



The Market for Retail Tenancy Leases in Australia

Productivity Commission Draft Report (November 2007)

Response to Draft-Public Hearing Brisbane, Queensland 11th February 2008

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Introduction

The Productivity Commission Draft Report on The Market for Retail Tenancy Leases in Australia has been well received and its Terms of Reference accurately reflect the areas of concern from Lessee's and Lessor's within this commercial environment.

Since the late 1980's Statutory Bodies throughout the Nation have introduced legislation to address the growth and strategic change in the operation and ownership of shopping centres. Such Act's were in essence designed to direct regulation and minimum standards towards retail shop leases in larger shopping centres.

Currently the demand for investment from high end sophisticated property owners/super funds and the fact that quality properties are so tightly held by a small group of very large and aggressive Lessor's the market has seen a very notable shift in focus.

As more sophisticated and highly resourced Owners are now investing in the smaller neighbourhood and strip centres, Lessee's of such premises are experiencing more than ever the same pressures as their colleagues do in the larger centres.

These retailers have historically maintained solid personal relationships with the Lessor which brought equilibrium to retail shop lease negotiations. This has radically changed in just a few short years.

The Draft Report is extensive and addresses the key areas of concern and its recommendations 1 through 5 are sound and should be adopted.

The Commission's invitation to comment further on pages 212,213,216 and 217 should bring further clarity to the process of adopting such recommendations with the view that the final report may include such processes.

This response is concentrated specifically on those areas where the Commission has invited comment and provides brief back ground to actual issues (although generalised) and recommendations to the process.

Invited Comment

“The Commission invites comments on the feasibility and benefits of more widespread registration and facilitation of this process by landlords”

Firstly the area of mandatory registration needs to be addressed; currently registration between the states is not uniform. This creates variance in the information available to both Lessee's and Lessor's.

The fact remains that as most Lessor's are highly resourced they do not as such utilise the information available from such registries as they have portfolios with data correlation and hence see the registration of leases as a purely title functionary.

The matter of timing of a lease being entered into and the data being available publicly from a register can vary dramatically.

It is not untypical for an executed lease to remain in the offices of the Lessor/Lessor's Solicitor for some months and then upon reaching the registry further delays can be experienced.

Therefore when researching recent lease negotiations the data is not available to an enquiring Lessee whose purpose is to assess the market terms of the instrument as opposed to the title, in the case of a Lessor or potential property investor.

Further there is also the difficulty in retrieving the relevant lease essential data as the format of retail shop leases vary extensively and it is not standardised as to where essential variable terms are recorded, requiring at least some limited knowledge of these documents for research to be effective.

Such knowledge and resources are not common amongst Independent Retailers this along with the wide spread ignorance of the processes and research methods available these Retailers are always at a gross disadvantage.

To simplify the process and make the data available at such registries become effective and increase the transparency in the Retail Shop Lease market that all leases of a minimum 3 years be registered regardless.

And such registration be carried out in a timely manner, more discussion needs to be held here with the Registrars to best comment on the process.

Such a document is to include a copy of the Lessor disclosure which clearly and simply sets out the relevant lease terms and market information which can be easily interpreted by any party as it is in simple form.

"The Commission invites evidence on the feasibility and benefits associated with the introduction of a voluntary national code of conduct for shopping centre leases enforceable by the ACCC"

The Draft Report recommendations lean strongly towards a National Code of Conduct (CC) for Retail Shop Leases (RSL) and this is widely supported from all major retail groups. (RSLCC)

Although there are varying lease formats given the diversity of Ownership, Retailers and Statutory bodies a RSLCC can address the market offering consistent and commercially prudent minimum standards across the nation.

This will widely assist Retailers of all sizes as not only will there be greater efficiencies in conducting negotiations and ongoing administration processes but more importantly a single message can form the basis of Retailer education and training for the future which at present is not available.

The RSLCC should include minimum lease standards which promote simple form processes and transparency rather than burdening legislation.

The code should include nationally standard disclosure requirements including forms, recoverable outgoings, casual mall leasing and lease registration requirements.



Most States and Territories already have legislation that promotes minimum lease standards which are not dissimilar which would readily facilitate the introduction of the RSLCC and with the inclusion of the other aforementioned areas would prove highly productive in introducing further efficiencies and transparencies into the market.

“The Commission invites comments on the desirability and feasibility of establishing a nationally consistent framework for tenancy leases through the drawing down of nationally consistent template legislation for commercial (including retail) leases to each jurisdiction.”

The many and varied reviews within each State and Territory of Retail Shop Lease over the past 2 decades has provided interpretable and mostly clear minimum standards or framework for same and as such given the retail market in Australia operates seamlessly between regions a nationally consistent legislative process is obviously the next step.

The benefits here for Lessee's, Lessor's and Governments are clear, although the process can be somewhat unclear and can be lost in the differing administrations.

