



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

COMMERCIAL TENANCY (RETAIL SHOPS)
AGREEMENTS ACT 1985

POSITION PAPER
LEASE REGISTER

September 2010

LEASE REGISTER

1. BACKGROUND.....	3
1.1. The Commercial Tenancy Act	3
1.2. Access to lease information.....	3
2. CURRENT SITUATION.....	4
2.1. Lease registration in Western Australia.....	4
2.2. Other jurisdictions – registration on title	4
2.3. Victoria – lease register	4
3. CURRENT PROPOSED CHANGES TO THE COMMERCIAL TENANCY ACT ...	5
3.1. Background.....	5
3.2. Proposed amendments.....	5
3.3. Limits to proposed amendments	5
4. PUBLIC LEASE REGISTER.....	6
4.1. Background	6
4.2. Benefits	6
4.3. Disadvantages	6
4.4. Conclusion	7
5. PROPOSAL – SHOPPING CENTRE REGISTERS	8
5.1. Option.....	8
5.2. Proposal	8
5.3. Benefits	9
5.4. Disadvantages	9
5.5. Conclusion	9
6. FEEDBACK	10

1. BACKGROUND

1.1. The Commercial Tenancy Act

The *Commercial Tenancy (Retail Shops) Agreements Act 1985* (Commercial Tenancy Act) regulates commercial tenancy agreements in relation to particular types of premises, namely retail shops.

The Act provides that a retail shop includes:

- any premises in a retail shopping centre used for the carrying on of a business; and
- any premises used wholly or predominantly for the carrying on of a retail business or a specified business.

A retail shopping centre is defined as a cluster of premises, five of which are used wholly or predominantly for the carrying on of a retail business.

The Commercial Tenancy Act provides protections to tenants under a retail shop lease that provides for the occupation of a retail shop, unless the premises have a floor area in excess of 1 000 square metres or the tenant is a public company.

1.2. Access to lease information

In recent reviews of retail tenancy legislation in Western Australia and nationally, concerns have been raised about the lack of access to meaningful information about leases by participants in the market, particularly tenants¹. Evidence provided to those reviews indicates that some landlords, agents and tenants are not prepared to provide information on the terms of rentals of retail shops.

It has been suggested that this lack of access to rental information can hamper efficient decision making by tenants².

It has also been stated that valuers preparing valuation reports for tenants under the Commercial Tenancy Act are often frustrated by the lack of access to meaningful data and are unable to present to the State Administration Tribunal (SAT) valuation reports which will stand up to scrutiny³.

¹ Review of the Commercial Tenancy (Retail Shops) Agreement Act 2003 (Review Committee Report)
Productivity Commission 2008, *The Market for Retail Tenancy Leases in Australia*, Inquiry Report no 43, Canberra (Productivity Commission Report)

² Productivity Commission Report – page 174

³ Review Committee Report – page 96

2. CURRENT SITUATION

2.1. Lease registration in Western Australia

There is no current requirement in the Commercial Tenancy Act concerning the registration of retail shop leases.

Under the *Transfer of Land Act 1893* a lease with a term of more than 3 years may be registered on the certificate of title of the commercial property the subject of the lease. Registration in this sense is done to protect the interests of a lessee (particularly in relation to options to renew) against others claiming an interest in the title to the land, such as a mortgagee or subsequent purchaser.

A by-product of lease registration on the title is improved access to market information⁴. However, it would be fairly costly for a tenant or prospective tenant to undertake titles office searches of all leases in a shopping centre. In addition, it should be noted that only a limited number of leases are registered in Western Australia⁵, thus resulting in limited access to lease information.

2.2. Other jurisdictions – registration on title

All other States also allow for registration of a lease on the land title. It should be noted that some jurisdictions require that a lease must be for a minimum term (such as three years) before it can be registered⁶. Registration on the title is voluntary.

No jurisdiction, other than Victoria, requires the registration of lease details.

2.3. Victoria – lease register

The Victorian *Retail Leases Act 2003* provides that landlords must notify the Victorian Small Business Commissioner (the VSB Commissioner) of the following details in relation to a lease:

- address of the premises;
- name and address (including email address) of landlord and tenant;
- date on which the lease was signed by all parties or renewed;
- lease expiry date; and
- the date/period within which an option may be exercised⁷.

