Tasmania

Review of the Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998

FINAL REPORT

March 2002

Department of Justice and Industrial Relations

Consumer Affairs and Fair Trading

1 Contents

2. Executive Summary

This report reviews the effectiveness of the *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* according to the specified terms of reference. The review has been conducted by the Office of Consumer Affairs and Fair Trading and recommends the establishment of a new statute to replace the existing regulation.

Generally, there is a need to regulate this area and to provide a framework for reasonable conduct in the retail market, both from a tenant and owner perspective. However, there is scope for significant improvement and simplification in any new regulatory regime.

Also, Government needs to be sensitive to the potential impact of any regulation on business and to recognise that, while regulation in this area has the potential to enhance confidence, it also has potential to stifle initiative and business activity. This review has had regard to this conflict and believes that this focus should continue in the development and drafting of new regulation.

The review process was proposed by the Retail Tenancies Monitoring Committee who has been involved with development of retail tenancy policy from the outset. The recommendations of this review have been developed from information provided in response to the Issues Paper published October 1999. The recommendations have also been developed from information provided by administrators in other jurisdictions and by examination of the relevant law in those jurisdictions, including the Commonwealth.

As the Retail Monitoring Committee recommended the review and the relevant terms of reference to the Minister in 1999, special thanks should be recorded to the contributions of committee members. In particular, it is appropriate to acknowledge the contribution of the Chair, Anne Brown whose patience and support has encouraged a lengthy and time consuming process to finally reach conclusion.

2.1 Recommendations

Recommendation 1

1.1 That the application of any regulation to retail premises be redefined as follows:

'retail business' means a business where the predominant activity is the sale of goods to the public; and

(a) any additional businesses included by regulation (such as hairdressers); but

(b) not those businesses (for example, an accountant or similar service) excluded by regulation.

'retail premises' means premises—

occupying a floor area of less than 1,000M^2; and

occupied predominantly by retail business; and

not located in parts of buildings where the predominant use or intended use is for other than a retail business.

The Regulations may include certain premises occupying a floor area of more than 1,000M^2, for example, service stations or small businesses occupying a larger than usual area.

'Shopping centre' means parts of buildings where there are five or more retail premises, which share common expenses, but excluding those parts of buildings where the predominant intended use is for purposes other than retail.

1.2 That market stalls not be included in any regulation.

1.3 That a simple cost-effective method be established for determining whether or not a business is covered by regulation.

Recommendation 2

2.1 That all leases comply with any new regulation within 5 years of commencement of any new regulation provided that:

(a) there be facility for exemption where application within this period would create injustice or hardship; and

(b) stakeholders are consulted during the drafting of appropriate transitional arrangements.

Recommendation 3

3.1 That retail tenancy regulation prescribe the detail of pre-contractual disclosure but allow this to be given as either a separate statement or contained within a lease.

3.2 That a separate disclosure statement is provided where occupancy is given prior to the signing of a lease. It should be an offence to grant occupancy without giving basic disclosures.

3.3 That retail tenancy regulation not specify the time period between the giving of disclosure or a lease and its signing.

3.4 That retail tenancy regulation contain a general warning that a lessee should seek financial advice prior to signing a lease.

3.5 That specific warnings be included where a lease is of less than five years in duration but that the term of any lease be defined as the initial term and any options exercisable by the lessee.

Recommendation 4

4.1 That any disclosure of trading hours detail the method of determining those hours rather than the actual times of trading.

4.2 That disclosures be based on the principle that all costs and charges that will or may become payable under the lease should be disclosed. Where actual costs and charges are not ascertainable, their method of calculation should be disclosed. The precise disclosures are to be the subject of further drafting.

4.3 That clauses be permitted in leases to make provision for the charging of 'unforeseen outgoings' in addition to disclosures but the application of any charge is limited to 'genuinely unforeseen' matters.

4.4 In the process of renewing a lease, neither a new lease document nor new disclosures should be required. However, any changes to the previous terms should be separately disclosed.

4.5 That any regulation specify that documents must be signed and that no alterations to any agreement are effective unless signed by both parties.

Recommendation 5

5.1 That the provisions relating to termination of a lease following material changes or representation be retained in their current form but strengthened, if appropriate, by the draw down of section 51AC of the Trade Practices Act and include a:

(a) provision that this right extends from 3 months to 6 months after commencement of a lease and;

(b) provision that loss arising from an inaccuracy or misrepresentation is recoverable, in addition to existing rights of termination.

Recommendation 6

6.1 That retail tenancy regulation specify only that a copy of the lease is given as soon as practicable after signing.

Recommendation 7

7.1 That any form of ratchet rent be prohibited.

7.2 That only one method of rent increase is permitted at any time and that any 'greater of two methods' is prohibited.

7.3 That while a lease may permit more than one method of rent calculation, a reasonable period of notice, such as six months, be required before switching between methods, except where changes occur by mutual consent of the parties.

7.4 That rent variation provisions be amended to restrict rent increase to once every 12 months irrespective of whether the agreement is a new agreement for the same premises, an option, or an extension of an old agreement.

7.5 That the Code be amended to include the following definition of market rent: *'The likely rent that an asset could command on the open market as indicated by current rents being paid for comparable assets.'*

Recommendation 8

8.1 That rent reviews be permitted once every 12 months from commencement of the agreement, or within the first 12 months

where an initial period of less than market rent is agreed to, and then every 12 months afterwards.

Recommendation 9

9.1 That retail tenancy regulation be expressed as clearly as possible and in plain language where appropriate.

Recommendation 10

10.1 That turn over figures for premises in shopping centres should be made available irrespective of whether the lease contains a turn over rent provision.

10.2 That the existing Code trigger for the payment of audit costs remains unaltered.

10.3 That consideration is given to the inclusion of statutory advice as part of the proposed pre-contractual disclosure requirements.

Recommendation 11

11.1 That the existing Code provisions relating to turnover calculations be replaced with a general descriptive provision which describes, in principle, what should be included in a rental turnover calculation.

Recommendation 12

12.1 That a simple process for establishing market rent adjustments be established as detailed in this report. That the President of the Australian Property Institute publishes a list of independent registered and suitably qualified valuers to resolve disputes about market rental adjustments.

Recommendation 13

13.1 That the definition of key money be revised to include a statement of principle to aid in interpretation. The following provision is an example:

An owner shall not charge a tenant any fee for a service or process relating to the leasing of premises which exceeds the cost incurred by the owner of providing that service.

13.2 There should be further consultation during the drafting of any regulation with regard to such a definition.

Recommendation 14

14.1 That the existing option to renew provisions be simplified and linked to the revised rent review provisions detailed in recommendation 12.

Recommendation 15

15.1 That the existing regulation be retained with the following additions or changes:

(a) that leases make appropriate provision for the correct application of GST;

(b) that retail tenancies regulation state explicitly that outgoings include only those costs which are directly attributable to the costs of operating a retail shopping centre or leased premises;

(c) that retail tenancies regulation state explicitly that outgoings should not be a source of profit to the owner;

(d) that dispute resolution be considered separately;

(e) that forwarded estimates and audited statements be required by any relevant regulation; and

(f) that the method of apportioning outgoings be a matter for the contracting parties.

Recommendation 16

16.1 That land tax may continue to be charged as an outgoing.

Recommendation 17

17.1 That retail tenancy regulation be simplified so that:

(a) there is a clear distinction between subletting and assignment;

(b) an owner may not unreasonably refuse an assignment or prohibit sub-letting; *[reasonable grounds for refusal would include a proposed change of use, a change in the tenant mix or an inability to demonstrate adequate commercial or businesses experience or viability];*

(c) that an owner may request any information that is reasonably required to make a commercial decision about assignment or subletting;

(d) that an owner must give reasons in writing for any refusal to assign or sub-let;

(e) that an owner not be able to force a change to an existing lease as part of giving permission for assignment and sub-letting;

(f) that a simple low cost mechanism be established to determine whether:

(i) the reasons for refusal are unreasonable; or

(ii) a condition imposed in an assignment or sublease is unjust.

Recommendation 18

18.1 That clause 31(1) of the Code remains.

18.2 That sub clause 31(2) be repealed and replaced with a provision limiting the amount of legal costs which can be recovered under an indemnity provision to 'reasonable costs'.

Recommendation 19

19.1 That the objectives of clause 23 be achieved with a simple provision such as:

'Where a tenant leases a premises in a shopping centre and the lessor causes or allows undue noise, or obstruction of access by potential customers, and this noise or obstruction

causes loss to the tenant, the tenant may sue to recover the loss.

The tenant cannot recover for loss where the noise or obstruction is caused by the carrying out of reasonable repairs, maintenance or refit of premises, plant, or equipment.

Action to be taken in a court of appropriate jurisdiction.'

19.2 That clause 35(2)(b) requiring compensation for loss of profit from relocation remain.

Recommendation 20

20.1 That clause 23(1)(i) be rescinded.

20.2 That clause 35 be rescinded and replaced with a provision such as:

'A provision in a lease allowing relocation of the tenant is to require the property owner to give the tenant at least 3 months written notice of the date for relocation and the details of the proposed new premises, unless otherwise agreed to by the parties.

The area and configuration of the new premises is to be materially the same as the existing premises.

If a tenant disputes that the premises are materially the same he or she may refuse to relocate until the matter is resolved.

The property owner must reimburse the tenant for the reasonable costs of relocation including compensation for any actual reduction in, or loss of, profit during relocation from the point of closure to the point of opening.'

Recommendation 21

21.1 That clause 27 is rescinded. The parties will negotiate their own requirements for refurbishment or refit. Any requirements must be in writing, and be referred to in any disclosure statement.

Recommendation 22

22.1 That clause 8 remains unchanged.

Recommendation 23

23.1 That the provisions relating to advertising and promotions remain unchanged.

23.2 That further consultation is undertaken with stakeholders on the need for a provision allowing tenants to have input into decisions about how and where promotional funds for shopping centres are spent.

Recommendation 24

24.1 That the type or form of security be a matter for the parties to determine and not be prescribed by retail tenancy regulation.

Recommendation 25

25.1 That the Code not make provision for the registration of leases but rely on the existing provisions of the *Land Titles Act 1980*.

Recommendation 26

26.1 That a simpler approach be adopted to ensure that:

(a) Core trading hours during which all businesses must trade is set by the owner.

(b) Core hours can only be changed with approval of a two-thirds majority of businesses.

(c) Any business may negotiate to open at other times but must pay the correct proportion of outgoings.

Recommendation 27

27.1 That clause 29 be repealed and replaced with a simple provision which specifies notice periods for negotiation or termination of leases.

27.2 That retail tenancy regulation not permit an option to renew which makes the total period of the lease less than five years.

Recommendation 28

28.1 That the provision relating to tenant associations remain unchanged.

Recommendations 29

29.1 That the Code be repealed and replaced with a Retail Leases Act.

Recommendation 30

30.1 That the Monitoring Committee cease to perform a formal role in the conciliation of disputes.

30.2 That ongoing advice and consultation with the market take place in future on an informal basis with key market stakeholders, rather than through a formal consultation body.

Recommendation 31

31.1 That regulation of retail leases be simplified and expressed in a statute.

Recommendation 32

32.1 That the present process of conciliating disputes through the Monitoring Committee be discontinued.

32.2 That consideration is given to whether the Office of Consumer Affairs and Fair Trading should have a role in informal mediation.

32.3 That a process for resolving disputes using commercial mediation services as a pre requisite to litigation be established.

32.4 That, following mediation, the Small Claims Division of the Magistrates Court be given the power to:

- restrain an action in breach of the Act;
- require a person to comply with an obligation under the Act, or a retail lease; and

- order a person to make a payment under the Act including compensation for loss or damage resulting from a breach of the Act or a retail lease.

32.5 That the Civil Division of the Magistrates Court is given power to determine any dispute involving between $3001 and $10,000. In such an instance commercial mediation shall not be a pre requisite to litigation.

32.6 That any dispute involving an allegation of unconscionability as defined by the Act be heard at first instance in the Civil Division of the Magistrates Court.

Recommendation 33

33.1 That the provisions of section 51AC of the Trade Practices Act be given effect in the Fair Trading Act and/or proposed retail tenancy regulation.

Recommendation 34

34.1 That the requirements in relation to rent and 'turn over' figures be reviewed to ensure compliance with the minimum standards agreed between State and Territory ministers.

3 Background

3.1 History and Introduction

Issues relating to retail tenancies were first raised with Government in 1991, in particular[1] by the Retail Trader's Association. The Department of Justice and Industrial Relations considered a number of options to deal with these issues, including a code of practice under the *Fair Trading Act 1990*. However, further consideration was deferred until completion of a national review of retail tenancy issues.

A national report presented to a meeting of Small Business Ministers on 13 March 1992, highlighted an inconsistent approach to retail tenancy regulation between States and Territories. The report noted that Tasmania had no regulation at all.

In June 1992, the Tasmanian Minister for Small Business proposed the development of a code of practice under the Fair Trading Act and the Office of Consumer Affairs established a consultative committee to consider issues relevant to this proposal. The consultative committee comprised Government, retail tenants, property owners and valuers and from this committee a working party was established.

The Tasmanian Chamber of Retailers undertook to prepare a paper on existing codes or legislation in other states and territories which could form the basis of working party discussions.

