

The Lease Police

**Retail Tenancies Inquiry
Productivity Commission
PO Box 80
Belconnen ACT 2616**

Attn: Dr. Neil Byron, Commissioner.

Re: Submission for the New Public Inquiry: The Market for Retail Tenancy Leases In Australia.

Dear Dr. Byron,

Firstly our company wishes to thank you and your colleagues, Dr. Bryon, Mr. Gretton and Ms. Bell for attending our offices to discuss what we believe are the key issues facing the Commission.

We are happy to provide the following submission for the Commission's information from the perspective of retail tenants.

We propose to highlight four, (4), issues that require urgent attention to redress the inequity in the contractual, (Legal) and commercial relationship between Retail Landlords and Retail Tenants using the guidelines provided in the issues paper.

These issues are...

- 1) The reporting of Sales Figures from tenant to landlord.**
- 2) Security of Tenure and Rights of Renewal of Leases.**
- 3) Lessor Disclosure to Lessee.**
- 4) Unconscionable Conduct.**

What are the weaknesses of the current structure and functioning of the retail tenancy market?

A) Clearly the main weakness in the current structure is the inequity of information possessed by the two parties to the lease contract.

Lessors, particularly shopping centre Lessors know, at any given time, what each of their tenants is paying in rent.

They also require their tenants, as a condition of their lease, to report monthly sales figures. This allows them to compare sales from one tenant to another, franchise and chain operators against independent operator, state against national etc.

This allows Lessors to target "weaker" performers for non renewal of their lease, increase the number of competing usages against a stronger operator and base renewal of lease on capacity to pay rather than the current market value of the premises.

**The Lease Police
Level 5/89 High Street Kew VIC 3101
Email: info@theleasepolice.com Phone: 1300 33 44 32 Fax: 03 9854 6293
The Lease Police is a wholly owned entity of the Leasewise Group ACN 118 63765**

The Lease Police

Case Study # 1:

A successful fishmonger whose lease is ending in a Centre in Sydney is told by the Leasing Executive, that if he wants to renew the lease his rent will be increased by 50% from \$150,000.00 per annum to \$225,000.00.

The reason given by the leasing executive is that, “This is the current market”

Leasewise is instructed by the retailer and we were asked by the Leasing executive, “would the retailer be prepared to walk away from \$2 million dollars in sales?”

The inference being that the retailer has, in the Lessor’s opinion, the capacity to pay as a result of his turnover. Further the leasing executive represented that the goodwill, (profit) of the business would be given to another fishmonger who could pay the higher rental as they would not have the establishment and set up costs our client had when he established the business.

No credit or weight is given to the retailer’s skills in growing the business.

B). Another weakness in the current structure is the secrecy regarding the terms and conditions of other retail leases, particularly in Victoria. We would encourage the commission to recommend that all retail leases be registered and have the ability to be searched as is the case in New South Wales, Canberra and Queensland.

What are the implications, if any, for the market in retail tenancy leases, of trends in urban and regional development, and changes in consumer preferences, in technology and in ways of working? How might such changes affect retail tenants?

The increasing domination of Shopping Centres in the retail market and the trend for expansion at any cost has lead to an imbalance of power.

Retailers are notionally forced into centres with Lessors charging whatever rent they themselves believe to be sustainable.

Prime retail property is tightly held by the large Shopping Centre Owners listed below.

These owners dominate the retail landscape in urban and regional areas and their growth has seen a trend for customers to spend more time at these centres for recreation rather than shopping.

The Regional centres however have reached a plateau in customer patronage as on line shopping, Direct Factory Outlets, Retailer Clearance outlets and the regeneration of prime shopping strip centres all compete for retail sales.

The Lease Police

Are there any competition, regulatory and access constraints on the effective and efficient operation of the retail tenancy market?

The notion of competition is one that retailers acknowledge as a commercial reality. The Newsagency industry, once regulated, now is competing with supermarkets selling newspapers and national “category killers” such as Officeworks.

Many products that were once, “Pharmacy Only” are now in discount department stores and supermarkets. Small and medium sized Hardware stores are almost gone, their staff and owners now working for Bunnings.

Competition has created sameness in retailing.

