LOSING BALANCE?

what's really happening to fair trading in NSW's retail leasing sector?

NATIONAL COMPETITION POLICY REVIEW

OF THE

RETAIL LEASES ACT 1994

SUBMISSION TO NSW GOVERNMENT

ABOUT THE AUTHOR

At 39, Stephen Spring has worked in retail practically all his working life. He is the principal consultant at Australian Retail Lease Management, a niche consultancy for specialty shops focusing on all aspects of management, marketing, legal, business rehabilitation and landlord/tenant difficulties with an emphasis on the "black art" of retail site selection and lease negotiation. He has helped numerous clients successfully establish 'one off' shops, revitalise struggling chains and frequently negotiates retail leases and settles landlord/tenant disputes. He is also a successful specialty shop retailer in his own right, a consultant to retail property developers in Sydney's CBD and suburbs and partner in a Sydney based outdoor media and branding business.

Starting 1986 in partnership with Ian and Tom Hayson's the Merlin Group, a retail property developer of 'new breed' retail, (Harbourside, Skygarden, Manly Wharf, etc) Stephen also founded the first of the Lolly Pops brand of confectionery shops. 14 years later, he still owns that brand.

DEDICATIONS

This submission is dedicated to brave entrepreneur retailers who have unwittingly walked the road to financial ruin at the hands the shopping centre "system". Paid for by increasingly large numbers of retailers who realise that despite current legislation, watershed Government inquiries and ACCC intervention, speciality retail has entered an era when leasing space in many shopping centres is a very high risk, marginal proposition requiring experience and expert knowledge. Retail life cycles are shortening, competition is concentrating and the buying power of retail space and merchandise is such that small speciality retailers are caught in the classic bind. They cannot pass on their higher rents and weaker purchasing power to their customers because competition from the majors is too fierce and operationally reaching economies scale in cost structures is extremely difficult - so only the larger chains will likely survive the future. Like lemmings, thousands of mum and dad shops will continue to open and close in an endless cycle of hope, reality and crushing debt.

Collectively, millions of dollars are wasted every year when dreams of self-employed shop-keeping turns to debt laden instability because risk management and pre-lease checks and balances failed them. This submission is dedicated to the families who lost businesses and homes and who's lives have been shattered due to family breakdown caused when they challenged self-serving asset managers who hide behind armies of lawyers, leasing agents and litigation experts. And also to the unfortunate tenants who took their own lives as their best way of dealing with pressures placed upon them.

ABOUT THIS SUBMISSION

Due to the breadth and nature of the subject matter and the resources available, it is not possible to submit a fully comprehensive submission on the Retail Leases Act ("the Act") complete with cross-referenced supporting material, documentation, case law and detailed recommendations for amendments to the Act. The author has used a sampling of the material to illustrate the jugular issues and will make available all the material in the industry consultations that will follow. He has collected thousands of documents regarding Australian retailing, retail leasing and shopping centres, and he would be happy to provide examples and evidence of matters raised in this submission.

ABBREVIATIONS IN THIS SUBMISSION.

ARA – Australian Retailers Association
ADT – Administrative Decisions Tribunal of New South Wales
The Act – The Retail Leases Act (NSW) as amended
PCA – Property Council of Australia
SCCA – Shopping Centre Council of Australia

A. THE TERRIBLE TRUTH ABOUT SHOPPING CENTRES – THE NEW RACHMANISM

> **Rachmanism** /rakmaniz'm/ n. Brit. the exploitation and intimation of tenants by unscrupulous landlords.
>
> [Named after Perac Rachman, a London landlord of the early 1960's whose name has become synonymous with tenant exploitation.]
>
> **Oxford English Dictionary, 1993 Edition**

The industry of shopping centre development and management in New South Wales is barely 30 years old, but today there are 289 shopping centres with around 14,600 speciality shops. These shopping centres generate $21 billion of retail sales, accounting for more that 46% of all retail sales in NSW. Owned largely by listed Trusts and Public Companies, they have a capital value of more than $17 billion and are mainly managed by career portfolio managers, asset or centre managers.