The consultative committee reported in June 1993 and recommended that retail tenancies should be regulated by a mandatory code of practice under the Fair Trading Act. The committee also recommended that minimum standards should apply to the market, while still allowing an opportunity for property owners and retail tenants to negotiate mutually acceptable terms and conditions. The committee proposed that a monitoring committee be established to oversee the operation of the Code, to recommend changes to the Code, and to hear disputes arising from the application of the Code.

The Government agreed to develop a draft code of practice and proceeded to do so under the provisions of Part 4 of the Fair Trading

[1] A number of other groups and individuals also raised concerns with Government.

Act. The TCCI was invited to prepare a draft code of practice[2] in consultation with those stakeholder representatives who participated in the original consultative committee.

A draft code of practice (the draft Code) was released for public consultation and advertisements were placed in major Tasmanian daily newspapers. The draft Code was amended to take responses into account, and was endorsed by both Houses of the Tasmanian Parliament. However, before the draft Code was commenced, the Government received representations requesting further amendments. As a result the Minister appointed members of the proposed Retail Tenancies Code of Practice Monitoring Committee (the Monitoring Committee), to consider these proposals. Subsequently, the Committee recommended a series of technical amendments to clarify interpretation of the draft Code.

Further, on 5 December 1998 relevant State and Territory Ministers agreed to a set of uniform standards to be incorporated into existing or proposed regulation. As a result, the draft Code was also revised to incorporate these changes.

Prior to final commencement of the draft Code, some technical problems arose which resulted in further delay. Nevertheless, the *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (the Code), which set a commencement date of 1 September 1998, was finally made on 27 July 1998.

3.2 Purpose of the review

Since commencement of the Code, further technical issues have been raised. Also, there is a view among stakeholders that the Code should be reviewed and that some aspects of the regulation might be better drafted. There is also an opportunity, as with any new legislation to conduct a review of its impact and operation.

As a result of these views and issues, the Monitoring Committee proposed to the Minister that a review of the Code be conducted in accordance with the terms of reference detailed below. This proposal was accepted by the Minister, who agreed to a review being conducted by the Office of Consumer Affairs and Fair Trading (OCAFT), with the

[2] This is required by section 43(2) of the *Fair Trading Act 1990*.

Monitoring Committee acting as Technical Reference Group (the Reference Group).

3.3 Terms of reference

Terms of reference for the review are:

1. to seek comments from principle stakeholders, the general public and other interested bodies on the Code and its operation;

2. to examine the effectiveness of the Code and any proposals to improve the effectiveness of the Code;

3. to examine the structure of the Code and its ability to achieve its original stated objectives;

4. to evaluate whether the Code creates certainty for business by providing more clearly defined rights and responsibilities for both tenants and property owners;

5. to examine the suitability of dispute resolution mechanisms;

6. to evaluate whether the Code meets key nationally consistent retail tenancy principles agreed by Commonwealth, State and Territory Ministers; and

7. to recommend appropriate amendments to the Attorney-General.

4 The Review Process

An issues paper detailing relevant issues and inviting comment on the terms of reference was distributed to the public in October 1999. The due date for submissions was 7 December. However, final submissions were not received until late January 2000.

The submissions, where relevant, have been summarised and referred to in this document.

4.1 Steering Committee

The Steering Committee comprised the Chair of the Monitoring Committee, the Director of Consumer Affairs and Fair Trading and the Project Manager. The Steering Committee examined this paper prior to its presentation to the Reference Group.

4.2 Technical Reference Group

This paper is developed for presentation to the Monitoring Committee in their role as Reference Group. This paper contains broad policy recommendations rather than specific drafting recommendations. Once the policy recommendations have been discussed and refined, specific recommendations will be presented to the Minister for the drafting of a bill. Such a proposal will require Cabinet endorsement. In recognition of the expertise of this group, the Reference Group will have significant input into any future drafting process and subsequent public exposure drafts.

4.3 Report to Minister

This report will be presented to the Minister once the Reference Group has had an opportunity for further comment and input.

4.4 Submissions

A number of submissions expressed satisfaction with the Code but detailed a range of areas where improvements needed to be made. Generally, these respondents thought the Code was working. Clearly some respondents wished to extend the scope of the Code and for it to be extended to cover open-air markets.

However, in discussions with stakeholders it has been alleged that there is widespread avoidance of the Code's provisions and that its functioning from a practical perspective is less than optimal. Further, some respondents have soundly criticised the regulation and have proposed that this review provides an opportunity for a major overhaul of regulation in this area. For example, one respondent stated, that:

> 'In almost every instance where governments have attempted to regulate on retail tenancies, the end result has been to simply make a complicated area of business more complex...This Code review, and the current absence of any specific legislation, gives Tasmania a unique opportunity to introduce a solution which is simple, minimalist and sets a base level of guidelines but which allows for genuine flexibility and consistency with whatever other jurisdictions decide to do.'

This report sets out the content of the submissions in a summarised form in an attempt to provide an overview of the variety of opinion.

4.5 Office of Consumer Affairs and Fair Trading

The Office of Consumer Affairs and Fair Trading has played a significant role in the development and management of policy in this area. The Office has managed this review and will manage the development of any subsequent legislative proposal as well as future compliance, enforcement or prosecution. A major role for the Office will be business and public awareness of any changes through a range of media options.

5 Terms of Reference

5.1. Term of Reference 1

Seek comments from principal stakeholders, the general public and other interested bodies on the Code and its operation.

An issues paper was distributed to the public during October 1999, seeking comments on the issues raised and the terms of reference. Copies of the paper were also made available on the Department of Justice and Industrial Relations web site.

5.2. Term of Reference 2

Examine the effectiveness of the Code and any proposals to improve the effectiveness of the Code.

5.2.1. Application of Code

Issues

1.	**Is the coverage of the Code adequate / appropriate in terms of the nature and the size of premises?**

Submission content

One respondent argued that the scope of the regulation of retail tenancies goes 'well beyond the need to protect the weaker tenants' and includes some of the largest corporations in Australia. It was argued that the larger 'players' are professionals who 'know the rules', and should have access to adequate legal advice.

From this perspective, it was proposed that the Code should not apply to publicly listed companies or to chains/franchises of 5 or more stores within Australia, irrespective of the size of the premises.

Along similar lines, it was argued that the coverage of the Code should not be extended to include tenancies over 1000 square meters and that the 1000 square metre limitation is appropriate in most circumstances. However, it was noted that some businesses such as garages needed a large area but are still small businesses.

With respect to shopping centres, a number of concerns were raised about the application of the Code where office buildings contained retail frontages. The application was unclear in these circumstances. It was argued that clause 2(4)(b) of the Code is confusing and would be improved by adding a definition of 'principle business' to the sub clause.

Alternatively, it was argued that the Code should be extended to cover retail tenancies or licences in open space such as the 330 licensed stallholders at the Salamanca market.

Technical Reference Group comment

The issue was discussed at length by the Reference Group and it was proposed by one member that instead of the existing inclusive list, a definition of 'retail business' might be linked to Subdivision G of the Australian and New Zealand Standard Industrial Classification (ANZSIC)' *[see webpage from Australian Bureau of Statistics (ABS) site at Appendix 1].*

It was further proposed that retail premises might be defined to mean 'premises occupied predominantly by retail businesses but excluding premises located in parts of buildings where the predominant purpose is other than retail'. Such a definition would exclude a single shop in an office building which it was reported creates significant property management and lease negotiation issues.

It was also proposed that a shopping centre could be defined to mean 'those parts of buildings where there are five or more retail businesses sharing common expenses but excluding those parts which are used for other than retail businesses'.

This approach would remove some arguably non-retail areas of business activity from the Code. This would solve the apparent contradiction where a bank was required to enter into a retail tenancy regulation lease in a shopping centre but would not be so required if located immediately across the road.

More significantly, the approach removes the current area restriction of 1,000 M^2. Furthermore, the proposal is that corporations and franchises are included within the regulation.

Finally, it was proposed that there should be an easily accessible mechanism to resolve any dispute about whether or not the law applied to any premises.

Comments

The Code currently applies to all retail premises with a floor area of less than 1,000 m^2 and defines 'retail premises' as those which are included in an extensive list in an appendix to the code. It would be preferable to have a more succinct definition of retail premises and to create a list of 'exclusions' rather than 'inclusions'.

The ANZSIC division G: - 'Retail Trade' includes the following subdivisions: Food Retailing; Personal and Household Goods Retailing; and Motor Vehicle Retailing and Services *[see list at Appendix 1]*. However, while the list is extensive and provides better structure than the list currently contained in the Code, there are some notable omissions. For example, the division does not apply to hairdressers or to travel agents and similarly, it does not apply to dry cleaners or to video-hire stores.

Nevertheless, if the ANZSIC Division G were included (perhaps with some further additions), it would still be an inclusive list. Consequently, there remains some merit in including a statement of 'application principle' and in providing a facility to make exclusions to premises covered inappropriately by the principle.

In an effort to establish a common thread as a basis for such a definition, we can describe retailers as predominantly sellers of goods to the public, as opposed to wholesalers who are predominantly sellers of goods to other businesses. There are some exceptions such as hairdressers, service stations and travel agents who are predominantly sellers of services to the public. These are clearly a different class of service provider than doctors, accountants or lawyers.

Consequently, most retailers would be included by a definition of 'retail business' which defined such businesses as 'businesses that predominantly sell goods to the public'. A list of additional inclusions could be made by regulation and the regulation could also exclude certain premises.

The existing floor area criterion of 1,000 m^2 is arbitrary, although the principle is that it provides a cut-off point between small retailers and large retailers who presumably are able to look after themselves. While many large retailers would also like the benefit of protections offered by legislation it would be difficult to support arguments for an extension of the regulation to large corporate players in the retail market.

For these reasons, the exiting floor area criterion of 1,000 m^2 should remain but with a provision to include by regulation any business which is a small business but which occupies large business sized premises. Service stations are the principal examples of this type of business.

The definition of shopping centre needs to be revisited and to focus on those things that set shopping centres apart from a normal retail tenancy arrangement. For example, one of the key factors for shopping centres is the presence of 'outgoings' or costs or expenses which are shared between a number of tenants. Also, there is potential for relocation from one area within a shopping centre to another, so that the premises are not as clearly defined as is usual for a single tenancy/premises arrangement. It would seem appropriate to create a definition based on these factors, rather than the physical or locational characteristics which are referenced in the existing regulation.

Along these lines, one member of the Reference Group proposes that a shopping centre might be defined as 'those parts of buildings where there are five or more retail premises sharing common expenses'. It was further proposed to exclude those parts of buildings where the predominant or intended use is for purposes other than retail businesses.

The first part of the definition makes sense and is a refinement of the existing definition. However, it is unclear as to how the identification and exclusion of non-retail areas would work.

It may be preferable and easier for parties to understand, if certain businesses were classed as non-retail whether they are in a shopping centre or not. For example, doctors, accountants and solicitors might be excluded as would banks and credit unions. This would mean that these businesses would not be covered, wherever they are located. Finally, the Office currently receives a number of inquiries as to whether a certain business is or is not covered. As the question of coverage is a critical issue there needs to be a simple and cost effective means of determining whether or not a certain business is covered. This needs to be explored further in the context of dispute resolution generally.

With respect to market stalls, there is already a view that some of the problems of the Code arise from trying to achieve too much for too many diverse types of premises. For example, the Code regulates shopping centres where rents may exceed $50,000 per year but also

regulate premises in regional Tasmania where rents may not exceed $3,000 per year. To include market stalls will add complexity rather than simplify this regulation.

Nevertheless, the Hobart City Council practice of charging 'key money' on the transfer of leases at the Salamanca market has created problems. However, the Council has revised its position following consultation between the Council and tenant representatives. Fees will now be charged on a flat basis for the issuing of leases and the quantum of these fees is much reduced. These fees are no longer based on the value of the business and it is unlikely that it could be argued that the fees are 'key money' for the purposes of the existing retail tenancy Code.

Generally, it is preferable, for all of the reasons detailed above that market issues are dealt with separately and not be covered by retail tenancy regulation. It is recommended that retail tenancy regulation not apply to market stalls.

Recommendation 1

1.1 That the application of any regulation of retail premises be redefined as follows:

'retail business' means a business where the predominant activity is the sale of goods to the public; and

(a) any additional businesses included by regulation (such as hairdressers); but

(b) not those businesses (for example, an accountant or similar service) excluded by regulation.

'retail premises' means premises—

occupying a floor area of less than 1,000M^2; and

occupied predominantly by a retail business; and

not located in parts of buildings were the predominant use or intended use is for other than a retail business.

The Regulations may include premises occupying a floor area of more than 1,000M^{2,} for example, service stations or small businesses occupying a larger than usual area.

'Shopping centre' means parts of buildings where there are five or more retail premises which share common expenses but excluding those parts of buildings where the predominant intended use is for purposes other than retail.

1.2 That market stalls not be included in any regulation.

1.3 That a simple cost-effective method be established for determining whether or not a business is covered by regulation.

2. Are the existing transitional arrangement adequate / appropriate and are there any gaps in the existing transitional arrangements?

