

## RETAIL SHOP LEASES

### PREFERRED NATIONAL LEGISLATION

#### Allen J Crawford FRICS FAPI

Mr Allen Crawford FRICS FAPI, Registered Valuer 1604 has been a Registered Valuer, originally NSW, since 28 June 1981, was elevated to the status of Fellow of the Australian Property Institute (then Australian Institute of Valuers and Land Economists) in 1994. He was elected a Fellow of the Royal Institution of Chartered Surveyors in March 2005. He is also a Specialist Retail Valuer (Queensland), Licensed Real Estate Agent and Auctioneer.

Allen Crawford currently holds the position of Executive Director, Chesterton Valuations (QLD) Pty Ltd t/a Chesterton Corporate Property Advisors and is also a Director of Chesterton International (QLD) Pty Ltd. Chesterton manage 20 shopping centres and more than 200 retail shop leases.

Mr Crawford's valuation experience is diversified both in terms of type of property and type of valuation. He is experienced in all forms of valuation from small stand alone properties to high rise office buildings, retail from single shops to regional shopping centres, industrial property, residential, subdivisions, and a broad range of specialist property. Valuations have been completed for mortgage purposes, litigation, books of account, acquisition and disposal.

In addition to valuation experience Mr Crawford has experience in property accounting, commercial management, retail management (Centrepont) and project management (National Australia Bank House 39,405 sq m high rise office).

Mr Crawford has been a "specialist valuation" lecturer at QUT particularly service stations, but also heritage and aged care. He is currently a lecturer on the subject of valuation at Finsia and provides assistance to University on Queensland in the setting of and presentation of assignments for the valuation of high rise buildings and shopping centres.

He has written numerous valuation industry papers, received formal recognition from the Australian Property Institute for his contribution to discounted cash flow standards and is involved in setting the industry standards for rental determinations. He regularly presents papers in professional forums including valuation and legal.

### Scope of Submission

Retail Tenancy arrangements are controlled by the lease which in itself should be within the scope provided by the legislation. There is significant variation between leases in the states and the API commends the government in the effort to obtain consistent and fair legislation throughout Australia. This submission focuses on :

- Premises to which the legislation should apply
- Preliminary disclosures by the lessor and lessee
- Minimum Lease Terms
- Payments under a Retail Shop Lease
- Turnover Rental Provisions
- Rental Review Provisions
- Rent Determinations
- Options – Extension of Lease Term
- Renewals
- Unconscionable Conduct
- Relocating or terminating Lessees Business
- Retail Tenancy Dispute Resolution

This submission resembles that provided by the Australian Property Institute ("API"). The views herein are those of Allen Crawford and work off the Queensland legislation adopting areas that work well and looking at alternatives where the current Queensland legislation is inadequate or inappropriate. The variation between this submission and that of the API is where, in the time permitted, I was not able to convince the state representatives on the API committee, which met on Friday 27 July, of the benefits in the solution offered herein.

In particular the following should be considered:

- Ensuring a prescriptive list of retail premises will remove doubt as to which lease is or is not included. To do otherwise is to create ambiguity or include leases which should not be covered by the legislation;
- Ensuring only Specialist Retail Valuer are appointed to determine the rental under a Retail Shop Leases.
- Consequences for including void rent review clauses should be at the choice of the Lessee.

### Leases to which the Legislation Applies

#### *Comment*

Various state legislation attempts to include or exclude, for various reasons, different types of property. Generally the result is cumbersome. By limiting the application to prescribed premises, problems associated with offices being caught in the legislation will not occur. In Queensland legislation an unintentional consequence is that office tenancies in a retail shopping centre leased to Government bodies falls within the legislation and the Government is not classed as a major lessee (see definition and consequences detailed below).

The definition should include all retail shop leases but not all leases to tenants in a retail shopping centre. Some provisions however should only apply to retail shop leases within a retail shopping centre. It therefore needs to be separately defined.

#### *Recommendation*

A **retail shop lease**, is a lease of a retail shop tenancy where, the whole of the term including options is greater than 6 months, of premises where the floor area is 1,000 sq m or less, where the use is prescribed (**a retail business**) and, where the lease was entered into after commencement of the legislation.

