

Productivity Commission Inquiry

# **The market for retail tenancy leases in Australia**

Submission No.5A

## **THE THEFT OF GOODWILL HOW SHOPPING CENTRE RETAIL RENTS ARE SET IN AUSTRALIA**

**Non-confidential**

**We request that this submission be published on the PC website**

**Southern Sydney Retailers Association**

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**Sept 2007**

## KEY FINDINGS

### **1. Retail rents set by a violation of a fiduciary duty of trust.**

Retail rents in Australian Shopping malls are not set by the normal forces of supply and demand – but are often set by a Landlords unscrupulous misappropriation and exploitation of a retailer’s intellectual property and confidential information (his sales turnover) which is nothing other than a violation of a fiduciary duty of trust that constitutes a fraud akin to embezzlement.

### **2. Percentage Rent Clauses – a tool of deception**

The ‘Percentage Rent Clause’ that exists in most leases is a “double edged sword of deception”. In most circumstances the Percentage Rent threshold is deliberately set by Landlords at a level that **the Landlord knows** the retailer has absolutely no possibility of achieving. Given this fact, the only purpose of this clause is to trick a retailer into freely handing over their confidential information of their sales figures (which the Landlord will exploit later) and also to create a false impression in the retailer’s mind that such “unachievable sales” might be achievable.

### **3. No Protection for the Property right of Goodwill.**

One of the keys to the success of the free enterprise system is the right to create, own, control, and receive the benefits from private property. The existence of clearly defined and well-secured property rights is the basis of the success of free market economies. Property rights not only exist for real property; such as land, buildings and goods - but also for intangible property; such as copyrights, patents, trademarks **and** goodwill – while all other property rights are protected, under current Australian law the property rights of a small retailer – his goodwill, is not protected.

### **4. Protectionist Polices shield Landlords from Competition**

The highly regulated nature of zoning laws in Australia has artificially restricted the supply of retail space. These protectionist polices have not only chilled competition, but have handed shopping centre landlords special privileges, shielding them from the normal forces of the free market. This artificial situation has created a “conflict of interests” between the property rights of shopping centre landlords - and the property rights of small retailers, which current Australian laws have so far failed to address.

### **5. International Laws protect Goodwill – Australian Law has failed to keep up.**

Other highly regulated markets such as the UK, which have similar land use restrictions to Australia (whereby landlords have been handed artificial market power) have established laws which balance the conflicting property rights between landlords and tenants. In comparison to UK tenancy laws, Australia is a regulatory desert.

### **6. Australian Shopping Centers massive overvalued, through theft of goodwill**

Australian shopping centers are valued at an incredible 71% higher than equivalent shopping centers in the USA. The incredible giant bubble valuation of Australian shopping centers is simply the result of Australian retailers having their property (their goodwill), confiscated by landlords whom convert it into higher rents and then higher shopping centre valuations. The rent increases upon lease renewal, which is common practice in Australia, is nothing other than a specialty retailer being forced to “buy back” their goodwill which the Landlord confiscates at lease end.

### **7. Need to Protect Goodwill**

There is an urgent need for a set of rules to protect a retailer’s property (both goodwill and confidential information) from misappropriation by landlords, and to ensure that equity, justice and that the normal forces of free market competition again work in the highly dysfunctional market of retail leases that has developed in Australia.

# Hard graft counts for nothing as deli battler forced to close

**Y**OUNG Yang is the sort of treasured local shopkeeper who knows all his regular customers by name, and many of their mothers. He works 14 hours a day till 8pm, seven days a week, with the help of his wife, Hong, and son, Max, 25.

For seven years he kept up this punishing routine at the Willoughby Gourmet Deli in Sydney's north. But he always had a smile on his face, even when clumsy customers dropped bottles of milk on the floor, because he knew he had a good business and the harder he worked, the better it was.

It was a pretty simple equation for the 51-year-old Chinese immigrant. The longer his hours, the friendlier his service, the more varied and interesting the produce he sold, the stronger his business grew.

He had bought the shop in 2000 for \$600,000, of which he says \$500,000 was goodwill, stored up over a quarter century, the rest in stock and equipment.

The goodwill was there in buckets. In a friendly suburb full of young families, Yang's spotless little deli became a community hub in an increasingly impersonal shopping arcade. Kids descended after school for iceblocks and lollies, mothers dropped in for a loaf of bread and left with gourmet gelato and gluten-free cakes.

Yang sold Weet-Bix and Nescafe, birthday candles and straws, fresh sliced ham and provolone, sourdough and Burgen rye. From fancy to humdrum, he had it all, even while Harris Farm Markets next door kept expanding its deli range.

In 2003 Harris Farm wanted to take over the space occupied by Yang's deli, the fish-and-chip shop next door, the butcher and a flower seller.irate locals signed petitions and held rallies to save the little shops and Willoughby Council knocked back the proposal.

After the defeat, the centre's owner raised Yang's rent about 20 per cent



CLOSING: Staff member Graham Gilbert, left, owner Young Yang, middle, and son Max, right, in the Willoughby store. Picture: SIMON ALEKNA

to \$10,000 a month, and told him the shop wasn't stylish enough.