Submission content

It was pointed out that under the existing transitional arrangements, the Code would not apply to many tenancies for another decade. As these tenancies need protection now, it is argued that all existing transitional provisions should be removed.

However, it was also argued that clause 2(1)(b) of the Code means that a new lease must be prepared to replace the existing lease as it would be difficult for the old lease to comply with the Code. It would be preferable to make only those variations that are necessary without the need to renew the entire document. It was proposed that any new regulation contain a provision to allow an existing lease to be modified following the exercising of an option to renew.

Comments

If a new regime is enacted, there will be three sets of regulation applicable to retail tenancies. This has potential to create considerable confusion. The need for transitional arrangements arises from the general practice of not disadvantaging a person who enters into an agreement in good faith. The main purpose is to limit retrospectively. However, where a practice is identified as inappropriate, it is an inadequate argument to use retrospectivity as a means of continuing that behaviour.

The general principle should be that, all leases comply with any new regulation within 5 years of commencement. This gives adequate time for new leases to be prepared or modified. However, there should be provision for a lease to be excluded from the application of any new

regulation for a specified period where the earlier application of the regulation would create an unjust outcome for a lessor or lessee. The precise nature of the transitional arrangements should be revisited during any drafting and public consultation process.

Recommendation 2

2.1 That all leases comply with any new regulation within 5 years of commencement of any new regulation provided that:

(a) there be facility for exemption where application within this period would create injustice or hardship; and

(b) stakeholders are consulted during the drafting of appropriate transitional arrangements.

5.2.2. Negotiation of a Lease

Issues

3. Are the existing restrictions on the negotiation of leases appropriate?

Submission content

One respondent proposes that the Code's provisions relating to negotiating a lease go well beyond what is needed. It was stated that the Code is overly specific and detailed, and considerably limits negotiations in some areas. It was argued that the Code presently restricts 'genuine in-confidence negotiations', such as, negotiations with a prospective tenant for the same tenancy or in the same category of merchandising.

Another respondent proposed that a change in any material matter should be notified to the prospective tenant and that a sub clause similar to sub clause 7.1 should be added to clause 5.1. Alternately, one respondent stated that the existing restriction which prevented the execution of a lease until seven days after the date of receiving a disclosure statement is an unnecessary impost on business.

Generally, most respondents supported the existing provisions as appropriate and said that they allowed the tenant more time to review the lease documentation. However, respondents questioned the need

for the minimum term of a lease to be five years and said that many tenants would prefer a shorter tenancy.

Finally, it was stated that many tenants use their own lease documentation especially national organisations. This creates a problem for the owner who cannot then provide the lease in the form requested by the tenant.

Comments

There is merit to the argument that existing provisions are overly restrictive both in process and in form. Further, the provisions do not reflect commercial reality and this results in practice which rarely meets the requirements of the law.

For example, the requirement that pre-contractual disclosure must be provided before negotiations are entered into, effectively precludes any discussion between the respective parties without that detail having first been established. To this extent the Code restricts or does not adequately allow for negotiation to occur.

Further, while the existing scheme is intended to ensure that prospective tenants have the advantage of clear and pertinent information before entering into a binding contractual arrangement, it often arises that tenants are keen to take up occupancy and start their business without delay. Problems arise for owners where tenants have already occupied premises and use their existing occupancy as leverage to negotiate certain conditions.

The notion of pre-contractual disclosure is a useful and important protection for tenants. If appraised of the terms and conditions of a proposed contract, the tenant can, at least in theory, either negotiate variations or decline the offer, based on the information contained in the disclosures. Nevertheless, the preparation of that information incurs a cost and the law that prescribes this information needs to be sensitive to the practicalities of contract negotiation.

To this end, there should be more flexibility in the pre-contractual process. This could be achieved by prescribing the pre-contractual information but allowing that information to be either included in a separate statement or to be incorporated into the contract. In the normal course of events, the law would not regulate the exchange of documents or the manner in which the contract detail was negotiated. Only the information in the final contract would be prescribed.

However, where a tenant wished to take up occupancy prior to the finalisation of the relevant contracts, separate pre-contractual information should be provided. Indeed, it should be an offence to allow a tenant to occupy premises without giving a statement containing the prescribed information to ensure compliance with an appropriate disclosure regime.

It is questionable whether the law should prescribe a period between the giving of a lease and its signing. To require a 7-day period to elapse between the giving and signing of information may not be practical for either party. This activity should not be regulated and should be a matter between the contracting parties.

With respect to the term of a lease, the Code currently requires that a solicitor provide advice where the term is for less than 5 years. However, it is not clear what the advice is supposed to be about.

The main problem is a lack of clarity as to what is being achieved. For example, if advice is to be given about the financial viability of a shorter lease, then an accountant rather than a lawyer should provide such advice.

However, the more important question is whether legislation should 'require' a prospective lessee to obtain this advice or simply encourage them to do so.

Ultimately, legislation might encourage prudent activity and pre-contractual disclosures coupled with warning statements are useful ways of encouraging informed choices. To this end, appropriate text should be included in the pre-contractual disclosure information.

If specific information is to be provided about a lease of less than 5 years, then it should be made clear that the 5 years includes the original lease term in addition to any options that may subsequently be exercised by the lessee.

Recommendation 3

3.1 That retail tenancy regulation prescribe the detail of pre-contractual disclosure but allow this to be given as either a separate statement or contained within a lease.

3.2 That separate disclosure statement is provided where occupancy is given prior to the signing of a lease. It should be an offence to grant occupancy without giving basic disclosures.

3.3 That retail tenancy regulation not specify the time period between the giving of disclosure or a lease and its signing.

3.4 That retail tenancy regulation contain a general warning that a lessee should seek financial advice prior to signing a lease.

3.5 That specific warnings be included where a lease is of less than 5 years duration but that the lessee defines the term of any lease as the initial term and any options exerciseable.

5.2.3. Disclosure

Issues

4. Are the disclosure requirements adequate / appropriate / clearly defined / easy to comply with?

Submission content

Many of the disclosure issues were discussed under the previous section and therefore the recommendations of the previous section should be read with this section. Respondents stated that the 7 day gap between disclosure and signing an agreement is too long, particularly when a tenant does not wish to wait for 7 days.

Respondents raised specific concern about the disclosure requirements relating to trading hours and said they were too specific and may date rapidly. This limits the ability of property owners and retailers to respond to changing circumstances.

Respondents also proposed that disclosure statements include details of bonds/security deposits/rent in advance. Some respondents also stated that disclosure should be reciprocal and include such things as pertinent financial and professional history, cash flow and business plans of tenants. It was noted that there are no requirements on the tenant to disclose relevant information that may impact upon the tenancy and that disclosure is all one way.

However, another respondent said that there should be a requirement for a lessor to declare any work that is planned which is likely to impact

upon the premises. Another respondent said that the minimum requirements for disclosure are appropriate and that it is not sufficient to simply make provision for a tenant to terminate a lease if the disclosure requirements are not met.

Technical issues relating to the existing Code were raised, such as, what happens if a tenant is already occupying the premises. Another respondent raised concern about the timing of the relevant disclosure statement when a lease is renewed. It was also suggested that it is unclear as to whether a disclosure statement must be signed by both owner and tenant within the time prescribed by clause 6(1). It was proposed that the tenant should sign the lease and return it within the time stipulated by clause 6(1). Finally, it was suggested that it would be of value to note that a disclosure statement forms part of a lease and may be required as evidence in legal proceedings or for examination by the Taxation Office.

Comments

There is merit in the issue raised relating to trading hours disclosure. As the existing code contains a provision for amending trading hours, the disclosures may become dated. If trading hours are to be disclosed there should be a statement to the effect that these are the hours that exist at the time of disclosure. Alternatively, the disclosure can state the method for determining the hours.

In relation to what disclosure should contain, these are matters for further discussion during the drafting stage of an appropriate bill. However, as an underlying principle, any charge which is or may become payable under an agreement, should be detailed. Where the payment is not ascertainable, the method of calculation should be disclosed.

However, a further issue arises in relation to outgoings that will not be disclosed when the lease is entered into because they will not be foreseeable at the time the disclosures are made.

As discussed on page 50, it is clearly not possible to 'foresee' all outgoings. However, providing facility for a 'catch all clause' may allow an owner to simply avoid disclosure and introduce charges unilaterally during the term of the lease. It would be preferable that some restriction was placed on the operation of a 'catch all clause' so that it would only apply to genuinely unforeseeable matters.

With respect to tenants occupying premises before disclosure, this is one area where there should be clear mandatory requirements. Owners should not allow tenants to take up occupancy without providing basic disclosures. Even where a lease is to be finalised, the essential terms should be disclosed before occupancy.

In relation to renewing a lease, renewal should not require the establishment of either a new lease, or new disclosures. It should be necessary only to disclose any changes which arise in a renewal, not to repeat all of the disclosures in the principle lease.

With respect to who signs a lease, regulation should simply state that both parties should sign the lease and that alterations should not be made without a notation by either party. To regulate this process beyond a simple statement of obligation is not needed.

In general, the policy of pre-contractual disclosure should be to disclose key obligations of the tenant, particularly but not exclusively to costs and amounts payable. Where the costs that might be incurred under the agreement are not ascertainable, the method of calculation should be disclosed. The final list of disclosures should be determined after further consultation.

With respect to disclosures by tenants, there would appear to be nothing in existing law that would prevent a lessor from including requirements that a prospective tenant attest to the accuracy of information or agree to provide certain information. While there may be limits on some information gathering and use imposed by the *Privacy Act 1984*, it would not seem necessary for government to legislate to provide such a right.

Recommendation 4

4.1 That any disclosure of trading hours detail the method of determining those hours rather than the actual times of trading.

4.2 That disclosures be based on the principle that all costs and charges that will or may become payable under the lease should be disclosed. Where actual costs and charges are not ascertainable, their method of calculation should be disclosed. The precise disclosures are to be the subject of further drafting.

4.3 That clauses be permitted in leases to make provision for the charging of 'unforeseen outgoings' in addition to disclosures but the application of any charge is limited to 'genuinely unforeseen' matters.

4.4 In the process of renewing a lease, neither a new lease document nor new disclosures should be required. However, any changes to the previous terms should be separately disclosed.

4.5 That any regulation specify that documents must be signed and that no alterations to any agreement are effective unless signed by both parties.

5. Are the consequences of non-compliance with the disclosure provisions appropriate / adequate?

Submission content

Respondents noted that, from a technical perspective where, under the existing Code, the owner and tenant agree to possession before the 7 day period, the lease may be invalidated. It is proposed that the consequences are serious and out of proportion with the problem.

However, another respondent proposed that the time frame for the tenant to be allowed to terminate a lease (following the discovery that the disclosures contain changes of a material nature or false or misleading information) should be extended to six months. It was argued that this is the approach taken in New South Wales.

It was further proposed that the words ' whichever is the earlier' be added to the end of clause 7(2). Clause 7(4) should mention saving of obligations accruing up to the date on which a notice of termination takes effect.

Comments

The issue relating to an agreement to possession voiding a lease agreement, should be dealt with under a revised disclosure regime. Clearly, if there is no mandatory period between disclosure and signing, this ceases to be a problem. However, it is proposed that possession without disclosure should be prohibited. While it might be suggested that this approach is excessive, it is important to make appropriate disclosure a linchpin of the relevant regulation. Therefore, while there

might be opportunities to streamline many aspects of the regulation, the fundamental principle should be that proper disclosures are given.

At present the Code appears only to entertain one solution to a change of a material nature or a change arising from a false or misleading statement. In general, the discovery of such changes may give reason to void a contract. However, this may not be the only or the most desirable course open to a tenant. For example, if a material fact is found to be incorrect and the tenant has spent a considerable sum on renovations and fittings, voiding the contract may well advantage the owner but cause considerable detriment to the tenant. To this end there should be a general right of redress, where any loss is suffered as a result of a material change or misrepresentation. It would be appropriate to include such rights as a part of any disclosure regime. This would be expressed as the effect of disclosure or recovery of a loss arising from inaccurate disclosure. At present, a loss is defined only as a result of activating the termination provisions of clause 7 of the Code. This loss should be more broadly defined but should be discussed further with the Reference Group.

Recommendation 5

5.1 That the provisions relating to termination of a lease following material changes or representation be retained in their current form but strengthened, if appropriate, by the draw down of section 51AC of the Trade Practices Act and include:

(a) provision that this right extends from 3 months to 6 months after commencement of a lease and;

(b) provision that loss arising from an inaccuracy or misrepresentation is recoverable, in addition to existing rights of termination.

5.2.4. Copy of the Lease

Issues

6. Are copies of leases required at appropriate times?

Submission content

One respondent said that the existing requirement creates a number of problems as the content of the lease may not be finalised until after

negotiations have taken place. There may be broad agreement on the terms of a tenancy but the lease cannot be finalised immediately. It may, particularly for small operators, be unreasonable to expect an owner to incur the cost of preparing a lease before an offer can be made.

Comments

The current requirement is overly restrictive. The general principle should be that regulation should prescribe that disclosures should be given before entering into a contract and before occupancy. Disclosures should legally form part of the lease but can exist and be given as a separate physical document. Therefore, the lease can be finalised after the disclosures have been given and after occupancy has been granted.

