

TRIBE, CONWAY & COMPANY
SOLICITORS

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Senator Sam Dastyari
Chairperson
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator

REFERENCE OF NATIONAL APPROACH TO RETAIL LEASING ARRANGEMENTS

Our ref: PC

This submission is made in relation to the Senate Standing Committee on Economics' inquiry into the need for a national approach to retail leasing arrangements to create a fairer system and reduce the burden on small to medium businesses with associated benefits to landlords.

Confidentiality

1. This submission is not confidential.

First right of refusal for tenants to renew their leases

2. Granting a first right of refusal should be the result of negotiations between landlords and tenants - just as options to renew follow such negotiations.
3. There may be sound commercial reasons why landlords do not want to grant options to renew, or first rights of refusal to renew.
 - (a) First rights of refusal are exclusively beneficial to tenants, without any benefit to landlords.
 - (b) Worse still, a landlord may be lumbered with significant delays whilst the time-consuming requirements of a first right of refusal to renew are exhausted. An alternative tenant may be unable to wait, and may seek alternative premises.
4. The present model whereby options to renew are directly negotiated works fairly and reasonably.
5. A lease is a contract between a landlord and tenant for the use of the landlord's property for a fixed period, and on fixed conditions. The lease does not, and should not, create a right or expectancy of occupation by the tenant after the end of the fixed period.
6. There is no need to require retail leases to grant first rights of refusal for tenants to renew their leases .

Affordable, effective and timely dispute resolution processes

7. The dispute resolution processes presently applicable to retail shop lease disputes are generally adequate, cheap, efficient, and speedy.
8. Still, precluding resort to NCAT or court proceedings without first resorting to mediation through a Retail Tenancy Unit is unjustified, and can constitute a fetter on large and serious disputes being dealt with efficiently and quickly.
9. There is no need to alter the existing procedures.

Fair form of rent adjustment

10. Landlords and tenants need to be free to negotiate their own commercial arrangements, without statutory impediments.
11. Landlords often have huge amounts of capital invested in their developments, and are entitled to receive a fair return on their investments.
12. Market rent reviews, CPI adjustments, fixed percentage rent reviews and similar adjustments in annual rent are each fair methods of keeping pace with inflationary variations.
13. The prohibition of ratchet clauses for rent adjustments - such as section 18 Retail Leases Act 1994 (NSW) - should be removed.

Implications of statutory rent thresholds

14. If the Committee is considering excluding categories of retail shop leases from the legislative framework because of the magnitude of the rent, then this is a sound and worthwhile approach.
15. There really is no difference in the need for statutory protection between retail shop tenants and other commercial tenants. And all the more so because any protection given is to the detriment of landlords.

Bank guarantees

16. Bank guarantees are an ideal solution to trying to remedy the financial consequences of a retail tenant's default in paying rent or outgoings under a lease.

National lease register

17. There is no need for a national lease register to record and retain details of retail leases.
18. Many leases are registered, with details being available for search from land registries.
19. But many short term leases are not so registered. Some leases are deliberately short, and hence not registered, because some lease terms are confidential. Sometimes confidential terms are contained in a side document, not incorporated into the lease.
20. Commercial bargains deserve confidentiality.
21. The confidentiality of financial arrangements between landlords and their tenants is more important than the provision of industry information.

22. A national lease register would be:-
- (a) expensive to maintain, and to update;
 - (b) quickly outdated as leases expire or tenants vacate; and
 - (c) of dubious commercial benefit to anyone.

Full disclosure of incentives

23. Full disclosure of incentives needs to be made to the tenant considering taking a retail lease - but not to other parties, and not generally.
24. Incentives offered in connection with a specific lease are irrelevant to other leases.
25. Landlords routinely offer lease incentives only when the retail premises are difficult to rent. That difficulty can be:-
- (a) shop related - such as when the shop is located in a poor trading location;
 - (b) time-related - such as when the shop is offered for lease during poor trading periods; or
 - (c) caused by short term events - such as noisy nearby building works.
26. Incentives are routinely the result of negotiations between landlords and prospective tenants, and often are not finalised until after those negotiations are concluded.
27. Incentives are inevitably confidential to the parties, should not be publicly accessible, and should be safeguarded from public release.
28. Mandating public disclosure of lease incentives is without purpose or benefit.

Provision of sales results

29. Particularly with large shopping centre tenants, rent is based:-
- (a) on a fixed proportion of the tenant's turnover in the shop; and
 - (b) not on a fixed numerical sum.
30. Such tenants generally resist agreeing to pay rent otherwise than based on turnover.
31. But a tenant whose rent is not based on turnover should not be required to provide turnover results to its landlord.

Contractual obligations relating to store fit-outs and refits

32. Provisions such as sections 13, 13A and 38 Retail Leases Act 1994 (NSW) adequately deal with these matters.

Related matters

Fair Trading Department review - January 2011

33. In January 2011 Fair Trading Department released a consultation draft Retail Leases Amendment Bill 2011.

34. I made a submission on 10 February 2011.

35. I append a copy of my submission made on 10 February 2011.

Issues affecting the retail leasing industry in NSW - April 2008

36. In April 2008 Minister for Small Business and Regulatory Reform, Joe Tripodi, released a discussion paper on issues affecting the retail leasing industry in NSW.

37. I append a copy of my submission made on 26 May 2008.

The market for retail tenancy leases in Australia

38. On 13 December 2007 Productivity Commission released a draft report inquiring into "The Market for Retail Tenancy Leases in Australia".

39. I append a copy of my submission made on 21 January 2008 to Department of State and Regional Development in relation to disclosure statements required under Retail Leases Act 1994.

Department of State & Regional Development review of Retail Leases Act 1994 (NSW)

40. In July 2003 Department of State & Regional Development undertook a review of Retail Leases Act 1994 (NSW).

41. I append a copy of my submission made on 29 July 2003.

Yours faithfully
TRIBE, CONWAY & COMPANY

Paul

Conway

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