

## BRUCE CROWE

7th August 2007

Retail Tenancy Lease Inquiry  
Productivity Commission  
PO Box 80  
BELCONNEN ACT 2616

By Email: [retailtenancies@pc.gov.au](mailto:retailtenancies@pc.gov.au)

Re. Inquiry into the Market for Retail Tenancy Leases in Australia

The attached submission is based on experiences with family properties in recent years.

The identities of people and the locations of properties have been anonymised to facilitate placing on the Commission's website, but such information can be supplied in confidence under the right conditions should it be required at a later stage of the Inquiry.

My background is that of a professional person in private practice with experience of property ownership, leasing and tenancy in the Sydney CBD and near northern suburbs. My wider background includes 25 years management consulting and many years work with government and private entities.

I have Chaired two associations, and am currently on a Sydney suburban local council committee concerned with the revitalisation of suburban shopping strips and business centres. I am also an accredited mediator with the Australian Commercial Disputes Centre.

I have laid out my submission in a form that addresses elements of your "Some issues for consideration".

The immediate background to my submission comments is experiences over the past two years with solicitors, property managers, and tenants connected with two family properties that were originally purchased as retail businesses many years ago in the 1960s and 1970's and that were worked by the family as retail outlets for many years prior to the proprietors' retirement. Those properties have since served as the superannuation on which the retired property owners rely for their income.

After many years of trouble free letting to former tenants, the current tenants and their advisers have consistently delayed and avoided payments under their leases. The tenants' conduct has caused financial and personal turmoil for the aged (80+) retired landlord, and has also had a negative impact on the landlord's financial and business standing because of the tenants' failure to meet their financial obligations on time; for example, failing to pay local council rates and thus causing an order to be served on the landlord by the council.

Solicitors have consistently advised that regardless of the Clauses in the Lease that provide the landlord with remedies such as giving notice and locking tenants out, such actions would be unfavourably viewed by the Courts if the tenants showed signs of "making every effort" to meet their obligations. The solicitors' advice has been that the relevant NSW Tribunal is biased against landlords and its mediations consistently favour tenants, and that Judges will permit tenants who pay something at the last minute or at any later time to continue as tenants.

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Of course, the effect on the landlord is financially disastrous and causes a negative cash flow with more cash flowing out to pay essential bills that the tenant should pay under the lease than flows in from rents. Also, solicitor's fees are incurred to chase the tenants, and it is doubtful that those costs can be retrieved, even though the lease says they can be, because of litigious solicitor's advice to the tenant and the expected bias of the courts.

So, the landlord is left to constantly chase the tenant for payment through solicitors who seem reluctant to take action that would terminate the tenancy, and presumably their fee income from that matter. Solicitors have produced formal letters and leases that contain errors of fact and omissions of key conditions they say aren't material, and then advised subsequently that because those things weren't done the lease is unenforceable.

At the time of writing, the current delinquency of the tenants has lasted 10 months and the solicitors' to-and-froing has lasted six months. The landlord has been driven to anxiety and depression, the next generation family members have had their lives taken over trying to resolve matters for their aged parent, and there is no end in sight.

Anything that can be done to make leases normal enforceable contracts, by removing them from special jurisdictions and negating case law impacts that bias current outcomes against landlords, would be welcomed. Also, changes that improve the capacity to enforce timely payment of rents would be appreciated; for example, remove the 14 day grace period for tenants to pay rents and make the contracts enforceable immediately rent is overdue.

I will be please to respond to requests for additional information, I you need more input from me.

Yours sincerely,

Bruce J. Crowe, JP, MA.  
FAICD, FIMC, FAHRI, Hon FAPS.

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### SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO THE MARKET FOR RETAIL TENANCY LEASES IN AUSTRALIA

Re “some issues for consideration”, I offer the following comments.

**1. Re. What do tenants and landlords look for in lease arrangements?**

Fairness. Fair terms to agree to, and fair performance of those terms in a timely manner.

**2. Re. The operation of State and Territory retail tenancy/lease legislation and associated regulation and administration?**

Solicitors persistently advise that **the disputes resolution process is biased in favour of tenants**. For example, it is good enough for tenants to have “shown efforts” to meet their commitments, even when they have clearly broken the lease by paying late and less than required, and disputing requests for payment of items clearly nominated in the lease. This deters recourse to mediation, and increases legal costs.

**3. Re. The operation of the Trade Practices Act 1997 re unconscionable conduct?**

There is a need to **balance the concept of unconscionable conduct** by including

- a. persistent late payment,
- b. persistent disputing of payments,
- c. persistent calling for evidence of payments,
- d. repeatedly issuing dishonoured cheques and
- e. similar tactics that delay payments until the last date of a demand or threat of closure, and

doing these sorts of things repeatedly such that they constitute a systematic and prolonged pattern of delays, obfuscation and avoidance until payment is forced.

