

# Productivity Commission – The Market for Retail Tenancy Leases in Australia

Submission by Peter Southwick, Certified Practising Valuer, Tenant's advocate in lease Negotiations, Adelaide, SA.

I have represented the interests of tenants for the last 12 years assisting in lease negotiations, mainly in retail Shopping Centres in South Australia. I manage a business with 20 odd staff, mainly in property valuation, and we have two people who work in the area of lease negotiations. I own commercial and retail property.

I make this submission with regard to Shopping Centres, not commercial leases for any other class of property.

The Retail and Commercial Leases Act 1995, under which we operate in SA, is in my view a useful Act in many respects and it generally has levelled up the playing field between tenant and landlord compared to that which existed prior to the Act's inception in 1995. The Trade Practices Act and its unconscionable conduct provisions are very nice, but very distant / general and difficult to access in any real way for retailers.

One amendment to our Act, which actually works in the tenant's favour, is the First Right of Preference, contained in Sections 20 of the Act. This section works because it forces the landlord to presume that the tenant wishes to remain in the premises at the lease expiry. If the landlord cannot agree a rent with the tenant, he may offer the premises to the wider market. If he receives another offer the sitting tenant has a right to match this offer or leave. Whilst this section needs improvement, it works and is in my view a reasonable test of the fair market rent for a shop. The major weakness is that the landlord is effectively offering the tenant's goodwill as well as the space to a potential competitor.

My view is that there remains a considerable in-balance in the negotiating power between tenant and landlord, especially in the large Shopping Centres. The landlords are ruthless in their pursuit of rental increases, generally heartless in their behaviour towards tenants and often totally abuse the power and trust which they have as property owners. There is an urgent need for review of our retail legislation to further balance the relationship and bargaining power between tenants and landlords. The balance of power remains firmly with the landlord.

Whilst all property owners will argue that there is no need for change, the simple reason that it is necessary is that they refuse to behave in a reasonable fashion. Their unchecked greed is destroying countless businesses / families and they must be more strictly controlled. There is no middle ground on this and the legislation must be changed to balance the bargaining power between owners and tenants.

## The Problems

My principal concerns about the legislation under which I act for tenants are as follows:

1. There is no right of appeal to any meaningful body for a tenant in dispute with his landlord.
2. Shopping Centre owners try to exclude the operation of fair and open market practices wherever possible.

3. Shopping Centre owners hide behind their lawyers and can delay any matter, which does not suit them, indefinitely.
4. A reasonable length of lease period is not offered to tenants, such that they have an opportunity to amortise their capital fit out costs, or upon which to really build a business. The minimum lease term offered of 5 years has generally become the maximum term offered.
5. The economic captivity of tenants works against them at lease expiry time. They are generally not in a position to walk away after 5 years with the cost of fit outs tying them to their tenancies.
6. The ability for landlords to demand monthly turnover figures is unfair and these figures are used against retailers to extort more rent out of them at lease expiry time. The provision of these figures to a landlord enable them to know exactly how much profit a tenant is making.
7. There is an absolute and total abuse by landlords in relation to outgoings recovery. This especially applies to management fees. I have valued retail property where the outgoings recovered have been more than 100% of the actual outgoings.

#### **Solutions / Suggested changes to legislation.**

1. Reintroduce a compulsory right of renewal under any lease, at the tenant's option. Make this right for a further 5 years and maintain the minimum 5 year term. This way a tenant will get a minimum 10 year period. This is time to amortise a fitout and build a business.
2. Introduce a tribunal with the power to decide any matter with a value of that decision limited up to say \$100,000. This sum would cover most minor disputes.
3. Introduce real fines against landlords (as per the Trade Practices Act) for breaches of the Retail and Commercial Leases Act.
4. Introduce a clause to all leases which says that at if a tenant exercises an option to renew a lease, that failing agreement between the parties, that the rent is set by independent determination by a qualified specialist retail valuer.
5. Introduce South Australia's First Right of Preference nationally but expand the powers of this clause to include that the landlord must supply the full details of an alternative offer to the sitting tenant and include a provision that the use for which the shop is offered to the wider market place must be the same as the existing business use.
6. Make it illegal for landlords to force tenants to give them turnover figures. Outlaw turnover rent provisions for small retailers. (Say under 1,000 square metre tenancies).
7. Strengthen the reporting provisions relating to outgoings and force full disclose of all outgoings to tenants if required. Only allow Shopping Centre owners to charge actual outgoings relating to the management of a specific Centre. Introduce substantial fines for any abuse of outgoings.

Yours sincerely

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