Since 1992, the average regional centre has grown from 45,272m^2 (with 11,623 m^2 of speciality shops) turning over a combined $186 million to 63,657m^2 (with 22,587m^2 of speciality shops) turning over $283 million. In NSW, more than 7,000 specialty shops in shopping centres are owned and operated by independent traders with 3 shops or less and are *employed* by those businesses who directly draw their family income from them.

In the past few decades, shopping centres of various sizes have evolved into extremely popular destinations with millions of weekly visits to the shops, cinemas and community centres and are now are part of our social fabric. Super regional centres often dominate a region, defining its retail boundaries and attracting large chunks of the local population's spending power. The stores within them take on the centre's trading characteristics as powerhouses of collective economic activity, delivering higher levels of turnover than many retailers could obtain in other locations because of greater customer advantages – free parking, air-conditioning, greater security, a clean environment and entertainment and food precincts.

So powerful a magnet are they, retailers mindful of demographic and psychographic shifts, often locate adjacent to shopping centre satellites and become parasitic upon them. Often these retailers, in turn become tenants of the shopping centre at a later time - and the centre continues to grow.

In Victoria for example, "expansion of shopping centres over the last eight years means one large regional centre has been added to that State's retail market every year for the past eight years. Leasing executives have, on average had to find and lease to 375 retailers just to fill the expansion and still hold on to all their existing tenants." Shopping centre managers put enormous pressure on leasing executives to seek out specialty retailers and sign them up to keep the centres full - and there are always willing neophyte merchants, franchsiors and other retailers expanding to protect their own market share. It is the specialty stores that provide the illusive point of difference to shopping centres as well as providing the vast bulk of revenue to their owners and in "Australia and New Zealand, a much larger proportion of retailers in shopping centres are small to medium sized business compared to U.S." Retailing is dynamic, ever changing and reflective of our changing society - and so too are shopping centres.

However, property laws governing the leasing of those centres are grounded in concepts from the English feudal system, and lately, modern contract law. Only since 1994 that NSW statute books have recognised retail property law is a species like no other.

> "The idea there is a 'war' going on in shopping centres around Australia, between retail tenants and property owners and managers, conveys accurately the tenor of evidence given to the Fair Trading inquiry on retail tenancy issues."
>
> **Finding a balance – Report by the House of Representatives Standing Committee on Industry, Science and Technology, The Parliament of the Commonwealth of Australia -1997**

It's fitting those words were the opening line by the Minister for Public Works and Services in the second reading speech of the Retail Lease Amendment Bill in 1998, that lead to further changes the Act - the national bench mark for retail leasing best practice. He went onto say, "It is the peace agreement that has been negotiated to end the "war", ushering in a new system to govern landlord and tenant relations.

He was wrong.

With hindsight, the Finding a Balance - Fair Trading inquiry only bought out in the open what many industry insiders knew all along - and Equity Courts had been alive to for many years. Clearly, lessons learnt from that inquiry post 1994 must *never* be forgotten. In that context, the Act must stand today as a *work in progress* because shopping centres aren't simply going to stop operating or expanding and retailers aren't simply going to stop signing retail leases.

It may have been far different had the NSW Joint Standing Committee on Small Business Inquiry into Retail Tenancy in July 1998 been completed - perhaps more information might have come to light.

Now, five years later, further regulation is needed in key areas and the process of ensuring *personal responsibility, integrity and ethical standards in retail leasing* must continue. That is not to say additional and strengthened leasing regulations should become a "refuge for those who are merely disgruntled with a bargain entered into on even terms", but regulation should be exercised to "protect victims of wrong dealing not to prescribe anodynes."

The need for further reform is immediate and never ending and not simply because NSW sets the agenda for harmonised legislation Australia wide, but because some landlords and their lawyers have moved to a new level of sophistication to use the "new system" to their best advantage.

> "The Act sought to re-write the rules and practices of retail leasing in New South Wales.
>
> The challenge to us was to:
>
> - avoid the traps applying under the new law: and
> - learn some of the legal "tricks" which might help balance things up."
>
> **Selwyn Black, Editor**
> **Retail Leasing Legal Update**

Whilst other State Governments are only now grasping the nettle and properly overhauling a system that has anti-competitively protected shopping centre landlords long enough, future small retailers of NSW will owe a huge debt to the present Government should it continue with reform. If the NSW Government fails to address emerging issues, a generation will pass before retail tenancy tragedies are again bought to light. In the meantime, the wealthy would have been delivered up untold billions with a green light that in essence says, the leading Government on retail leasing reform can be hoodwinked by vested interests from the big end of town.

