



Commercial Tenancy Review
Department of Mines, Industry Regulation and Safety (Consumer Protection Division)
Locked Bag 100
East Perth WA 6892
By email: consultations@commerce.wa.gov.au

Dear Sir/Madam,

RE: Submission regarding 'Statutory Review: Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA): Consultation Paper, June 2022'

Thank you for the opportunity to provide feedback with respect to the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)*. The Council of Small Business Organisations Australia (COSBOA) welcomes your review of the legislation and appreciates your office ensuring a fair and transparent review process for commercial landlords, tenants, and stakeholders in the retail industry. We acknowledge all parties have important contributions to make with respect to this discussion.

We also acknowledge the inherent power imbalance that exists between large commercial landlords and their tenants, many of whom are small, family and privately owned businesses who are in a vulnerable position. Many are not covered and have no recourse when an issue arises, as their businesses often have a floor space over 1000sqm but are considered 'small' in every other sense.

The Council of Small Business Organisations Australia (COSBOA)

COSBOA is the national peak body representing the interests of small business. Collectively, COSBOA's members represent an estimated 1.3 million of the 2.5 million small and family businesses that operate in Australia.

As a collaboration of peak organisations across a wide range of industries, COSBOA acknowledges small and medium sized enterprises (SMEs) are major contributors to the Australian economy. SMEs employ 68% of Australia's workforce. In GDP terms, SMEs together contribute 56% of value added. Small and medium businesses are therefore key partners in rebuilding Australia's economy as Australia emerges from the COVID-19 pandemic.

Consultation with members

COSBOA's collaborative consultation on this issue has included discussions with representatives from Australian Hairdressing Council (AHC), Australian Lottery and Newsagents Association (ALNA), Australian Retailers Association (ARA), Certified Practising Accountants (CPA) Australia, Master Grocers Association (MGA), and Pharmacy Guild of Australia. We have also consulted with David Halvorsen of LeaseMap, who has extensive experience with respect to commercial leasing in Western Australia. Our responses are based on the perspectives of our members, our consultation process, and our extensive experience with small and medium sized enterprises across Australia.

Leases covered by the Commercial Tenancy Retail Shops Agreements Act 1985 (WA)

COSBOA supports the Act continuing to apply to business premises situated in a retail shopping centre, however we consider it would be worthwhile extending this provision to include businesses situated in a retail shopping centre with a lease for a premises up to 1500sqm (an increase from 1000sqm to 1500sqm). In talking with the Master Grocers Association, it became apparent that many of their members are not currently covered because

their premises is greater than 1000sqm, yet they are still a small business when considered by market strength. Similarly, many hairdressing and beauty businesses are not covered. They have little recourse when disputes with their landlords arise. Classifying small businesses as those operating in an area smaller than 1500sqm, regardless of turnover, would be helpful.

Further, COSBOA supports the Act applying to small businesses including retail businesses selling mostly services. Businesses operating in retail locations are increasingly evolving to secure more service-based revenue as retail trends have shifted. As noted by the Pharmacy Guild of Australia, the COVID-19 pandemic saw many pharmacies offering increased vaccination services within their business, as many consumers purchased personal care products on-line from major supermarkets. It is essential that small businesses who have adapted and increased their revenue from service provision continue to be protected.

It is noted that some jurisdictions (ACT, NT, SA and VIC) cover leases to small businesses selling services outside shopping centres. In Victoria, legislation covers leases to premises located both inside and outside shopping centres that sell legal or accounting services.

As noted by CPA Australia, small businesses providing accounting services have struggled during the COVID-19 pandemic and need to be protected. For professional services businesses such as accounting practices, higher wages are currently one of the business costs of most concern, and of biggest concern is the shortage of skilled accountants. CPA Australia is responding to these challenges through offshoring work, turning down new work, no longer servicing certain clients, especially those not paying on time, working longer hours, and investing in digitisation and technology that automates repetitive tasks.

It is essential to protect these small business owners who are trusted advisers and offering valuable professional services to other small businesses as they navigate severe financial hardship due to the challenges of the COVID-19 pandemic. Many small business owners currently have less cash flow, reduced ability to borrow and re-finance, and an ever-increasing debt burden due to deferred loans and payments. The consequence of businesses not seeking professional accounting and legal advice is that the range of options available to business owners to respond to their difficulties reduces significantly. This can lead to otherwise viable businesses needlessly struggling, and can result in decisions about the future of a business being made by creditors, not the business owner.