If the disclosures form part of the lease, the lease would not contain provisions which negate these disclosures. While it would be prudent for a lease to be signed and a copy given before occupancy, there is nothing fundamentally wrong with a lease being given and entered into after negotiations.

From this perspective, the regulation should only prescribe that a copy of the lease is given 'as soon as practicable after signing'.

Recommendation 6

6.1 That retail tenancy regulation specifies only that a copy of the lease be given as soon as practicable after signing.

5.2.5. Rent Calculation

Issues

7. Are the restrictions on rent increases and the method of calculation appropriate for the current market?

Submission content

Respondents have argued the existing regulation is commercially restrictive and confining. They argue that parties should be free to negotiate whatever arrangements they choose. One respondent said that only the differences between standard practices should be disclosed. This respondent said that investors need some bottom line guarantee on rental income to underpin their investment. Without this

it is more difficult to attract funds which may be to everyone's detriment.

It was also suggested that the current wording of the regulation prevents an owner from decreasing the rent.

It was further argued that there is an inconsistency between the provisions for adjustment and the provisions of clauses such as 12(5). 12(5) states that provisions in a lease are invalid if they allow for adjustments to be made more frequently than every 12 months. Thus, a lease which makes provision for an annual review would not comply with 12(5).

Other respondents argued that restrictions are appropriate in the current market and add certainty for tenants. It was also noted that clause 16 does not specify that a special rent may also apply to structural improvements to a property.

Comments

The Code does not currently regulate the rent to be established at the outset of a lease. However, it does restrict the means by which rents can be increased during the term of a lease. The Code currently permits only one form of rental adjustment to be effected at any time and requires that the date of any rent increase be detailed in the lease.

There is a national view, endorsed by the Ministerial Communiqué, that ratchet clauses should be prohibited. Along similar lines, there is some question as to whether the process of disclosing more than one method and choosing that which gives the best return during the course of the rental, is appropriate. One might, for example, disclose four methods and alternate between the methods to achieve the best rental outcome. If the purpose of pre-contractual disclosure is to give certainty, then switching appears to counter this intention.

The use of either the turnover method, the Consumer Price Index or market rental, gives of itself, a means of linking performance to rental returns and allows the rental burden to be reduced during periods of economic malaise. If these methods are permitted, disclosure should be focused on a statement of the specific method that will be used to determine rental for the duration of the agreement. If more than one method could be used, there should be a significant lead-time and some restrictions on the ease with which switching can occur.

The argument that the parties should be free to negotiate any method does not take account of the view that rental adjustments are the area where a tenant's lesser bargaining power may require them to accept whatever is on offer. Regulatory intervention in this regard is intended to ensure that the method of calculation is fair and conscionable.

Nevertheless, the existing provisions would benefit from some redrafting and clarity. Any doubt that a rental reduction is not possible should be removed. There is no need to specify a date from which an increase takes place, only that a review might take place once in each year. Further, there is a risk that a technical error in the lessor's part might result in the invalidation of a rental increase provision. Attention should be made during redrafting to ensure that the essential right to increase rent is preserved.

Recommendation 7

7.1 That any form of ratchet rent be prohibited.

7.2 That only one method of rent increase is permitted at any time and that any 'greater of two methods' is prohibited.

7.3 That while a lease may permit more than one method of rent calculation, a reasonable period of notice, such as six months, be required before switching between methods, except where changes occur by mutual consent of the parties.

7.4 That rent variation provisions be amended to restrict rent increase to once every 12 months irrespective of whether the agreement is a new agreement for the same premises, an option, or an extension of an old agreement.

7.5 That the Code be amended to include the following definition of market rent along the following lines:

'The likely rent that an asset could command on the open market as indicated by current rents being paid for comparable assets.'

Issue

8. Is the process for effecting rent adjustments appropriate?

Submission content

One respondent said that leases should be allowed to provide for annual rental adjustments to take place on the anniversary of the start of the agreement.

Comments

The proposal is reasonable and was discussed in the previous section. Disclosures should focus on methods rather than dates. It is proposed that adjustment should take place only once in each year and that the period between reviews should not be regulated.

Recommendation 8

8.1 That rent reviews be permitted once every 12 months from commencement of the agreement, or within the first 12 months where an initial period of less than market rent is agreed to, and then every 12 months afterwards.

9. Are the provisions easy for contracting parties to understand?

Submission content

One respondent said that the provisions are easy to understand, while others did not comment on this issue.

Comments

While this issue did not elicit much comment, there would appear to be some scope for greater clarity and ease of interpretation. Generally, there is scope for considerable confusion about the clarity of the regulation and there is considerable scope for improvement. There should be underlying objective for regulation to be expressed in plain language, wherever possible.

Recommendation 9

9.1 That retail tenancy regulation be expressed as clearly as possible and in plain language where appropriate.

5.2.6. Rent Based on Turnover

Issues

10.	**Are the provisions relating to turnover rent adequate / appropriate?**

Submission content

One respondent stated that there should be no impediment to rent based on turnover for the following reasons:

- the strength or weakness of trade reflects the determination of the value of a property;
- the information provides essential feedback to Centre Management and provides information by which to assess the centre for the benefit of all tenants; and
- the information allows the centre to identify and solve problems.

Another respondent stated that the Code currently forces (clause 10(7)) owners to include a turnover provision in their leases to ensure that statistical information is available. The respondent said that this was '...a pointless requirement, and simply introduces an otherwise avoidable distortion, additional costs and additional effort for all parties'. However, other respondents continue to oppose the inclusion of sales figures unless turnover is the basis for the calculation of rent.

Another respondent suggests that cause 15(2) is inadequate because while allowing for audits to be conducted, it does not guarantee access to lessee's records. Further, it is proposed that clauses 15(3) and (4) be amended so that if the information provided by the tenant is understated by more than 5% of gross sales then the tenant pays for the audit. Alternatively, if the information provided by the tenant is understated by less than 5% of gross sales then the owner pays for the audit.[3]

[3] Clause 15 currently provides that if an audit reveals that information provided by the tenant is 95% accurate, the cost is borne by the owner. If the information is less than 95% accurate, the cost is borne by the tenant.

Representations from shopping centre tenants also raised concerns about the level of turnover rent that should be permitted by regulation. Respondents stated that research indicated that significant financial problems were more likely to occur where tenants entered into agreement where the rent exceeded 14 per cent of turnover. They argued that regulation should limit rent to an amount less than or equal with this figure.

Comments

Generally, there appears to be good reason why turnover rent is used. In the event that turnover is used there should be reasonable access to the books to validate this. Further, there is good argument that these figures should be available, whether or not turnover is the basis for rent review. It should be unnecessary to include a turnover provision in a lease simply to obtain information which is relevant to the operation of a shopping centre. Retail tenancy regulation should maintain the confidentiality of such information and provide that only gross turnover figures are provided. This should provide adequate protection and comply with proposed minimum national standards.

It is difficult to resolve the question of who should pay for an audit. Clearly it would be desirable that the level of trust between the parties was such that an audit was not required. However, in the event that the owner seeks to verify the figures and the tenant's figures prove accurate, the owner should pay. Similarly, if the tenant's figures are found to be deficient then the tenant should pay. As to whether the trigger should be 'less than 95% accurate' or understated by more than 5% of gross sales, is an arbitrary question which will require further consideration. In the absence of any persuasive arguments having been advanced by submissions, the existing provisions seem adequate.

With respect to proposals for capping the maximum rental, it is always difficult to define reasonable rental. The general principle of disclosure is to ensure that the prospective tenant is aware of the detail of a lease and can make an informed judgment. Rental above a certain amount might present a risk in some circumstances but not in others and capping rental may attempt to resolve a non-existent problem. Nevertheless, it would be useful if pre-contractual disclosure included some statutory warnings and a statement suggesting that prospective tenants seek appropriate financial advice before signing a lease. Appropriate statutory warning should be included in any pro-forma

pre-contractual disclosure requirements. [See also recommendation 3.4 on page 29]

Recommendation 10

10.1 That turn over figures for premises in shopping centres should be made available irrespective of whether the lease contains a turn over rent provision.

10.2 That the existing Code triggers for the payment of audit costs remain unaltered.

10.3 That consideration is given to the inclusion of statutory advice as part of the proposed pre-contractual disclosure requirements.

11. Are the list of exclusions detailed in clause 15 adequate?

Submission content

One respondent proposed that exclusions from turnover calculations should be a matter for the parties to negotiate, provided there is full disclosure. They argue that circumstances vary and that a static list in legislation cannot be expected to take account of changes to the market.

However, other respondents agreed to the existing provisions with one further addition to take account of GST. They propose that turnover should be net of GST rather than the gross amount.

Comments

The purpose and intent of section 15 seems appropriate if it is to provide certainty to ensure that such measures are based on transactions of substance. Clearly, in the event that turnover rent is to be used as a basis for rental review, there needs to be some clear formula for determining what is in and what is not in. While it might be argued that such matters should be left to the parties to negotiate, two problems arise with this approach. Firstly, we need to assume that there is an equality of bargaining power in the contractual relationship and there is ability for a tenant to genuinely negotiate for reasonable terms. Secondly, a contract may be inadequately drafted so as to leave doubt about what is included. This means that there is potential for dispute about inclusions and a subsequent lack of clarity or certainty.

Nevertheless, regulation cannot remove all uncertainty and there may be a need to rely on other dispute resolution processes.

From this perspective it would be preferable that any regulation contained a principle which gave some clarity and upon which the parties have some reliance. Any restrictions beyond this could be included in a contract. Therefore, regulation might state that, '...in the calculation of any rent based on turnover, the rent shall be determined only by calculation of the total value of any goods or services sold to and taken possession of by customers of the business during the relevant period, less any taxes payable to any government.' Any further exclusion could be included in a contract.

Recommendation 11

11.1 That the existing Code provisions relating to turnover calculations be replaced with a general descriptive provision which describes, in principle, what should be included in a rental turnover calculation.

5.2.7. Rent Review

Issues

12. Is the method for resolving disputes about market rent adequate?

Submission content

One respondent said that this is '...a good example of where the Code over specifies requirements. This should be left to the parties to negotiate.'

It was noted further that a number of technical issues arise with the current process. For example, if an owner fails to deliver a notice in accordance with clause 13(3) and (5) a rental adjustment cannot proceed.

A number of other issues were raised such as:

- clause 13(6)(b) should specify that negotiation of the market rent should be done in accordance with clause 14;
- 'Does clause 13(8) apply to market value adjustments only or to all reviews or adjustments of rent?';

- 'What happens if clause 14(1) conflicts with clause 13 because the owner can serve a notice of proposed market rent regardless of whether the tenant makes a request?'; and

- where an owner fails to deliver a notice under 13(3) the tenant has no rights to negotiate or seek an independent valuation.

It was further proposed that 14(3) (a) and (b) be replaced with: 'Rent is not to be adjusted if the due date for the adjustment of the rent passes before either party has initiated a review of the rent in accordance with clause 21.'

Also, it was proposed that clause 21 should not be subject to resolution of a dispute over market rent under clause 39. It was suggested that there is no point in participating in a dispute resolution process prior to undertaking an independent valuation.

Other issues include:

- an absence in clause 21 of a requirement for the parties to accept the valuer's decision;

- 'Does Clause 21(3)(c) refer to the two valuers appointed under the previous clause?';

- either party can circumvent the process for appointment by the Director of Consumer Affairs and Fair Trading by stating that they will not agree that the valuer's decision is binding;

- there is no procedure setting out the role of the third valuer; and

- 'Should the costs of the valuer in clause 21(3)(a) be shared equally?'.

Comments

As indicated by the submissions, there is considerable confusion about what can and should occur in relation to the existing provisions. Further, this confusion seems to underscore varying views about what is intended and what needs to be achieved. From this perspective, it is inappropriate to examine the specific technical detail without revisiting what these sections are intended to achieve.

Clearly, the essential purpose of regulatory intervention in this area is to ensure that market rental adjustments occur in a manner which is fair and reasonable. In simplistic terms, this means that the property owner

/ lessor will seek periodically to maximise the rental return on the property. Similarly, the tenant / lessee will endeavour to pay the least possible rent and therefore maximise their business return. Both objectives are reasonable and the only issue in dispute is how to fairly determine what the market rent is, for a given premises, at a specific point in time.

The existing regulation achieves this in a very cumbersome manner by prescribing the time and the manner in which notices can be given. This is also based on the premise that rental can only be increased on a date fixed by the lease. As previously indicated in the earlier discussion on rental adjustments, (see page 34) this inclusion is restrictive and it is necessary only that a limit on increase be restricted to once in each year. It is also appropriate to include a provision that gives some reasonable notice and from this perspective, six months seems appropriate.

Beyond these specifications, if the lease authorises the lessor to do so, it should only be necessary for the lessor to notify the tenant that a variation of a given quantum will be effected in six months from the date of the notice bearing in mind that only one notice may be given in any year. If the lessee disagrees with the amount of the variation, the tenant may lodge a notice of dispute within 2 months from receipt of the notice.

Any mechanism for resolving a dispute should be simple, fair and inexpensive. The following process is proposed.

(a) If a tenant disputes a notice of increase in market rent which is not accompanied by a report from a registered valuer the tenant may engage an API valuer. Whatever the outcome both parties share the cost equally.

