for the delivery of the disclosure statement is also stipulated in the Acts. In several jurisdictions, the disclosure statement must be accompanied by a copy of a draft lease and

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280 Note the potential operation of s 51A of the TPA in this respect.
281 Qld s 22; NSW s 11 Pt 1 Sch 2; Vic ss 12, 17; Qld ss 3, 22; ACT ss 30, 31, 157A; Tas cl 6 App B; SA s 12; WA s 6(4); NT ss 19, 20.
282 For example, Queensland s 22.
Disclosure statements have become more comprehensive over time with more factors being added, it seems, with each amending Act. For example, the recent amendments in New South Wales now require disclosure of any current legal proceedings involving the lawful use of the premises or the shopping centre, the expiry date of the leases of major lessees, the intended future mix of outlets, assurances regarding current tenancy mix and enhanced detail regarding administration and cleaning costs. The amendments also provide that, to the extent to which it is collected, the disclosure statement must provide information as to the annual sales of the centre, traffic count for the centre and annual turnover for specialty shops in the centre. The availability of the five year minimum term has been made more conspicuous on the disclosure statement.

Assessment

Most disclosure statements require a considerable amount of information regarding matters which may have the potential to impact upon a tenant’s business. While the disclosure statement in New South Wales remains the most comprehensive, disclosure statements in most other jurisdictions provide generally for the issues listed in the NSW disclosure statement at the time of the Reid Report. However, there remain areas of concern which were raised in the Reid Report which have not yet been addressed in all jurisdictions. While there is significant overlap, jurisdictions still vary as to the nature and quantity of information required to provide adequate disclosure. Disclosure in some areas, particularly tenancy mix and relocation remain problematic.

Change in tenancy mix

Where the same or similar businesses commence trading in a centre, the profitability of existing businesses is likely to be affected. The Reid Committee received submissions and heard evidence that incumbent tenants were neither consulted nor compensated for significant changes to tenancy mix, even when such changes would impact adversely upon their business. On the other hand, property managers asserted that they should have sufficient licence to change tenancy mix in response to changing trends in the retail industry.

Some disclosure statements included information regarding tenancy mix, however, were generally regarded by the committee as lacking in safeguards for the tenant. A major concern was that information provided in disclosure statements could be valid as at the date of the lease however the tenancy mix...
could subsequently change during term of the lease. Recommendation 2.10 provided:

The committee recommends that the Uniform Retail Tenancy Code provide:

(a) for the merchants’ association in a shopping centre to be consulted in relation to changes in tenancy mix; and

(b) for lessors to include in disclosure statements provided prior to the signing of a retail lease the tenancy mix of the shopping centre and whether or not there are any provisions for rent reduction to apply if the turnover of the lessee falls owing to the introduction of a new competitor, or new competitors.

Aside from a consultation process between management and merchant associations in Victoria, the legislation in Queensland and New South Wales provides the most comprehensive procedures. The legislation in Queensland287 and New South Wales288 provides the most comprehensive procedures regarding the disclosure of changes in tenancy mix. The respective disclosure statements require the lessor to show the current tenant mix on a floor plan attached to the disclosure statement. The lessor must disclose whether they can assure the lessee289 that the current tenant mix as shown on the attached floor plan will not be altered through the introduction of a competitor or any other type of tenant. If the lessor cannot provide such an assurance, they must provide details of the proposed changes on the disclosure statement. In New South Wales, the lessor must also reveal details relating to agreements or representations between lessor and lessee, or representations made by lessor or lessee including those relating to exclusivity or limitations on competing uses.

In South Australia,290 the disclosure statement must state the details of the current tenant mix, any proposed changes to the tenant mix and whether the lessor would be prepared to give the lessee an assurance that the current tenant mix will not be altered to the lessee’s disadvantage by the introduction of a competitor.291 The Victorian legislation requires the lessor, again in the disclosure statement, to state whether the tenancy mix of the centre is likely to change over the term of the lease and, if so, to provide details of presently known, or likely, changes. Similarly, in the Northern Territory,292 the disclosure statement must provide information as to tenancy mix (by category) of the centre and the lessor must indicate whether the tenancy mix is or is not likely to change over the term of the lease. Interestingly, there is no instruction to provide details.

286 However, it seems this would not result in a derogation of the grant: W D Duncan, ‘Non-Derogation from the Grant and Tenant Mix’ (1998) 6 APLJ 197; Duncan, above n 197, at 259.