A **retail shopping centre** is a cluster of premises having the following attributes

- (a) 5 or more are used wholly or predominately for carrying on **retail businesses** and
- (b) the premises
  - (i) All are owned by the 1 person or
  - (ii) Have the 1 lessor or lessor or if the premises were leased would have the 1 lessor or head lessor or
  - (ii) Comprises lots within a single community title scheme

## Disclosure Statements

### *Comment*

There are always arguments that

- The Lessor of a shopping centre is at an advantage through knowledge of market evidence including turnover details of other tenants.
- Major Lessees (Lessees that have more than 10 shops in Australia where the use is a prescribed use) have at their disposal significant evidence about which the Lessor is not aware.

In both instances to expect disclosure of these confidential matters is unreasonable. The Lessor of the shopping centre is bound to keep confidential information of other tenants. A major Lessee has a right to withhold details of other business interests confidential from the Lessee.

The Legislation needs to create as far as possible a level playing field between Lessor and Lessee. In particular the party with the weaker negotiation strength needs to be protected. In shopping centres, the Lessor generally will have greater expertise in lease matters. It would prove too difficult to attempt to level a playing field where the Lessee has more expertise than the Lessor but it can be achieved where the Lessor has the greater expertise.

The Legislation should however, recognise that some Lessees have greater expertise and relax some of the provisions designed to protect the less experienced Lessee.

The Lessor should provide a statement to the Lessee detailing all matters which may affect the operation of the lease.

The Lessee, not being a major Lessee, should obtain such independent advice necessary to ensure a full understanding of the obligations under the lease.

*Lessor's Disclosure Statement*

The Lessor must provide to the Lessee at least 7 days before a prospective lessee of a retail shop enters into a lease a draft of the lease and a *Disclosure Statement*. Similar provisions should apply to prospective lessees and prospective assignees. The *Disclosure Statement* must contain :

- (a) the names of the lessor and lessee;
- (b) the address and description of the leased shop;
- (c) the term of the lease;
- (d) the date the lease starts;
- (e) details of any options to renew the lease;
- (f) the following details about the rent—
  - (i) the amount of the initial rent (other than rent based on turnover) calculated yearly or the method of calculating the initial rent;
  - (ii) any rent free or reduced rent period;
  - (iii) any rent review, whether during the term of the lease or a period covered by an option to renew the lease;
- (g) identification of any provisions of the lease about—
  - (i) the giving of information to the lessor about turnover of the lessee's business; and
  - (ii) the payment of turnover rent;
- (h) details of payments to be made by the lessee under the lease for the lessor's outgoings;
- (i) details of the lessee's liability to pay—
  - (i) survey fees;
  - (ii) costs to register the lease;
  - (iii) cost's in obtaining mortgagees consent;
  - (iv) stamp duty;
  - (v) promotion amounts;
- (j) the date or estimated date when the leased shop will be available for fit out by the lessee;

- (k) details of each of the lessee's and lessor's liability for fit out costs of the leased shop;
- (l) details of the trading hours for the leased shop;
- (m) identification of any provision in the lease about demolishing the leased shop or relocating the lessee's business to different premises;
- (n) the lessee's permitted use of the leased shop and whether or not the use is exclusive to the lessee and whether circumstances are contemplated by the lessor where changes of use will occur;
- (o) mention of the agreements to be entered into by the lessor and lessee in relation to the lease;
- (p) if the leased shop is, or is to be, situated in a retail shopping centre, each of the following details—
  - (i) the name and address of the centre;
  - (ii) the total number of shops in the centre when the disclosure statement is given;
  - (iii) the name of the current anchor tenant for the centre and the date the current term of the anchor tenant's lease ends;
  - (iv) the leased shop's area or estimated area;
  - (v) the centre's lettable area or estimated lettable area;
  - (vi) the number of parking bays available for the following—
    - (A) customers of the shop;
    - (B) the lessee or the lessee's employees;
  - (vii) the facilities provided by the lessor;
  - (viii) the lessee's entitlement to use part of the centre's common areas for trading;
  - (ix) the types of business carried on by the centre's tenants when the disclosure statement is given;
  - (x) whether the types of business carried on by the centre's tenants is to change during the term of the lease and details of any proposed changes;
  - (xi) any intended changes to the centre approved by the local government for the area in which the centre is situated;
  - (xii) if there is a tenants' association for the centre—information about the association, including contributions payable by members and members' voting rights;

- (q) each of the following details, if the leased shop is, or is to be, situated in a retail shopping centre, and the lessor obtains the details—
  - (i) the centre's moving annual turnover for its previous financial year;
  - (ii) pedestrian traffic estimates for the centre during the previous financial year;
- (r) details of any intended conduct by the lessor that may affect the lessee's or assignee's business during the term of the lease or assignment;
- (s) if the lessor is giving the statement to a prospective assignee details of any unresolved retail tenancy dispute that may affect the assignee.