Precisely because the NSW Courts and Tribunals see only the tiny tip of the iceberg when it comes to retail leasing problems, (with 1,272 applications for mediation for 8 years to 30 September 2002, the overwhelming majority are *not* pressed or settled in *secret*) the opponents of continual reform say "these figures put the lie to the nonsense peddled by some for their own purposes that this is an industry in turmoil."

Without keeping the lessons of Finding a balance, Fair Market or Fair Market Failure? and the recent Dawson Reports top of mind, the culture of Rachmanism will flourish at shopping centre level. Today there *are* better mechanisms for redress by retailers, but in reality, the Courts and Tribunal *must* be the absolute last line of defence in the perplexing and confusing world of retail lease law.

How many retailers understand the nuances of quiet enjoyment, derogation of grant, privity of contract between valuer and tenant, the law of options, offer and acceptance just to name a few? With retailers earning an average $15-25.00 per hour, what is the real hope of employing a specialist solicitor at $250-350 per hour and a barrister at $3-3500 per day to find out?

More importantly, the "war" has opened up on new front – the battle for hearts and minds of the legislature through the PCA and it's well funded lobby group, the SSCA - headed by Milton Cockburn, media and public affairs expert, former Sydney Morning Herald editor and 'spin-doctor' for the Sydney 2000 Olympic Games. The formation of this group, whose "key advocacy task is to roll back restrictive lease legislation at Federal and Local government level" came as a direct result of the Fair Trading inquiry.

> "...last year, shopping centres discovered that, in some quarters, we had a perception problem....the fair trading debate was heated and sensationlised, with only rare moments of cool headed common sense. Once or twice it verged on the bizarre with shopping centre owners and managers accused causing of everything from business failure to marriage breakdown.
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> For their audience – politicians and the media – it was an easily digestible package. It had victims, it had power plays and it had lots of human interest stories. It was a classic David and Goliath pantomime and in the wash up, we looked like the bad guys. And we weren't prepared.
>
> When politicians, the bureaucrat, the journalist think "shopping centres" in the future, we want them to think "jobs, family security, economic activity, small business success" and not "market dominance" and "high rents".
>
> We are not perfect in this industry and we don't shy away from our shortcomings. Companies make mistakes. The individuals who work for us make mistakes – but those incidents are the exception and not the rule.
>
> That message did not get an adequate hearing last year and it caused the shopping centre industry to take stock. The Property Council of Australia was certainly very active in the fair-trading debate, but we found at the end of the day that it lacked resources. Basically we weren't well organised enough to do the job that needed to be done, to mount the sort of public campaign to protect our standing."
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> **Stephen Lowy, Managing Director, Westfield America**
> **International Shopping Centre Conference April 1998**

It's the disconnectedness of those last in the food chain - the *retailers themselves* as opposed to the system players directly financed by the retailer's capital and rents – centre managers, lawyers, leasing agents, property consultants and analysts and even the ADT judicial members and Supreme Court judiciary - that the need for reform must never cease. As the PCA keeps saying, Australia's retail environments are dynamic and highly competitive, but our changing society now dictates a bottom line that doesn't come at the expense of other things society values - fair dealing in good faith, full disclosure for informed choices and professional ethics when livelihoods are at stake.

Today, *fair* rents seem to be of no concern to most landlords who are more focused on tenancy mix, rent arrears and investment yields and often pointing to low vacancy rates as their harbinger of success. Vacancy rates are not the sole measure of the supply and demand equation and certainly *not for affordability.* For example, the practise of varying contract rents (i.e. concessional rent relief) is normally only considered when landlords run real the risk their property is emptying of shops and are forced to negotiate out of fear of losing too many tenants. Often by then its too late, and many businesses have been ruined. Unbelievably, some supposed fully leased centres run almost entirely on monthly tenancies after continual rent arrears trigger lease clause conversion to month-to-month tenancies, *because initial rents were too high and the developers got their feasibility numbers wrong in the first place.*

Despite claims to the contrary, many retailers are trading not because they really want to – many are simply trading at a loss waiting to run out their lease. Through either their own fault or the landlord's, many, have over time, become true economic captives, slowly decapitalising, working for less than wages and without superannuation. It is the overall economic and social cost of the high occupancy rates that is the real test - retailers and future retailers of NSW ask a lot from the Act.