Yang worked harder to pay the extra rent and business was still good, buoyed by the phenomenal drawing power of Harris Farm, with its juicy figs and luscious avocados.

Some weekends you could barely move in the arcade and the attendants in the car park out the back struggled to cope with the traffic.

But this year the butcher and the fish shop quietly disappeared and Harris Farm opened its own giant butcher shop in their place. Yang's lease ran out and, on June 12, the centre's commercial manager, Robyn Pedruco, wrote him an unsettling letter.

"Should you provide [the owner] with a business plan outlining the manner in which you would operate the premises and a plan for its renovation which will bring it up to the standard of the other Premises in the centre he will consider your proposal [for a lease extension] but

without any obligation on his part to accept it."

So the Yangs laboured over a seven-page business plan and diagrams of a proposed renovation, for which they would try to borrow \$300,000. The product range would expand to include homemade Italian meatballs and "hard to find desserts and candies".

The keys to their success, they wrote, included "knowledgeable friendly service, high-quality foods with domestic and international themes, sold at a fair price in a clean comfortable environment".

But none of it was good enough.

Tonight Yang will close his shop forever, evicted because, as Pedruco told him in another letter last month: "the owner is not convinced the standard of the refurbishment and the style of the business will co-exist with other tenancies and further direction of the Centre."

He has been so worried he says he

"can't think properly" about what to do next.

"We didn't pay [off] our mortgage on our house because we put all our money in here," he said. "Now I have nothing left for all the goodwill."

Hong, 50, stayed home last week. "My mum has been sick," Max said. "She finds it hard to get out of bed right now."

Last year the Yangs' shop won outstanding delicatessen (gourmet food) in the North Shore Local Business Awards.

This year it is again a finalist. But by the time the winners are announced at a gala dinner at the North Sydney Leagues Club on Tuesday night, the Willoughby Gourmet Deli will be no more.

Yang will have nothing to show for seven years of hard work and his life's savings. And there's not a thing he can do about it.

The conclusion of the article is correct, under current Australian law - in the land that that gave birth to the phrase "**a fair go**" - Mr. Yang has no recourse to justice.

However, under existing English Law, the *UK Landlords & Tenants Act*, such an unjust and inequitable confiscation of property, (a retailers goodwill) would not be allowed to occur. Further if governments in Australia had adopted the recommendations of the *Finding A Balance* Inquiry back in 1997, such an unjust and inequitable confiscation of property would not have occurred.



## The Theft of Goodwill – How retail rents are set in Australia

Under English Law, **Theft** was codified into a statutory offence by the *Theft Act 1968* which defines theft as:

*"...the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it".*

Theft of a small retailer's goodwill & confidential information is one of the main factors determining rents in Australian shopping centres. The theft comes at lease end, where as a result of the dishonest misappropriation of a retailers confidential information, (his sales turnover) under the sham Percentage rent clause, a landlord confiscates any goodwill a retailer has created, and forces the retailer to "buy it back" in the form of a rent increase, or auctions the retailers goodwill to competitors, again by the way of higher rents. This is the reason why retail rents in Australia are absurdly 150% higher in Australia than the USA, while no such difference exists in office or industrial rents.

### 5.1 Spot Three Differences – "The forces of supply and demand"



**Picture 1**

Your sales have been high. We know what you have in the till.

Hand over the days takings or you'll never sell another thing in this shopping centre again !!!!



**Picture 2**

Your sales have been high. We know what you have in the till

Hand over \$1000 protection each month for the next year or you'll never sell another thing in this shopping centre again !!!!



**Picture 3**

Your sales have been high. We know what you have in the till

Hand over 50% more rent every week for the next 5 years (indexed to CPI + 1.5%) or you'll never sell another thing in this shopping centre again !!!!

#### Spot Three Differences Answers :

##### 1. A different amount is stolen

**Picture 1** – \$4,000 is stolen. **Picture 2** – \$12,000 is stolen. **Picture 3** - \$400,000 is stolen

##### 2. The Criminality

**Picture 1** – A Crime by a villain. **Picture 2** – A Crime by a villain. **Picture 3** - A Crime in the UK, but not in Australia where it is often the method used to set rents (or the forces of supply and demand)

##### 3. The Dress of the Villain

**Picture 1** - The Villain wears an old pair of jeans. **Picture 2** - The Villain wears a cheap suit. **Picture 3** - The Villain wears Armani.

## 5.2 The Importance of Defining & Protecting Property Rights

One of the keys to the success of the free enterprise system is the right to create, own, control, and receive the benefits from private property. The existence of clearly defined and well-secured property rights is the basis of free market economies.

During periods of Feudalism, “property” and the common law notion that went along with it was restricted to physical things (real property) such as a piece of land or moveable goods. For centuries, the law did not recognize the concept of intangible property rights.

It was not until 1618 that the English courts first recognized intangible property rights, when they reversed 300 years of previous decisions, and said a man had right to damages which he suffered by reason of having his business property interfered with, not just the physical property of the business, but also its intangible property<sup>1</sup>. It was not called ‘Goodwill’ until 150 years later.