287 Section 22(1).

288 Reference should be made to s 11 Sch 2 and the disclosure statement.

289 Or assignee.

290 See, generally, s 12(2) and particularly s 12(3).

291 Section 12(3)(g), (h).

292 NT ss 19(2), 21(2) regs 4 & 5 Form 1.
Other jurisdictions do not provide the same assurances. In Tasmania\textsuperscript{293} the disclosure statement must divulge the tenancy mix in the centre,\textsuperscript{294} however this appears to refer to the date of the statement and does not provide any insights into future plans or assurances regarding changes to tenancy mix. Similar comments apply in Western Australia, although the 2003 review recommended the inclusion of more detail in the disclosure statement regarding exclusivity and competition.\textsuperscript{295} In the Australian Capital Territory, the disclosure statement refers to tenancy mix and requires floor plans to be attached.\textsuperscript{296} In a footnote, it is stated that the details are current to the knowledge of the owner as at the date of the disclosure statement but may change. There is also a tenant acknowledgement that subject to the lease or agreement for lease, the tenant acknowledges that the owner may grant leases and licences to other persons which may operate a business in competition with the tenant.

Assessment

The disclosure obligations regarding tenancy mix are very comprehensive in most jurisdictions. Elsewhere however, assurances with regard to tenancy mix are limited to the date of the lease, a situation regarded by the Reid Committee as unsatisfactory. To date, none of the legislation provides for a reduction in rental in the case of increased competition within the centre.

Some problems continue, for example, the introduction of not identical but competing businesses, existing lessees operating outside their use clauses and the trend towards erecting kiosks and booths within the walkways of centres thus taking up floor space and affecting traffic flow.\textsuperscript{297}

Redevelopment and relocation

Lessors have considerable discretion regarding redevelopment and relocation. Clearly, there is a need to refurbish, renovate or extend a centre from time to time. The ensuing long term benefit to the centre may mean that, in the interim, a tenant may suffer some short term inconvenience through relocation, temporary or otherwise, or suffer some disruption to trade during this process. However, tenants contended before the Reid Committee that there was little consultation by landlords regarding redevelopment and relocation. Tenants who were inconvenienced or who suffered losses as a result of relocation to inferior premises or the disruption of customer flow

\textsuperscript{293} Pursuant to cl 6.
\textsuperscript{294} Appendix B(2)(o).
\textsuperscript{296} Interviews conducted with retail tenants in Sydney and Perth, April 2006.
\textsuperscript{297} States that floor plans are attached showing, in the case of a new shopping centre, the proposed tenancy mix for the centre, including the location of common areas and kiosks within the centre, and in the case of an existing shopping centre the existing and any proposed tenancy mix and the location of common areas and kiosks within the precinct.
were rarely, if ever, compensated. Tenants also asserted that during redevelopment specialty tenants received less favourable treatment than anchor tenants.\textsuperscript{298}

The committee agreed that it is within the landlord’s discretion to extend or refurbish a shopping centre and relocate tenants.\textsuperscript{299} However, the committee was in no doubt that the necessity to relocate may interfere with trading blocs in existence in the centre, confuse customers and impact upon the business. Even where the tenant was not required to move, it was noted that compensation provisions in the legislation provided little guidance as to calculation and that compensation was a matter of negotiation.\textsuperscript{300} The committee was of the view that tenancy law should be unambiguous about the eligibility of tenants to be compensated for disturbance to trading. There was also criticism of tactics such as the non-renewal of leases if a redevelopment was planned. Therefore, in some cases tenants would be placed on short term leases to avoid relocation cost.\textsuperscript{301}

The committee recommended that a pre-determined formula was required to assess compensation. Tenants were to be compensated for disturbance caused by redevelopment and the costs of compulsory relocation. In the case of relocation the tenant should be granted a lease of premises comparable to those formerly occupied and on like terms and conditions. Recommendation 2.11 stated:

The Committee recommends that the Uniform Retail Tenancy Code provide for retail tenants to be compensated according to pre-determined formulae, specified in the lease or disclosure statement for:

(a) disturbance to trading caused by redevelopments carried out at the direction of the lessor; and

(b) any costs incurred as a result of a compulsory relocation, including packup costs, any new fitout requirements, and compensation for disruption to trading.

The Committee further recommends that the Uniform Retail Tenancy Code require a relocated tenant to be granted a lease over new premises comparable to those vacated on like terms and conditions to the surrendered lease.

In 2006, all jurisdictions refer to redevelopment and relocation in their legislation and in disclosure statements. Lessors are required to inform tenants of any plans for redevelopment and relocation. Most jurisdictions deal with redevelopment and relocation in separate provisions.