(b) If the tenant disputes a notice of increase in market rent which is accompanied by a report from a registered valuer the tenant may engage an API valuer. If that valuer's determination of market rent is 95% or more of the rent stated in the notice the tenant must pay the cost of the valuation. If the valuer's determination of market rent is less than 95% of the rent stated in the notice the owner must pay the cost of the valuation.

This does not prevent the parties agreeing to use the services of an independent valuer at any time and sharing the costs equally.

Any disputes must be resolved by an independent valuer who is on a list of registered valuers put forward by the President of the Australian Property Institute. The independent valuer's decision is final and binding on the parties.

Schematic diagram of rent adjustment process

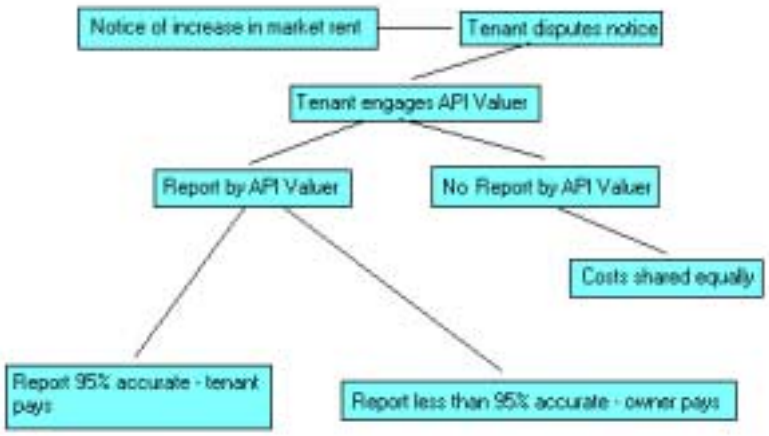

Table 1

Recommendation 12

12.1 That a simple process for establishing market rent adjustments be established as detailed in this report. That the President of the Australian Property Institute publishes a list of independent registered and suitably qualified valuers to resolve disputes about market rental adjustments.

5.2.8. Key Money

Issues

13. Are the provisions relating to key money appropriate / adequate?

Submission content

Two respondents proposed that sub clause 9(3)(a) be deleted and that the definition of *key money* should be altered to include changes of

conditions such as refit. Another respondent said that the definition of key money as currently contained in the Code is too broad.

Further, as mentioned earlier in this paper, there is concern about the Hobart City Council practice of charging key money for the assignment of stall leases and a request that the Code apply to prohibit this activity.

Comments

A prohibition on key money comprises one of the minimum standards agreed in the Ministerial Communiqué.

Clause 9(3)(a) is clearly intended to permit rent reviews, refurbishment and assignment. It does not expressly permit key money to be paid in these circumstances, although clearly the current drafting causes concern for stakeholders.

It may be possible to view a rent increase which occurs as a result of physical improvements to property, as key money. However, provisions relating to rent reviews would ordinarily deal with such issues. Code compliant contracts would appear not to allow increases of this type to be imposed unilaterally. However, it would be unreasonable to prevent parties from mutually agreeing to an increase in rent in exchange for a refurbishment or refit. If the existing definition of key money causes anxiety about this practice then this is an unfortunate outcome.

The principle, which underlies the prohibition of key money, is that owners should not use certain events in the course of a tenancy to extract fees which are unrelated to the provision of any service. It is intended to prevent a fee for 'collecting the keys', 'signing the contract' or 'renewing the lease', which is out of proportion with the costs of these activities. From this perspective, it is argued that collecting 10 percent of the value of a business as an 'assignment fee', clearly contravenes the principle of reasonableness and should be prohibited. However, as with the drafting of any provision in any future regulation, it would be useful to include in the definition of key money a more explicit statement of principle to aid in its interpretation. A definition is included as an example below. However, as a general principle, fees often include some profit component and are rarely restricted entirely to actual costs. There should be further consultation about the drafting of any relevant provisions to ensure that these types of issues are resolved to the satisfaction of relevant parties.

Recommendation 13

13.1 That the definition of key money be revised to include a statement of principle to aid in interpretation. The following provision is an example:

'*An owner shall not charge a tenant any fee for a service or process relating to the leasing of premises which exceeds the cost incurred by the owner of providing that service.*'

13.2 There should be further consultation during the drafting of any regulation with regard to such a definition.

5.2.9. Options to Renew

Issues

14. Are the provisions relating to the exercise of options appropriate for the current market and adequate for all parties concerned?

There was a wide range of differing views expressed by stakeholders. For example, owners strongly oppose providing tenants with the first right of refusal at the conclusion of a lease where no options to renew are in place. While tenant organisations either support the existing scheme or its extension.

Owners raised specific concern with the existing regulation. In particular, it was proposed that the tenant should not be able to delay a decision on whether to renew an option until after the rent has been determined. It was proposed that an option should be exerciseable at a rent 'to be determined'. More strongly, it was suggested that under the current law, it would be better for the owner to not offer an option to renew. It was agreed that this approach would put the tenant at a disadvantage. However it was argued that the provisions of options is ceasing to be relevant and are gradually disappearing. It was concluded that the existing law might be accelerating this decline.

From a tenant's perspective, it was argued that if a lease did not contain an option to renew, the owner should be required to state whether the lease would be renewed at least six months before the date of expiry. Tenant organisations were generally satisfied that the existing provisions are appropriate. However, it was acknowledged that existing rules require owners to identify the level of rent for the first year of new term, 9 months in advance and that this is unreasonable.

Comments

There is some overlap between rights of renewal as detailed in a lease and the notion of first right of refusal following expiry of a lease. The latter issue is dealt with in more detail on page 63 under the heading 'Termination of lease'.

The existing provisions for options to renew are extremely complex, and clearly in need of substantial revision. Clause 20 of the Code contains a complex list of procedures that must be followed in the event that an option is to be exercised at current market value rent. The provisions include:

- a requirement for the tenant to notify the owner that they wish to exercise the option (not less than 4 months or more than 6 months before expiry);
- a requirement that the owner notify the tenant of the rent (3 months before the expiry of lease);
- a requirement that the tenant respond to the owner's offer within 30 days of the owners advice of acceptance or rejection of the offer; and
- details of process for dispute resolution in the event that agreement cannot be reached.

Apart from clause 20(1)[4], clause 20 seems to be devoted entirely to resolving disputes about rent reviews and avoiding a situation where either party might use a disagreement to frustrate a progression to a renewed arrangement. Clearly, there are a number of objectives which need to be achieved. The tenant, should be in a position, as soon as possible, to determine whether or not to exercise the option. It is also implicit that they wish to know the outcome of any rent review before making this decision. The owner, should be in a position, as soon as possible, of knowing whether a tenant will renew, or whether they need to seek a new tenant.

It is proposed that a simpler process be adopted for determining rent reviews. A rent review for the purposes of exercising a right of option should generally be treated in precisely the same manner as a normal

[4] Clause 20(1) states that an option to renew must specify the period of time from which the renewed lease will apply.

rent review. It has already been proposed that notice of a new rent should be given 6 months before it comes into effect. It is also proposed that a tenant may dispute the rent within 4 months of the date that it takes effect or within 2 months of receipt of the notice. In these circumstances, the rent review should run the course detailed in the preceding section on rent review. The tenant should be required to state whether they are prepared to renew at the rent stated in the original notice from the owner or whether they wish to renew subject to the resolution of a dispute. Such notice should be given within 2 months of receiving the notice for rent review and at the same time as the right to dispute the rent is closed.

Recommendation 14

14.1 That the existing option to renew provisions be simplified and linked to the revised rent review provisions detailed in recommendation 12.

5.2.10. Outgoings and Operating Expenses

Issues

15. Is the prescribed process of identification and the method of determining outgoings reasonable / appropriate?

Respondents expressed a range of concerns about these provisions. For example, a number of respondents stated that the provisions do not adequately deal with GST. More specifically, concern was expressed about the process of linking outgoings to occupied floor area. It was argued that this is inappropriate and often works to the detriment of tenants. For example, the collective provision of services may offer significant cost savings, as opposed to individual tenants negotiating on their own behalf. It was argued that there is no scope under the current arrangements for economies of scale or the factoring of different requirements for individual tenants.

It was proposed by one respondent that the Code should simply state a principle that the recovery of outgoings should not be a profit centre for the owner and that outgoings should be allocated according to the proportion of costs incurred by the tenant. Under this arrangement, the detail would be left to the tenant with a provision for dispute resolution, as required.

Alternately, it was proposed that the existing method is reasonable but should be strengthened. It was proposed that the following items should be added to the current list of exclusions:

- any building insurance premiums for non-lettable areas of a centre such as a common areas or an owner's administration or storage;
- any property, vacant land, building or car park leased by the owner; and
- any administration costs of the centre.

Finally, it was argued that the term 'unforeseen outgoings' is confusing.

Comments

In exploring outgoings, it is difficult to establish a guiding principle that might form an appropriate basis for regulation. In South Australia, outgoings include 'operating, repairing and maintaining, rates, taxes, levies, premiums and charges', although there are some restrictions on land tax. Victorian legislation includes a detailed list of items which may be included. New South Wales legislation describes outgoings as including the operation, maintenance or repair of buildings including rates, taxes, levies, premiums or charges in relation to building and land. Queensland legislation includes maintenance and promotion amounts, charges, levies, rates or taxes but excluding land tax, capital expenses, insurance for loss of profits, interest and charges on lessor loans. The Western Australian legislation doesn't address outgoings.

In general, outgoings are costs associated with the operation of shopping centres. Most, if not all jurisdictions, include the costs of operating, repairing and maintaining buildings. In Tasmania, the existing regulation excludes capital expenditure but makes separate allowance for funding of major items of capital expenditure and repair. Generally, regulations include charges relating to the operation of the building or centre. They also include rates, taxes and levies.

In addition to the common threads in national regulation, the nationally agreed minimum standards[5] may provide some further assistance.

[5] The standards referred to in the 'New Deal: Fair Deal - Giving Small Business a Fair Go' released by the Commonwealth Minister for Workplace relations and Small Business, 30 September 1997.

These state that outgoings should be restricted to costs directly attributable to the operation of the retail shopping centre or the leased premises. The standards further propose that owners/managers should be required to provide annual forward estimates of outgoings and audited reconciliation of actual outgoings within three months of the end of each accounting period.

In most jurisdictions the apportionment of outgoings is determined on the basis of floor area. In South Australia some account is taken of rental levels. However, rent does not appear to be a better means of predicting costs than floor area.

The existing Tasmanian regulation complies with the proposed minimum standards and generally provides that the nature and content of outgoings are those which are authorised by the lease. The process of apportionment is illogical and should be left for the contracting parties to determine, as long as the method for determining the apportionment is clear from the outset and is properly disclosed.

The current list of exclusions comply generally with matters that are outside of the principle purpose of outgoings and should be retained. Similarly, any 'property, vacant land or vacant building' not directly connected with the operation of the shopping centre should be excluded in accordance with this principle.

However, building insurance for common areas or owners storage, leased car parks and the administrative costs of a centre may have a common value and not only a value to the owner. Therefore, rather than exclude certain costs, it would be preferable to determine whether or not in each case, the costs are 'directly attributable to the operation of a retail shopping centre'.

Dispute resolution is currently referred to the Monitoring Committee. Dispute resolution generally should be revised and this will be dealt with in a later section.

To comply with the national standard the provision of forward estimates should be provided as a matter of course, as should audited statements. The relevant law should reflect this standard.

With regard to the use of the word 'unforeseen', it is clearly not reasonable that all of the matters for which costs or charges might be incurred are foreseeable. However, it is difficult to define these other

than unforeseen and therefore difficult to see how the relevant definitions might be improved upon.

Finally, the regulation should ensure that GST could be applied wherever applicable.

Recommendation 15

15.1 That the existing regulation be retained with the following additions or changes:

(a) that leases make appropriate provision for the correct application of GST;

(b) that retail tenancies regulation state explicitly that outgoings include only those costs which are directly attributable to the costs of operating a retail shopping centre or leased premises;

(c) that retail tenancies regulation state explicitly that outgoings should not be a source of profit to the owner;

(d) that dispute resolution be considered separately;

(e) that forwarded estimates and audited statements be required by any relevant regulation; and

(f) that the method of apportioning outgoings be a matter for the contracting parties.

5.2.11. Land Tax

Issues

16. Is the recovery of Land Tax appropriately dealt with by the Code?

Submission Content

Some respondents said that that the recovery of land tax should be a matter for negotiation between the parties while others said land tax is a lessor's expense and should not be recoverable from the lessee.

Comments

As previously discussed, charging of land tax is prohibited or restricted in at least two jurisdictions. However, it is difficult to draw a clear line as to what is or should be permissible as outgoings. For example, why might we include rates but exclude land tax. In part, the answer lies in the notion that rates are a fee levied for services which are used by the lessee of retail premises, while land tax is simply a tax for no specific benefit to the payee.

Nevertheless, land tax does arise directly from the operation of a shopping centre and presumably the charge, in a similar manner to rates, would not arise if the shopping centre did not exist.