B. ACCESS TO JUSTICE

Access to justice is access to the maxims of Equity and equality - and equality in today's language is *fair play among equals.* The ADT simply follows the law, but despite it recognising retail leasing has a "public policy setting" it has no duty judge for urgent interlocutory matters and no joinder mechanisms for proper claims against those personally responsible for many of more sinister practices ventilated before it. And it has effectively nobbled the Registrar of Retail Leasing Disputes' prime weapon - the powers of intervention under Section 65 – designed to dispense with the need for a Retail Leasing Ombudsman.

C. ACCESS TO INFORMATION

Despite the Act's provisions (and NSW's lease registration scheme), information flow and secrecy imbalances are grey areas of the system that play to the landlord's advantage, discouraging openness and fair rents. Disclosure statements are increasingly being distorted to protect landlords' interests instead of giving prospective lessees the relevant information. Face rents recorded by the Land and Tiles office (even offered as fraudulent "market evidence" in Courts) do not document the millions of dollars of "collateral arrangements", side deals, rent free periods, fit-out and stock contributions, kick backs and secret commissions and other un-related lease surrender deals. These are the very same instruments that valuers use to set "current market" and capital valuations - so many are based on falsities.

A specialist retail valuer, in essence "must put himself in the shoes of a retailer" whilst evaluating effective current market rent. Retailers often spend years developing a location profile prior to making an investment decision, but valuers, with a single visit and legally binding report, can rentalise a retailer out of business. Many valuations are based on the untested word of the landlord or their agent, despite provisions set out in the Act. And to challenge a valuer's report is no trivial matter because retailers must *challenge the valuer in an action for negligence* – not challenge the landlord. It is a system fraught with deliberate distortions and opportunities for deceit.

These "clear market" deformations are seemingly insurmountable impediments to give full effect to frank disclosure and informed decision making for small business. They are dishonest at best and anti-competitive and institutionalised corruption at worst.

It is this anti-competitive profiteering as the main reason why landlords keep tenancy schedules so secret. They often acknowledge massive disparities in rents paid between retailers within classifications or worse, reveal their own actual sales performance estimates and anticipated occupancy cost ratios (used for setting budget rents in expansion and development feasibilities) are hopelessly inaccurate.

Over time, using tenants' turnover information, shopping centre landlords develop profitability profiles that prospective tenants can only dream about. It follows then, that many shops are often leased by agents and spruikers to prospective tenants *with the full knowledge that the business will likely fail with that usage and that rent* – yet in industry parlance, it is merely a weak leasing deal.

For sitting tenants, the industry averages "bible" by Jebb Holland Demasi (the JHD reports) used by landlords as affordability of rents is no better. It does not record arrears, rent written off, rents exclusive of incentives, uses information supplied only by landlords and ignores promotional contributions, often amounting to about 5% of rent. Not surprisingly, the JHD reports are produced by a business whose main clients are the major shopping centre landlords. Sadly, it's an industry built on half truths and slight of hand.

What shocks many retailers is their turnover figures disclosed to their landlords are, in fact, used against them. Despite protestations to the contrary by landlord groups, retailer's sales figures *do* dictate leasing and expansion decisions and "rental optimisation strategies." Landlords *do* regularly use turnover figures to computer model shopping centres precincts, redevelopments, category acquisition and retailer profitability. A cursory glance the General Property Trust or former Stocklands annual reports shows that retailer's occupancy costs are a key part of "rental growth" strategies to attract investment.

