

Retail Tenancies Enquiry
Productivity Commission
P O Box 80
BELCONNEN ACT 2616

Dear Sirs

The Lottery Agents' Association represents 720 Tattersall's agencies throughout Victoria. Of this number approximately 30 outlets are operated from kiosks in major shopping centres, while another 70 outlets operate within major and secondary shopping centres hosted by another business such as a pharmacy or newsagency. The remaining outlets are in metropolitan strip shopping centres or in the country.

Neither the Association nor our franchisor Tattersall's are involved in lease negotiation but from time to time retail tenancy issues are raised with the Association giving us deep concern as we see retailers struggling to survive under massive tenancy costs, insecure tenancy arrangements and inevitably increasing rent.

In preparing to submit our views to this enquiry we met with Tattslotto agents in six major and secondary shopping centres and we have suggestions as to how the market could be made to work more satisfactorily. These are summarised in the paragraphs below.

The absolute market power of shopping centre landlords is demonstrated in various ways but the most striking is the fact that not one of our members is prepared to put their name to anything which is even remotely critical of their landlord. Such is their fear of losing their business investment by the landlord's refusal to grant a new lease after the fixed term lease expires.

Lack of Information

In every tenancy negotiation involving these major shopping centres there is a great disparity of information held by the tenant compared to that in possession of the landlord. The tenants only way of overcoming that is to use leasing consultants and our experience is that the leasing consultant usually produces a more favourable outcome for the tenant than they would have achieved on their own.

While retail tenants in Victoria appear to receive quite properly detailed disclosure documents on the taking up of a lease, that is the only disclosure about plans for the centre which they receive.

The Association suggests to the Enquiry that landlords ought to be required to provide an updated disclosure document to every tenant whenever there is a material change in the content of the document. This is a similar requirement to that which exists under the Franchise Code. It would be neither difficult nor expensive for landlords to implement but would greatly help a tenant to plan his business future.

The Sitting Tenant Issue

From our enquiries it is abundantly clear that the existence of nothing more than a fixed five-year term lease puts absolute market power in the hands of the landlord. The Enquiry is already aware of debate over this matter that took place in late 1997 when all State and Territory jurisdictions agreed to introduce key minimum standards into their Retail Tenancy legislation. It is the Association's view that the landlord's claimed right to do with its property whatever he wishes – hence the fixed tenancy term, must be moderated by a responsibility of the landlord to not damage the business of his tenants – particularly if that is done in a cavalier or a sometimes vengeful way.

The Association suggests the Enquiry should explore the concept of a mandatory minimum five plus five term of lease with termination at the end of the first term by the landlord only permitted in specified circumstances such as where he can demonstrate that the continuance of that particular tenant is not in the interests of the centre and therefore other tenants or when lease conditions have been breached. In other words there is an onus on the landlord to justify the non-renewal of a lease.

Rent Discrepancy

Leading up to this Enquiry there have been media reports indicating that anchor tenants sometimes pay one-tenth the level of rent paid by smaller tenants. While this has been rejected by the Shopping Centre Council it conforms with anecdotal evidence given to our Association.

The discrepancy in rent can be even worse than that. In two instances reported to us the anchor tenants had in fact paid no rent for twelve months and twenty months respectively while smaller tenants paid full rent. The reasons for this were that the anchor tenants had negotiated provisions in their leases which in the first case meant that no rent would be paid until all shops in the centre had been leased and in the second case there was a customer traffic count below which rent would cease to be paid. Obviously the ability to negotiate concessions such as that are not available to smaller tenants and there can be no doubt that rental concessions granted to anchor tenants are in effect subsidised by higher occupancy costs met by smaller business owners.

The Association can accept that there should be some concession to a retailer who occupies a large amount of space but we believe that the differential in the current market is unjustifiably large.

It is also sometimes claimed that the anchor tenant draws the customers which smaller retailers then feed off. This is only partially true since businesses, notably pharmacies; newsagencies and lotto outlets are also strong customer traffic generators and these three business types are all sought after when shopping centres are being developed. Most developers endeavour to obtain an anchor store plus pharmacy; newagency and lotto outlet and having secured tenants in those areas find it easier to attract other specialist retailers. It is inequitable that rental concessions are given to one party because of its power to draw customers but not to others.

The Association believes this matter could be addressed by some form of regulation or code of practice which limited the degree of the rental differential noting that there are other ways such as shopfit contributions by which landlords can attract anchor tenants.

Trader's Associations

In the six centres subject to the Association's enquiries there was only one Trader's Association. The reason put to us for this was that anybody thought to be organising a Trader's Association would suffer when the time came for rent review or lease renewal. The absence of a Trader's Association compounds the problem of lack of information held by tenants.

Even when the Tenant's Association operated it was controlled by Centre Management. We note media reports that the ACCC believes that recent changes to collective bargaining authorisation processes ought to be an opportunity for tenants to negotiate with landlords "en masse". The fact that this is not occurring is another consequence of the absolute power which landlords have by virtue of a fixed term lease.

We would like to see Tenant's Associations compelled by law for centres with (say) over fifty tenants, such Associations to be managed by an independent party who could be appointed by the tenants.

Dispute Settling

The Association believes that Victoria leads the way in cheap, fast and effective mediation services. The Victorian Small Business Commissioner provides an outstanding service in this regard but we have to acknowledge those services are not widely known by retail tenants. The Association proposes to pursue this matter with the Victorian Government but the Enquiry would do well to study the Victorian Dispute Settling model.

Education

Following the previous point and noting earlier comments about the lack of information held by tenants the Association is of the view that there needs to be increased education of retail tenants as to their rights particularly in regard to matters such as Dispute Settling, Disclosure provision of a shopping centre's marketing plan and reports on the expenditure of the promotional levies.