COSBOA supports small businesses located inside and outside shopping centres being afforded protections, and having more flexibility to sell a mix of goods and professional services.

With respect to costs incurred, COSBOA supports the use of standard lease terms and standard lease templates in order to simplify leasing processes, make leasing processes more time efficient, and reduce legal costs. The commercial leasing process should be made as cost-effective as possible for all parties, including small business tenants.

Minimum five year lease

COSBOA supports the right to a minimum five year lease. Retail tenancy legislation in all Australian jurisdictions except NSW and QLD provides for a minimum five year lease term.

This is a cornerstone protection provided by the Act. The purpose of this protection is to provide tenants with certainty and security of tenure after the initial six months of the lease. It is very important that tenants have time to establish a viable business in a particular location by developing regular customers and clientele, and recouping their establishment and fit-out costs over a period of time.

Tenants can lease for periods of less than five years if they wish to – they are not required to sign a five year lease. This is often miscommunicated to tenants by landlords. However, the right to a minimum five year term should be maintained to prevent landlords forcing tenants to agree to shorter lease periods and significantly increasing rent between lease periods.

It is very important that imbalances in bargaining power between landlords and tenants are addressed. Many small business owners experience difficulties communicating and negotiating with their landlords. In talking with the Australian Hairdressing Council, it became evident that in many cases, landlords hold all the power.

“Our rent is too high and as a new business we contemplated closing due to the exorbitant costs and lack of finishing to a new shopping plaza that was supposed to occur. The property looks nothing like what was approved by the local council or what was portrayed to us. Today nearly five years later there are still at least 40% vacant spaces. We are still there as we are unable to negotiate out of our lease ... our lease is due for renewal and none of the correct processes have been followed and we have not been given the required notice as per the legislation ... We are now so established in our community we need to find alternative space within a 5km – 10km radius of our current location. Unfortunately, due to COVID-19, a lot of building has slowed and we are faced with minimal options.” – AHC member.

Disclosure requirements

COSBOA supports requiring landlords to disclose and provide prospective tenants with all relevant leasing information before they enter into a lease. We again highlight the inherent power imbalance between landlords and tenants. Landlords often hold a wealth of knowledge and leasing information about their commercial properties, while tenants often do not have access to the same information during lease negotiations and during their tenancy. All parties should be fully informed and have equitable access to relevant information prior to making decisions.

Under the Act, landlords must provide a disclosure statement and a tenant guide. This requirement should be maintained. In addition, landlords should also provide a complete tenancy schedule including further information relating to the rents and incentives of other tenants, the estimated annual turnover of a shopping centre, customer traffic flow, and greater transparency about outgoings such as utilities costs including electricity and rates. This is particularly important with respect to embedded networks where shopping centre landlords purchase electricity from an electricity retailer. If a landlord is charging a tenant for electricity, charges should be transparent and audited. A small charge could be added for administration costs if required, which should be fully disclosed prior to the commencement of the lease. However, landlords should not be able to charge a markup for electricity. They should be required to source the best value supply for the outgoing expenses. Landlords should be required to act in good faith with full transparency at all times.

Without detailed information, it is very difficult for tenants to compare outgoings and make informed decisions about the costs associated with shopping centres. For example, an Australian Hairdressing Council member described confusion regarding outgoings:

“Second landlord is unfortunately not much better ... no audit of outgoings paid so as per advice we refrained from paying ... then audit provided with minimal and incorrect information included. Requested clarification, no response.” – AHC member.

The contact details for the landlord or landlord’s representative, agent, or asset manager should also be disclosed. This includes the name of the contact person, their phone number, email address, and postal address. Many tenants are unable to communicate directly with their landlord because large commercial landlords often intentionally choose to distance themselves from dealing with small business tenant matters. In order to encourage better communication, facilitate good faith negotiations, and ensure disputes can be addressed as quickly and easily as possible, all parties should be able to contact each other directly.

Landlords should be required to provide current disclosure documents to prospective assignees. Landlords have access to current information, and should provide an updated version of all disclosure documents to potential assignees.

Disclosure and access to rent information needs to be improved to ensure tenants have easy and affordable access to current market information. Small business owners need to be able to understand what a fair and reasonable rental amount is for the size and location of their tenancy. They need to be able to compare their prospective rent and outgoings with other locations prior to signing a lease, and also to retain the ability to make informed decisions during the term of their lease.

