

From: Graeme Smith
To: retailtenancies@pc.gov.au
Sent: Monday, January 07, 2008 5:32 PM
Subject: Inquiry into the Market for Retail Leases

Dear Sir/Madam

I have been meaning to make a submission to this inquiry for some time and now I've got around to it I feel it may be too late. Would you at least keep me informed of when the public consultation process will come to Adelaide so I can attend?

I have 3 retail leases currently in operation, two in "retail street" precincts and one in a shopping centre.

I feel the balance of power has definitely shifted towards the landlord, particularly in the case of smaller retail operations. There seems to exist a "take it or leave it" attitude to all negotiations, especially when a lease has ended and a new one is being sought. There is a growing feeling that tenants are at the mercy of the landlords goodwill, and to a large extent operate at their discretion. Also, I have seen a few leases from different landlords, and they all seem to be copying the lead of Westfields in regard to the terms and conditions they place in their leases. It is almost as if they "collectively bargain" to the disadvantage of tenants (the smaller, the more vulnerable). Surely, this is anti-competition! I think the balance of power between tenant and landlord is not in equilibrium and this needs to be addressed.

I certainly feel smaller independent tenants are being forced out of the market in favour of national retailers, and this can only have an adverse effect on the overall economy if it were allowed to happen.

In particular, my main concerns/issues are as follows

1. "Market" rent.

When leases expire and are up for renewal, a "market rent" is proposed by the landlord, and in reality, is difficult to objectively define, particularly in a shopping centre.

If the landlord can get one tenant to agree to new (larger) amount, does that then become the new "market" figure? How does an independent valuer assess market rents except by comparing what others are paying in the same centre? Making comparisons with other shopping centres is problematic and would depend on information such as customer numbers/ store turnovers which landlords hold and would be reluctant to divulge.

I propose that the landlords be limited to "market" increase somewhere around the rate of inflation, or else be forced to justify a larger increase (perhaps by proving an increase in customer numbers, through capital improvements to the centre.)

2. Rent increases

This follows from my first point. In recent times, the leases I have been offered all allow for a 4% yearly increase or CPI whichever is greater. Surely this is unfair and is in fact a driver of inflation. Why should a landlord be entitled to any more than a CPI increase?

I propose that yearly rental increase during a lease term be confined to CPI only.

3. Renewal periods

Landlords now tend not to offer any right of renewal terms as a matter of firm policy, and only offer a maximum term of five years in any lease. This is extremely unfair to tenants, especially when there is usually a clause in the lease that requires the tenant to refit his shop periodically, to the exacting standards of the landlord. Tenants already have a significant investment in their business (often at a greater cost per square metre than the owner of the shopping centre), and are required to put money back into updating the shop periodically. With no legally binding right of renewal, the landlord is in an unfair bargaining position when the lease ends. The tenant has far more to lose than the landlord, and is more likely to accept a large rent increase just to maintain his capital and not lose his business altogether!

Also, a retail business is very hard to sell with a small lease term. In fact with no guaranteed renewal period, the value of the business reduces every month closer to the end of the lease term. This has a serious effect on the liquidity of the market for selling and buying retail businesses. In short, it makes them very difficult to sell!

I propose that at least one renewal term be included in the original lease.

4. Turnover disclosure

What possible justification could there be for a landlord to want to know a tenant's turnover? Of course, the information gives him power, and at negotiation time, he will know if your business has increased its turnover, and he can set his rents accordingly. Why should he get to share in the good retailing practices and hard work of the tenant, particularly if the increase has nothing to do with his input or involvement?

I propose that the report recommends that legislation guarantees the confidentiality of a tenant's trading figures.

5. Sale of business

Already the sale of a retail business in a shopping centre is made difficult by short lease terms and no right of renewal periods (as set out in my point 3). This is further exacerbated by the landlord's power to impede the process or to disapprove of a proposed purchaser. The South Australian Retail legislation is too general in its wording and allows the landlord ample excuse to disallow the sale of a business thereby allowing it to make unreasonable demands on the existing and proposed tenant. I have just been through this process and have very detailed information as to how the legislation was exploited by the Landlord in my case. I would be happy to provide you with further information should it be useful and relevant to your Inquiry.

6. Rent guarantee

Most leases require a three month unconditional rent guarantee in a form acceptable to the Landlord. This is wide open to abuse, and in one instance I have been asked to provide an unconditional rent guarantee with no end date!

I propose your report recommend that any Legislation include very specific guidelines for the term and conditions of rent guarantees, and the circumstances in which they can be drawn upon.

7. Lease documentation

SA legislation provides for a plain English disclosure statement to be provided by the Landlord, but as they say, the devil is in the detail, and there is lots of detail, carefully prepared and worded by the Landlord's lawyers. Sure, the tenant signs his agreement to all the clauses, but the reality is that there is no negotiation allowed by the small tenant as he has no power to do so. The lease is a "take it or leave it" document.

Perhaps a standard retail lease document could be placed in Legislation to protect the rights of small tenants?

I feel your report needs to highlight that the power has shifted too far in favour of Landlords, and new National Legislation should be enacted to regain the balance of power, allowing for a more even playing field.

I fear that without some Government action, the face of retailing in Australia will change to the detriment of our society and economy.

I would be happy to discuss any of the points I have raised, or provide you with further detail relating to the above if it is beneficial to your Inquiry. As I would like to attend the public forum when it comes to Adelaide, would you please provide me with details as to the date, time and location.

Yours Sincerely

Graeme Smith
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