

Background

My name is K. Varr. I am the Managing Director of an organization called Kingsley's Chicken Pty Ltd, an organization that has been involved in leasing in shopping centres in Canberra for about 23 years.

We are currently 3.5 years and \$350,000 approx into a lease renewal dispute with the one shopping centre, and are still no where close to finalizing what should be a straightforward lease renewal at market rent, and are now having difficulties with a second landlord.

I want to take the opportunity to congratulate Mr Costello for appointing the Productivity Commission to inquire into the market for retail tenancies. The basic problem has arisen in our case because of the lack of transparency and misinterpretation of the Retail Leases & Tenancies Act 2001 (ACT).

I have been very involved in studying the Act and guiding my solicitors (I am currently on my 3rd firm) and my barrister on the correct interpretation of the Retail Leases & Tenancies Act 2001 (ACT).

SUBMISSION TO THE PRODUCTIVITY COMMISSION CONCERNING RETAIL TENANCIES

TRANSPARENCY IN THE RETAIL LEASES MARKETPLACE IS BY FAR THE BIGGEST PROBLEM IN FACILITATING THE FAIR AND EQUITABLE TREATMENT OF TENANTS BY LANDLORDS, ESPECIALLY:

1. In establishing Market Rent by
 - a. New Entrants
 - b. Existing Tenants on renewal of leases.

Currently, leases are frequently registered a year later or not at all, so that they are useless to anybody trying to ascertain what market rent is. Access to these leases is denied to the public such as tenants or prospective tenants under the pretext of being a breach of the Privacy Act.

2. Facilitating compensation claims where shopping centre extensions by landlords affect trade

3. Facilitating compensation claims where shopping centre refurbishments by landlords affect trade.
4. Changes to sight lines caused by the construction of walls and kiosks under landlord approval that affect trade and require compensation.
5. Facilitating claims by tenants to be released from leases and compensation caused by unilateral changes carried out by the landlord that affects the viability of the tenant's business.

TO FACILITATE TRANSPARENCY, LANDLORDS MUST BE REQUIRED TO ISSUE A DISCLOSURE DOCUMENT WHICH NEEDS TO BE UPDATED EVERY 6 MONTHS AND PROVIDED TO ALL TENANTS AND PROSPECTIVE TENANTS.

In the Disclosure Document, landlords must be required to disclose the following:

1. Shopping centre tenancies should be divided into categories which should have a minimum of 4 stores (to maintain privacy) for disclosure purposes, however the makeup of the categories must be disclosed.
2. A history of the area let and the number of shops in the centre.
3. Moving Annual Turnover and previous month turnover by category must be disclosed, especially necessary for market rent determination, disputes in relation to effect of landlord extensions and refurbishments, and landlord relocation of tenants to other parts of the centre.
4. As with 3 above, disclosure of foot traffic entering the centre and requirement for the centre to ensure the accuracy of these counts, and redundancy in case of breakdown of equipment (as this used to be is a common excuse when centre managements were approached for traffic numbers).
5. Disclosure of leases that have been terminated by the landlord in the previous 5 years.
6. Disclosure of leases that have been terminated by tenants with contact names and addresses should those tenants want to provide them.
7. Disclosure of average base rent per square meter over the last 5 years.
8. Disclosure of total lease incentives paid to tenants over the last 5 years.
9. Disclosure of a list of out of court settlements paid **to** tenants
10. Disclosure of a list of our of court settlements paid **by** tenants
11. Total outgoings by expenditure category over the previous 5 years.

12. Any related parties that supply services, eg management services, to the centre, and the history of these service costs over the previous 5 years.
13. Advertising Contributions received and categories spent on, over the previous 5 years.
14. New tenants and existing tenants must be provided with a disclosure document or access to the disclosure document on the “net”. The Ombudsman must be able to penalize Shopping Centres for not updating or distributing Disclosure Documents to tenants.
15. Shopping Centre should be defined as 1 building with 4 or more tenants, and a common owner

I attach my submissions as to matters that need to be taken into consideration, and specifically addressed in any Retail Tenancy Lease legislation to be introduced.