D. "UNFAIR" AND 'UNCONSCIONABLE" ARE NOT THE SAME

"Unconscionable" in the legal sense does not have the same meaning as "unfair" in the vernacular of the layman – it never has. The High Court has recently clarified 'unconscionable conduct' in the context of retail leasing and so the need for "fairness" must now be clearly spelt out. It must be read "according to the common sense approach characteristic of the ordinary journeyman...it is a plain matter of morals...and should utilise the commonsense approach characteristic of the ordinary, reasonable, hypothetical standard jury person...which appear to him to provide a proper balance or division of advantage and disadvantage between the parties who have made the contract or arrangement. In doing so, he would always have to bear in mind the conduct of the parties, their capacity to appreciate the bargain they had made and their comparative bargaining positions when entering into the contract or arrangement."

Whilst some landlords breathed a collective sigh of relief after the ACCC's failure in the High Court, the ADT has readily taken its cue from the High Court and applied a "cautious approach". In reality, it has set the industry back 20 years. To give public illusions that current retail law protects against *unfair* trading is a cruel twist between two realities. It is for this reason, amongst others, some lessees elect to use the Industrial Relations Commission of NSW to hear claims under 106 of the Industrials Relations Act of NSW and *not* press them in the ADT.

> "Because of the delay and cost involved clearly most retail tenancy matters in dispute do not get to court. In the past two years alone the ACCC had received almost 1000 complaints and inquiries relating the [unconscionable conduct]. Many of these involved commercial and retail tenancy matters."
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> **Outline of the interaction of retail tenancy Issues and section 51AC Report to the ACCC, November 2001,**

E. THE CULTURE OF DECEIT, BULLY AND COMBAT

Many of the Act's leasing issues are really corporate culture, governance and attitude issues. In other industries, sharp practices of shopping centre landlords and their advisors would be issues for the police fraud squad. An emerging and alarming trend is to use the cost recovery provisions of lease outgoings clauses to maximise centre returns – in reality, it's rent by stealth, an accountant's trickery - almost a profit centre in its own right. Matters such as: -

- collecting money from tenant's outgoings for taxes and not passing it on;
- funding centre manager's home repairs or paying for trips overseas;
- charging tenants legal fees for defence against claims from those tenants;
- diverting millions of dollars of tenant's promotional funds from one centre to prop up a failed centre owned by the same company;
- allocating secretarial services to the promotions account properly attributable to the owners; and,
- issuing customer shopping vouchers redeemable only against rent accounts arrears,

are just some of the tricks of the shopping centre trade and they are not mere assertions.

Courts and Tribunals regularly hear cases where landlords, aided and abetted by law firms are adept at using the "bikini principle"– where the provisions of the Act and the legal processes apparently disclose a great deal - but hide the most important bits. Sadly, it confounds those tenants who seek access to the truth about where their monthly charges are really going. Unfortunately, perpetrators are not punished and tenants often lose their life savings.

Is there another industry where employees daily sign up people up to contracts worth on average $0.5 million dollars without any formal training, professional ethics regime or understanding of the law? Most other form of professional work - from tradesman to real property transactions - need professional licensing, but amazingly, not with leasing shopping centres. It is an industry crying out for licensing of centre managers and leasing agents and now is the time.

F. ADDRESS THE NEED FOR CONTINUING EDUCATION

Many retailers find themselves in a legal vortex that has its origins in risk management and business issues that should have properly been addressed prior to signing their leases. Other legal problems are due to ignorance of the Act itself because property law is by its very nature, technical, notice driven and problematic with evidence. How for instance do you claim loss and damage when your landlord allows foul and noxious smells to emanate within your tenancy due to faulty air-conditioning under its control? (Clearly customers will be put off, many might leave never to return, but *proving* the breach and then the *damage quantum* is quite a different matter).

And because most small retailers rely on their occasional visit to their solicitors for their advice, they often don't know what they are signing up to.