This decision by the English Courts to recognize and protect intangible property rights, fostered the Commercial revolution, that brought Feudalism to an end and helped to develop the principles of free market capitalism.

In the following almost 400 years, an important role for governments in free market economies has been to develop laws that define, and protect the 5 main types of intangible property rights; goodwill, copyright, patents, trademarks and confidential information - to ensure that these property rights of a small trader, are not unjustly misappropriated by criminals, charlatans, commercial fraudsters or free riders.

In modern commerce, intangible property has far greater value than real property. The value of most successful companies rests not in real property of land, buildings, and physical goods - but in the value of their intangible assets; goodwill, trademarks, patents and copyright.

The principle of protecting intangible property rights is summed up in the famous metaphor in 1918 case, *International News Service v. Associated Press*, which stated that a business cannot “reap where it has not sown”.<sup>2</sup> In other words, the wrong, both moral and legal, consists in free riding, that is, benefiting from something of value that another has invested in creating.

As the nature of commerce continues to change, the on-going success and support for free market capitalism, and the protection of liberty and economic opportunity is reliant upon governments & the courts to continue to develop fair laws that define and protect the intangible property rights of a small trader.

Failure to define and protect **all** property rights of the small trader, and failure to allow those that create the property to fully benefit from it, will result in not only unjust and inequitable outcomes, but also inefficient economic outcomes.

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<sup>1</sup> Source : Samuels, Warren *Research in the History of Economic Thought and Methodology*, Archival Supplement 4. JAI Press, Greenwich Connecticut, 1994, 227-233

<sup>2</sup> *International New Service v Associated Press* 248 U.S 215,239 (1918)  
[Southern Sydney Retailers Association](#)

### 5.3 Goodwill

Goodwill was defined over a century ago, by Lord MacNaghten in *Inland Revenue Commissioner v Muller & Co's Margarine*, (1901) A.C 217 as;

*“the benefits and advantages of a good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start”.*

For centuries, retailers and small traders have created goodwill by providing great customer service, reliability, low prices and innovative products.

Goodwill is also developed by a retailer's ability to create and maintain unique relationships with their customers through personal service.

Over the length of any lease, a small retailer builds up hundreds of these unique relationships with their customers – they will get to know many customers by name – something a giant corporate retailer simply cannot compete with - and it's these personal relationships and the good name and reputation of a retailer's business that represent the goodwill of the business.

A retailer also creates goodwill through investments in advertising, to build awareness of a business name to new customers, and to consolidate its reputation with existing customers.

The ability of the small trader and the individual with little capital to create, own, control, and receive the benefits of goodwill, has been one of the major contributors to success and ongoing support, of free market capitalism.

In contrast, one of the main reasons why communist societies first evolved and then later collapsed, was that the average citizen did not have the rights to create, own, control, and receive the benefits of goodwill, as it was simply confiscated by either powerful entities or by the state.

### 5.4 Why the Property of Goodwill is Under Threat in Australia today

For centuries in free market economies, small traders have had both the **economic opportunity** to create goodwill - and **the ability to receive the benefits** of it. They were able to reap what they sowed. However, in Australia today, these liberties the very basis of free market capitalism, are under threat.

A small trader's right to goodwill has been recognised by the English courts since 1618, and while laws to protect Trademarks, Copyright and Patents, have continually been developed, and still do so to this day, for almost 300 years, there was not any special requirement to protect Goodwill.

Traditionally a small trader would locate in a village, and he would draw his customers from within that village. Even if a single landlord owned all the retail shops in a particular village, if the landlord attempted to steal the retailer's goodwill, by demanding more rent, he could not exclude the small trader from the village, as there were no restrictions on the creation of additional retail space within the village, therefore a retailer could simply

set up next door to the landlord, and continue with his business, and the small traders goodwill was **relocatable**.

Throughout the history of retail trading, a small trader has had the ability to relocate to alternate premises within his existing “village” or regional market and in doing so had the ability to retain if not all, a significant proportion of the existing loyal customer base he had developed, and therefore in such a free market, the small traders goodwill was naturally protected by the free market itself.

Put simply, throughout the history of retail trading, all, or a significant proportion of a retailer’s goodwill was transferable. If a retailer was to move premises, he could literally “pack up his goodwill” and take it with him, just as he could his physical property.

However this centuries old principle of easily transferable goodwill in a free market has been extinguished in Australia today, as a result of a series of anti-competitive practices;

- 1) Protectionist planning regulations that shield shopping centre landlords from competition, and distort the free market.
- 2) The design of shopping centres, where normal planning laws are bypassed allowing 4 storey high walls to be built without as much as single window, which has the effect of making it difficult for customers to ‘escape’ to the outside competition.
- 3) Predatory Pricing in retail rents, where retail space is leased below economic costs to a few privileged retailers for the purpose of luring customers away from the shopping centres competitor – i.e the surrounding retail strip.
- 4) A cartel arrangement between the major shopping landlords, a type of “keep off the grass arrangement” whereby no shopping landlords, intrudes into the other exclusive territory. This “keep off the grass arrangement” has divided our major cities in exclusive regional zones of non-competition, ensure a single landlord enjoys a regional monopoly.