Any legislation must further seek to ensure that:

Tenants Security of Tenure:

1. Tenants must have security of tenure as they are investing tangible assets to build an intangible asset (goodwill) within a space that belongs to a third party. While the tenant may lose their asset if tenure is removed, the lessor will always control their asset. Both parties of course have to be able to evaluate each other, however currently, due to the current lack of transparency the lessor can evaluate the lessee, but the lessee is unable to evaluate the lessor.
2. The period from the time a renewal lease is given to a tenant to the determination of the market rent of the renewal lease and 8 weeks thereafter must be defined clearly to be a period covered by the original lease, therefore no back rent should be payable. This would encourage landlords to reach agreement in a timely manner.
3. The commencement date of a disputed lease renewal must be clearly defined as commencing 8 weeks after the renewal dispute has been resolved, and that the terms of the original lease including the rent payable continue until that date. This will ensure that the tenant is given ample time to evaluate the market rent and receive advice as to the viability of their business should they accept the lease.
4. There must be transparency by ensuring that all leases are registered in a public domain within 7 days of being executed, and that they can be accessed by any person to make educated an decision as to what rent to pay. This Act will be used to regulate and control a market place and thus all rules applying to a market place should apply here.
5. Any unilateral change by the landlord affecting the tenancy should be agreed to between the tenant and a landlord, as the initial agreement is based on a

“snapshot” of the market and the competition at the time of making the agreement. While the tenant is in a static situation, the lessor is in a position where they may

- a) introduce new competition.
- b) change sight lines that affect traffic flow to the site (say by the introduction of kiosks)
- c) carry out extensions, refurbishments etc that can affect traffic flow.

All of the above change the snapshot on which the agreement was made, and are based on decisions by the landlord that was made unilaterally.

2) The Act must have a clause that allows a lessee to

- a) Renegotiate their lease
- b) Negotiate compensation
- c) Terminate their lease
- d) Carry out these applications in concert with other tenants without breaching the Trade Practices Act

In circumstances where a unilateral action is carried out by a landlord (eg re-routing traffic and affecting turnover, setting up a kiosk which changes sight lines, carries out building works that affect traffic and/or turnover).

Renewal of leases

1. Landlords must be required to review all tenants leases if they have adhered to their lease terms, and the landlord must be required to at least 12 months before the end of the lease provide a copy of the proposed lease to the tenant, together with a list of changes to the original lease, with explanations as to why these changes are required by the landlord.
2. All leases should be renewed subject to the lessor deciding that they want to change the tenant mix. As this would be a unilateral decision by the lessor, the lessee should be compensated by the lessor for the cost of moving the lessee's tangible and intangible assets to a new site.
3. The tenant should be required, within 8 weeks, to inform the landlord if they accept the lease or dispute the lease. If the market rent is in dispute, the dispute must be registered by the landlord, with the Magistrates Court as soon as the tenant informs the landlord that they are in a dispute.

4. The Magistrates Court must require both parties to make submissions to each of the valuers who must submit valuations. Valuers must be given powers to examine documents and request information and documents relating to the valuation process. If the dispute is about other terms, then normal court proceedings must be the course of action.
5. If there is a lease dispute on a renewal, and the lessor has offered the tenant a new lease, the offer must remain open until the dispute process is complete, the dispute is brought to a conclusion, and the tenant is given 8 weeks to decide whether to remain or leave, based on the outcome of the dispute, and the terms of the lease that is being renewed remain in force until the dispute is concluded. The tenant must be given 8 weeks to decide whether to renew the lease.
6. If a tenant does not want to renew their lease, they must inform the landlord at least 12 months before the expiry of their lease, and must make good their premises by the expiry date of the lease.
7. All legal costs of both parties in relation to disputes must be borne by the party bringing on the action. This will ensure that landlords do not attempt to string cases out and try to outspend tenants into submission. and only serious matters that cannot be negotiated actually come before the courts. Tenants do not bring on frivolous actions. An Appeal process to the Supreme Court and higher Courts must be available.