The retail tenancy market is not regulated and as such Lessors looking for growth at all costs, (a similar philosophy to a Cancer Cell), continue to increase rents to unrealistic and unsustainable levels.

Inconsistent State Retail Tenancy Legislation also hinders the efficient operation of the retail tenancy market.

Are there restrictions on the availability of information to tenants that impact on business decisions and operations?

Yes.

Case Study # 2.

When attempting to negotiate a lease a regional shopping centre in Melbourne a Leasewise Client requested current Customer Traffic Figures. Although the potential tenant has a right to this information she was told in writing that, “The Landlord and its consultants, employees or any other representatives do not warrant, imply or represent any traffic flow estimates”. This despite the Lessor collecting customer traffic information electronically via counters on the entrances to the centre.

Often tenants are told by Lessors that, “Customer Counts are for Internal Purposes Only”.

When renewing a lease at a NSW centre due to expire in 2007 a Leasewise client was provided with the following by way of the Disclosure statement: “The Lessor’s traffic flow figures and details for the period 1st January 2005 to 31st December 2005 are listed below, Approximately 7,800,000.

The above case study shows Lessors reluctance to be transparent and up to date with information they collect.

The cost of collecting this information is often passed on to the tenant via the outgoings charges.

Lessors know exactly how many customers patronise their centres but are evasive and selective in disclosing this information.

The Lease Police

The Lessors should also be compelled to disclose the average cost of fit outs for each retail category from their detailed data bases.

Are the main factors influencing the level of rents and associated tenancy conditions appropriate and transparent to prospective tenants?

No. Rents are set based on capacity to pay using sales figures collected from tenants or by a notion that the rent is fixed by the Lessor and is not negotiable. The Lessors have all the relevant data, sales figures and rental information prospective tenants have no access this information.

Are the provisions of leases establishing the rights of tenants when leases end, appropriate and transparent?

No. We would recommend that, as part of the disclosure statement at the commencement of the lease tenants be made aware that they will not be offered a lease renewal in the first instance.

We would recommend that the Lessors be compelled to disclose the average rental increase on all renewed leases in the centre 12 months from the expiration of the subject lease.

We would recommend that the Lessor be forced to disclose that any renewed lease is conditional on the tenant refurbishing the premises and the average cost of each refurbishment 12 months from the expiration of the subject lease.

Case Study # 3

A coffee shop operator is offered a new lease in a large Melbourne centre. Then Lessor wants a 30% increase in rental and a full refit of the premises. These conditions are not negotiable. The Tenant fully refurbished the premises 3 years ago and the premises present extremely well and represent the current branding and livery of the coffee shop. The design criteria insisted upon by the centre designer for the store is expensive. The Lessor will not offer a contribution to the new fit out or rent free period to assist with the cost. The Lessor will not warrant or represent that this investment will improve the sales or profitability of the business. While this is occurring the Lessor permits a large coffee shop to open within a department store with less strident design criteria thus increasing competition for the Tenant. As a result the tenant may be forced out of the business due to subjective and selective design criteria and undisclosed increase in competition.

Is the notion of unconscionable conduct sufficiently clear?

As retail tenants advocates we are conversant with all definitions of unconscionability. We recommend that section 51AC of the Federal Trade Practices Act be incorporated in all state and territory retail tenancy legislation.

The notion of is unconscionability is clear however the major shopping centre Lessors reaction when confronted with an accusation is to relocate the perpetrator to another centre in another state.

It is impossible to bring a claim for unconscionability against a Lessor in a cost effective manner as Lessor's will litigate the tenants to death.

The Lease Police
Level 5/89 High Street Kew VIC 3101
Email: info@theleasepolice.com Phone: 1300 33 44 32 Fax: 03 9854 6293
The Lease Police is a wholly owned entity of the Leasewise Group ACN 118 63765

The Lease Police

What regulatory and other avenues are available for dispute resolution between landlords and retail tenants?

The RTU and the in Sydney and the OSBC in Melbourne and Mediation Centre of Queensland work well. These states have a compulsory mediation process and they are justly proud of their settlement rates. South Australia has a voluntary system and consequently it remains difficult for tenants to force their Landlords to attend. This needs to be addressed.