The result of these anti-competitive practices that our laws have yet to catch up with is that at the end of the lease, a retailer now faces a single landlord with a regional monopoly, and can be excluded from the “village” at a monopolist landlord’s whim.

Therefore, at end of lease, a small retailer in Australia today cannot relocate without losing a significant proportion of their existing customer base. Therefore, instead of the centuries old practice of a retailer’s goodwill being transferable from location to location, these artificial restrictions on competition have resulted in a situation where the goodwill that a small retailer has created, now becomes “trapped” within the landlord’s premises. No longer can the small trader **reap what he has sowed**.

Therefore, at lease end, a shopping centre Landlord confiscates any goodwill that the retailers has created, and is able to force the retailer to “buy back” his goodwill in the form of a rent increase, or the Landlord can “sell off” the goodwill the retailer has created to a competitor – again in the form a higher rent.

The more successful any small retailer is in a shopping centre, the more goodwill he has created, the higher rent increase he will be slugged with. This is why the concept of “market rent” doesn’t exist in shopping centres, and virtually identical shops will be leased at totally different prices. For a small trader, the “market price” is how much he can afford to pay.

For the small retailer, at lease end, he faces a situation nothing short of extortion, akin to dealing with the Gambino Crime family, to which a retailer has no recourse to justice.

This has been the method of setting rents in shopping malls across the nation, and is why retail rents in Australia and 'rent/sales ratios' are so much out of alignment with the rest of the developed world.

Goodwill exists, it's an asset that small retailer's create, but under current Australian law, a small retailer does not have the right to control it, nor does he have the right to receive the benefits from it.

This current situation is not only completely unjust and inequitable, but is a perversion of the very principles of free market capitalism – and the Australian concept of “a fair go”.

### 5.5 Balancing Conflicting Property Rights.

The government imposed restrictions on competition through protectionist zoning regulations that control retail space in Australia, have created a “conflict of property rights interests” between the property rights of shopping centre landlords (the bare concrete shells they lease) and the property rights of small retailers (their goodwill).

Similar conflicts of rights, between “real or physical property” and “intangible property” have existed for over 400 years – and have been resolved through regulation.

The theory espoused by some Shopping Centre Landlords, and their apologists is that “real property has supremacy over intangible property”, however this nothing other than a feudal notion, a common belief back in the 16<sup>th</sup> Century, but today is nothing other than a misguided concept which plays no part in free market capitalist societies.

The recognition and protection of intangible property, Goodwill, Copyright, Patents and Trademarks, and the balancing of these property rights with real property rights has been the basis of the commercial revolution that transformed society from feudalism to capitalism.

Laws to resolve these conflicts and to create a fair balance between real property rights and intangible property rights conflicts have evolved over four centuries of jurisprudence and government regulation, and these laws continue to evolve today as the nature of commerce continues to change and evolve.

Today, one of fundamental concepts that underwrite our free market system is that real property rights do **not** override Intangible property rights as they once did during times of Feudalism.

Today an owner of real property (land, buildings, and physical goods) does not have the right to use his real property in a way that infringes upon the intangible property rights of others.

When we hear calls by vested interests, whinging about “heavily regulated markets”, and implying that **any** regulation should be “rolled back” under the misconception that free markets work best without any regulations - are they calling for the regulations that protect intangible property rights and other regulations to be rolled back ?

It has been the development and enforcement of these regulations over 400 years that are the very basis of our free market system, it is these regulations that protect



liberty and opportunity, and distinguish capitalism from feudalism. Without regulations to protect the workings of free market economies, we revert to back Feudalism.

While laws to identify and protect intangible property rights have developed over the centuries, the need to protect retailer's goodwill from misappropriation by landlords is only a relative recent phenomenon, as it has only resulted from the artificial restrictions on the development of retail space, or where a single Landlord enjoys market power in a particular region.

In the USA there has been little need for any laws to protect a retailers goodwill, as with a free market philosophy, the type of protectionist zoning laws that exist in Australia which shield shopping centre landlords from competition have not taken hold, and this has resulted in a far greater availability of retail space per capita in the USA, and ensured that in most circumstances a retailer's goodwill is transferable from location to location.

However, in contrast to the USA, in UK where protectionist zoning regulations exists, that hand landlords market power, the need for regulations to protect goodwill have been recognised.

English Law has identified that such artificial restrictions on retail space, results in conflicting property rights between the real property of a landlord - and the intangible property of a tenants, whom find themselves in a situation where the goodwill they have created is not easily transferable as it is in a free market, but it becomes "trapped" in a Landlords premises.

This conflict has been identified as a problem, requiring regulation, and has been fairly balanced under the UK *Landlords & Tenants Act 1954*, which protects a retailer's goodwill from misappropriation.

In Australia, a federal Government committee in 1997, *Finding a Balance : Towards Fairer Trading in Australia*, recommended proposals to also balance these conflicting property rights, the English law has addressed 43 years earlier.