Turnover Rent

The payment of turnover rent should be banned as the lessor is usually not in partnership with the lessee, and turnover rent is payable by tenants for successfully increasing their turnover, although this may be done without increasing gross profit.

Mid Term Reviews

Mid term rent reviews should be banned, as this places the lessor in a position where the tenant may be coerced into accepting an extortionate rent, the alternative being to challenge the rent and incur substantial expense in valuation and court costs.

Relocation Proposals During the Lease

If the landlord required a tenant to be relocated to a new site, the landlord should be required to pay the cost of the physical relocation of the tenant, subject to the tenant agreeing to the relocation. If the tenant refuses to relocate and the lessor still requires the tenant to move, the landlord must compensate the tenant for:

- a. Cost of loss of goodwill from trading in the current site or trading from another location not under the control of the landlord based on the tenant's estimate of the impact of such a move. This money should be paid into trust and the tenant must prove such impact, plus

- b. The cost of physically moving the business.
- c. Compensation for advertising and promotion by the tenant for re-establishing their business.
- d. Or some other agreed amount arrived at through negotiation.

Introduction of direct competition

If the landlord introduces a competitor to the market place, the lessor would have unilaterally changed the snapshot under which the lease agreement had been entered into. In these cases, the Act must set out a process whereby the landlord seeks the approval of the tenant, who must be given the opportunity to:

- a. Renegotiate the lease
- b. Negotiate compensation
- c. Terminate their lease and seek compensation for loss of goodwill, and the costs of moving their physical asset
- d. Join other tenants to any action to do any of the above without breaching the Trade Practices Act.

Any goodwill valuations for compensation required by the Act must be based on methodology prescribed by the Act, such as a multiple of EBITDA.

Rental Increases

While a lease agreement is based on a snapshot of the market, and circumstances at a moment in time, future increases are currently put forward by the landlord seeking increases which are

- a. usually CPI based or
- b. CPI plus a percentage
- c. or a fixed percentage increase

While CPI would be an acceptable and equitable method, the CPI plus or fixed percentage should be banned as the premium to CPI is put in place by lessors so as to get a super profit and compounding increase in valuation of their buildings which are based on their EBITDA. They are inequitable because:

- a. the amounts compound over the period of the lease
- b. there are no deliverables by the landlord, eg increased traffic to the site for the premium to CPI payable

- c. the fixed percentage is usually an amount that is in excess of recent historical CPI.

Outgoings

Outgoings must be addressed by the Act. Currently the main problems in this area are found in

- a. facilities and utilities being provided for the exclusive use of one tenant eg electricity and this being booked up to the utility of the common areas
- b. Advertising collected from all tenants and then spent on an individual tenant
- c. Conflict of interest and siphoning of funds charged by the lessor's subsidiaries for eg
 - i. Management of the Centres, ie instead of management of the Centre being charged to the Centre, they are paid by a subsidiary of the lessor, who then adds a substantial markup and charges the Centre's Outgoings Account.
 - ii. In Centre decorations which are paid for by a Centre are then unsold by a lessor to another Centre after the first Centre has finished using the decorations or promotions, with each Centre paying full value for these items.

Time Limits given to Tenants.

The time limits for decision making by tenants can be as short as 14 days. This is not equitable as, quite frequently, it is not possible for tenants, who are frequently running their own businesses, to make an appointment with their solicitor or their advisors within that time frame, let alone to provide enough time for the advisor to get a grasp of the facts to provide adequate advice. Six working weeks with additional days for any public holidays would be more reasonable.

Rental Deposits

1. Where rental deposits are paid in cash, interest should be paid annually on the deposit.
2. An Ombudsman should be set up to settle disputes on the release of rental deposits.

I am sure that there are many more matters that need to be addressed by the Commission in the area of retail leasing and that these will come to the fore during the course of the inquiry.