> "The retailer will only have knowledge of the basic commercial terms from the letter of offer given by the leasing agent. Despite the provision in the Act, most will not have seen a copy of the form of the proposed lease.
>
> All marketing information is usually taken as being gospel, both as to the rent being at market rent and as to the sales performance that is being achieved from the area. In many instances the retailer has little or no idea as to whether or not the rent is affordable.
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> Retailers will have little knowledge as to what is in the lease document other than the commencement date, the rent to be paid and what is the rent review provision...
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> ...they have little understanding that a lease is a contract for a specific period with obligations to pay the pay rent for the full period of the lease...demolition clauses mean nothing to most and they are astounded when given notice to vacate in six months as the landlord has other plans for the property. This demolition clause has been included despite the tenant having paid full market rent for the premises...
>
> ...the majority of small retailers would not have done an assessment as to the affordability of the rent for the lease..."
>
> Michael Lonie, tenancy director ARA
> Speeches for Continuing Legal Education Centre, Sydney

Michael Lloyd, owner of Shopping Centre News and former leasing director of Lend Lease Retail, recommends that "new leasing agents take *at least a week* to read and re read to familiarise themselves" with their lease documentation they are selling.

It follows that due to lease language and complexity, most small retailers rely solely on the solicitors and never read their lease properly. The Act can do much to prevent these information gaps, perhaps by way of pre-lease explanation certificates signed by professionals as in Queensland (Retail Shop Lease Act (QLD) sections 22D&22E). However, great caution must be taken in their application, lest the process becomes a mechanism for landlords to sheet home the blame to the lawyers and accountants that advise their small retail clients.

Simple measures can be easily introduced, perhaps by regulation. Under the Residential Tenancies Act of NSW, all tenants are *given* a copy of a condition report and "The Renting Guide" booklet in numerous languages outlining landlord and tenant rights and responsibilities. Yet surprisingly, this simple mechanism is overlooked when it comes to retail leasing.

There is no reason why a compulsory, simple business planning step-by-step guide cannot be *given* to prospective lessees in their initial dealing with landlords. This common sense approach also raises the spectre of a plain English and statutory lease – the ARA has already produced one, so too has the NSW Government. Understanding what they are signing must surely be a right that prospective tenants could opt into.

It is clear from experience that retailers expect different things from the landlord and tenants relationship. *Both* must be educated about the relationship in the context of the economics of the initial transaction and the operations of the lease. Full self-regulation in this industry is not an option.

G. OTHER AREAS FOR CONCERN

- The growing trend by landlords to effectively auction off fitted-out retail space by way of "expression of interest" at lease end. This effectively means the sitting tenant is bidding for his or her own goodwill, often up against bidders without any knowledge of the true nature of the business.

- The growing trend by landlords to "trade" confidential retail sales information amongst their internal and external shopping centre managers.

- The growing trend by landlords to use a rolling series of "licenses" for less than 6 months thereby avoiding provisions of the Act;

- The growing trend by landlords to use mediation processes as a way of testing the opponent's case.

- Lack of small business retailers and layman on the ADT Member's panel, (even a Member working at high levels in the property management industry was involved with practices that actively work against their retailers, contrary to the spirit and provisions of the Act.) thus the ADT operates in a partial vacuum;

- There is *still* no Retail Industry Ombudsman to investigate and publicly report the misdemeanours of shopping centre managers and agents.

H. AMENDMENT CONCEPTS TO MINIMISE INFORMATION IMBALANCES, PROMOTE FAIRNESS AND GIVE CLARITY AND GENERAL EFFECTIVENESS TO DISPUTE RESOLUTION AND ENFORCEMENT

- All landlords' representatives dealing with retail leasing transactions be under an industry licensing scheme for continued education, advancements in the laws and a suitable authority be empowered (probably the ADT) to revoke licenses under certain specified conditions;

- Certain classes of tenants be recognised and be given differing status accordingly;

- The Registrar of Retail Tenancy Disputes be given expanded powers to issue "show cause" certificates for certain offences in the Act, and that the Registrar be allowed to recommend license revocation and prosecution for persistent and serious offenders;

- All disclosure documentation be in a specific, detailed format more in keeping with the disclosure of *past relevant* tenancy information (as required by the Franchise industry regulations of the Trade Practices Act) and any known *future relevant* information including centre trends, incoming competition, etc or matters affecting future ability to pay agreed initial rent;

- All prospective lessees to be given a simple step-by-step booklet guide on the rights and responsibilities under a lease, boiled down site selection processes, what to look for in a lease and affordability calculations regarding capital and cost structures - prior to entering into retail leases;