Recommendation 2.4 (Security of Tenure) stated;

*The Committee recommends that a the Uniform Retail Tenancy code provide;*

*\* Sitting tenants to have the option of lease renewal for a further 5 year term*

*\* Sitting tenants to have a right of first refusal for the lease for subsequent five year periods.*

*\* These recommendations extent to tenants under existing leases.*

However, Government's in Australia have so far failed to follow through on the recommendations of this committee, and have failed to follow the precedents set under English law through the *Landlords & Tenants Act 1954*

Therefore today in Australia, the property rights of small traders (their goodwill) are not protected, and their property can be misappropriated by landlords, and a Landlord is able to "reap where it has not sown"<sup>3</sup> benefiting from something of value that another has invested in creating.

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<sup>3</sup> *International New Service v Associated Press* 248 U.S 215,239 (1918)  
[Southern Sydney Retailers Association](#)

## 5.6 The position of the Shopping Centres – “There is no Goodwill”

Amazingly as it may seem, despite almost four centuries of legal precedent, the existing retail hierarchy have continued to argue the absurd proposition that “*there is no goodwill*”<sup>4</sup>

Clearly, this argument is misplaced, and it reflects ignorance and a fundamental misunderstanding, (either innocently or deliberately) by the Shopping Centre Council of the nature of intangible property.

The fundamental point needs to be acknowledged by the Shopping Centre Council, that retail tenants, as they have done for centuries, actually create goodwill, and this is a property that Tenants have rights to – and the theory that ‘real property’ has supremacy over ‘intangible property’ is a misconception that came to an end with Feudalism almost 400 years ago.

It must also be remembered that **both** tenants and landlords invest huge amounts of capital to establish a retail shop. A fact often overlooked by Landlords, is that they are only leasing a bare concrete shell. It is the tenant that invests his capital to turn the concrete shell into a living, breathing retail shop. And it is the tenant’s investment that creates the goodwill.

As the learned Justice Grice stated in *Smith v Davidson*, 31 S.E 2d 477 (Ga.1944)

*“It is difficult to conceive the goodwill of a business.....a thing of form and substance. It is more like a spirit that hovers over the physical, a sort of atmosphere that surrounds the whole; the aroma that springs from the conduct of the business; the favourable hue or reflection which the trade has become accustomed to associate with a particular location or under a certain name. As fragrance may add loveliness from which it emanates, so goodwill may add value to the physical from which it springs”*

A small retailer’s Goodwill exists – it is real, it has value, but due to the artificial restrictions on competition, that grant Landlords market power, Goodwill is no longer transferable as it has been for centuries.

## 5.8 The Greatest Asset Transfer from Small Business in Australia History.

As a result of the artificial restrictions on competition through protectionist planning laws, and the Australian government’s failure to protect a retailer’s property by counter balancing these artificial restrictions (unlike the UK government) thousands of small retailers in Australia have had their property of goodwill confiscated by shopping centre landlords over the last two decades.

This confiscation is achieved by shopping centre landlords forcing retailers to “buy back” their goodwill at the end of each lease term in the form of higher rents upon renewal.

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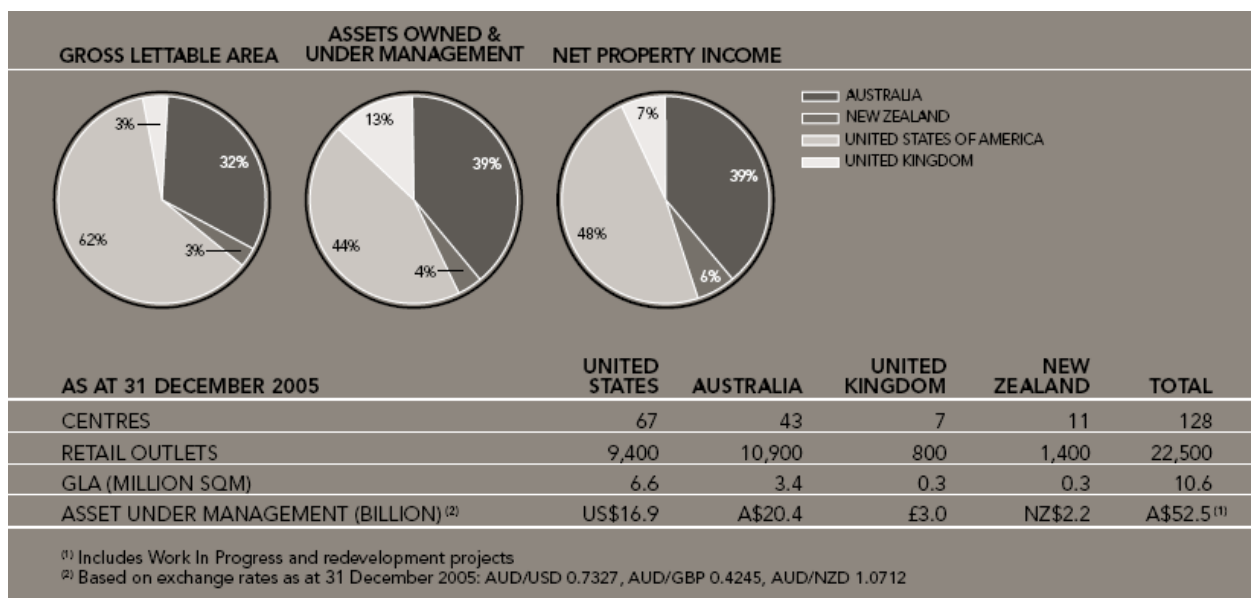
<sup>4</sup> Mr Alan Briggs, Chairman Australian Council of Shopping Centres Official Hansard, House of Representatives, Canberra. 24<sup>th</sup> Feb 1997 [1<sup>ST</sup> 785]