Redevelopment

In Queensland, the disclosure statement requires the lessor to reveal if the relevant local authority has approved plans for future alterations or additions to the centre, and, if so, whether it is presently intended that these works will be commenced during the term of the lease. Also, the disclosure statement queries whether there a relocation clause in the lease and, if this is the case,
the clauses of the lease referring to relocation must be specified. Section 43(1) refers to the circumstances where a lessor is required to pay reasonable compensation to a tenant. These provisions cannot be excluded and refer, inter alia, to actions by the lessor regarding relocation,302 restriction of access into or past the retail shop303 or causes significant disruption to the tenant’s business.304

The requirements are similar elsewhere. In New South Wales the lessor must provide details in the disclosure statement regarding changes or developments planned by the lessor.305 There should also be a notice of proposed alterations and refurbishment which is likely to affect the business of the lessee. Similar provisions exist in Tasmania, South Australia, Australian Capital Territory, Western Australia and the Northern Territory. In Victoria, the merchants’ association is also consulted. Compensation is payable for significant disruption to trading.306 Such compensation may be limited in some cases where the proposed works are drawn to lessees attention.307

Relocation

In New South Wales, s 34A implies certain provisions into a lease containing a relocation clause. In the absence of such a clause the tenant cannot be relocated.308 A tenant cannot be relocated unless the lessor can provide details of a genuine proposed refurbishment or extension and the lessor has given the tenant at least three months’ notice in writing of the relocation. The notice must provide details of an alternative shop which is to be made available to the tenant. The tenant must also be provided with an offer of a new lease of the alternative shop on the same terms and conditions for the remainder of the term. However, the rental for the remainder of the term may be adjusted to take into account the differences in commercial values of the existing shop and the alternative shop at the time of relocation. The tenant may accept or reject this offer. If they reject the offer the tenant can terminate the lease. However, if they accept309 the lessor must pay the tenants reasonable costs of relocation.310 Similar, although not identical, provisions apply in

302 Section 43(1)(a) relocates the lessee’s business to other premises during the term of the lease or of any renewal of it.
303 Section 43(1)(b)–(c).
304 Section 43(1)(d). The provision also states that compensation will be payable where the lessor has not rectified as soon as possible the situation where the lessee has had to vacate the leased shop before the end of the lease or renewal of it because of the extension, refurbishment or demolition of the retail shopping centre or leased building containing the shop.
305 Section 11 Sch 2 Pt 1.
306 NSW s 34(1); Vic s 54; Qld s 43(1); ACT ss 79–83; SA s 38(1); WA s 14; Tas s 23; NT s 47.
307 For example, pursuant to s 34(3), in NSW the legislation provides that the landlord may be protected from liability to pay compensation in the event of a disturbance to a tenant where a statement has been provided to the tenant, prior to entering into the lease, that provides details of a proposed disturbance. A general statement without specific details is insufficient and the notice must provide a specific description of the nature of the disturbance, its likelihood and the timing, duration and effect of the disturbance so far as can be predicted. See too SA s 37(3).
308 NSW s 34A; Vic s 30; SA s 57; Tas s 35(2).
309 Or if there is no response it will be taken to have been accepted.
310 Including fixtures and fittings.
Queensland, Victoria, South Australia, Australian Capital Territory, Tasmania and the Northern Territory. Western Australian legislation does not presently address this issue. However, the 2003 review saw a significant number of submissions deal with the redevelopment and relocation issues and recommendations were made by the committee to adopt provisions similar to those in other Australian jurisdictions.

Recent amendments in New South Wales also provide that the tenant will be entitled to be paid reasonable fit-out costs and legal costs associated with the relocation. In the event of the parties failing to agree on what is reasonable in the circumstances the decision will be made by a quantity surveyor appointed by the parties.

Assessment

Since the Reid Report, legislation in most jurisdictions has specifically addressed tenant concerns regarding redevelopment and relocation. The legislation generally requires more comprehensive disclosure obligations in this regard and places the onus on the landlord to ease the burden of redevelopment and relocation on affected tenants, for example, the necessity for the lessor to have a genuine project in mind before a tenant can be moved, the offer of a new lease and the payment of compensation. However, arguably, some tenants are still being kept on short leases after expiry to ensure that compensation in the case of redevelopment need not be paid. Issues involving alternative accommodation and ‘reasonable’ compensation remain contentious. In some circumstances, recourse to the unconscionability provisions may be appropriate.

Conclusions re State and Territory impact

The States and Territories have addressed many of the issues raised in the Reid Report. While the measures adopted may not, in some cases, have been to the extent the Reid Committee desired, they have certainly enhanced the obligations of landlords regarding disclosure of information, conduct of matters such as rent reviews, assignment and relocation. However, there would still appear to be the possibility of objectionable conduct where the

311 In Queensland, s 43(1) states that a lessor is liable to pay to the lessee reasonable compensation for loss or damage suffered by the lessee because the lessor, or a person acting under the lessor’s authority (a) relocates the lessee’s business to other premises during the term of the lease or any renewal of it. Pursuant to s 46C(1), a lessor must not relocate the lessee’s business to other premises during the term of the lease, or any renewal of it, without giving the lessee at least three months’ written notice of the relocation. The notice must state the premises to which the lessee’s business is to be relocated.

