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Inquiry into the need for a national approach to retail leasing arrangements

Committee Secretary
Senate Economics References Committee
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Parliament House
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Thank you for the opportunity to provide input to this important inquiry.

COSBOA has been seeking relief for its members from the behaviour exhibited by some larger businesses through the misuse and abuse of leases. This is particularly important around the lack of good faith during negotiation of leases and also the inclusion of clauses and information that is too the detriment of the smaller business person.

Differences between big and small business – it is all about trust, process and communications

Our approach to this issue is based on achieving productivity and health in the small workplaces of Australia by creating simpler and easier to understand processes.

We should first note some of the differences between big and small business, particularly important when in the large retail centres the landlord will always be a big business and their tenants are often people who run their own business.

A small business owner is closely connected with his or her business, they do not make a profit the same way as a big business instead they make an income and a living. Measuring success is not about a share price, it is about income, time with the family, lifestyle, interaction with customers, interaction with suppliers, happy and productive employees and personal health.

There are very rarely experts in leasing law employed directly by a small business person. Therefore what is a drain on a small business person is not necessarily a drain on a big business.

In the end the bigger problem for small business people is that by nature they are trusting and optimistic. Indeed if they were not of that ilk they would not ever start or purchase their own business. A small business person should not be punished for possessing these personality traits. The people who make comments “*it is their own fault if they sign a dodgy lease*” or “*there is one born everyday*” are happy to blame the victims of unscrupulous bigger businesses. Something that is not viewed the same way for the general consumer who has protections against that kind of behaviour.

One area where there is an entrenched culture of taking advantage of the trust of small business people and their lack of experience and understanding is in the biggest shopping malls.

The business model of the largest landlords appears to be based on lack of transparency and on entrenched “all care no responsibility” practices.

As an example of the ingrained problem, one representative of the landlords was given this scenario “there are landlords who know that a business who is signing a lease will not last for more than a few years yet they go ahead with the lease.” His response was “what can we do they (the small business person) signed the lease”? This is an appalling response that shows the business model is not built on good faith and disclosure, it also shows the complete lack of concern that business failure has on individuals and their families. This must stop and we are not sure changing leases can change that culture.

The other issue then becomes seeking justice for those that have been wronged. That is another area of difficulty. The history of the landlords is that they will ensure that any legal activity is dragged through courts and other legal processes until the aggrieved small business party runs out of resources or health.

Solutions

There are various processes in place or being developed that will assist to add good faith to the areas of retail leasing. This includes the services of the small business commissioners who are found in NSW, Victoria, South Australia and Western Australia as well as at the national level. These commissioners are being given more and more power to bring businesses together to resolve disputes. This then removes the capacity for bigger businesses to stall legal processes and stone wall activities until the smaller business can no longer participate. The small business commissioners will bring the issue under their jurisdiction and create an environment of openness and transparency.

The other solution is to increase sanctions on those that have misused their power. This is already being addressed in other related areas such as through the franchise code but also needs to be applied in the leasing area. A large enough sanction will inhibit unacceptable behaviour.

Given that a small business person who is in a shopping centre will be ostracized and is treated unfairly if they complain or cause what the landlord deems to be trouble, then the sanctions must also include a high compensation to that business person so they can establish a new business in another sector or exit business altogether.

The other solution is to review some of the common clauses found in leases that create problems. For example a common inclusion in leases is a clause that forces a lessee to conduct a shop fit-out a few months before lease renegotiation. The lessee then find themselves in a position where they have invested a significant amount of funds into the business and the landlord can increase lease costs knowing that the small business person will need to protect their investment.

There are other changes that can add fairness to the process these include:

- The first right of refusal for tenants to renew their lease – this addresses the practice of landlords to seek to push a tenant out so that a tenant from a national chain can be given room to trade.
- A fair and transparent form of rent adjustment – this provides all parties with the information necessary to make or justify decisions.
- A need for a national lease register – this would add to the transparency needed for good business negotiations.
- Provision of business information from tenants to the landlord needs to cease –the practice of connecting cash registers or sales information to the landlord to assist in determining lease costs is detrimental to developing new and better business practices, the smarter the tenant the more profitable the landlord. A business should be rewarded by its own efficiency or innovation not by the capacity of others.

In the end the biggest issue is the sanctions. The biggest landlords see themselves as above the law, they will threaten and cajole their tenants full in the knowledge that they can make any legal activities taken out by their tenant extend beyond the capacity of that tenant to maintain action.

There needs to be an independent judge, and this can be the small business commissioner, who can make determinations that are binding and significant, that will be so damaging that the guilty business cannot continue with their unacceptable behaviours.

In the end with fair and transparent practices, without the capacity for bullying, the landlords will still be profitable and the tenants will be able to trade as any business can with no unfair impositions.

Effect on competition

The other area of concern is the impact of local retail monopolies. This is often created by the biggest developers in partnership with landlords who take control of the CBD of a community and force other businesses outside their mall out of business. This is achieved by manipulating local government into closing car parks outside the malls and in some cases moving bus stops and changing street orientation to ensure all roads and transport systems lead to the mall.

This removes choice for consumers and allows for pricing to be decided by location and access for consumers not by a local competitive market place.

The developer will promote the development of the new mall to local government by stating that hundreds of new businesses and new jobs will be created. They choose to ignore the fact that hundreds of businesses and jobs will also be lost as a result of their development. This also creates an environment where poor business practices take place as exemplified by the current NSW ICAC proceedings where developers have compromised negotiations and transparency.

This problem can be resolved by ensuring that the developer funds an independent business and job impact statement for the development that highlights all losses and gains to be made for the business community and the general community. The local government representatives and the general community then has the facts to help in decision making.

In the end we need choice for consumers; local competitive marketplaces; and fairness and transparency for business people. This will only be achieved by giving relevant powers to small business commissioners and by ensuring that good faith and transparency exists in planning and in business to business negotiations.

Ends.