It must also be remembered that although shopping centre landlords often talk about small increases upon renewal, they forget to mention that most standard leases in Regional Shopping Centres have an automatic escalation clause (usually CPI +1.5%) which results in the rent increasing 20%-25% automatically during the period of the lease. So when the SSC refers to a 5 year lease being renewed with “no increase”, it has actually already increased 20-25% from the original rent, and then will also increase another 20-25% over the second term of the lease.

This “theft of goodwill” has resulted in one of greatest asset transfers in the history of Australia - from small businesses in the retail sector - to those control Australian regional shopping centres.

The extent of the asset transfer from small business in Australia is evidenced by the comparative valuations of Shopping Centers in Australia and USA.

Again the Westfield group has been very helpful by publishing data in their 2005 annual report <sup>5</sup> to enable this comparison to be made.



<sup>5</sup> See page 7 [http://westfield.com/corporate/pdf/reports/2005AnnualReports/Group\\_AR\\_210306.pdf](http://westfield.com/corporate/pdf/reports/2005AnnualReports/Group_AR_210306.pdf)

<b>WESTFIELD GROUP</b>		<b>USA (US\$)</b>	<b>Australia (A\$)</b>
Total Shopping Values		\$16,900,000,000	\$20,400,000,000
Gross Leasing Area (M2)		6,600,000	3,400,000
Shopping Centre Value per m2 GLA		\$2,560.61	\$6,000
at A\$1.00 = US\$0.7327		<b>\$3,494.75</b>	<b>\$6,000.00</b>
Excess valuation in Australia		<b>71.7%</b>	
<b>Valuation of Westfield's Australian shopping properties at USA rates</b>	per m2		3494.75
	Total M2		3,400,000
	Total at US rates		\$11,882,150,000
	Actual Value		\$20,400,000,000
<b>Over-valued compared to USA</b>			<b>\$8,517,850,000</b>

Comparisons of the valuations between Australia and the USA, show that Westfield's Australian shopping centers are valued at A\$6,000 per m2 a truly incredible **71.7%** higher than their shopping centers in the USA which are valued at the equivalent of A\$3,495 per m2.

Naturally advocates for Westfield will seek to muddy the waters to come up with some excuse for the massive higher valuations in Australia, but certainly construction costs are not 71% higher in Australia than the USA, and other types of rental property such as offices or warehouses are certainly not valued 71% higher in Australia than the USA.

Further, retail sales in Australian shopping centers are not 71% higher than in the USA. Although there is some evidence that sales of **some** retail categories may have slightly higher sales per m2 in Australia than the USA, this difference is most likely the result that goods in Australian retail shops have higher prices because of the higher rents, not because Australian retail shops sell more goods.

However, for department stores, which account for upwards of 50% of the Gross leasable space in shopping centers in both Australia and the USA, sales per m2 are significantly **higher in the USA**, than they are in Australia.

It is clear – the 71% higher valuation of shopping centre retail space in Australia is a complete distortion, a giant bubble, that only exists because of artificial restrictions on the supply of retail space – and the absurdly higher values in Australia simply represents the value of small retailers property (their goodwill) that has been confiscated and transferred to ownership of Shopping Centre Landlords.

This has resulted in Westfield's Australian shopping malls being valued at **\$8,517,850,000** higher than what would have occurred in a normal competitive market without artificial regulations and protectionist policies that shield them from competition.



## **5.9 Length of Leases**

It is also interesting to note that Shopping Centre Landlords argue that they need short five year lease terms for “flexibility” – yet typically, at least 70% of the retail space in each shopping centre is “locked up” on 20-25 year leases at peppercorn rents.

It's only the small retailers that face life in 5 year periods in shopping centres, having to “buy back” any goodwill they create in the form of a rent increase every 5 years (and also every year with a rent increase of CPI +1.5%) while the large retailers are able to sit back and enjoy 25 years.

This is clearly a discriminatory policy, which places small business at an unfair competitive disadvantage, and results in a substantially lessening of competition in the retail sector.

Therefore, if any small retailer was able to make a serious competitive challenge to the existing large retailers – he would simply be brought back to field, by being slugged with a large rent increase at the end of this lease term.

The evidence from shopping centre leasing schedules makes it clear, - the more successful a small retailer has been, the higher the value of the goodwill he has created - the larger the rent increase he will be slugged with upon lease renewal.

## **5.10 The Theft of Goodwill – The Detriment to Society**

Consideration needs to be given to the effects on society, if small retailers no longer have the opportunity to create and enjoy the benefits of goodwill.

When a small retailer has the ability to create and retain goodwill, both the consumer and society receive the benefits.