If this is not done or it is a *Defective Statement* the lessee may terminate the lease and seek reasonable compensation unless, in the case of a *Defective Statement*, the lessor acted honestly and the lessee is substantially in as good a position.

#### *Lessee's Disclosure Statement*

Before entering into a retail lease the prospective lessee must give the lessor a *Disclosure Statement* stating:

- (a) the names of the lessor and prospective lessee;
- (b) the prospective lessee's address;
- (c) if the prospective lessee is a corporation—sufficient information to identify the corporation;
- (d) the number of retail business premises leased by the prospective lessee when the disclosure statement is given;
- (e) sufficient details of the prospective lessee's experience in retail business to demonstrate the lessee's ability to meet the financial and other obligations of the lease;
- (f) details of anything known to the prospective lessee that may affect the prospective lessee's ability to meet the financial and other obligations of the lease;
- (g) details of statements or representations made by or for the lessor during the lease negotiations and being relied on by the prospective lessee;
- (h) a declaration that no other promises, representations, warranties or undertakings have been made by or for the lessor to the prospective lessee about the premises or the business to be carried on in the premises;

- (i) confirmation that, the lessor has given the prospective lessee a draft of the lease and a disclosure statement.

Where the prospective Lessee is not a Major Lessee (Lessee of more than 5 retail shops in Australia) the Lessee must provide a Financial Advice Report and a Legal Advice Report.

A Financial Advice Report is to be signed by a qualified accountant and contain statements that

1. identify the parties to the lease and identify the premises
2. the accountant has provided advice about the prospective lessee or prospective assignee's financial rights and obligations under the lease including—
  - (i) the rent, outgoings and other payments; and
  - (ii) the potential financial impact of the rent review; and
  - (iii) the fact that the operation of the business is restricted by the term of the lease;
3. the accountant has advised the prospective lessee or prospective assignee to obtain further professional advice including advice about the following—
  - (i) the volume of sales required to meet all costs of carrying on the business including capital costs, loan repayments and salary for the business operator;
  - (ii) appropriate accounting and financial reporting systems;
  - (iii) cash flow forecasting;
  - (iv) sales budget forecasting;
  - (v) taxation requirements;
4. by the prospective lessee or prospective assignee about receiving and understanding the advice mentioned in the report.

A legal advice report is to be signed by a lawyer stating that the lawyer and contain statements that

1. identify the parties to the lease and identifying the premises
2. the lawyer has given advice on the following matters in relation to the lease—



- (i) the rent, outgoings and other payments and how they are calculated;
  - (ii) the rent review;
  - (iii) the liability to contribute to outgoings;
  - (iv) the term of the lease;
  - (v) any special or unusual terms or conditions of the lease;
  - (vi) whether a repayable bond or guarantee is required under the lease;
  - (vii) whether the lease contains an option to renew;
  - (viii) if the lease does not contain an option to renew—any rights the lessee or assignee may have to extend the lease;
  - (ix) the obligations on all parties at the end of the lease;
  - (x) any terms or conditions of the lease that allow the proposed lessee or proposed assignee's business to be relocated to other premises;
  - (xi) the uses permitted for the retail shop premises under the lease;
  - (xii) the lessee's right, under section 45 of the Act or the lease, to deal with the lease and assets of the business intended to be carried on in the retail shop;
  - (xiii) the consequences of a breach of a term or condition of the lease;
3. the lawyer has advised the prospective lessee or prospective assignee to obtain further professional advice including advice about the following—
- (i) town planning matters, including the licences or permits required to carry on the business intended in the retail shop;
  - (ii) building laws, including the appropriate classification under the Building Act 1975 to carry on the business intended in the retail shop;
  - (iii) the statutory approvals required to carry on a retail business of the type intended;
  - (iv) financial advice about the operation of the retail business intended to be carried on;
4. by the prospective lessee or prospective assignee about receiving and understanding the advice mentioned in the report.