312 Section 55.
313 Section 57. Note that with the exception of rent, the new lease offered will be on the same terms and conditions as the existing lease.
314 Sections 136–138.
315 Clause 35.
316 Section 48.
317 Or failing an agreement on a choice of quantity surveyor appointed by Australian Institute of Quantity Surveyors.
318 Interviews conducted with retail tenants in Sydney and Perth, April 2006.
most appropriate course would be through the operation of the unconscionable conduct provisions. Therefore, the next section of this article will examine briefly the interpretation of s 51AC and its equivalents to date and make comments upon whether this interpretation addresses matters of concern before the Reid Committee.

**Has s 51AC been effective in addressing issues raised in the Reid Report?**

Section 51AC was inserted into the TPA on 1 July 1998. The provision extended the existing unconscionable conduct provisions of the Act to small business transactions.

Provisions dealing with unconscionable conduct in the TPA are not a new development. The possibility of inserting a section dealing with unconscionable conduct in commercial and consumer transactions was mooted initially in 1976.321 A provision dealing with unconscionable conduct in consumer transactions was introduced in 1986.322 Later, s 51AA, a provision prohibiting unconscionable conduct within the meaning of the unwritten law of the States and Territories, was inserted into the Act.323 It was envisaged that s 51AA would deal with unconscionable conduct in commercial transactions.324 However, complaints continued to be made to the ACCC and other Fair Trading authorities regarding allegations of unconscionable conduct in small business transactions, particularly in the areas of franchises and retail leasing.325

In 1997, the Reid Committee concluded that s 51AA was not addressing the concerns of small business. It was therefore recommended that s 51AA be repealed and replaced with a new provision that proscribed ‘unfair’ conduct in commercial transactions.326 To assist in interpretation, the provision was to contain a non-exhaustive list of factors the court could have regard to for the purpose of determining whether a corporation has engaged in unfair conduct.327 The committee made a conscious decision to utilise the term ‘unfair’ rather than ‘unconscionable’. The committee was of the view that retaining the term ‘unconscionable’ would not provide a sufficiently clear signal to the courts that a concept broader than the traditional equitable

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320 Commercial transactions involving the supply or possible supply (s 51AC(1)(a)) or the acquisition or possible acquisition (s 51AC(1)(b)) of goods or services to or from a person (other than a listed public company) the price of which does not exceed $3 million. Note that this amount will be increased to $10 million as a result of the 2004 Senate Economics Committee Recommendations.
322 Section 52A inserted by Act No 17 of 1986.
324 Section 52A was renumbered s 51AB. Consumer transactions, covered by s 51AB were expressly stated to not be in the ambit of s 51AA. See s 51AA(2). Since 1998, this section also refers to s 51AC.
325 Finding a Balance, above n 5, Ch 1.
326 See, generally, ibid, paras 6.7–6.22.
doctrine was intended.\footnote{Ibid, p 178.} Using ‘unconscionable’, a term with a well established legal meaning, could, in the view of the committee, result in the recognition of and association with the term being retained thus creating a ‘tension between that precedent and the legislative intention’.\footnote{Ibid, pp 178–9.} After considering several examples where a ‘fairness’ standard had been utilised, the committee formed the view that a ‘fairness’ standard regulating conduct in commercial transactions could be a workable option that would not undermine ‘the institution of contract’ by tipping the balance in favour of small business.\footnote{Ibid, p 167.}

In September 1997, the \textit{New Deal Fair Deal} statement concurred with most of the recommendations of the Reid Report. However, the Commonwealth Government decided to adopt an unconscionability standard rather than an unfairness standard when determining whether business conduct offended the TPA. This decision was made, ‘in order to build on the existing body of case law which has worked with respect to consumer protection provisions of the Act, and which will provide greater certainty to small businesses in assessing their legal rights and remedies’\footnote{The Hon Peter Reith, \textit{New Deal Fair Deal Statement}, 30 September 1997.}. In the government’s view, this would allow the courts to draw on the bank of precedent already formulated in the area on the meaning and scope of unconscionable conduct.