- Any retail lease provision requiring disclosure of tenant's revenue information be voided (unless that turnover is the sole determiner of rent) and an industry body aggregate sales revenue figures at shopping centres (so no individual retailer can be identified) for distribution to interested parties;

- All outgoings and promotion outgoings are explicitly on a cost recoverable basis and any charge is void unless the landlord is prepared to provide a transparent mechanism for allowing the source document to be made available for lessee inspection, or an auditor's inspection appointed by lessees acting alone or collectively or by an industry body;

- All outgoings and promotions be allocated in a common chart of accounts;

- The ADT be given explicit powers to void or vary *certain classes* of leases that are or become unfair, harsh or unconscionable *due to a landlord's action*;

- The ADT be given powers to personally join landlords' representatives as respondents in their dealing with retail leasing transactions in any claim, albeit under specified conditions;

- The ADT be given the power to entertain a claim voiding or varying a valuation of current market rent on the grounds it offends the Act or principles of speaking valuation *without* the need to sue the valuer in negligence;

- The ADT Member panel be expanded to include experienced *retailers* and a Duty Member with the equitable jurisdiction to hear ex-parte applications for matter such as relief from forfeiture. (This is very important in the "lock out" seasons of Christmas and Easter, when retailers traditionally receive notices to quit at the last moment, without quick access to the Court system.)

- The ADT be compelled to order harsher sanctions against seemingly trivial, but highly important offences such as allowing tenant to fit-out and trade without the necessary disclosure and lease documentation in place;

- The ADT's monetary limits be revised to $800,000;

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EXPRESSIONS OF INTERESTS AT RETAIL LEASE END

There is substantial evidence that sitting tenants are being exploited at lease end because of the inequitable bargaining position between landlord and tenant. Under current rental regimes, the cost of the landlord's capital works and the tenant's fit-out is often still on the tenants books at lease end (i.e. has not been fully depreciated or paid for over the normal lease term of 5 years). The poor profits in recent years generated over the term of the lease is often perceived by the tenant to be "recoverable" if the business is sold with a new lease or trade continues without spending too much capital to better the business.

In NSW, under current law and unless varied by notice, a tenant has the right to trade for the term of the lease only. The landlord knows the unpalatable choice the retailer is left with and often takes advantage of this. This vulnerability often gives rise to substantial rental increases if a further lease term is executed because the choice is clear - either close-down the business or relocate (plus "make good" by returning the premises to the exact state it was in prior to entering the lease in both instances) or accept more onerous terms on offer. *Most seasoned retailers would have experienced this dilemma.* The new lease rental in turn effectively sets the "current market rent" which in turn is used as market evidence by the landlord in its negotiations with other tenants. Over a period of time, the landlord is normally able to slowly, but surely, raise total rent income irrespective of trading conditions.

An emerging trend is the landlord informs the sitting tenant the lease will not be renewed and advertises and issue to the public "expression of interest" documents on the sitting lessees location using the same usage. The result is that the lessee is effectively in a bidding war for his or her own business. Expressions of interest documents usually require a detailed business plan and bidding usually happens whilst the current tenant still trades. From the landlord's point of view, they can effectively go to market and choose the best offer as they see fit without falling foul of unconscionable conduct provisions 62B(4)(6) of the Retail Lease Act ("the Act"). Landlords argue that a tenant has the right to trade for the term of the lease and the landlord can deal with their property as they see fit upon expiration of the term - and the current law stands behind them in this regard.

From a bidders perspective, incoming tenants are effectively cashing in on the goodwill (and often the business establishment capital cost and in some cases entire fit-outs) generated by the sitting tenant and perhaps offer a higher rent than is economically prudent. This market offer is then used against the sitting tenant in any further negotiations despite these conditions not meeting the criteria used by valuers to arrive at an 'effective rent' under section 31 of the Act.

Perhaps a solution to this unscrupulous practice is to enact a provision offering first right of refusal to the lessee at lease end and if no further lease is taken up, statutory compensation to the lessee if in the event the landlord elects to deal with a third party for the same usage and subsequently leases the tenancy to that third party.