### Minimum Lease Term

Most states (with the exception of Queensland) provide that a tenant is entitled to a minimum term including option of 5 years. This is a minimum period generally required to amortise fitout. It also allows for the development of the business and establishment of goodwill. There needs however to be a proviso that parties can agree to a shorter term.

### Payments under a Retail Shop Lease

It is appropriate to restrict the types of payments under a Retail Shop Lease. Items such as Key Money are not appropriate.

### *Recommendation*

A lease can only require a lessee to pay provided the following items are declared in the Disclosure Statement

1. Rent including percentage rent provided a clear formula is detailed
2. Outgoings or a share of them but excluding items of a capital or structural nature or other outgoings such as land tax if restricted by state law. Where outgoings are applicable to a particular tenant or group of tenants the outgoings should be limited to that group. I.e a tenant must derive benefit from the outgoing to be charged that outgoing.
3. Contributions to a sinking fund (there are some arguments there should be no contribution by tenants to a sinking fund and this in effect is payment for capital items)
4. Amounts for promotion and advertising
5. Survey fees, mortgagees consent costs, stamp duty and lease registration fees
6. The lessor's reasonable costs in responding to a request by the lessee for:
  - (i) A variation of the lease
  - (ii) Consent to enter into a sublease or license
  - (iii) Damages for breach of a term of the lease
  - (iv) The cost of an indemnity given by the lessee for damaged suffered by the lessor as a result of the lessee's actions

7. Interest on arrears of rent or outgoings, but the interest rate must be clearly stipulated in the lease
8. GST
9. Electricity Charges

#### Turnover and Turnover Rental

The provision of turnover details to the Lessor of a shopping centre is not only used for the calculation of rent but more importantly, for the sake of monitoring shopping centre performance. It enables the shopping centre manager to optimise the shopping centre mix which is to the benefit of all tenants. It may highlight instances where a particular section of a centre is adversely affected by certain actions of the manager or conversely demonstrate where particular strategies are successful. It is essential therefore that lessors have the option of obtaining retail turnover figures whether or not a lease contains turnover rent provisions.

Where turnover is collected by the lessor a lessee must

- Monthly, within a reasonable period after the end of the month provide to the lessor a sales certificate
- Annually, provide to the Lessor an audited annual statement.

The Lessor must not disclose the Lessee's sales figures except

1. in a document giving the aggregate turnover of businesses, or a class of business, in the retail shopping centre in which the leased shop is situated if the disclosure is made in a way that does not disclose information about the turnover of an individual lessee's business; or
2. specifying the turnover of the lessee's business to—
  - (i) a prospective purchaser or mortgagee of the retail shopping centre in which the leased shop is situated; or
  - (ii) a professional adviser to, or properly appointed agent of, a prospective purchaser or mortgagee mentioned in subparagraph (i); or
  - (iii) the lessor's professional advisers; or
  - (iv) a court under a court order; or
  - (v) a mediator or tribunal under this Act; or

- (vi) a specialist retail valuer.
3. A person who is given turnover information
    - (a) may use the information only to enable the prospective purchaser or mortgagee to make a decision whether to purchase the lessor's interest in, or to obtain financial accommodation on the security of, the retail shopping centre; and
    - (b) must not, whether directly or indirectly, disclose the information to anyone else without the lessee's agreement. Maximum penalty—60 penalty units.
  4. A person who is given turnover information
    - (a) may use the information only to determine the lessee's rent on the basis of the turnover of the lessee's business carried on in the leased shop or to advise the lessor on the centre's trading performance; and
    - (b) must not, whether directly or indirectly, disclose the information to anyone else without the lessee's agreement. Maximum penalty—60 penalty units.
  5. If a person discloses information and the lessee suffers loss or damage because of the disclosure, the lessee is entitled to the reasonable compensation for the loss or damage agreed between the lessor and lessee or, failing agreement, decided by way of the dispute resolution process.

Turnover needs to be defined. Most state and territory legislation includes exhaustive definitions although I note some still allow mail order sales to be included.