If participants see a need to reform current arrangements, what should those reforms be and what are the likely benefits and costs of such reforms to retail tenants, landlords and investors?

Shopping Centre Leases in their current format are *unsignable*.

Retail Tenants are so embattled that the Federal Treasurer has intervened and instructed this commission.

Waiting lists at the state dispute resolution centres grow longer, The fact that there is a need for specific retail tenancies lists at the various state tribunals and mediation centres is evidence that the shopping centre industry is ripe for legislative reform that improves the lot of retailers, forces Lessors to be open and transparent and deny Lessors access to information from their tenants that can be used against them.

Based on the above submission re request that the Commission make the following recommendations...

- All new or perspective tenants are required to receive independent advice before entering into a retail lease. It must be noted that Tenants who choose The Lease Police are sometimes dealt with harshly, threats have been made and has sometimes caused the tenant to submit to the threat with catastrophic results. The fact that The Lease Police are unconscionably denied free trade has been brought up on several occasions with the ACCC over the years.
- Financiers must align repayment of loans for shops with Lease terms only. Many people loses houses to either greedy centre owners or greedy banks, these entities are in some cases interchangeable.
- Clearly our advocacy which operates in an aggressive manner has been targeted by the Shopping Centre's to the point whereby they directed their lobby group and Spin Doctor Mr Milton Cockburn to write a four (4) page 'hatchet' job report on the Lease Police, it's Directors and it focussed on two (2) unsuccessful cases, not the 550 odd kept under the wraps of confidentiality. This report was circulated in the Shopping Centre News magazine.
- When assigning a lease the assignee, when approved by the Lessor, should be entitled to an automatic 5 year term.
- Rental increases on renewed leases to be capped at CPI plus 3% with increases over 8% prohibited.
- Existing tenants who have not been in breach of their previous lease be given a 1st right of refusal, at agreed market rent, for a new 5 year lease.

The Lease Police
Level 5/89 High Street Kew VIC 3101
Email: info@theleasepolice.com Phone: 1300 33 44 32 Fax: 03 9854 6293
The Lease Police is a wholly owned entity of the Leasewise Group ACN 118 63765

The Lease Police

- Deletion of the requirement for tenants to report sales figures. They are abused, all confidentiality is neglected and the reporting of them is a tool to weaken tenants only.
- Lessor to disclose average rental increase on all renewed leases in the subject shopping centre before a new lease is signed and 12 months prior to a renewal.
- Lessors to disclose any refurbishment requirements 12 months from the expiration of the lease. Arbitrary upgrades to be assessed by Impartial Government consultant as most directives from Centre Designers are driven by selfish personal folio agendas. Eg. Mission brown is now relevant with blade signs and exposed wood. Three years ago it was limes, oranges and three dimensional signs. The wasted amount of money in shop fits is almost a separate environmental waste.
- Shopping centres to be prohibited from passing on the cost of ceilings, walls, slab floors, plumbing and fire protection and air conditioning. This is currently a rort with significant loading added to 'category 1' costs by development companies associated with the centre owners. Category 1 works for an average tenancy can be as much as \$50,000 unless challenged. When they are challenged they are quickly revised as they are purely predatory and fiction.
- Make-good costs at the end of the Lease must be disclosed prior to entering a Lease as these are also fictional and addressed by way of cartel in reverse from previous point.
- Disclosure statements to include: All same category rentals, traffic flow information that can be relied upon as an accurate representation.
- Introduction of Federal Retail Tenancy Legislation using the Amended NSW Retail Leases as the template
- Any proven claim of misrepresentation or unconscionability will give the tenant the right to terminate the lease and be compensated for loss to the extent that they are returned to the financial situation they were in before signing the lease.

We thank the Commission for this opportunity.

Please contact the undersigned to discuss its contents.

Peter Macaulay
Ange Kondos
Directors: The Lease Police Pty Ltd

The Lease Police
Level 5/89 High Street Kew VIC 3101
Email: info@theleasepolice.com Phone: 1300 33 44 32 Fax: 03 9854 6293
The Lease Police is a wholly owned entity of the Leasewise Group ACN 118 63765