The alternate approach would be for an owner to increase rents to cover land tax. In this case the amount of land tax becomes hidden. It may be preferable that land tax is known and apportioned among tenants. If we presume that the cost of land tax will be recovered, either as outgoings or as rent, the most transparent method of charging would seem preferable. In either case, there would appear to be no detriment arising from maintaining the existing inclusion of land tax as an outgoing.

Recommendation 16

16.1 That land tax may continue to be charged as an outgoing.

5.2.12. Consent to Assignment or Sub-lettings

Issues

17. Are the mechanisms and options for assignment contained within the Code appropriate?

Submission Content

One respondent said that there should be an obligation on the tenant to make appropriate disclosures to the incoming lessee. It was also argued that regulations should prohibit the changing of any conditions of a lease by a property owner at the time of assignment.

One submission said that a clause should be added providing that an owner or agent may not offer a person or party a lease for a tenancy about which the owner is in dispute with the tenant.

Comments

Existing provisions provide that an owner may not unreasonably refuse assignment and makes available to the owner appropriate information with which to make a commercial decision.

While the existing provisions refer to assignment, there is some scope for confusion between this notion and the notion of sub-letting. In a strict view of assignment, there is a transfer from an existing tenant to a new tenant. If assignment were complete, all of the obligations under the lease would be transferred to the new tenant and the former tenant would be discharged from any further obligations. However, if the premises are sublet, the obligations might be transferred from an existing tenant to a new tenant but obligations for performance remain with the original tenant. The new tenant, in this case, would be answerable to the original tenant for the premises. From this perspective, it is difficult to understand why the existing clause 28(11) continues to impose obligations on the former tenants.

The purpose of assignment or sub-letting is to provide some relief for a tenant from the obligations of fulfilling the terms of a lease where, for whatever reasons, it is undesirable to do so. In addition, this arrangement ensures that the owner is not left without the income that arises implicitly from the agreement to commit to a lease for a given time period.

However, the existing provisions are complex and make the sitting tenant a third party intermediary between the owner and the prospective assignee. It would seem preferable for the property owner to negotiate directly with a prospective assignee. The existing tenant should only be concerned that proper reasons are given if assignment is refused or about any residual obligations that might persist following assignment. There should be no statutory restriction on the nature of these negotiations.

However, while the provisions should be simplified, there may be value in providing some right of appeal against a decision to refuse assignment or subletting. The appeal could be provided simply on the grounds that a refusal to grant an assignment or permit sub-letting is unreasonable or that a condition imposed is unjust.

Recommendation 17

17.1 That retail tenancy regulation be simplified so that:

(a) There is a clear distinction between subletting and assignment;

(b) an owner may not unreasonably refuse an assignment or prohibit sub-letting; [reasonable grounds for refusal would include a proposed change of use, a change in the tenant mix or an inability to demonstrate adequate commercial or businesses experience or viability];

(c) that an owner may request any information that is reasonably required to make a commercial decision about assignment or subletting;

(d) that an owner must give reasons in writing for any refusal to assign or permit sub-letting;

(e) that an owner not be able to force a change to an existing lease as part of giving permission for assignment and sub-letting;

(f) that a simple low cost mechanism be established to determine whether:

(i) the reasons for refusal are unreasonable; or

(ii) a condition imposed in an assignment or sublease is unjust.

5.2.13. Indemnities

Issues

18. Is the existing prohibition against indemnities appropriate / adequate?

Submission Content

A number of submissions argued that the prohibition on indemnities is inequitable and overly prescriptive.

Comments

The existing provisions prohibit a provision in a retail lease that purports to indemnify the property owner against any action, liability, penalty, claim or demand to which the property owner would otherwise

be liable. Indemnities are common in many fields of business, and the question to be considered for the purposes of this review is what problems the prohibition is attempting to address.

Property owners favour indemnity provisions to protect themselves from possible legal action taken by a third party who has been wronged by the tenant. A possible scenario would be where a tenant mops the area in front of their shop but fails to warn pedestrians. A customer slips and suffers injury. The customer would most likely be advised to sue the tenant, centre management, or both in the hope of obtaining a pay out from a public liability policy. The issue for owners is that they may become a party to the dispute whether they are liable or not. They will thus incur legal costs regardless of the eventual outcome of the proceedings. Where the action does not stem from any negligence of the owner, an indemnity provision may allow them to recover their legal costs from the tenant. Where the tenant is wholly liable the owner could sue to recover costs in any case, however an indemnity provision makes the tenant's obligations clear and simplifies the process.

This is reasonable in that it simply reflects commercial and legal reality. Tenant groups however have expressed concern that indemnity clauses in leases may be unjust on two grounds. Firstly they may make the tenant liable for legal expenses which are excessive or unreasonable. Secondly they may act to make the tenant liable for damages to third parties where injury occurs as a result of negligence on the part of the owner.

Other States have not seen a need to address these issues although the Victorian Act mentions indemnities. The existing provision of the Code invalidates a provision which indemnifies an owner where the owner would otherwise be liable, although sub clause (2) may be read to go beyond this.

It is reasonable to retain the principle that one party cannot indemnify the other for the other's negligence. There may also be value in a provision which limits liability for another's legal costs to 'reasonable costs'. In addition a court as one factor in determining unconscionable conduct may consider a clause which unfairly indemnifies an owner.

Recommendation 18

18.1 That clause 31(1) of the Code remains.

18.2 That sub clause 31(2) be repealed and replaced with a provision limiting the amount of legal costs which can be recovered under an indemnity provision to 'reasonable costs'.

5.2.14. Property Owner's Obligations and Compensation for Breach

Issues

19. Are the provisions for compensation adequate?

Submission Content

The compensation provisions were criticised for their lack of reciprocity, and for being too broad and unspecific. It was pointed out that there is some overlap between the provisions of clause 23 and clause 35. It was said that a property owner should not have to compensate a tenant if the tenant is responsible for cleaning, maintenance and repair, and fails to keep the premises in good order and repair. One respondent argued that the Code should not regulate issues of compensation while another argued that the Code should deal with the issue in more detail.

Comments

Clauses 23 (1) (i) to (k) are unnecessary because they relate to matters which should be fully dealt with in the lease agreement, or by general regulation dealing with relocation. The general principle of compensation is that compensation should place a victim as far as possible in the same position that he or she would be in if the event hadn't occurred. The Code contemplates three such events. These occur where the owner causes a loss to the tenant by:

- failing in their contractual obligations;
- inhibiting access to the premises; or
- forcibly relocating the tenant.

In relation to the first issue there may be no need for a provision as this could be dealt with under general contract law. A provision in a Code or statute may however lend some clarity to any dispute. In relation to the second issue, restriction of customer access can have a significant impact on business. Regulation would be helpful since it cannot be

assumed that it will be considered in a lease. The last issue needs to be addressed in a regulatory way. A tenant who is forced to relocate to inferior premises would, in the absence of regulation, have few options but to terminate the lease. Since this is almost never a preferred option for the tenant, a mechanism for resolving this situation needs to be in place. The existing approach of the Code is consistent with that taken in other States.

Recommendation 19

19.1 That the objectives of clause 23 be achieved with a simple provision such as:

'Where a tenant leases a premises in a shopping centre and the lessor causes or allows undue noise, or obstruction of access by potential customers, and this noise or obstruction causes loss to the tenant, the tenant may sue to recover the loss.

The tenant cannot recover for loss where the noise or obstruction is caused by the carrying out of reasonable repairs, maintenance or refit of premises, plant, or equipment.

Action to be taken in a court of appropriate jurisdiction.'

19.2 That clause 35(2)(b) requiring compensation for loss of profit from relocation remain.

5.2.15. Relocation, Repainting and Refurbishment

Issues

20. Are the provisions of clause 23(1)(i) relating to the payment of compensation following relocation adequate/appropriate?

Submission Content

There was a view that the provisions relating to compensation are too inflexible in that they only allow an aggrieved party to rescind the lease. It was said that lack of provision for conciliation on this issue could potentially allow a single tenant to frustrate a popular development within the centre.

It was also argued that any compensation payable as a result of relocation should be dealt with in clause 35 and should be restricted to loss of profits and costs of relocation. It was said that clause 35 is unclear about what circumstances allow a tenant to terminate a lease if the new premises is not acceptable. It was generally argued that tenants should be obliged to relocate should management require this in the interests of the centre.

Comments

Clause 35 could be usefully simplified. It is not helpful to only allow a tenant to terminate a lease as this is almost never a preferred or practicable option. Rather the tenant should be allowed to refuse relocation unless the area and configuration of the new premises are substantially similar. A generally worded provision with opportunity for dispute resolution would be sufficient. This is a matter which either party should be allowed to take to mediation.

Recommendation 20

20.1 That clause 23(1)(i) be rescinded.

20.2 That clause 35 be rescinded and replaced with a provision such as:

'A provision in a lease allowing relocation of the tenant is to require the property owner to give the tenant at least 3 months written notice of the date for relocation and the details of the proposed new premises, unless otherwise agreed by the parties.

The area and configuration of the new premises is to be materially the same as the existing premises.

If a tenant disputes that the premises are materially the same he or she may refuse to relocate until the matter is resolved.

The property owner must reimburse the tenant for the reasonable costs of relocation including compensation for any actual reduction in, or loss of, profit during relocation from the point of closure to the point of opening.'

21.	**Are the provisions relating to refurbishment adequate/appropriate?**

Submission Content

One respondent argued that there should be no requirement upon any tenant to undertake in a five year lease any refit of the premises during the term of the lease and the cost of any such refurbishment should be able to be paid off over the balance of the term of the lease.

Comments

It is reasonable that a lease allow for refurbishment or refit. For example, a property owner might not want to bear the cost of fitting out premises for a tenant but may be willing to grant a free period or period of low rent so that the tenants can do it themselves. However clause 27 only sets out in law what the parties would do in any case. As such it is an unnecessary provision.

Recommendation 21

21.1 That clause 27 is rescinded. The parties will negotiate their own requirements for refurbishment or refit. Any requirements must be in writing, and be referred to in any disclosure statement.

5.2.16. Tenant's Costs

Issues

22. Are the provisions relating to costs adequate?

Submission Content

One respondent argued that there is a need for greater clarification of what an owner can charge a tenant who requests alterations to the lease. Submissions did not point to any difficulties with the provision.

Comments

No problems appear to have arisen which require a change to clause 8. It seems reasonable that the party that requests a change should pay for it.

Recommendation 22

22.1 That clause 8 remains unchanged.

5.2.17. Promotion Contributions

Issues

23. Are the provisions relating to advertising and promotions appropriate / adequate?

Submission Content

No criticism of these provisions was made in formal submissions. However, shopping centre tenants have made subsequently expressed concern about the value of some promotions. It is argued that some promotions are misdirected or poorly targeted and would benefit from greater input from tenants.

Comments

The existing clause is not overly prescriptive when compared with other States. Since no criticism of the present provision has been made there is no case for changing it. There may be value in adding a provision allowing tenants to sue to recover a proportion of any contribution towards any promotion or promotion fund which has been spent on purposes other than promoting the centre.

Recommendation 23

23.1 That the provisions relating to advertising and promotions remain unchanged.

23.2 That further consultation is undertaken with stakeholders on the need for a provision allowing tenants to have input into decisions about how and where promotional funds for shopping centres are spent.

5.2.18. Guarantees

Issues

24. Does the Code adequately deal with guarantee issues?

Submission Content

There was general dissatisfaction with the requirement that property owners must accept a bank guarantee. It was said that bank guarantees no longer provide financial benefits to tenants and may impose a

financial impost. The present provision thus fails to benefit either party. The view generally was that the form of security should be left to the parties to decide.

Comments

Property owners often prefer a bank guarantee to other forms of security because a guarantee is simpler and cheaper to manage. For their part tenants tend not to prefer a guarantee because of associated bank fees and, in some cases, the requirement for them to deposit what is often a considerable amount of money in a long-term non-interest bearing account.

Presently, clause 30 (4) only says that a property owner must not unreasonably refuse to accept a bank guarantee. This fails to address the issue where the property owner prefers a bank guarantee but the tenant does not. Some inequity may arise from a provision which forces an owner to accept one or another form of security. This is a matter which should be left to the parties to negotiate between themselves.

Recommendation 24

24.1 That the type or form of security be a matter for the parties to determine and not be prescribed by retail tenancy regulation.

5.2.19. Mortgagee's Consent

Issues

25. Should the Code make provision for the registration of leases?

Submission Content

Submissions differed on this issue. It was suggested that further legal advice should be sought. One respondent said that it should be left to the parties to negotiate, while another said that leases should have to be registered within a given period beginning when the signed document has been returned to the lessor or its agent.

Comments

The *Land Titles Act 1980* sets up a process for registering leases in a central registry. The purpose of registering a lease is to ensure that the rights of the lessee attach to the title and are discoverable on search. In

other words, if the property is sold the new owner is deemed to have known about the lease and is obliged to honour it's terms. Only leases which are of three years or more duration may be registered. If a tenant has a lease of less than three years it is not registerable but any new owner of the property is still obliged to honour the terms of the lease. The only potential injustice which may be caused to the tenant is where a lease is of three years or more duration and the property owner fails to register the lease and sells the property. In this circumstance the new purchaser may not be bound by the lease since it was not discoverable. In addition the Act renders void any lease of three years or more which is made without permission of the mortgagee. In this instance the tenant would have an action for damages against the former property owner. A requirement in the Code that the owner must register the lease would allow government to levee a fine for failure to register, but would not avail the tenant who will still have to rely on a civil remedy.