It was anticipated that s 51AC would have a significant impact on the law, particularly with regard to retail leasing matters. This anticipation was fostered too by the drawing down of the provisions into State and Territory retail tenancy legislation\footnote{The draw down was initially delayed by Constitutional difficulties. The Trade Practices Amendment (Operation of State and Territory Laws) Act 2001 (Cth) resolved this matter of concern. The amendments cleared the way for the State and Territory legislatures to pass amendments to their retail tenancy legislation which extends the jurisdiction of the retail tenancy tribunals to consider matters involving unconscionable conduct: Trade Practices Amendment (Operation of State and Territory Laws) Act 2001 (NSW), Retail Shop Leases Amendment Act 2000 (Qld), Retail Leases Act 2003 (Vic) and Leases (Commercial and Retail) 2001 (ACT).} which permitted matters involving allegations of unconscionable conduct to be heard in State and Territory courts and tribunals.

To date, fully contested court decisions dealing with s 51AC have been few. Tribunal decisions have offered some guidance but are, of course, limited with regard to their precedent value. Determinations have been made at the interlocutory stage in some matters that a triable issue regarding unconscionable conduct exists, however, this does not necessarily indicate whether the matter would succeed at trial.

However, the discussion thus far does provide some indication of the likely interpretation of the section and the standard of conduct required to establish unconscionable conduct in a retail leasing matter. As noted by Deputy President McNamara in \textit{Barbcraft Pty Ltd v Geobel Pty Ltd}:
It may be that the unconscionability referred to in the provisions with which I am dealing in some respects resembles an elephant, that is, it is impossible of simple and exhaustive definition. It is nevertheless easily recognisable when it presents itself. \(^{333}\)

In the writer’s view, the decisions have succeeded in demonstrating not what unconscionable conduct is for the purposes of s 51AC but what it is not. And, the present interpretation does not address, except in the direst examples, conduct regarded as requiring remedy in the Reid Report.

Two issues should be discussed: the potential impact of s 51AA on the interpretation of s 51AC and the seemingly restricted interpretation of s 51AC to date.

The interpretation of s 51AA may influence the court’s view of s 51AC. Section 51AA has, for the most part, been interpreted in adherence with the ‘narrow’ view of unconscionable conduct. Both provisions have a differing focus. However, in both sections the courts are utilising a term with a well-recognised legal meaning which is steeped in traditional notions of freedom of contract and arms length dealing. On such a view, meddling in commercial transactions will only be appropriate in the direst circumstances. Although s 51AB also forms part of Pt IVA, the focus on consumers is obvious and underlines the necessity to adopt a more flexible standard. Sections 51AA and 51AC both deal with commercial transactions, albeit with one provision having a financial limitation on its operation. However, given the commercial focus, is it unavoidable that s 51AA will impact upon the interpretation of s 51AC?

The effectiveness of s 51AA in small business transactions was criticised in the Reid Report. This foresight was borne out in relation to decisions involving retail leasing under s 51AA, particularly two WA cases,\(^ {334}\) one of which went to the High Court and the other to the Full Court of the Federal Court. These cases reveal an adherence towards a restrained interpretation of what will amount to unconscionable conduct in a commercial transaction. For example, in *ACCC v CG Berbatis Holdings Pty Ltd (Berbatis)*,\(^ {335}\) the tenants’ lease was due to expire and they wanted to secure a new lease in order to sell their business. The tenant was led to believe that the landlord would grant the new lease. At the last minute, the landlord inserted a clause requiring the tenant to discontinue a dispute involving the alleged overpayment of outgoings. Failure to agree to this term would mean the lease would not be renewed. It was alleged by the ACCC that this conduct, in circumstances where the tenants were particularly vulnerable due to their need to secure a new lease, was unconscionable pursuant to s 51AA. While successful at first instance,\(^ {336}\) the Full Federal Court and ultimately a majority of the High Court concluded the conduct was not unconscionable. The decision in *Berbatis* has been analysed by numerous commentators\(^ {337}\) and the exercise need not be repeated here. However, it is pertinent to this article to note the views of the

\(^{333}\) [2003] VCAT 1700 (unreported, 3 November 2003).

\(^{334}\) *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; 197 ALR 153; *ACCC v Samton Holdings Pty Ltd* (2002) 189 ALR 76.

\(^{335}\) (2000) A TPR 41-778 per French J.

\(^{336}\) (2003) A TPR 41-778 per French J.

High Court regarding s 51AA and the circumstances of a sitting tenant, an area regarded as of crucial importance in the Reid Report. It is suggested that it is likely these views could be readily applicable to a matter involving a sitting tenant and s 51AC.\textsuperscript{338}

If unconscionable conduct in s 51AC is interpreted consistently, or restricted in its interpretation because of a desire for consistency with unconscionable conduct in s 51AA, it seems possible that in the same way as s 51AA has been restrained in its operation, s 51AC too may be so limited.