## Rental Review Provisions

### *Comments*

Historically parties with a stronger negotiating position have taken advantage of those with a weaker negotiating position. In particular lease clauses with review to market but subject to ratchet clauses or leases where the rental is to be the greater of two options have caused concern. The recommendation below is a fair procedure.

### *Recommendation*

- (1) If, under a retail shop lease, the rent payable under the lease or any renewal or extension of the lease is to be reviewed during the term of the lease or under an option to renew or extend the lease, the lease must state the timing of the reviews and the basis on which each review is to be made.
- (2) The rent may not be reviewed more than once in each year of the lease other than in the first year.
- (3) The rent may be reviewed using different bases during the term of the lease, but each review must be made using only 1 basis.
- (4) The basis for a rent review must be a single basis consisting of 1 of the following—
  - (a) the current market rent of the leased shop;
  - (b) an independently published index of prices, costs or wages;
  - (c) a fixed percentage of the base rent;
  - (d) a fixed actual amount;
  - (e) if the rent is determined as a base rent plus an amount equal to a percentage of the turnover of the lessee's business—the average rental paid over the previous year, or the stated number of previous years, of the lease;
  - (f) a single basis formed by a combination of 2 or more bases mentioned in paragraphs (b) to (e).
- (5) If, under a retail shop lease, the rent is to be reviewed during the term of the lease or any renewal or extension of the lease, the rent payable for the rental period after the timing of an invalid review is at the choice of the lessee
  - (a) the same as the rent payable before the timing of the review; or
  - (b) the rent worked out on 1 of the bases on which the review was made;

### Rent Determinations

The expertise to complete a retail rental determination requires specialist knowledge of the retail market and the legislation applying to retail leases. It is important that any determining valuer of a rental under a retail shop lease has demonstrated this higher level of expertise. There is currently a Valuers Registration Act in each state which could be used to provide a separate category of membership for those who have demonstrated and satisfied the registration board as having the specialist expertise required. Alternately and preferable the Australian Property Institute is able to set up a sub-member group of those who have satisfied the Institute as having the specialist expertise required.

Only Specialist Retail Valuers should be appointed to determine the rental.

The procedure for a determination is also of great concern to API members.

- A rental determination inevitably leaves one party or the other disappointed in the outcome. We have often experienced vindictive behaviour by the disappointed party. Determinations are a service provided by API members to the retail industry and should not be placed in a position of defending malicious and unjustified actions by the Lessor and Lessee.
- Specialist Retail Valuers need the option for fees to be paid in advance. Again the disappointed party will often attempt to refuse or delay payment.
- In completing determinations lessors and lessees have sought to restrict information provided to the valuer to the extent that determinations at best are delayed or possibly issued without the determining valuer being as fully informed as is desirable.
- On a regular basis, a specialist retail valuer in carrying out a determination will encounter ambiguous lease clauses or clauses where the parties to the lease apply a different interpretation. Where this occurs the legislation should allow a process whereby these problems are resolved. This process can be stated in the terms and conditions of the Specialist Retail Valuer's appointment.

### *Recommendation*

If the lessor and lessee can not agree on the current market rent within 1 month of the review date of the current market rent, the rent is to be determined at the request of either party by a specialist retail valuer agreed by the lessor and lessee, or failing agreement, nominated by the state President of the API.

The Specialist Retail Valuer is to be given similar protection and indemnity to that provided to arbiters under the Arbitration Act or valuers appointed under the Family Law Act.

The Specialist Retail Valuer may require the Lessor to provide confidential information relating to the business of other lessees in a retail shopping centre.

The Specialist Retail Valuer may require the Lessee to provide confidential information relating to the business in the premises.

If either the lessee or lessor refuses or does not provide the information within a reasonable time a retail tenancy dispute is created.

Either party may at the Request of the Specialist Retail Valuer provide other confidential information.

The lessor and lessee may each make a written submission to the specialist retail valuer about the current market rent of the retail shop. A submission must be made within the reasonable period decided by the valuer (*the submission period*).

I do not see significant benefit in exchange of submissions. This merely prolongs the determination process and creates further conflict between the parties.