Where an owner refuses to register a lease the tenant is able to unilaterally take out a caveat on title claiming a leasehold interest by virtue of having an agreement for lease. This can be done over the counter at the Land Titles Office with a filing fee of $107.10 (this fee is adjusted on an annual basis in accordance with the *Fees Units Act 1997)*. A caveat could be challenged in the Supreme Court but only on the basis that the tenant no longer had a valid lease. Given this, there is no practical reason why the Code should be amended to address issues of lease registration.

Recommendation 25

25.1 That the Code not make provision for the registration of leases but rely on the existing provisions of the *Land Titles Act 1980*.

5.2.20. Trading Hours

Issues

26. Are the provisions relating to trading hours appropriate?

Submission Content

A number of criticisms were made of clause 38. It was argued that a simple majority vote should be sufficient to change trading hours, and that the costs for after hours trading should only be born by the tenants

who actually trade. It was also argued that a property owner should be allowed to set trading hours without input from tenants.

Comments

The requirement of approval of two thirds of tenants is consistent with other States and is a good a measure of agreement as any. Clause 38 however contains some apparent incongruities. For example, sub clause (4) says that special trading hours are negotiable between the property owner and tenants whereas sub clause (6) says that a property owner may set all trading hours. It is not clear whether the process for changing trading hours set out in sub clause (8) applies to core, centre, or special trading hours, or to all three.

The purpose of regulating trading hours is to ensure that there is some agreement on when a centre remains open, and to ensure that those businesses which do not trade don not contribute to the extra outgoings of those businesses which trade outside of normal hours.

Recommendation 26

26.1 That a simpler approach be adopted to ensure that:

(a) Core trading hours during which all businesses must trade is set by the owner.

(b) Core hours can only be changed with approval of a two-thirds majority of businesses.

(c) Any business may negotiate to open at other times but must pay the correct proportion of outgoings.

5.2.21. Termination of Lease

Issues

27. Are the provisions relating to the renewal of agreements appropriate / adequate?

Submission Content

Clause 29 was roundly criticised by respondents for both stating the obvious and for inconsistencies. In summary:

- clause 29(1) states the obvious and should be deleted as this will always be true in all agreements;

- clause 29(9) was seen as a meaningless clause in the context of a regulatory code since it really says that the parties can agree to any rent they like;

- property owners can circumvent the requirements of clause 29 (2) by stating in a lease that the parties agree that the property owner is not required to give the notice specified in clause 29(2);

- clause 29(6) allows the tenant to extend the term of a lease if the owner fails to give the notice in 29(2) but there is no time specified for the tenant to have the notice.

It was also argued that where there is no option to renew the onus should be on the owner to state whether the lease will be renewed. It was argued that this notice should be given six months prior to the date of expiry.

Submissions also indicated that a minimum lease period is too inflexible and tenants often prefer a short lease with a number of options to renew.

Comments

It is not true that clause 29 (9) serves no function. It acts to prevent a property owner charging more than market rent without the consent of the tenant where a lease is renewed.

The issue which the Code attempts to address is security of tenure. This could be addressed much more simply with a requirement that, where the tenant gives notice within a given time that they wish to negotiate a renewal or extension of the lease, the owner must give written notice of their intentions within 30 days.

Where the lease gives an option for renewal the tenant should give the same notice to the owner of their intentions.

There is merit in the Property Council view that a sitting tenant should not have a 'first right of refusal'. The 'first right of refusal' is intended to prevent an injustice where in the normal course of business it would be expected that a lease would be renewed, but the owner uses the tenant's vulnerability to insist on onerous conditions.

The issue then is how to prevent owners using the renewal or extension of leases, or the exercise of options, as occasion for pressuring tenants into agreeing to unreasonable conditions. The condition most complained about is rent increase. This could be solved without complicated regulation by carrying over time restrictions on rent increase to any new or extended agreement. A provision prohibiting unreasonable rent increase would, without complicated provisions about market rent, prevent owners imposing unfair rents. In the event of a dispute 'reasonable rent' would become market rent, which is that rent which would be reasonable for an equivalent premises.

A five-year minimum lease term is a standard part of all State retail tenancy laws in Australia. While the market in Tasmania is somewhat different it would be unfortunate if tenants were to have less security of tenure than their counterparts in other States. Tenants expressed a definite preference for options to renew in leases rather than long fixed terms. A simple solution would be to provide that a lease period including any options to renew must not amount to less than five years.

Recommendation 27

27.1 That clause 29 be repealed and replaced with a simple provision which specifies notice periods for negotiation or termination of leases.

27.2 That retail tenancy regulation not permit an option to renew which makes the total period of the lease less than five years.

5.2.22. Tenant Associations

Issues

28. Are the provisions relating to tenant's associations adequate / appropriate?

Submission Content

Submissions did not raise any objection to this provision.

Comments

This provision is consistent with legislation in other States and has not been the subject of contention in Tasmania.

Recommendation 28

28.1 That the provision relating to tenant associations remains unchanged.

5.2.23. Dispute Resolution

This issue is examined in detail under Term of Reference 5.

5.2.24. Form of Regulation

Submissions did not express a strong preference for the existing Code and one argued that an Act would be a more appropriate mechanism. This issue is discussed in more detail in Term of Reference 3.

5.3 Term of Reference 3

Examine the structure of the Code and its ability to achieve its original stated objectives.

Issues

29. Is a code of practice an adequate / appropriate mechanism for regulating retail tenancy arrangements or would this better be achieved by a separate retail tenancy statute?

Submission Content

One respondent said that ... 'the Code is an unnecessary hindrance on commercial activity in Tasmania and the provisions of the Code do not achieve the desired aims.'

Others complained generally about its complexity and its lack of flexibility. At least one submission argued that a statute would be preferable while some submissions opposed any form of compulsory regulation. Some submissions favoured a code of practice.

Comments

The Fair Trading Act provides for the creation of codes of practice as an alternate form of regulation to statute law. The advantage of a code is that it is seen as a less intrusive means of market intervention and is more representative of industry or market consensus. A code offers the prospect of greater input, greater flexibility and greater relevance.

Where there is significant industry cohesion, voluntary codes of practice offer significant advantages over statute law. However, these advantages are less discernible for mandatory codes and indeed specific problems arise. For example, the experience of the retail tenancy code suggests that there is greater prospect of legal ambiguity and therefore uncertainty. This arises in part because of the manner in which codes are structured as a regulation under the Fair Trading Act. Further, the process of drafting requires that industry develop a code and propose the code to government. This means that the drafting process is not subjected to the same rigor as other statues or regulations and that the drafting is less precise.

To the extent that regulation is required there is value in creating a legal framework that has the least possible ambiguity. A discrete statute provides the best means of achieving this purpose. Therefore, rather than having a code of practice, it might be useful to have a general statute which provides a basic framework applicable to all tenancies.

Recommendations 29

29.1 That the Code be repealed and replaced with a Shop Leases Act.

Issues

30. Is the Retail Tenancy Code of Practice Monitoring Committee an appropriate body to administer the Code?

Submission Content

Submissions were supportive of the role of the Monitoring Committee as a cheap and efficient alternative to litigation. It was also noted that a different body might be required to administer a separate statute should this replace the Code. Some submissions argued that the parties should be able to exercise their own rights in the magistrates court without relying on an application from the Director of Consumer Affairs and Fair Trading.

Comments

The Monitoring Committee was established to advise on the effectiveness of the Code, recommend any changes to the Code, and conciliate disputes arising under it. There is a view however that

specialists in the field should conduct alternative dispute resolution. For this reason it is questionable whether the Monitoring Committee or the Office of Consumer Affairs and Fair Trading is an appropriate body for resolving disputes. Other jurisdictions defer to specialist tribunals or use commercial mediation services. In Queensland Departmental officers may attempt an informal conciliation by telephone but any formal process is accomplished by appropriately trained persons. If a mediation process were adopted as a mandatory precursor to litigation it would be preferable to use trained commercial mediators. It would then be unnecessary to use the Committee in a conciliation role.

There is a need for ongoing input from industry and consumer groups as the law is refined and amended over time. To this end the Committee has acted as a balanced voice for different players in the industry. This role is an exceptional one in that most law is administered by the relevant Department acting under the direction of the relevant Minister. The role of a monitoring committee may be of value where a Code is administered because a Code mandates an exceptional level of industry input in its' formulation and administration. Should the Code be replaced by a statute however, it would be more appropriate for government to take responsibility for ensuring that stakeholders are consulted and informed. To this end the Office of Consumer Affairs and Fair Trading may be better placed to liaise with industry and consumers, and to recommend legislative changes to government.

Recommendation 30

30.1 That the Monitoring Committee ceases to perform a formal role in the conciliation of disputes.

30.2 That ongoing advice and consultation with the market take place in future on an informal basis with key market stakeholders, rather than through a formal consultation body.

5.4 Term of Reference 4

Evaluate whether the Code creates certainty for business by providing more clearly defined rights and responsibilities for both tenants and property owners.

Issues

31.	**Does the Code adequately detail the rights and responsibilities of the parties to retail tenancy leases?**
32.	**Has the Code created certainty in the market?**
33.	**What improvements could be made to better assist understanding and certainty?**

One respondent argued that 'We have this piece of regulation that significantly complicates commercial agreements and which solves many 'problems' which in fact did not exist while creating new problems and complications.' Other respondents had a more benevolent view and believe that the Code does create certainty in the market. Most respondents supported the Code but believe that some ambiguity and uncertainty should be resolved. It was noted that there is a need for better education of prospective tenants of the risks and obligations that attach to renting a business premises before they enter a lease.

Comments

Submissions generally indicated that the Code had increased certainty but had also increased the cost and complexity of transactions which could work against the interests of both property owners and tenants.

Recommendation 31

31.1 That regulation of retail leases be simplified and expressed in a statute.

5.5 Term of Reference 5

Examine the suitability of dispute resolution mechanisms.

Issues

34.	**Should retail tenancy regulation provide for alternate dispute resolution mechanisms?**
35.	**Should some types of disputes be exempted from an alternate dispute resolution process?**
36.	**Should there be a capacity to by-pass alternate dispute resolution in certain circumstances?**
37.	**Should alternate dispute resolution encompass a conciliation role?**
38.	**Who should conduct alternate dispute resolution - specialists or generalists?**

Submission Content

There was general support for an alternative dispute resolution process being built into the Code. There was concern however that any such process should not act as a barrier to a party seeking urgent injunctive relief. There was also concern that any issue involving allegations of unconscionability be heard in a court of higher jurisdiction. It was also noted that the Committee had not been asked to resolve any disputes since commencement of the Code, although the Office had assisted in the resolution of some matters.

Comments

The Code gives the Monitoring Committee a power of conciliation. The Committee has not been called upon to exercise this power since the Code came into effect. This could indicate that the Code has substantially reduced conflict in the market, or that conflict is occurring but parties are not seeking conciliation for other reasons. Submissions did not suggest that there had been a general reduction in the level of market conflict. It could be that people in the market are more familiar with traditional court processes and are not aware of, or do not understand the role of the Committee.

It should be noted that the terms ‘mediation’ ‘conciliation’ and ‘arbitration’ are often used incorrectly and interchangeably. In this

paper 'mediation' means the process whereby a neutral third party assists the parties to reach agreement but does not impose any final solution. 'Conciliation' refers to a process of mediation in which the neutral third party also has a role in adjudication and can impose a solution on the parties. However, where the courts refer to a 'conciliation hearing' they are in fact referring to a mediation. 'Arbitration' refers to the resolution of disputes by order of an arbitrator following presentation of evidence.

Other States have adopted some or all of the above approaches in their efforts to resolve conflict. All jurisdictions see value in a process of mediation/conciliation prior to any kind of arbitration. Experience nationally, both in the context of retail tenancy, and of other regimes such as the Grocery Industry Code of Practice, has shown a great deal of success with mediation as a cost effective technique for resolution of conflicts. For example, last year some 3000 retail tenancy disputes were notified in Queensland. Of these around 2850 were resolved through informal mediation by a government official. Around 150 disputes proceeded to formal mediation. Each mediation cost each of the parties $100. Of these disputes only 30 could not be resolved and proceeded to conciliation. It was reported that the settlement rate for mediated disputes arising under the Franchising Code of Conduct is 70%.

Mediators have found that one of the reasons for this success is that most disputes do not stem from the alleged problem but from emotional issues that have often been unresolved in the business relationship for some time. This was also noted in one submission to the review. An opportunity for each of the parties to express their views and feelings has been found to be a key in resolving disputes. This opportunity is denied the parties in a conventional adversarial court process.

There is also a view that for a mediator to have expertise in the industry, while necessary to some degree, is less important than expertise as a mediator. Many parties to disputes favour mediation because of a perception that a mediated solution will keep the business relationship intact whereas a court process would not. In addition there are significant financial barriers to litigation which operate to deny access to justice for those less financially able.