### The interpretation to date

The second reading speech of the Bill which introduced s 51AC stated that the provision was intended to be broader than the equitable doctrine of unconscionability and s 51AA.\textsuperscript{339} In circumstances where s 51AC has been interpreted, it appears that the courts accept that s 51AC is broader than at common law.\textsuperscript{340} However, even if there is an acceptance of a broader view, to what degree will the courts be prepared to expand the traditional restraints of unconscionable conduct in commercial transactions?

Since its inception, there has been little litigation under s 51AC. This is despite a Ministerial Direction instructing the ACCC to initiate proceedings for the purpose of establishing legal precedent under s 51AC on matters of

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\textsuperscript{338} For example, the statement by Gleeson CJ at [14]–[15] that:

Unconscientious exploitation of another’s inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence. It is neither the purpose nor the effect of s 51AA to treat people generally, when they deal with others in a stronger position, as though they were all expectant heirs in the nineteenth century, dealing with a usurer. In the present case, there was neither a special disadvantage on the part of the lessees, nor unconscientious conduct on the part of the lessors. All the people involved in the transaction were business people, concerned to advance or protect their own financial interests. The critical disadvantage from which the lessees suffered was that they had no legal entitlement to a renewal or extension of their lease; and they depended upon the lessors’ willingness to grant such an extension or renewal for their capacity to sell the goodwill of their business for a substantial price. They were thus compelled to approach the lessors, seeking their agreement to such an extension or renewal, against a background of current claims and litigation in which they were involved. They were at a distinct disadvantage, but there was nothing ‘special’ about it. They had two forms of financial interest at stake: their claims, and the sale of their business. The second was large; as things turned out, the first was shown to be relatively small. They had the benefit of legal advice. They made a rational decision, and took the course of preferring the second interest. They suffered from no lack of ability to judge or protect their financial interests. What they lacked was the commercial ability to pursue them both at the same time.

See too the, arguably, unsympathetic comments of Callinan J at [120]–[191] regarding the predicament of sitting tenants.

\textsuperscript{339} Trade Practices Amendment (Fair Trading) Bill 1997 (Cth), Hansard, 30 September 1997, p 8800.

specific relevance to small business. To date, ACCC v Simply No-Knead (Franchising) Pty Ltd and Automasters Australia Pty Ltd v Bruness Pty Ltd (Automasters) and Coggin v Telstar Finance Co (Q) Pty Ltd (Coggin) are the only three court decisions where s 51AC actions have been successful. None of the cases involved retail leasing although it appears that had the matter progressed, the conduct in ACCC v Leelee Pty Ltd, a case involving inter alia a landlord’s refusal to consent to the assignment of a lease, would have been regarded as unconscionable.

Similarly, in the tribunals, there have been few decisions where the landlord has been found to have engaged in unconscionable conduct in contravention of the relevant provision. Some cases have discussed the provisions at interlocutory level. However, in these matters, although it was determined that there was a triable issue with regard to unconscionable conduct, no final determination was made. A considerable number of other cases have argued that the conduct under consideration was unconscionable but have not been successful.

Cases which have discussed s 51AC and its equivalents indicate the difficulty in satisfying the unconscionability standard. The results of cases thus far suggest s 51AC will offer protection only against malevolent and overt varieties of conduct. Conduct falling short, even that not far short, of these scenarios, would seem to fall outside the scope of the section.

No doubt, some commentators will be of the view that this is a desirable development. The adoption of a constrained view of s 51AC could be seen as a sensible and balanced interpretation which prohibits the direst examples of commercial misconduct without creating uncertainty and anarchy in small business dealings. However, s 51AC was intended to provide an avenue for relief to parties who suffer loss through dubious behaviour in a small business relationship. If the term unconscionable in s 51AC is constrained, the

341 Ministerial Direction, Minister for Customs and Consumer Affairs, Canberra, 28 August 1998. Preference was to be given to initiating proceedings as representative proceedings on behalf of small business.

342 (2000) 104 FCR 253; 178 ALR 304.


345 The Simply No Knead and Automasters cases involved franchises. Coggin involved the conduct of a finance company which took security over the plaintiff’s boat to finance the purchase, by a third party, of a franchise.


348 Softplay Pty Ltd v Perpetual Trustees (WA) Pty Ltd [2002] NSWSC 1059 (unreported, 7 November 2002, BC200206660); Foodco Management Pty Ltd v Go My Travel Pty Ltd [2002] 2 Qd R 249; Castle Mall Fine Foods Pty Ltd v QIC [2003] NSWADT 207.