In making a determination of the current market rent, the specialist retail valuer—

(a) must determine the rent—

- (i) on the basis of the rent that would be reasonably expected to be paid for the retail shop if it were unoccupied and offered for leasing for the use for which the shop may be used under the lease or a substantially similar use; and
- (ii) on the basis of gross rent less lessor's outgoings payable by the lessee under the lease; and
- (iii) on an effective rent basis; and

(b) must not have regard to the value of the goodwill of the lessee's business or the lessee's fixtures and fittings in the retail shop; and

(c) must have regard to—

- (i) the terms and conditions of the lease; and
- (ii) submissions from the lessor and lessee about the market rent of the shop; and

(iii) the other matters prescribed by regulation.

Where the Specialist Retail Valuer did not comply with these requirements either party may create a retail tenancy dispute in order to have the determination set aside and that a further determination be made.

The specialist retail valuer's determination of the current market rent must—

- be in writing; and
- identify the location of the leased shop; and
- state the matters taken into consideration in making the determination; and
- state detailed reasons for the determination; and.
- state whether the current market rent includes GST; and if the rent includes GST, the GST amount.

The specialist retail valuer must give the determination to the lessor and lessee within 1 month after the latest of the following occurs—

- the valuer is asked to make the determination;
- the terms and conditions of the Specialist Retail Valuers appointment are agreed
- the Specialist Retail Valuer is paid the professional fees;
- the confidential information is provided to the Specialist Retail Valuer;
- any matters of conflict in lease interpretation are resolved;
- the submission period ends;
- if, for whatever reason, a retail tenancy dispute is created, the matter is resolved.



## Options

### *Comments*

One of the major roles of the lessors in retail shopping centres is to manage the leases. It stands to reason that the administration procedures in place by a lessor are more developed than those of the lessee, particularly where that lessee is not a major lessee. The traditional option process however is to place the onus on the lessee to diarise the range of dates in which the option must be exercised.

A further potential problem may exist for a lessee. The business potential and hence market rental of the premises may be greater than the particular lessee can achieve. The commitment must be made to exercise the option with the uncertainty whether a business can afford the market rental. This is not in the interests of either the lessee or lessor.

### *Recommendation*

If the lease provides for an option the Lessor must advise the Lessee of its opinion of the current market rent prior to the earliest day on which the option can be exercised otherwise the period the option can be exercised in the lease can, at the option of the lessee, be extended.

If a lease provides for an option and the rent has not been agreed the Lessee may, during the early determination period, ask for the rent to be determined. The Lessee may then exercise the option on the earlier of 21 days after the lessee receives written notice of the determined current market rent or the day the lease ends.

The early determination period means :

- for a lease of not more than 1 year the period starting 3 months before the option expiry day and ending 1 month before the option expiry day.
- for a lease of more than 1 year the period starting 6 months before the option expiry day and ending 3 months before the option expiry day.

The option expiry day means the last day on which the option to renew or extend the lease may, under the lease be exercised.

The current market rent must be determined as at the date the request is made by the Lessee.

The cost of the determination is shared equally by the lessor and lessee, however if the lessee chooses not to exercise the option at the sole cost of the lessee.

## Renewals

### *Comments*

State legislation is similar.

### *Recommendation*

If the lease does not provide for an option the lessor must advise the lessee whether or not it intends to offer a new lease

- In the case of leases of less than 1 year at least 3 months but not longer than 6 months before the lease ends.
- In the case of leases of 1 year or more at least 6 months but not more than 12 months before the lease ends.

If the lessor fails to give the notice within the required time frame and the lessee requests an extension the lease term is automatically extended by 6 months.

Where the lessor does offer the lessee an extension of the lease, that offer must identify all the terms and conditions of the new lease being offered.

Where the Lessor does offer the lessee a new lease or extension on the existing lease and the lessee wishes to accept that offer the lessee must do so within 1 month of the offer being made otherwise the lessor may revoke the offer.

## Unconscionable Conduct

Provisions in various state legislation seek to define Unconscionable Conduct. This however causes confusion with the Trade Practices Act by seeking to expand on those provisions. The legislation should be consistent.

We therefore recommend that the South Australian approach be taken where Unconscionable Conduct relies on the Trade Practices Act. A retail tenancy dispute can be created to enable the dispute to be resolved in a cost effective manner.

