

Senate Economics References Committee
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio
13 February 2015

Department/ Agency: Treasury

Topic: Inquiry into need for a national approach for retail leasing arrangements

Reference: Friday, 13 February 2015 – Hansard, page 22

Senator: Xenophon

Question:

Senator XENOPHON: I am interested in this from a constitutional point of view. If it is a sole trader tenant, then the head of power is not caught up under the corporations power, but presumably—and I do not know what the statistics would be—there would be only a very, very small minority of rents where both the tenant and the landlord are not a corporation. Is that your understanding?

Mr Dolman: You are correct that the corporations power is the relevant head of power, and so, in principle, our Commonwealth regulation could apply to govern behaviour and contracts between either two corporations or one corporation and an unincorporated entity. Where there is a leasing arrangement between two unincorporated entities then the Commonwealth would not be able to regulate there. The other constitutional issue we raised in our submission is that, unlike the states, the Commonwealth is required, if it acquires property, to do so on just terms. When you are in this industry code space, to the extent that you are envisaging modifying existing contractual relationships, that is potentially an issue as well.

Senator XENOPHON: Has there been advice on that? I am surprised. You are saying that the Commonwealth, being directly involved in the regulation of retail leasing arrangements, might trigger the just—is it 'just'? It has been a while since I did constitutional law; I think it has been 39 years—compensation provisions?

Mr Dolman: It would depend entirely upon the particular circumstance of what it was intended that the industry code do, and we have to seek legal advice on a specific provision.

Senator XENOPHON: Could you provide some more information on that. I think it would be relevant. If it would trigger those compensation provisions in the Constitution, that would throw a spanner in the works. But if, for instance, we are talking about a right of renewal and moving towards harmonisation based on, say, the Tasmanian approach, that does seem to codify and have some better processes from a tenant's point of view for rights of renewal. Would that in itself necessarily trigger those constitutional provisions in terms of compensation?

Mr Dolman: We have not received any legal advice on specifics and, as I say, we would need to take advice on the specific details of any provision that were being proposed.

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Answer:

Legislation that modifies rights under existing contracts may result in an acquisition of property without just terms in contravention of s 51(xxxi) of the Constitution. For example, a provision in an industry code that operates (or could operate) to extinguish, or override the existing contractual rights of one party, to the benefit of another party, is at risk of contravening s 51(xxxi). The risk of an acquisition of property occurring can be reduced by applying legislation only to contracts entered into after the legislation's commencement, or by seeking voluntary adherence with the legislation.

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Reference: Friday, 13 February 2015 – Hansard, pages 23-24

Senator: Ketter

Question:

Senator KETTER: You may not be able to answer this question now, but I would appreciate it if you could take it on notice—and I know that your department was not responsible for this at the time. I want to go back to the National Retail Tenancy Working Group and the fact that it was disbanded. I am interested in the key reasons why that group was disbanded. That would probably give us some understanding of the key issues that are the real tough things. Are you able to shed any light on that?

Mr Dolman: Perhaps we can provide something on notice in response to this question. As I said, I was not involved with the process at that time. My understanding was that the group had decided that sufficient progress had been made on the projects they had identified and that there were not other tasks at that stage for them to take forward. But I can provide further detail on notice.

Answer:

The final meeting of the National Retail Tenancy Working Group (NRTWG) was held on 22 March 2012. The NRTWG resolved that there were no new or existing retail lease projects to warrant the continuation of the working group and that it should cease. The NRTWG agreed that the Small Business Officials Group (comprising Commonwealth and state government officials) and the Small Business Commissioner's Group, now Chaired by the Australian Small Business Commissioner Mr Mark Brennan, provided sufficient mechanisms to finalise existing projects and handle any future retail tenancy issues.

The NRTWG's core model national disclosure statement project had been implemented to the extent possible (implemented by VIC, NSW and QLD in 2011; partly implemented by WA) and could be closed. The NRTWG agreed that the nationally consistent terminology project could be progressed through the Small Business Commissioner's Group as part of the nationally consistent data collection and reporting project.