The VSB Commissioner must create and maintain a register of this information, but may only use the information for the purposes of performance by the Commissioner of his or her functions under the *Retail Leases Act 2003*⁸. Details of rent payable are not required to be provided to the VSB Commissioner.

⁴ Productivity Commission Report – page 178

⁵ Productivity Commission Report – page 180

⁶ NSW – 3 years; Vic – 3 years; Qld – 3 yrs; SA – 1 year; Tas – 3 years

⁷ Section 25 *Retail Lease Act 2003* (Vic) and Regulation 9 *Retail Leases Regulations 2003* (Vic)

⁸ Section 84 *Retail Lease Act 2003* (Vic)

3. CURRENT PROPOSED CHANGES TO THE COMMERCIAL TENANCY ACT

3.1. Background

In its 2003 Report on the Review of the Commercial Tenancy Act, the Review Committee recommended that a provision be included in the Act that, on request, a valuer appointed by either the landlord or the tenant to determine the market rent for a retail shop, be supplied with all relevant information about leases for retail shops situated in the same building or retail shopping centre to assist the valuer to determine the rent⁹.

3.2. Proposed amendments

To implement this recommendation, the Government intends to insert a new provision in the Commercial Tenancy Act to require a landlord to provide the following information to a licensed valuer, undertaking a market review of rental, about leases for comparable retail shops in the same building or retail shopping centre:

- current rental for each lease;
- rent free periods or any other form of incentive;
- recent or proposed variations of any lease;
- outgoings for each lease; and
- any other information prescribed in the regulations.

The amendments will provide that, if the landlord fails to provide the relevant information, the tenant may make an application to the SAT for an order that the landlord comply with the request for information.

A provision will also be included to ensure that any information provided remains confidential and can only be disclosed in certain limited circumstances.

3.3. Limits to proposed amendments

Whilst the proposed amendments to the Commercial Tenancy Act will ensure that valuers have improved access to lease information, it is important to note that this information will only be provided to valuers appointed by the landlord and/or tenant who are undertaking a market review of the rental for particular retail shop premises during the term of the lease.

Market participants have called for access to information more broadly, so that tenants (as well as valuers) can assess lease information prior to entry into a lease and at other times, not just on a market review of rental.

⁹ Review Committee Report - Recommendation 30 – page 96

4. PUBLIC LEASE REGISTER

4.1. Background

In order to further address concerns about access to lease information, the 2003 Review Committee also recommended that Government examine the option of establishing a public lease register that records and provides all relevant lease information¹⁰. The Review Committee did not identify what this lease information would be.

In addition, the Productivity Commission has made the following recommendation:

To increase the transparency of the market, State and Territory governments should, as soon as practicable, facilitate the lodgement by market participants of a standard one page lease summary at a publicly accessible site¹¹.

Key lease terms would be included in the summary, including rent, outgoings and other key statistics¹². The Productivity Commission is of the view that lodgement of the summary should be voluntary rather than mandatory.

4.2. Benefits

The 2003 Review Committee was of the view that a public lease register in Western Australia would:

- provide economical readily accessible lease information to landlords, tenants, valuers and others in the industry;
- enable improved access to market rents and other lease details which would contribute to a more open and informed market; and
- redress the information imbalance that currently exists, result in fewer disputes, and contribute towards more constructive relationships between landlords and tenants¹³.

4.3. Disadvantages

A number of concerns have been raised by stakeholders in relation to the proposal to establish a public lease register, including:

- concerns about confidentiality, if commercially sensitive information is available on a public register;
- the costs involved in creating and maintaining a public register;
- difficulties in keeping the register up to date, given the number of variations, renewals and assignments of leases occurring in the market;
- additional costs to the landlords in registering lease information (that could be passed to tenants);

¹⁰ Review Committee Report - Recommendation 31 – page 96

¹¹ Productivity Commission Report - Page xxx

¹² Productivity Commission Report – Page 181

¹³ Review Committee Report - Page 98

- difficulties in ensuring that information can be used appropriately – there may not be any value in comparing rents across different shopping centres, as a number of other variables (such as incentives, location, tenant mix, different turnover figures and varying operating hours) also need to be taken into account to ensure that the comparison is meaningful; and
- there may be some difficulties in ensuring compliance, particularly given that there are currently no penalty provisions in the Commercial Tenancy Act.