It would seem prudent that the introduction of an RSLCC with minimum standards for such lease areas as disclosure, outgoings, mall leasing and registration would over the short period bring a culture of acceptance and market credibility.

This being the case and acknowledging then a willingness of such parties involved in the respective reviews of Retail Shop Leases then each of these reviews would adopt the RSLCC through commercial expediency and open market forces within each State/Territory current legislative requirements and timetables without intervention federally.

However given the current political scene that exists nationally a common undertaking by all the respective Ministers may facilitate an alignment of the timetable of these reviews to bring about consistent change under common time frames.

“The Commission invites evidence on the costs and benefits of its draft recommendations for retail tenants, landlords, investors and the community generally.”

The adoption of the Commission's recommendations will in the most part greatly improve the ease of understanding and common knowledge of RSL for Retailers through a RSLCC.

The perceived costs to Lessee's and Lessor's should be at a minimum as the further consistency and transparency along with improved accessibility of lease data should in fact over time create efficiencies.

The statutory cost of introducing the Commission's recommendations is difficult to assess, given that I have no access to these processes.

However in the short term assuming each State and Territory already has an Industry Working Committee for the review of the respective legislations currently in place.

Submissions should be called by the respective regions to form a National Industry Working Committee to draft the RSLCC reporting to the Federal Minister.



In the whole these Committee Members are suitably qualified representatives of interested parties and are volunteers as such to represent the industry.

These processes has proved efficient in the past with the respective RSL review processes over the past 2 decades and therefore assume the same would be the case in the development of a RSLCC.

General Comment

The Commission's Draft Report refers to the willingness to introduce further transparencies throughout all RSL legislations and a consistency in same.

One of the main areas of concern for Retailers is the recovery of Management Fees in outgoings although this has already been addressed in Victoria and Western Australia the issue remains highly contentious in the remaining States and Territories.

Centre Managers, Administration, Accounts and other ancillary personnel are in the majority focused on the improvement of the Lessor's investment rather than the direct operation of the property and as such have a primary role directly benefiting the Lessor.

These management fees are not transparent under such legislation nor exposed to market forces as is other major expense areas as cleaning/security etc let alone any performance standards, and is solely governed by the Lessor.

Further the fact that Retailers are essentially funding the Lessor to resource themselves to directly gain an advantage in such areas as dispute resolution, lease negotiation and rental reviews to name a few.

This is the greatest area of inequity in the process of Retail Shop Lease dealings between the parties as the Lessee must resource itself to perform the research and data collection to represent themselves in such lease events whilst directly contributing to the Lessor's already onerous resources.

Also there is the unchecked scope here for the Lessor to create an internal return through these management fees and/or recovery of head office personnel and other such departments which are involved solely in the Lessor's portfolio.

Management Fees on the whole is the largest single amount reported in recoverable outgoings other than statutory and yet there is no transparency in these charges under any current legislation as such.

The same can be said for Land Tax where there is also a difference between the States and Territories; it is strongly recommended that any RSLCC address these 2 areas by removing them from the list of recoverable outgoings.

Another area to improve transparency is the interpretation of the Lessee in the case of disputes/relocations etc where compensation is involved.

A RSLCC should recognise a Lessee as not only the Lessee, Head Lessee or Assignee but also any Licensee or Sub Lessee particularly where a franchise operation is in place.

This would ensure that those parties directly affected in such events is suitably involved and directly receives the benefits of outcomes under the relevant legislations.



This was adopted in the Queensland RSL Act review adopted 2006 as there was evidence that Franchisor's had received benefits from Lessor's with no regard to the Franchisee operating the premises under license.

Conclusion

The industry is not broken far from it; it is competitive in both spectrums of Lessor's and Lessee's for lettable retail premises.

There will however always be inequities in such a market not only between Lessee's and Lessor's but even amongst Retailers/Retail Groups.

As Industry Advocates it is our collective responsibility to improve the transparencies and efficiencies of such a market so as all parties can be better informed to conduct their respective business through simplified, uniform and readily available information and processes.

In summary the introduction of a RSLCC which promotes a simple form Lessor/Lessee Disclosure which is registrable and accessible in a timely manner to all parties along with consistent and accountable recovery of outgoings will prove the most significant step towards achieving the changes needed to the market to promote transparency and efficiency.

Having said this, the greatest challenge to the Retail Industry is the inherent apathy of Retailers to resourcing themselves of the available information and proactively enters into informed negotiations for RSL.

After such changes have been adopted it is the education and dissemination of information of the RSLCC to all industry bodies and more importantly the Independent Retailers that will prove the greatest challenge, I would strongly recommend that any committee or body developed to introduce the RSLCC put at the top of their agenda the communication and education of same.

I thank the Commission for the opportunity to participate in this process which I view as a vital part of the Australian community and look forward to receiving the Final Report.

END

