

RESPONSE

TO THE

PRODUCTIVITY COMMISSION'S

DRAFT

THE MARKET FOR RETAIL TENANCY LEASES IN
AUSTRALIA

FROM

THE NEWSAGENTS ASSOCIATION OF NSW AND ACT LTD

(NANA)

AND

NEWSTRADe ADVISORY SERVICES PTY LTD

(NEWSTRADe)

Background:

The Newsagents Association of NSW & ACT Ltd (NANA).

NANA has been the peak State Association since 1891 supporting newsagents through evolutionary and sometimes revolutionary change.

Part of this change has been market enforced (evolutionary) and part has revolutionary effected by the de regulation of the industry in 2001by the ACCC.

NANA sees its role to provide the members the necessary mentoring by helping them through this transition. This mentoring is not only an exercise within the industry, but one of education to those outside of the immediate focus. The main aim is to bring together a formidable presence of competitive retailers as specialist newsagents.

Newstrade Advisory Services Pty Ltd (Newstrade).

Newstrade's Principal is Graeme Day. Graeme has been in the Newsagency and Retail industry for 39 years. He has owned and operated three newsagencies , two bookshops, two toy warehouses and one sports warehouse. He represented the newsagency industry as a Director (Vice President) of NANA for three years and a Chief Executive Officer for a period of five years. He has developed industry benchmarking since 1992.

Currently Newstrade conducts a Newsagency specialist Business Brokerage as well as a consultancy practice. It is in this role that Newstrade represents NANA LTD.

Newsagency History:

Prior to the Trade practices Act (1974) was introduced as law in 1979 Newsagents were appointed by a committee representing the three major (then) newspaper companies, Fairfax, News Ltd and Australian Consolidated Press (ACP). This committee decide the price of the newsagency (through a devised formula based upon circulation sales only) and appointed the newsagent depending on their assessment of his capabilities. I say his, as women then were not allowed to be newsagents. In return the newsagent was given, through his newsagency a restricted area, in writing. This meant no opposition, in fact the newsagent had a monopoly.

In 1979 the then Trade Practices Act through the Trade Practices Commission (TPC) (now ACCC) ruled the newsagency system anti-competitive and thus de regulated it. This was appealed by publishers , Newsagents Associations and supported by the then Fraser Government resulting in the TPC granting a State by State Authorisation for the newsagency :”system to operate collectively and collusively. It was reasoned and accepted that the community at large was main beneficiary by receiving a wide range of print media distributed at a low cost and efficient manner by resulting in “Public Benefit”. The retail section of the newsagency was acknowledge as the tool for the cross subsidization that made the dissemination of material to be distributed at such a low cost. This resulted in allowing the continuity of the retail monopoly. Low profit margins for newsagents and low cost home delivery fees were also part of the arrangement. These were and still are controlled by the publisher.

In 2001 it was determined by the ACCC that “changed circumstances” had evolved over a period of twenty years .With the increased availability of electronic media the past the regulation of the system was no longer necessary. It determined the industry to be anti competitive and withdrew all State Authorisation thus de regulating the industry.

Leasing:

The productivity Commission's Draft Report has many references to Retail Tenancy and different view points on commercial reality and unfair practices that may disadvantage retailers.

Whilst NANA agrees in principal with many of the complaints by retailers it also accepts the commercial reality of business and the "right to fail" by one's own judgement.

This is neither a purist statement nor a soft line approach, but of business expectancy by any commercial standard. However, for one's judgement to sound it should be based on Due Diligence including complete transparency by all parties including the landlord.

This is NOT the case in NANA's observation of most rental negotiations with newsagents since the 2001 de regulation.

Pre de-regulation it was accepted that newsagents because of their regulated status were like the Post Office today. They were wooed and given exemplary treatment. Their exclusivity to product gave them dedicated traffic flows which was in turn utilised by Shopping Centre management by placing them in low trafficked areas . This helped the Centres to equalise the traffic flow throughout the mall.

The newsagent of the era could still maintain a profitable site, like Post Offices even with low profit margins, because of product exclusivity.

Changed Circumstances:

"changed circumstances" resulting from the de- regulation of newsagencies and the competitive opportunities that now avail the market place has caused newsagents to "suffer" turnover and therefore some profitability. The proliferation of outlets by major chains (Supermarkets and Discount stores Service Stations and Convenience Stores) has had an effect on the industry and newsagents have had to adjust accordingly. They have grasped the mettle by in the main marketing their products more effectively (some through "branded" stores) than before. In fact it is fair to say that they "treating" the market rather than expecting the market to treat them.

Market place casualties have been almost nonexistent such has been the essence of the transition. The ACCC should be delighted.

They, the newsagent is still restricted to low margins of the essential material that allowed for regulation over a twenty year period *without competition* in an environment of incredible competition with any address from key players such as the landlord. The landlord has engaged in activity of increasing outlets of newsagencies within their centres probably unaware that they are making “both” businesses unviable. There is substantial evidence of this situation available.

We would like to bring to the Commission’s attention where small business is being disadvantaged with their lease conditions and renewal activity through lack of transparency.

Term:

Like many of the submissions made to the Commission we believe that term of the lease (minimum 5 years) is too short to return capital outlay to the investor. With some shop fit-outs costing around \$2,000 per sq metre and many amounting to a total cost of \$600k and more. The investor cannot repay this amount out of profit within the duration of the lease resulting that if the lease is not renewed in a considerable capital loss.

If the capital costs of the business cannot be amortised over the term of the lease financial institutions and banks are reluctant to lend on solely on the business’s ability to service the loan without taking addweight security in the form of bricks and mortar, usually the family home.