350 For example, note the many cases listed in S A Christensen and W D Duncan, ‘Unconscionability in Commercial leasing — Distinguishing a Hard Bargain from Unfair Tactics?’ (2005) 13 CCLJ 158 where conduct, although harsh and arguably unfair, was found not to be unconscionable.
recommendations of the Reid Report may be rendered largely ineffective.

Given that eight years after the introduction of a highly anticipated provision there is still considerable doubt as to the scope of the section, an obvious question may be why is there an absence of precedent? At this stage it is unclear whether this, arguably unexpected, development has been the result of effective dispute resolution and settlement of actions, or that the problems thought to be existing in the industry were not as prominent as originally thought. Another possibility is that a heightened awareness of the provisions of the Act and a raised consciousness amongst lessors and lessees for the need to comply with the Act has resulted in an improvement of practices within the industry so problems of the past are not arising to the same extent. However, the content of a number of submissions to the Dawson Committee and the Senate Economics References Committee suggest that, in some cases, the kinds of unfair practices regarded by the Reid Report as warranting legislative intervention still occur.

Another possible explanation as to the apparent lack of activity is the reluctance of lessees to commence actions against landlords for unconscionable conduct because of the high costs associated with litigation. There are also, understandably, fears amongst lessees that the commencement of an action against a lessor will jeopardise their chances of obtaining renewal of their lease. Therefore, it is often where a situation involving a landlord and tenant has gone beyond any prospect of compromise that legal action will be contemplated. Issues regarding the costliness of litigation were alleviated, to a limited extent, through additional funding from the Federal Government to the ACCC to commence actions in this area. However, resources will only extend to a limited number of matters per year and therefore one wonders as to how effective this measure will prove to be.

However, in the writer’s view, a pivotal explanation of the provision’s arguable ineffectiveness is that, given the present, and it is likely continuing, restrained interpretation of unconscionable conduct under the general law and under the statutory provisions, s 51AC imposes a threshold test that is too arduous for a person in a commercial relationship, no matter how lopsided, to fulfill. The result is that many types of unfair practices, identified as problematic by the Reid Report, remain outside the scope of s 51AC.

In 2004, the Senate Economics References Committee again examined

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353 Finding a Balance, above n 5, p 158.
354 For example, the Fair Trading Coalition and ARA. Although the submissions were made, the Dawson Committee was of the view that the contentions regarding s 51AA were outside the committee’s terms of reference.
355 The Effectiveness of the Trade Practices Act 1974, above n 39, p 34.
356 Hansard, (HR), 30 September 1997, p 8800.
357 Interviews — Sydney and Perth, Interview — ARA.
358 Gardini, above n 29, at 274.
whether the TPA should contain provisions prohibiting unfair conduct. The committee was cognisant of the fact that, although the Act utilises the term unconscionable, in reality the conduct which the Act seeks to address seems akin to unfairness. Nevertheless, the committee did not recommend the adoption of an unfairness standard, describing the proposition as ‘unworkably ambiguous’. The prospect of a provision prohibiting unfair conduct is fraught with negativity. Two main arguments emerge against such a proposal. Firstly, it is contended that the meaning of the term ‘unfair’ is too contentious and that a provision prohibiting unfair conduct will result in the courts making ‘value laden judgments’ which are likely to be applied inconsistently. The other argument against an unfairness provision is its perceived potential to interfere with traditional notions of freedom of contract such that parties will be uncertain whether commercial contracts are enforceable. The prospect of widespread uncertainty if a fairness standard was adopted were discussed in the Senate Economics References Committee and firmly rejected. However, arguably Australian courts have considerable experience with interpreting, and giving meaning to, ‘general concepts’ such as reasonableness, unconscionability, good faith and, indeed, unfairness. Unfairness has been the subject of judicial consideration pursuant to s 106 of the Industrial Relations Act 1996 (NSW) and the term ‘unjust’ which is arguably synonymous to unfair has been discussed in the context of the Contracts Review Act 1980 (NSW). These statutes have become established within the law and have not given rise to a ‘floodgate’ of spurious claims.

Uniform retail tenancy law — an impossible dream?

The Reid Report also recommended the introduction of a URTC to be submitted to the Council of Australian Governments with a view to the adoption of uniform retail tenancy legislation throughout Australia. The URTC would elaborate on conduct which, as well as outlining appropriate practices within the industry, would inform the courts as to business conduct regarded as unfair and harmonise retail tenancy law in Australia. After the Reid Report the TPA has been amended to incorporate Pt IVB which authorises the creation of prescribed industry codes via regulation. This provided the opportunity for the URTC to be introduced pursuant to the