LeaseMap is a new initiative which has been developing cost-effective solutions to ensure concerns regarding disclosure and rent information are addressed. LeaseMap advocates for changes requiring landlords to make

detailed information available to prospective tenants and other professionals such as valuers and lease negotiators. LeaseMap also advocates for the role of the Small Business Development Corporation (SBDC) to be expanded to gather, analyse, and publish localized leasing benchmarking information for businesses of certain types in certain locations. COSBOA supports this idea and welcomes further involvement from the SBDC.

Land tax

COSBOA notes land tax is an ownership expense of the landlord, and payment of land tax by tenants can place significant and often unanticipated financial burdens on tenants. In Victoria, Queensland and South Australia tenants are not required to pay land tax. COSBOA supports amending the Act to prohibit landlords from passing on land tax to tenants as these costs are often very difficult for small business to absorb, particularly in the current financial climate where many small business owners are suffering from severe financial hardship.

Marketing funds

COSBOA believes that all marketing charges should be transparent and fully disclosed prior to the signing of a lease, as marketing funds can place a significant burden on tenants and become a 'cash cow' to the landlords or managing agents. Tenants should be able to choose how they spend their money marketing their business to their customers. Small business owners have in-depth knowledge of their business and the nuances of how their products and services meet customer needs. Successful marketing campaigns driven by passionate and skilled small business owners will generate a better return on investment. Ideally, marketing funds should be made non-compulsory, and tenants should not be forced to make payments into a general marketing fund for a retail centre. Any voluntary marketing contributions should be agreed to by all parties prior to implementation, and an auditor's report should confirm expenditure.

Security bonds, bank and personal guarantees

COSBOA understands it is difficult for tenants entering a lease to have significant funds available for security bonds and guarantees, particularly in the current financial climate where many small business owners have limited cash flow and reduced borrowing capacity.

COSBOA notes most jurisdictions regulate the payment, holding, and return of security bonds or bank guarantees. New South Wales, South Australia and Victoria include a timeframe for landlords to return security instruments to tenants. South Australia, Tasmania, and the Australian Capital Territory also limit the amount landlords can request as a security deposit.

All tenants should be made aware that a security bond or guarantee is required prior to entering a lease, and that the bond or guarantee is required to be in place for the duration of the lease. Tenants should be given a choice as to which form of security they would like to use, as bank guarantees may suit some small business owners better than large lump sums. The maximum amount a landlord can collect as a security bond or require as a bank guarantee should be 3 months gross rent plus GST. Landlords should be required to return the guarantee within 30 days of the expiry of the lease or the tenant vacating and completing their obligations.

The regulation of payment and release of security investments by the Act would provide certainty for landlords and tenants, and reduce the risk of protracted and costly disputes.

First right of refusal

COSBOA supports the Act providing a preferential right for existing tenants, whereby tenants should be given the option to extend their lease before the landlord offers to lease the premises to anyone else. A statutory right of renewal with an independent market rent review process and conditions no less favourable than any new lease to a prospective tenant is important to ensure small business owners have security of tenure.

Small businesses are the lifeblood of our communities. Small business people create local jobs, donate to community organisations like sporting clubs and schools, and bring culture and community to each local area. All this is lost when small businesses disappear. A preferential right for existing tenants would reduce the imbalance of power between landlords and small business tenants, particularly during lease renewal negotiations. It would ensure tenant vulnerability is minimised, and small business owners are actively encouraged to continue investing in their business and their local community.

Early termination due to severe financial hardship

COSBOA notes the severe financial difficulties caused by the COVID-19 pandemic, particularly the impact on small business owners. Many small business owners are still experiencing worker shortages, supply chain issues and an ever-increasing debt burden. They need time to recover.

It is also evident that landlords face significant challenges when tenants are unable to meet their financial obligations. Landlords need to be able to re-tenant their properties as quickly and as easily as possible to ensure the Western Australian economy continues to function.

COSBOA supports the Act including hardship provisions allowing for temporary adjustments and/or early termination for tenants, with a strong focus on encouraging cost-effective, timely, and good faith negotiations between all parties to ensure the termination process is not protracted and costly. Parties need to have an opportunity to fairly negotiate the payment of any break lease costs, make good costs and security guarantees. The Small Business Commissioner has an important role to play in facilitating timely dispute resolution.