This in itself stymies the growth of small business in Australia and impedes the ability of that business to expand or fully potentialize as the mortgage repayments over the residence is not only, not tax deductible. It is taxed PAYG before repayment. This amounts to “double taxation” contaminating business progress with the consumption of non deductible debt repayment.

- Can one possibly imagine Woolworths or Coles or a Department Store with a five (5) year lease and not being in a position when it fell due, to be in a position as not be able to renew it?
- It is therefore proposed that leases for small businesses be extended for a reasonable period of time that is effective in amortising the capital investment during that period.

Renewal:

Renewal of lease is usually given six months before due date. The time is viewed by many tenants as an inadequate amount of time to negotiate. When approached earlier than the notification time, say ten months before they are often told that it will be looked at soon or wait until notification has been received.

Transparency:

At the time of renewal the tenant is approached with basically “ a take or leave it attitude” They are reminded that there is always some else that is prepared to ‘take on” their lease at the newly proposed rent and conditions.

This we believe to be contrary to a level or even handed negotiation in fact it may well border on Unconscionable Conduct section 51AC We refer Box 4.4 page73 of the Draft Report.

The factors a court *may* consider include:

- Bargaining strength of each party.
- Where in any way is the incumbent in a position of strength in this situation when the Landlord has a known prospective in the wings without risk in the negotiation and also is aware of the incumbent’s financial exposure?
- We strongly believe the power is disproportionate in favour of the landlord.
- Use of undue influence. pressure or unfair tactics
- Same as above, lack of disclosure and using undue pressure to accept a rental that the incumbent cannot afford but knows that the alternate loss of capital investment and goodwill is too great to refuse.
- This represents in our opinion misuse of market power.

- Whether the small business could obtain an arrangement on better terms elsewhere.
- This may be a possibility in a strip shopping area but extremely unlikely, or closer to impossible , within a shopping centre with the same landlord.
- Adequate disclosure; often the landlord will not disclose the offer made by the prospective (new) tenant stating that they have someone – they may even name them but NOT disclose the details of the proposal.

The above points we believe are factors unconscionably existent within the negotiation process on the basis that through lack of disclosure the Landlord has an advantage not equal to that of the tenant..

- We therefore propose that leasing negotiations for renewal are available to be commenced at least two years before the expiry of that term.
- That all competing proposals be fully disclosed at the initial time of negotiating the new term. This transparency would allow negotiators to be aware well before expiry of the landlord's intentions and would allow for healthy negotiations as all factors are on the table.

Performance:

A performance criteria needs to be in place. Criteria that measures the standard and performance of both parties. We find that it is one sided when the landlord can make a decision based on the perception or the image of the newly proposed tenant versus the performance of the incumbent without comparison of any measured standard .

A recent example of performance by a newsagent was questioned by the landlord when the tenant newsagent expressed concern that extreme rent was rendering his business unprofitable.

The landlord insisted that the tenant provide a detailed report stating performance per sq. metre per department of Sales and Gross Profit. It was also demanded proof of sales (computer records and an up to date Profit and Loss account from their accountants accompany the report. Source documents stating income and expenditure were also requested.

This report was completed by Newstrade and presented to Centre management.

- The documentation and report proved that the incumbent's performance in sales and profit were in line with their expectancy for a newsagency on a national comparison.
- The report divided the distribution of Gross Profit into four different groups showing a percentage allocated.
- Wages were below that of normal operational as the owners could not afford to take an average basic wage.
- Rent as a percentage of Gross Profit was 60% converted to occupancy cost of sales is 26%
- All Other expenses; light, insurance staff amenities etc were trimmed to the most efficient achievable less than 12 % of G.P.

The owner's return was **minus 10.4%**.

The report was not discussed with the writer or the tenant and when contacted by the writer the Centre Manager stated that an answer to the report was not requested.

The Centre management's answer was to issue a Deed of Surrender of lease with all cost of "making good" the vacant store (upon finding a new" suitable tenant) at a cost borne by the incumbent (around \$50k)

OR

Accept a promotional allowance of \$2K per month for 4 months in total \$8k (see attached correspondence)

Bearing in mind that the newsagent is losing \$52k per annum, it is not difficult to realise \$500 per week was a token display of "we are not going to seriously help you even though you meet our performance criteria"

The Report in question is enclosed along with the correspondence from the landlord stating their position.

This tenant through changed circumstance instigated by the Management through expanding the shopping centre and increasing the competition by opening an opposition newsagent into the new section with out disclosure has effected this business into the losses it now incurs.

The tenant has remortgaged his house twice in the past 12 months to keep financially afloat. His past record as a proven trader with this landlord in different outlets over 18 years is exemplary winning many industry awards Nationally as well as State in Retail excellence.

PROPOSAL:

We propose that “performance” criteria be agreed upon between the parties i.e. sales per sq metre and profit per sq metre before the commencement of the lease be introduced . It is well documented that the Landlords collect turnover data monthly from all tenants nationally and included in “their” own performance package as part of their asset structure return. This criteria would be a “negotiating tool” ensuring both parties of their responsibilities. If the criteria was affected by the landlords performance i.e. work under construction etc then the performance criteria could be temporally ceased until conditions returned to normal or compensation paid for the reduction in profit caused by such action.

A dispute resolution tribunal to be put into place to adjudicate in the event of unfair practise with the final decision based upon the material evidence put before them.

This should ensure that the tenancy renewal is only dependant on performance based criteria previously negotiated .

This along with fair market rental appraisal should be a considerable bridge to better relationships between performing parties.

However, the changed circumstances of increased competition and maintaining,, low profit margins and over supply of media products and leases that are semblance of the past are inherent of our previous privileged protected environment we believe this submission is representative of the majority of small business retailers and should be considered in that text.

Compiled by Graeme Day
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On behalf of
The Newsagents Association of NSW & ACT Ltd