4.4. Conclusion

The creation of a public lease register is not supported by Government as the benefits appear to be outweighed by the disadvantages.

5. PROPOSAL – SHOPPING CENTRE REGISTERS

5.1. Option

Another option for improving access to lease information is to require landlords of shopping centres to maintain a register of relevant lease details, including rent, outgoings and other matters, for all retail shops in a retail shopping centre. The register could then be made available, on a restricted basis, to licensed valuers (appointed by relevant parties), tenants and prospective tenants.

5.2. Proposal

It is proposed that the Commercial Tenancy Act be amended to include a requirement that landlords in retail shopping centres (as defined in the Commercial Tenancy Act) should maintain a register of relevant lease details for all retail shops in the particular retail shopping centre. The particulars to be included in the registers will be prescribed by regulation.

The Commercial Tenancy Act defines a “retail shopping centre” as a cluster of premises, five or more of which are used wholly or predominantly for the sale of goods by retail or for a specified business (drycleaning, hairdressing, beauty therapy, shoe repair or video shop) and all of which have a common head lessor or comprise lots on a single strata plan. If there is more than one landlord for a shopping centre, the obligation to maintain a register will need to be undertaken jointly.

“Retail shop” is defined as including any premises in a retail shopping centre used wholly or predominantly for the carrying on of a business. Landlords will therefore be required to maintain a register of details for all premises in the shopping centre, even if the lease for the premises is not classes as a retail shop lease.

Relevant particulars will include matters such as:

- address of the premises;
- details of the parties to the lease;
- the lettable area of the premises;
- the rental value of the premises on a cost per square metre basis or details of the manner in which rent is to be determined;
- details of any incentive payments or rent free periods; and
- details of the basis upon which outgoings are to be determined.

Access to the registers will be limited to other tenants in the shopping centre, bona fide potential tenants and valuers appointed by those tenants or prospective tenants. It is likely that a confidentiality provision will also be included in the Act. The requirement to maintain a lease register will be enforced by the inclusion of a penalty provision in the Act.

5.3. Benefits

Benefits of a shopping centre lease register, maintained by the landlords, include:

- it would allow tenants, prospective tenants and their valuers to have access to relevant lease information, thus allowing more informed decisions;
- the confidentiality concerns raised in relation to a public register are alleviated to some degree by limiting access to relevant parties (tenants, prospective tenants and their valuers);
- being a cost effective mechanism for improving access to information, as landlords are already likely to hold the relevant information. Collating that information in a register would not be unduly onerous; and
- the information contained in the register would relate to a particular shopping centre only and could therefore be viewed as being more relevant and meaningful.

5.4. Disadvantages

Some potential disadvantages in requiring landlords to maintain a lease register include:

- some market participants may still have concerns about the availability of commercially sensitive information, even if access to the information is restricted;
- the proposal imposes additional regulatory burdens and costs on landlords; and
- there may be some difficulties in ensuring compliance, particularly given that there are currently no penalty provisions in the Commercial Tenancy Act. It is proposed, however, to include a penalty for non-compliance with any lease register requirements.

5.5. Conclusion

The Government is of the view that the shopping centre register option will facilitate access to relevant lease information for relevant parties, but will alleviate confidentiality concerns by providing that the access to information is limited. The benefits of this option outweigh the costs or disadvantages.

This option will be more cost effective than a public lease register, as management in a shopping centre is already likely to retain or compile relevant lease information as part of their records. This means that the regulatory burden imposed on landlords will be lower than that under the public lease register option.

6. FEEDBACK

If you would like to provide feedback on implementation of the lease register proposal, and in particular:

- the lease details that should be included in the lease registers; and
- the parties who should have access to the lease registers,

please forward your comments to the Department of Commerce at the following address:

Amanda Blackwell
Legal Policy Officer
Department of Commerce
Locked Bag 14
Cloisters Square PO
Perth WA 6850
or

Amanda.Blackwell@commerce.wa.gov.au

The deadline for feedback is close of business on Wednesday, 6 Oct 2010

Disclaimer:

This paper should not be used as a substitute for the *Commercial Tenancy (Retail Shops) Agreements Act 1985* or professional legal advice.

Government of Western Australia 2009

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