Trading hours

COSBOA believes tenants should not be forced to trade certain hours. Many tenants are small and family-owned businesses who are experiencing worker shortages and are not currently able to trade the same number of hours they were prior to the COVID-19 pandemic. Small business owners should not be penalised with potential breaches of lease due to an inability to trade.

In talking with the Australian Retailers Association, it became evident they also prefer leaving the determination of trading hours to each retailer. ARA supports the complete deregulation of trading hours and would prefer the Act not to provide for leases to include requirements around trading hours.

Unconscionable conduct

Unconscionable conduct is a legal matter. COSBOA believes the case law on unconscionable conduct should continue to be relied upon, however there may be scope to include a fairness requirement which promotes a higher standard of behaviour, namely a duty for parties to act 'in good faith.'

The National Leasing Code of Conduct which resulted from the COVID-19 pandemic is a good example of how rights and obligations between tenants and landlords can be balanced. The requirement for parties to act in good faith, and for landlords to enter into mediation prior to evicting or locking out tenants was particularly helpful and should be continued.

Dispute resolution

COSBOA highly values the role of all state Small Business Commissioners. Small Business Commissioners were extremely important during the COVID-19 pandemic, and they continue to be of great assistance during the current recovery phase.

The COVID-19 pandemic brought a permanent and dynamic shift in consumer behaviour, particularly in CBD areas. Some small business owners now need assistance with restructuring and exit strategies, ensuring they can exit gracefully from their current business without impediments for the future. Other small businesses owners who have a viable business need assistance to deal with debt as they continue to rebuild with limited cash flow. It is important for small businesses to receive ongoing support through known and trusted pathways with their industry associations, peak bodies, and trusted advisors such as Small Business Commissioners.

Small Business Commissioners provide access to information, advice, dispute resolution case management and formal mediation sessions to discuss business disputes, leasing disputes, make good provisions, break lease provisions, and exit strategies allowing landlords to re-tenant their properties as soon as possible.

COSBOA supports the Small Business Commissioner's role under the Act to assist parties to resolve a matter and provide alternative dispute resolution services. This role should be maintained, and resourcing for the Small Business Commissioner should be increased.

While some matters do not require a certificate from the Small Business Commissioner and can proceed directly to the SAT for determination, COSBOA notes that attending the SAT can be extremely costly, time consuming and stressful. Many small business owners do not have the knowledge or skills to represent themselves, nor the capacity to pay expensive legal fees. They are often drawn into a process involving significant delays and the need to take time off work to prepare and attend on multiple occasions. They experience on-going psychological distress while their matter is yet to be determined. The Office of the Small Business Commissioner could assist by playing a greater role in adjudicating low-value commercial disputes under a certain dollar threshold.

All dispute resolution mechanisms within the Act should be as timely, cost-efficient, effective, and easily accessible as possible.

Impact of COVID-19 and other issues

COSBOA believes the review of the Act needs to take into consideration that many small business owners have been profoundly impacted by COVID-19 and they will not be able to recover quickly. They are stressed, exhausted, time-poor, and experiencing severe financial hardship. They will require increased and ongoing tailored support to emerge successfully from this challenging period.

COSBOA welcomes the changes detailed in this submission which seek to address the inherent power imbalances between large commercial landlords and their tenants, many of whom are small, family and privately owned businesses who are particularly vulnerable.

COSBOA advocates for continued small business stakeholder consultation in relation to leasing and dispute resolution issues. We welcome further opportunities to provide feedback in the future.

On behalf of our members, I sincerely thank you for the opportunity to participate in this consultation process.

Yours sincerely,



Alexi Boyd
Chief Executive Officer
Council of Small Business Organisations Australia (COSBOA)

9 August 2022

About COSBOA

Small business in Australia is the backbone of the economy. We harness its diversity and provide its people with a voice, distinct from big business.

Established in 1979, the Council of Small Business Organisations of Australia (COSBOA) is a member-based not for profit organisation exclusively representing the interests of small businesses.

The capability, representation and reach of COSBOA is defined by a mix of over 40 national and state-based association members. COSBOA's strength is its capacity to harness its members views and to advance consensus, across policy areas that are common to many. Our member organisations work behind the COSBOA secretariat, to assist us with policy development and to guide our advocacy - not just for small business but also for the benefit of the Australians they employ.

In this capacity, COSBOA makes submissions and representations to Government including its agencies, on issues that affect small business and in pursuit of good.