Goodwill is created by personal service, by going the extra mile to help a customer, it might be to accept a return of an item where otherwise it would be unjustified, it might be organising a special delivery to an elderly customer's home, it might be to offer a special deal to someone who is disadvantaged or down on their luck.

Creating goodwill is about getting to know a customer as a friend rather than just a number. The value of this to society cannot be overstated, as with the increasing number of elderly Australian's that live alone, there is an unmeasured social value to society for these Australian's having the opportunity of going to a friendly small business that knows them by name, which often maybe the only opportunity many elderly Australians have for real human interaction on a daily basis.

Further, where goodwill is recognised and protected, it encourages small retailers to donate to the local school, or to sponsor a local sporting group, as the small retailer can then benefit from the goodwill such donations create.

Where the creation of goodwill is recognised and protected by law, it helps to create good corporate citizens and simply a better society.

However, when a retailer can't retain the goodwill he has created the game changes - instead of an independent retailer going the extra mile to help a customer, instead the retailer needs to go the extra mile *to milk every cent from consumers pocket for today* – as tomorrow his goodwill will be gone.

When a government fails to define and protect Goodwill, donations and community spirit shall be less – what's the point of donating to build up goodwill if you can't control or obtain a benefit from the goodwill in the future ?

For centuries, small family retail businesses would build up goodwill, which they would pass on from generation to generation. But this centuries old concept is extinct in Australia today, when goodwill is not protected.

For centuries, small retailers have also create goodwill in their business to build up a “nest egg” – an asset that the owner would sell to fund their retirement – but this centuries old concept has also been killed off by the theft of goodwill in shopping centres.

Goodwill is also important for society as its one of the glues that holds together our free enterprise system, as it gives an individual with little capital the chance to build the value of his business and become a successful independent business man. If the Government fails to protect goodwill, it is a restriction on liberty, and equality of economic opportunity.

Theodore Roosevelt, the 26th President of the United States of America, gave a speech in 1912, which he stated;

*“It is of utmost importance that in the future we shall keep the broad path of opportunity just as open and easy for our children as it for our fathers.....that it shall not only possible but easy for an ambitious man, whose character has so impressed itself upon his neighbours that they are willing to give him capital and credit to start in business for himself and if his superior efficiency deserves it to triumph over the biggest organisation that may happen to exist in his particular field.*

*“Whatever practices upon the part of the large combinations many threaten to discourage such a man, or deny home that which in the judgement of the community is a square deal, should be specifically defined by the statutes as crimes.”*

Roosevelt no doubt would have viewed the “theft of goodwill” that is rampant in Australian Shopping Centres, conduct that should be specifically defined by the statutes as crimes.

The failure to protect and identify all property rights is one of the main reasons why communist economic systems broke down, as citizens had no incentive to create private property including goodwill, as it could be confiscated by the state.

Today many migrants to Australia having fled former communist regimes have set up small retail businesses in Australia - the land that coined the phrase “a fair go” - only to find out to their dismay and financial ruin, that in Australia today the property that they created, their goodwill, can be confiscated, not by the state, but by giant corporations, and they have no recourse to justice.

One of the great ironies of the dysfunctional Australian shopping centre industry that has developed over the last 20 years – is that one of Australia’s richest men, fled a communist country at the end of WW2 where there was no goodwill. He migrated to Australia, where he opened a small retail store in Blacktown. Having built up the goodwill in this retail business, he was free to benefit from the goodwill that he had created, and later sold the goodwill of the business. This gave him the capital to enter into the property development business, and was the start of one of Australia’s largest shopping centre empires.

But today, the system that gave him a start – the Australian retail sector - has been so corrupted and distorted, that new migrants are denied the right to control and benefit from the goodwill that they create, a right that previous generations of migrants enjoyed.

### [5.11 Failure of Laws to Protect the Property rights of Goodwill - Creating an Atmosphere of Fear and Intimidation in Shopping Malls.](#)

One of the great things about our free enterprise society, as opposed to a Stalinist regime, is the ability in a free society for citizens to carry out their daily business without fear and intimidation by powerful forces, and the right to speak out freely if they see an injustice - without fear of victimisation or reprisal.

But this freedom is as dead as a dodo in Australian shopping centres today. As the *Finding a Balance* Inquiry stated in their conclusions;

*A significant proportion of the written and oral evidence from retail tenants was required to be received in camera because of **fears of victimisation** by landlords and property managers. Indeed, the examples of **combative behaviour** by property managers documented both in confidential evidence and on the public record suggest fears of victimisation are well founded.<sup>6</sup>*

Small retailers in Shopping Centres know that if they are labelled an “agitator” they can be singled out for reprisal by their landlord at the end of their lease.

This situation only arises, as small retailers in shopping centres live in fear, as they know that when a landlord enjoys a government protected regional monopoly, that at the end of their lease, their property, their goodwill, and their livelihood, can be confiscated by the Landlord, and the Landlord doesn’t even have to give them any justification, and the small retailer has no recourse to justice or equity.

Even this inquiry has received many submissions from retailers so frightened of victimisation and reprisal that they have sought to hide their identities.

This fact alone, presents a clear need for substantial reform to the retail lease market, and the Australian retailing sector. It is a completely un-Australian situation; a situation that simply cannot be allowed to continue in our democratic and free enterprise society.