National Uniformity

Proposals to establish a uniform National Retail Tenancy Code need to be revisited. Since this major finding of the 1997 report "Finding a Balance: Towards Fair Trading in Australia" there appears to be no progress with a concept that could address some of the major imbalances that still exist between landlord and tenant. In recent years the emergence of the Franchise Code mandated under the Trade Practices Act shows that there can be an effective alternative to black letter law and the Association urges the Enquiry to give close consideration to this concept.

Why is it only Shopping Centres that have these problems?

The Association's experience has been that tenancy issues are raised as concerns only within shopping centres. Given that so many of our members operate in strip centres and appear to have minimal problems why is this so?

The answers we believe are that there is far more available knowledge about tenancy conditions in high street locations e.g. comparative rents outgoings; future developments etc than are available in shopping centres. We are also certain that the potential for Goodwill loss in high street centres is minimal because an aggrieved tenant has an opportunity in many cases to move to a nearby shop. Therefore the overbearing and bullying actions that occur in major centres cannot arise.

We also believe that competition between landlords to attract good quality tenants in high street locations helps to keep tenant conditions reasonable and rents moderate. A further factor is that in high street locations the rental gouging that occurs on renewals of leases in shopping centres is not apparent, again because of the tenant's ability to move to nearby premises.

In conclusion we point out as indeed was indicated in the Commission's call for submissions that many of the current problems in retail tenancy have existed for more than a decade; were identified in the Reid Report but have yet to be universally and effectively addressed in all cases.

The continuing calls for fairer treatment of shopping centre tenants has lead to all these matters being raised again in this Enquiry and that alone is testimony to the seriousness of the issues and the need for real and immediate reform.

PETER JUDKINS
CEO

Lottery Agents' Association of Victoria (Inc)

Attachment to Submission to Enquiry into the Market for Retail Tenancy Leases in Australia.

The following brief points emerged from discussions with tenants in major shopping centres.

Details of the centres and the tenants concerned can be provided to the Commission however the retailers concerned do not wish to be identified.

Case 1:

Secondary Shopping Centre anchored by Safeway

Landlord requesting 50% rent increase because lotto agent has secured the sub-newsagency. The former newsagent tenant closed down.

This business is valued at around \$450,000 and is now on a monthly tenancy because of inability to resolve the lease issue.

In addition there is a redevelopment proposal being considered by the owners and this is disclosed in a thorough disclosure document given to a new tenant but this has not been disclosed in the same degree to the existing tenants. This retailer is taking the inherent risks of operating without a lease hoping that he will be offered a tenancy in the redeveloped centre. He is also relying on his franchisor refusing to grant a franchise to anyone other than him for the eventual new centre.

This retailer is informed because of his own efforts to find out what's going on not because of any obligation by the landlord to communicate their intentions to him. Mandatory disclosure of a material change in a disclosure document would address this situation.

In this centre customer count is down by 30%, the retailer is uncertain of the future and is obviously unable to sell the business.

Case 2:

Business valued at around \$600,00 is a lottery kiosk in a major shopping centre. Life is becoming difficult with 5% per annum rent increases on a five-year lease in the centre which is struggling because of other shopping centres having opened nearby. This retailer endeavoured to form a Trader's Association but was warned off by Centre Management. He has no option but to make the best of what is a bad situation.

Formation of a Trader's Association may help this centre by means such as proposing redirection of traffic customer flows and more effective use of the marketing fund. Note that this retailer has also been forced to provide sales figures based on turnover regardless of the fact that the Retail Leases Act in Victoria specifies that turnover in respect of lottery sales is the commission received - the balance of the customer's payment belongs to the prize pool; Government and the lottery operator - not the retailer. This retailer simply has no bargaining power.

Case 3:

Secondary centre where rent has increased from \$26,000 to \$40,500 per annum and a new seven-year lease has now been taken despite incorporating an annual rental increase of 5%. Centre Management refuses to allow some forms of promotional signs despite this being a requirement of the franchisor. The new lease was signed at a 50% rent increase. In this centre there is no reporting of the expenditure of marketing funds. The tenant faces a "take it or leave it" situation.

Case 4:

Major shopping centre. Retailer fears retribution if he forms a Tenant's Association but he desperately needs information to help decide his business direction. The anchor tenant is twelve-months rent-free because customer projections are not being met and there is no disclosure to tenants about future plans concerning the centre.

At a rental of \$24,000 per month with 5% per annum rent increases this retailer is looking at declining sales and contemplating the demand to complete a shopfit in the remaining three years of the five year lease. In this centre there is no feedback on expenditure of the promotional levy and no projections of marketing plans – despite this being one of the top five shopping centres in Victoria.

Case 5:

Relatively new secondary shopping centre in outer suburbs. Anchor tenant is paying no rent as a lease condition they negotiated was to this effect until all shops were let. Projected rental for the anchor tenant is reported to be 10% of the amount paid by the specialty shops.

Case 6:

Major shopping centre in outer suburbs is now applying a general policy of not re-negotiating leases until six months after expiry of the previous lease. Rental increases in the order of 25%-30% are being demanded.

Several retailers have been bankrupted in this centre blaming amongst other things high rental costs and introduction of competing tenants e.g. café; juice bar; pizza shop. While that occurs there are usage restrictions in leases which prevent existing tenants from diversifying their product range so as to endeavour to survive.

An immense irritation is the knowledge that often the site of the bankrupted tenant is subsequently let to a new tenant at a significantly lower rent than previously applied.

In this centre there is a Tenant's Association which meets monthly but it is run by the Centre Management and hard issues are not dealt with. In fact outspoken tenants have been told to quieten down or they will not be granted a new lease. This centre also produces a marketing plan but has not provided audited statements of promotional fund expenditure.