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359 The Effectiveness of the Trade Practices Act 1974, above n 39, p 35. Indeed, the committee noted that if the current s 51AC ‘seeks to proscribe “unfair” conduct, it remains reasonable to consider why it should not simply say so’.
360 Ibid.
361 Finding a Balance, above n 5, p 168.
363 The Effectiveness of the Trade Practices Act 1974, above n 39, p 35.
364 J Dietrich, ‘Giving Content to General Concepts’ (2005) MULR 6. Dietrich defines ‘general concepts’ as ‘those legal notions or ideas that are necessarily described in broad and abstract terms’. Note too the comments in n 1 of the article.
365 Reid Report Recommendation 2.1, para 2.25
366 Sections 51ACA, 51AD and 51AE.
TPA. Contraventions of an industry code are prohibited by s 51AD of the Act and can be pursued by the ACCC or by private action. Remedies are available under the Act where a contravention has been proved.

However, the development of a URTC was soon derailed as, despite endorsing the findings of the Reid Committee, the Commonwealth Government did not act on the URTC recommendation. In 1999, the Joint Select Committee on the Retailing Sector released its report, *Fair Market or Market Failure*. Although the committee’s focus was the retail grocery industry, there was discussion regarding retail tenants and the committee recommended that a mandatory UTC be introduced. The Federal Government refused to act on this recommendation stating that industry should ‘take ownership’ of self-regulatory schemes with minimal government involvement.

Although some form of national legislation is generally recognised as desirable, the reality of the situation is that such reform will be difficult. At one extreme, all the States and Territories could agree on one form of legislation. This would no doubt ignite considerable debate as to which jurisdiction’s legislation, or parts thereof, would be the appropriate template. Even if this were to occur, maintaining the initial consistency would be difficult because each jurisdiction would retain the right to amend their legislation. At the other extreme is the controversial possibility that the States and Territories could relinquish their power to legislate with regard to retail tenancy to the Commonwealth. Between these two extremes is the adoption of codes of conduct of varying potency.

Many arguments exist for and against each of these alternatives. Clearly, the most likely scenario is that the status quo is maintained, with the possibility of greater harmonisation, such as that achieved recently in Queensland, New South Wales and Victoria. The likelihood of the States and Territories surrendering their Constitutional powers to legislate in this area is slim. Codes of conduct have, arguably, procedural advantages over legislation, however the recent experience in the United Kingdom where the trial voluntary code of conduct was found so wanting that legislation was recognised as a more desirable course, does suggest that a leasing code, particularly of a self-regulatory or voluntary nature, may be ineffectual.

Therefore, in the 10 years after the Reid Report there has been unprecedented attention focused on retail leasing in Australia. Anecdotal

368 Section 51AE and see the discussion below.
370 Whether a harmonised system is achieved through a code or in another way, the path would be complex. A number of possible routes exist, being:
   • Amendment of the State Acts to harmonise retail tenancy laws
   • Adoption of codes of conduct in each State which complement the existing legislation
   • A voluntary, self regulatory code of conduct for the retail industry
   • A voluntary code pursuant to the Trade Practices Act
   • A mandatory code pursuant to the Trade Practices Act
   • Industry specific Commonwealth legislation
evidence suggests that there has been a behavioural shift with an increased awareness by industry players of the provisions of the State and Territory legislation and also the TPA. However, while the legislation addresses many of the issues of concern in the Reid Report, it can do little to regulate non-compliance where the affected party is reluctant to commence proceedings because of concerns regarding the future of their business and the relationship with the centre/management/lessor. In circumstances where it is alleged that the conduct has impacted adversely on a tenant and proceedings are commenced, it appears s 51AC and its equivalents, on the interpretations so far, will not effectively address the standard of business conduct regarded by the Reid Committee as actionable. While it is arguable that the section has potential to address such issues it is, and it seems will continue to be, restrained by a cautious interpretation and the traditionally difficult unconscionability standard. Amendment of the Act to substitute an unfairness standard could be considered as unconscionable and has a connotation which is not easily ignored by the courts.

Therefore, almost 10 years after the Reid Report, the States and Territories have stepped up to vastly enhance retail leasing legislation in Australia. Greater harmonisation between the jurisdictions will only enhance this process. However, achieving cohesion across all jurisdictions is a difficult task and, even if it was to be achieved, amendments may result in such conformity being short lived. The two recommendations fundamental to the committee’s proposals regarding retail leasing, an unfair business conduct provision and a harmonised retail leasing regime to oversee these and other matters pertinent to retail tenancy, have been largely ignored. The prospect of a further legislative change regarding the unconscionability standard to, for example, unfairness, would appear remote. Therefore it will be interesting to continue to watch the development of the case law involving s 51AC and its equivalents to gauge whether, after the last decade of government enquiries and reviews and legislative change, that the recommendations of the Reid Report will in fact be achieved.