**4. Re. Restrictions on the availability of information: undue advantages and material impacts?**

Whereas a landlord is required to disclose all relevant costs related to a tenancy in a disclosure statement attached to a lease, a tenant is not required to provide full disclosure of their financial situation and their business history.

Consequently, a **landlord is at a disadvantage** when trying to evaluate the business acumen of a prospective tenant and when trying to assess the business risk involved in taking on a tenant. Further, the landlord cannot investigate the prospective tenant’s background due to privacy restrictions.

The **material impact** of an under resourced tenant with poor business history and bad business acumen is that the tenant falls behind in payments, which can negatively impacts on the landlord’s income, reputation and financial rating.

**5. Re. Regulatory and other avenues available for dispute resolution?**

The Inquiry needs to ask if **the avenues are fair to both parties**, and to avoid the bias suggested by the opening statement of the “call for submissions”, viz. “The request stems from concerns of small business that the market for retail leases has distorted features that frequently lead to exploitation of the tenants”.

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I suggest the Inquiry take a more ecumenical approach that recognises that small landlords with one or two small retail rentals to rely on for their superannuation are also open to **exploitation by unscrupulous tenants and their litigious advisers**, and to unfair treatment by biased regulatory institutions and legal practices.

The quoted reason for the Inquiry may be justified by the behaviour of large commercial landlords at large shopping centres, but they are not the sum total of all landlords.

**There are many more landlords of shopping strip retail properties who do not deserve the same criticisms that can be levied at the large shopping centre landlords**, and who are fighting for survival and for a future, as is evidenced by several retail centre renewal funding projects supported by Commonwealth and State governments and by local councils.

As to **alternative dispute resolution options**, the Inquiry should include an examination of solicitors' roles and activities on behalf of their landlord and tenant clients. The over-riding impression gained by experience and from advice received is that there are delinquent solicitors who encourage delinquent tenant behaviour as a means to protect their tenant clients' finances by having their clients avoid paying their landlords for as long as possible. Thus, the dispute resolution system seems to reward delinquent tenant behaviour and to punish reasonable landlord demands for performance of a supposedly legal and enforceable contract called a lease.

### 6. Re. Scope for change?

More transparency can be achieved through **additional disclosure** by the tenant of financial and business performance information that can improve the chances of a fair decision being made about entering into a lease agreement.

**Dispute resolution** can be improved by allowing recourse to normal contract law remedies that are free of anti-landlord bias (e.g. legal institutions) and landlord/tenant exploitation (e.g. litigious solicitors).

**Inaction** will result in cascading economic impacts on landlords and service providers as late rent and outgoings payments flow through landlords to utilities and other service providers, and ultimately the landlord gets fed up and opts out and arranges their affairs such that they end up on social services.

### 7. Re. Appropriateness of provisions when lease ends?

A landlord's hands are tied by the requirement that a retail lease be for a minimum of 5 years in total, so shorter leases are difficult to terminate at their end.

Among the good reasons for **shorter leases** are predictable events like a supermarket chain will open a major centre in 3 years time, and the landlord may need to re-develop the property then.

It is a restriction on trade that subsequent leases having to be in the same form and with essentially the same conditions as the original lease, as that requirement ties a landlord's hands unreasonably and prevents changes that take into account the tenant's performance and changing business conditions. There needs to be provision for **non-renewal if the tenant's behaviour and performance has been delinquent**, and a landlord should also have the right to decide to do something different with their property at the end of a lease. So, let each lease period stand alone, and if potential

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tenants don't like the terms of a lease offered to them they don't have to enter it; market forces will soon ensure that a balance is struck and the lease period is one that is acceptable to both landlord and tenant.

### 8. Re. Reforms needed?

One **priority** is to return leases to normal contract status and remove institutions and rules that make their interpretation and application biased against landlords.

The **consequences** of such changes would be to allow contracts/leases to be relied upon. If the present situation continues, then delinquents will drive the honest people out of the retail tenancy market and it will degenerate into a litigious quagmire favoured by the more slippery forms of operator and legal adviser.

Another likely **consequence** will be that some landlords will shift from being self funded retirees to being burdens on social services.

**Reduce the special tribunals and associated regulatory apparatus** that props up the present biased system, and ensure the courts are not empowered to exercise discretion for or against either party to a dispute.

To allow the present situation to continue unchanged will cause contraction in the small business private retail market, damage shopping strips and associated business precincts, and place more retail dependence on large landlords and centralised retail shopping centres.

The **flow on impacts to the community are less choice, less diversity and less dispersion of retail opportunities**. Put another way, fewer and larger landlords would have more power over fewer tenants in fewer locations, and shoppers would have less choice about where and when to shop and prices would increase while product ranges would decrease as the market tightens and retailers look for efficiencies.