## Relocating Lessee's Business

Provided that the lease allows for potential relocation of the lessee's business during the lease term and any renewal thereof, due to refurbishing, redeveloping or extending the building in which the leased shop is situated and the works can not be carried out practicably without vacant possession of the leased shop, the lessor may take action requiring the lessee to

relocate the lessee's business (relocation action). The lessor takes relocation action by giving the lessee a written notice at least 3 months before the relocation day (a relocation notice) stating :

- (a) sufficient details of the proposed refurbishment, redevelopment or extension to indicate a genuine proposal that—
  - (i) is to be carried out within a reasonably practicable time after the lessee's business is relocated; and
  - (ii) can not be carried out practicably without vacant possession of the leased shop;
- (b) details of the reasonably comparable alternative retail shop to be made available to the lessee;
- (c) the day by which the lessee must vacate the leased shop (the relocation day).

Within 1 month after receiving the relocation notice, the lessee may give the lessor a written notice terminating the lease in which case the lease terminates—

- (a) on the day agreed between the lessor and lessee; or
- (b) if there is no agreement—3 months after the relocation notice is given.

If the lessee does not give notice terminating the lease, the lessee is taken to have accepted the lessor's offer of a lease of the alternative retail shop mentioned in the relocation notice, or an alternative retail shop agreed between the lessor and lessee, on the terms and conditions agreed between the lessor and lessee; or if there is no agreement on the same terms and conditions of the existing lease however :

- (a) the term of the new lease is taken to be the same as the remaining term of the existing lease; and
- (b) the rent for the alternative retail shop is taken to be the same as the rent for the existing leased shop, adjusted to take into account the difference in the commercial values of the shops when the lessee's business is relocated. Where the lessee and lessor do not reach agreement as to the new rent, the rent is to be determined by a Specialist Retail Valuer.

The lessee is entitled to payment by the lessor of the lessee's reasonable costs of relocation, including, but not limited to—

- (a) dismantling and reinstalling any fixtures and fittings; and
- (b) modifying or replacing any fixtures and fittings to the standard existing immediately before the relocation; and
- (c) lost business during the relocation; and
- (d) costs to advertise the new location; and
- (e) legal costs.

Provided that the lease allows for states the lease may be terminated if the building in which the leased shop is situated is to be demolished requiring vacant possession of the leased shop, the Lessor terminates the lease by giving the lessee a written notice at least 6 months before the determination day (a lessor's termination notice). A lessor's termination notice must state—

- (a) sufficient details of the proposed demolition to indicate a genuine proposal to demolish the building within a reasonably practicable time after the lease is terminated; and
- (b) the day on which the lease terminates.

If the lessor gives the lessee a lessor's termination notice, the lessee may terminate the lease earlier than the termination day by giving the lessor written notice of an earlier termination day (the lessee's termination notice) which must be given at least 7 days before the earlier termination day.

The lessor is liable to pay to the lessee reasonable compensation for loss or damage suffered by the lessee—

- (a) because of the early termination of the lease, if the demolition is not carried out, or is not carried out within a reasonably practicable time after the termination day; and
- (b) for the fit out of the retail shop to the extent the fit out was not provided by the lessor, whether or not the demolition is carried out.

## Dispute Resolution

### *Comments*

Dispute Resolution needs to be cost effective but equitable to the parties. To lose the equitable outcome by saving on costs is not a desirable solution. There are arguments for and against representation at Mediation.

Certainly a mediation should not be bogged down by legal argument. A mediation is intended to resolve the differences, as far as possible between the parties or at least narrow the issues.

It is often the case however that the less experienced party to the lease will attend mediation unprepared. For example the experienced retail manager may attend the mediation and the lessee with little expertise has only limited chance of success. If the Lessee was also able to obtain representation to help prepare and present the arguments a more equitable outcome will result.

### *Recommendation*

There should be a 3 stage process

1. Mediation
2. Directions Hearing by Tribunal Legal Member
3. Tribunal Hearing

## Mediation

At a mediation hearing parties may attend with property expertise to help present the arguments but not legal representation where that legal representation seeks interpretation of the law applying to the retail shop lease.

A mediator has jurisdiction to mediate retail tenancy disputes, other than a retail tenancy dispute—

(a) about an issue between the parties that—

- (i) is the subject of arbitration where that arbitration proceeding has started; or
- (ii) has been the subject of an award (interim or final) in an arbitration proceeding; or
- (iii) is before, or has been decided by, a court; or

(b) about—

- (i) arrears of rent under a retail shop lease; or
- (ii) the amount of rent payable under a retail shop lease; or
- (iii) the amount of a lessor's outgoings under a retail shop lease.