With the introduction of laws that recognise and protect a retailer’s property - their goodwill, and provide a fair balance between the conflicting property rights between Landlords and Tenants - overnight this shameful and un-Australian atmosphere of fear and intimidation of threats and reprisals would end.

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<sup>6</sup> Finding a Balance – Chapter 2 Retail Tenancy  
Southern Sydney Retailers Association

## 5.12 International Laws that Recognise and Protect Goodwill, and Balance Conflicting Property Rights.

English law recognises the conflicting property rights between a small retailer's property of goodwill and a landlord's property that results from protectionist planning laws.

Simply, if landlords are given special privileges by Government, which protect Landlords from competition, by placing artificial restrictions on the development on retail space, then the trade off for these special privileges is that retailers have their goodwill protected.

English Law has made this trade-off under the provisions of the *Landlords & Tenants Act 1954*.

The existing retailing hierarchy, will bleat to this enquiry about "excess regulation" and attempt to perpetuate the myth of Australia's so called "highly regulated market compared to elsewhere in the world" – but the provisions of the UK *Landlords & Tenants Act*, exposes this myth for the red herring that it is.

If the UK Landlord's & Tenants Act were introduced in Australia, the majority of the existing state tenancy laws would fade away into irrelevance.

A fundamental point needs to be made clear, that the UK *Landlord & Tenant Act* does **not** provide security of tenure for any under-performing retailer. It simply provides that at the end of lease, the sitting retailer's goodwill cannot be sold off in a Dutch auction.

If a retailer is under-performing, his goodwill is worth little, and if he is under-performing he simply will not be able to afford the market rent, and will be forced to exit the market.

Under the UK *Landlord & Tenant Act* if a Landlord attempts to exploit the Landlords market power, by demanding an unjustified rent increase, the Tenant can apply to the court to have the rent set at a fair market price.

The UK Landlord & Tenant Act is all about fairness, which prohibits the exploitation of undue market power and balances conflicting property rights.

Further, the UK Landlords & Tenants Act does provide for both landlord and tenant to "contract out" of the provisions of the Act. However a fact that is very, very important – that when a tenant contracts out of his rights, **he must be given a large warning notice** (see below).

In comparison in Australia – there is no mechanism to set a fair market rent, there is no mechanism to protect the property rights of goodwill – and there is not even a requirement to give a warning notice.

In Australia, retail tenants have the worst of both worlds – a situation that cannot be allowed to continue.

Following is copy of the warning notice.



Q8. What does the warning notice for agreements to surrender say?

A. It warns the tenant about giving up the right to renew the tenancy. This is how it reads:

**IMPORTANT NOTICE**

Do not commit yourself to any agreement to surrender your lease unless you have read this message carefully and discussed it with a professional adviser.

Normally, you have the right to renew your lease when it expires. By committing yourself to an agreement to surrender, you will be giving up this important statutory right.

- You will not be able to continue occupying the premises beyond the date provided for under the agreement for surrender, unless the landlord chooses to offer you a further term (in which case you would lose the right to ask the court to determine the new rent). You will need to leave the premises.
- You will be unable to claim compensation for the loss of your premises, unless the lease or agreement for surrender gives you this right.

A qualified surveyor, lawyer or accountant would be able to offer you professional advice on your options.

You do not have to commit yourself to the agreement to surrender your lease unless you want to.

If you receive this notice at least 14 days before committing yourself to the agreement to surrender, you will need to sign a simple declaration that you have received this notice and have accepted its consequences, before signing the agreement to surrender.

But if you do not receive at least 14 days' notice, you will need to sign a "statutory" declaration. To do so, you will need to visit an independent solicitor (or someone else empowered to administer oaths).

Unless there is a special reason for committing yourself to the agreement to surrender sooner, you may want to ask the landlord to let you have at least 14 days to consider whether you wish to give up your statutory rights. If you then decided to go ahead with the agreement to end your lease, you would only need to make a simple declaration, and so you would not need to make a separate visit to an independent solicitor.

A full copy of a guide called "Renewing and Ending Business Leases a Guide for Tenants and Landlords" which outlines the provisions of the UK Landlords Act, (none of which exist in Australia) will be provided by the Southern Sydney Retailers Association in a supplementary submission.

## Conclusion

Almost a century ago, back in 1909, Edward. S Roger in *Comments on the Modern Law of Unfair Trade* wrote;

*"This is the present state of Law, that every Trader has a property in the goodwill of his business, that he has right to the exclusive benefit of this goodwill"*

But this is not the present state of law in Australia today - a small retailer no longer has the right to the exclusive benefit of his goodwill.

Laws to protect intangible property have evolved over 400 years and continue to evolve today, and they will in the future as the nature of commerce continues to change.

In Australia, our laws need to evolve as so that once again, every Trader has the right to the exclusive benefit of the goodwill they create.

Failure to act, to protect the property of goodwill, and set a fair balance between intangible property rights and real property rights, threatens to undermine Australia's entrepreneurial culture, and threatens to extinguish the economic freedoms that should be the birth right of every Australian.