This presents some opportunities for Tasmania. There exists in the State a reputable commercial mediation service and accredited

mediators which could be used before the parties proceed to litigation. This would allow a number of options. An officer of Consumer Affairs and Fair Trading may attempt informal mediation. If this is unsuccessful parties must proceed to formal mediation with a commercial mediator as a pre requisite of any kind of litigation. Alternatively they could go straight to a formal mediation. If a formal mediation is unsuccessful they may seek arbitration. A court of appropriate jurisdiction should do this. As was noted in submissions, such a process should not act to prevent a party seeking urgent injunctive relief if there are adequate grounds.

There is added complexity if the unconscionability provisions of section 51AC of the Trade Practices Act are incorporated into retail tenancy law. This is a complex area of law and one which relies significantly on case law precedents. For this reason it is only appropriately dealt with by a court. Logically this would be the Supreme Court, however there are significant financial and procedural barriers which act to prevent plaintiffs from pursuing action in that court. Given this it may be appropriate to confer jurisdiction on a lower court with rights of appeal to the Supreme Court. The following model might be the most workable.

A mediation process involving a commercial mediation firm could reasonably be completed within a few days of a dispute arising. If mediation is unsuccessful applications for orders to comply with the Act including orders for vacant possession, and disputes involving amounts of $3000 or less, could be determined in the Small Claims division of the Magistrates Court.

Disputes involving amounts between $3000 and $10,000 should be heard in the Civil Division of the Magistrates Court. In this instance it would be inappropriate to require mediation as a pre requisite to litigation because the court already conducts pre trial conciliation hearings. Some retail disputes are likely to involve amounts in excess of $10,000. Disputes involving greater amounts should be heard in the Supreme Court but only following mediation.

Disputes involving allegations of unconscionability should be heard at first instance by the Civil Division of the Magistrates Court. A right already exists to seek leave to appeal from this court to the Supreme Court on points of law. Given that the unconscionability provision of the existing Code, and of any draw down of section 51 AC remain untested, it is likely that the Supreme Court would grant leave to

appeal. It is not unreasonable that the law be allowed to develop in this way, but plaintiffs should be allowed to benefit from the relatively cheap and expeditious magistrates court process at first instance.

Recommendation 32

32.1 That the present process of conciliating disputes through the Monitoring Committee are discontinued.

32.2 That consideration is given to whether the Office of Consumer Affairs and Fair Trading should have a role in informal mediation.

32.3 That a process for resolving disputes using commercial mediation services as a pre requisite to litigation be established.

32.4 That, following mediation, the Small Claims Division of the Magistrates Court be given the power to:

- restrain an action in breach of the Act;
- require a person to comply with an obligation under the Act, or a retail lease; and
- order a person to make a payment under the Act including compensation for loss or damage resulting from a breach of the Act or a retail lease.

32.5 That the Civil Division of the Magistrates Court is given power to determine any dispute involving between $3001 and $10,000. In such an instance commercial mediation shall not be a pre requisite to litigation.

32.6 That any dispute involving an allegation of unconscionability as defined by the Act is heard at first instance in the Civil Division of the Magistrates Court.

5.6 Term of Reference 6

Evaluate whether the Code meets key nationally consistent retail tenancy principles agreed by the Commonwealth and State and Territory Ministers.

5.6.1 Unconscionable conduct

Issue

39. Should the code of practice for retail tenancies be amended to mirror section 51AC of the *Trade Practices Act 1994*.

Submission Content

There was general support for 'drawing down section 51AC'. However, some stakeholders argued that these provisions are untested and should not be drawn down until case law is more fully developed. It was noted that where the provisions have been adopted such as in Victoria, New South Wales and Queensland, jurisdiction has been conferred upon the higher courts.

Comments

The Commonwealth has amended the Trade Practices Act to allow the unconscionable conduct provisions of section 51 AC to be 'drawn down' into State law. Victoria, New South Wales and Queensland have already adopted these provisions.

Case law to guide the interpretation of section 51AC is in its infancy but will develop with the passage of time. Two examples of cases under section 51AC include the 'Simply No Knead' case and the 'Leelee' case. Other cases have been considered under section 51AA. Section 51AC is similar to 51AA but is said to be more liberally expressed and may result in different court outcomes.[6]

In the Simply No Knead case the court held that the franchisor has breached section 51AC in ...'an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour'.

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[6] Grant Levy, Partner, Maddock Lonie and Chisolm in Shopping Centre Council of Australia Shop Talk 15 February 2002.

In the Leelee case the court granted an injunction against the owner of a food plaza. Specifically it held that the owner had engaged in unconscionable conduct by allowing another tenant to infringe on the exclusive menu entitlements agreed with Leelee; and restricting the tenant's ability to determine the prices at which its dishes were sold.

One key case under 51AA is the Farrington Fayre case where the judge referred to the conduct by the owner as ...'grossly unfair exploitation'. However, the Full Federal Court has overturned the decision of the trial judge who had found that the landlord had acted unconscionably.

While the interpretation of this law presents a significant challenge to courts, landlords and tenants there seems to be value in providing access to these protections at a state level. Existing Commonwealth provision provide a means of addressing serious incidences of abuse of power, which are not provided by state law. However, there are substantial barriers to tenants accessing the existing Commonwealth law, which would be reduced if section 51AC were 'drawn down'.

At present, the jurisdiction of the Federal Court under section 51AC does not extend to businesses which are not corporations and which do not operate in more than one jurisdiction. Access to any higher court is costly, and it may take one to three years to have a case resolved.

However, there is concern that the lower courts in Tasmania are not equipped to deal with the complexity that arises in matters relating to unconscionable conduct. From a practical perspective, if the relevant jurisdiction was determined on the monetary value of the dispute, it is likely that almost all cases would be considered in the Supreme Court in any event.

The unconscionability provision may be of equal value not just to retail tenancy arrangements but also to other trading relationships. For this reason there may be value in adopting the provision within the *Fair Trading Act 1990* in preference to including it in a Retail Leases Act. An alternative to drawing down s.51AC is to develop a more simply worded provision that has the same effect.

Recommendation 33

33.1 That the provisions of section 51AC of the Trade Practices Act be given effect to in either the Fair Trading Act and/or proposed retail tenancy regulation.

5.6.2 Minimum standards for States and Territories - Key Principles

Commonwealth, State and Territory Ministers have agreed to a set of key minimum standards for retail tenancy regulation to be implemented in each jurisdiction. These minimum standards are detailed below. The Fair Trading Code of Practice for Retail Tenancies has attempted to address these standards in ways discussed elsewhere in this document.

Disclosure

Ministers agreed that there should be sufficient disclosure to enable tenants to properly value and assess a lease, amortise their fixed costs, and assess their likelihood of commercial success. In addition it was agreed that tenants should have sufficient notice of the owners' intentions with respect to lease renewal. The Code meets or exceeds this requirement in that it compels extensive disclosure several days prior to any agreement being entered into, and requires adequate notice from both parties of their intentions with respect to renewal of a lease. This is discussed in more detail at page 29.

Rent reviews

Ministers agreed that there should be sufficient access to information to enable valuers to determine effective market rent. This includes information on rents by other tenants in a centre. The Code meets this standard by including detailed instructions on how market valuers can determine market rent. Although it does not specifically require owners to release details of rent paid by other tenants in a centre it does require valuers to examine 'all relevant market evidence from any source'. This is discussed in more detail at page 41.

Relocation costs

Ministers recognised that compulsory relocation can have a detrimental effect on tenants but this needs to be balanced against the needs of shopping centre management to determine and alter the tenant mix within a centre. Ministers agreed that, where a tenant is compulsorily relocated during the course of a lease, owners should be liable for the reasonable relocation costs incurred. The Code presently exceeds this standard. It not only requires owners to pay the reasonable costs, including loss of profit, incurred by tenants who are compelled to relocate, but allows them to refuse relocation if they believe the new

premises are not equivalent to their existing premises. This is discussed in more detail at page 57.

Outgoings

Ministers agreed that there is a need for sufficient transparency and accountability in outgoings to enable tenants to determine whether or not the outgoings charged by a centre are appropriate and reasonable. In addition outgoings should involve only the costs directly attributable to the operation of the retail shopping centre, or a leased premises. The Code meets this standard by requiring detailed disclosure of outgoings including audited accounts, and restricting those things for which outgoings can be charged. This is discussed in more detail at page 48.

Assignment

Ministers agreed on the need for certainty in assignments. To this end it was determined that owners should:

- not be able to unreasonably refuse an assignment;
- respond to a request for assignment within a reasonable time;
- make appropriate disclosure; and
- not use assignment as occasion to insist on changes to the terms of a lease.

The Code meets these standards with a series of detailed provisions. These are discussed in more detail at page 52.

Turnover

Ministers agreed that turn over figures should be made available where necessary on a restricted basis. Specifically it was agreed that where turn over figures are provided, they may be released to third parties only in aggregate unless there are exceptional circumstances, such as the sale or financing of a business, legal action, rental valuation consistent with the lease agreement, or where the tenant consents. The Code restricts those things which may be taken into account when calculating turn over, and allows a property owner to insist that figures are audited. However there is no requirement that figures must only be released to third parties in aggregate. To this extent the Code fails to

meet the minimum standard. 'Turn over' is discussed in more detail at page 38.

Ratchet clauses

Ministers agreed that ratchet clauses should be prohibited because they prevent rents dropping below existing levels at the time of rent review regardless of the general climate of the market. The Code fails to meet this standard in that it allows for a fixed percentage increase in rent. This is discussed in more detail at page 34.

Dispute resolution procedures

Ministers agreed on the need for a speedy and economical process for mediating disputes, such an alternative dispute resolution and retail tenancy tribunals. The Code adopts an alternative conciliation process which provides a cost effective alternative to the courts for initial hearing of disputes. While the Code thus meets the minimum standard it could be improved by inclusion of a process for mediation of disputes prior to conciliation. This is discussed in more detail at page 70.

Issue

40. Does the existing code of practice for retail tenancies adequately meet the minimum standards agreed by Commonwealth, State and Territory Ministers?

Submission Content

Submissions indicated that the Code does meet the minimum standard agreed by Ministers although there was still concern that the Code does not allow a property owner to relocate a tenant in order to create a better tenancy mix within a shopping centre.

Comments

The Code has successfully met most of these standards but arguably does so with greater complexity than is necessary. The Code fails to meet the agreed standard with respect to ratchet clauses and 'turn over' figures.

Recommendation 34

34.1 That the requirements in relation to rent and 'turn over' figures be reviewed to ensure compliance with the minimum standards agreed between State and Territory ministers.

5.7 Term of Reference 7

Recommend appropriate amendments to the Attorney-General.

The recommendations which are contained in this document will be forwarded to the Attorney-General.

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Statistical Concepts Library

Australian and New Zealand Standard Industrial Classification (ANZSIC). Chapter 3. The detailed classification

Division G Retail Trade

EMBARGO: 11:30 AM (CANBERRA TIME) 31/05/93

Jump to: Related Links

Overview

Division G: Retail Trade, includes all units mainly engaged in the resale of new or used goods to final consumers for personal or household consumption or in selected repair activities such as repair of household equipment or motor vehicles. Businesses engaged in retail trade include department stores or other shops, motor vehicle retailers and service outlets, stalls, mail order houses, hawkers, door-to-door sellers, milk vendors, vending machine operators and consumer cooperatives. Units mainly selling goods on a commission basis to final consumers for personal or household consumption are included. However, cafes, restaurants, hotels and motels are included in Division H Accommodation, Cafes and Restaurants.

Units mainly engaged in reselling their own goods by auction are included in this Division, but units which are mainly engaged in providing auctioning services for others are included in Division L Property and Business Services.

Subdivisions and Groups

51 Food Retailing
- 511 Supermarket and Grocery Stores
- 512 Specialised Food Retailing

52 Personal and Household Good Retailing
- 521 Department Stores
- 522 Clothing and Soft Good Retailing
- 523 Furniture, Houseware and Appliance Retailing
- 524 Recreational Good Retailing
- 525 Other Personal and Household Good Retailing
- 526 Household Equipment Repair Services

53 Motor Vehicle Retailing and Services
- 531 Motor Vehicle Retailing
- 532 Motor Vehicle Services

Appendix 2 List of Submissions

The following organisations and individuals made submissions to this review.

NAME OF RESPONDENT
Australian Retailers Association (Tasmania Division)
Property Council of Australia (Tasmania Division)
Retail Traders Association of Tasmania
Mr Colin Quon
Walker Youngman Dixon
Mr Peter M. Roach
Butler, McIntyre & Butler
Dobson, Mitchell & Allport
The Gandel Group of Companies
Salamanca Stall Holders Association Inc.
Levis Stace and Cooper
Deputy Registrar Retail Unit NSW

Appendix 3 Members of the Retail Tenancy Monitoring Committee

The members of the Retail Tenancy Monitoring Committee provided technical advice to this review and have made a significant contribution to this process. However, this does imply that members necessarily, either as individuals or as members of the organisations they represent, endorse the recommendations contained in this report.

NAME	ORGANISATION
Ms Anne Brown	C/- Butler McIntyre & Butler
Mr Duncan McDougall	Australian Retailers Association (Tasmania Division)
Mrs Lou Cox & Mr Tony Smithies	Property Council of Australia (Tasmanian Division)
Mr Bernard Smith	Australian Property Institute Incorporated (Tasmanian Division)
Mr Paul Morgan	Retail Traders Association