A mediator has jurisdiction to mediate a retail tenancy dispute about—

- (a) the procedure for the determination of rent payable under a retail shop lease, but not the actual amount of the rent; or
- (b) the basis on which lessor's outgoings are payable by, and the procedure for charging lessor's outgoings to, a lessee under a retail shop lease, but not the actual amount of the outgoings; or
- (c) whether an item, or part of an item, of the lessor's outgoings was reasonably incurred in, or directly attributable to, the operations, maintenance or repair of the centre or building.

#### Directions Hearing

At the Directions hearing the tribunal legal member may make decisions and give directions deemed appropriate regarding:

- Questions of law
- The tribunal's jurisdiction
- Discovery and inspection of documents
- The parties representation at the tribunal's hearing of the retail tenancy dispute

#### Tribunal Hearing

A tribunal has jurisdiction to hear retail tenancy disputes, other than a retail tenancy dispute—

- (a) about an issue between the parties that—
  - (i) is the subject of arbitration if the arbitration proceeding has started; or
  - (ii) has been the subject of an award (interim or final) in an arbitration proceeding; or
  - (iii) is before, or has been decided by, a court; or
- (b) about—
  - (i) arrears of rent under a retail shop lease unless the dispute is also about the payment of compensation by the lessor to the lessee under the lease; or
  - (ii) the amount of rent payable under a retail shop lease; or

- (iii) the amount of a lessor's outgoings under a retail shop lease; or
- (c) if the amount, value or damages in dispute is more than the monetary limit allowed under other state legislation.

A tribunal has jurisdiction to hear a retail tenancy dispute about—

- (a) the procedure for the determination of rent payable under a retail shop lease, but not the actual amount of the rent; or
- (b) the basis on which lessor's outgoings are payable by, and the procedure for charging lessor's outgoings to, a lessee under a retail shop lease, but not the actual amount of the outgoings; or
- (c) whether an item, or part of an item, of the lessor's outgoings for the retail shopping centre or leased building in which a leased shop is situated was reasonably incurred in, or directly attributable to, the operations, maintenance or repair of the centre or building.

A tribunal may do all things necessary or convenient to be done for, or in relation to, the performance of its function. A tribunal may make, or cause to be made, the investigations it considers necessary for its hearings, including, for example, investigations about current market management costs and fees for the retail shopping industry.

The tribunal may make the orders, including declaratory orders, the tribunal considers to be just to resolve the retail tenancy dispute, including but not limited to any 1 or more of the following orders—

- (a) an order for a party to the dispute to do, or not to do, anything (an enforcement order);
- (b) an order requiring a party to the dispute to pay an amount (including an amount of compensation) to a specified person (a payment order);
- (c) an order that a party to the dispute is not required to pay an amount to a specified person;
- (d) an order setting aside the mediation agreement between the parties to the dispute;
- (e) an order that an item, or part of an item, of the lessor's outgoings for the retail shopping centre or leased building in which the leased shop is situated was or was not reasonably incurred in, or directly attributable to, the operations, maintenance or repair of the centre or building;

- (f) if the dispute is about the payment of compensation by the lessor to the lessee under the retail shop lease and the lease contains provision for the amount of compensation payable or a formula to calculate the amount of compensation payable—an order that the amount of compensation payable under the lease is reasonable;
- (g) an order giving effect to a settlement agreed on by the parties to the dispute;
- (h) an order relating to Disclosure Documents ;
- (i) with consent of the parties to the dispute—an order to rectify the lease;
- (j) if the tribunal finds that, in making a determination of current market rent, a specialist retail valuer did not make the determination in accordance with the Act—an order that the determination be set aside and a further determination, in compliance with the act, be made.
- (k) If the tribunal finds a party to the dispute engaged in unconscionable conduct in connection with the retail shop lease, the tribunal may only make 1 of the following orders based on the unconscionable conduct—
  - (i) an order requiring the party who engaged in the unconscionable conduct to pay an amount to a stated person;
  - (ii) an order that the party who engaged in the unconscionable conduct is not required to pay any amount to any person.