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**Unfair Contract Terms Consultation Paper**  
**Small Businesses, Competition and Consumer Policy Division**  
**The Treasury**  
Langton Crescent  
Parkes ACT 2600

### SUBMISSION

#### Extending Unfair Contract Term Protections to Small Business – Retail Shop Leases

Lease1 is Australia's leading Retail Shop Lease specialist, providing a unique tenant-only representation service to ensure retailers achieve the best commercial outcomes on their leases.

We are the only national firm of our kind that works exclusively on behalf of tenants in their lease negotiations with centre managers and retail landlords.

From individual stores, to large retail groups and franchise systems – we always put tenants first.

Our business was established in 1997 to specifically address the inequalities that exist between Lessees and Lessors in Retail Shop Lease negotiations.

This year represents the twentieth year since specific and extensive retail lease legislation began to be introduced by State & Territory Governments. These included development of dispute resolution systems specific to the Retail Shop (Retail Commercial) Property industry.

However there remains significant imbalance in the bargaining power between small retailers and large landlords (portfolio managers).

And even after an in-depth and substantial Productivity Commission Report – The MARKET for Retail Tenancy Leases in Australia" (2008) which proposed 9 specific recommendations to promote transparency towards a more informed market with the view to addressing directly these imbalances no positive action nor steps have taken place to date.

Although the Government openly supported the Productivity Commission Report recommendations and noting a reasonably high level of bipartisan support from Industry Stakeholders here we are 5 years past with no improvements of the problem(s) to hand. Therefore the opportunity to address same specifically for Retail Small Business is openly welcomed.

Although the Industry Supply Stakeholders - the Landlords will vehemently oppose any further legislation and/or regulative intervention into what maybe currently described as an overly subscription legislative sector

certain areas of the contractual relationships between Landlord (Lessor) and Tenant (Lessee) need to be explored under the Australian Consumer Law.

Specifically the areas of imbalance under a Retail Tenancy (Shop) Lease Contract that need addressing are:-

- i. Procedural unfairness
- ii. Unconscionable conduct
- iii. False, misleading and deceptive Conduct
- iv. Information disclosure arrangements

Due largely to the nature, structure and resources of Small (Retail) Business in these transactions there remains a potential for under reporting of the problem as most feel powerless in the face of a contract (lease) they see as non-negotiable particularly in light of the huge resource advantage of the Landlord.

**i. Procedural Unfairness**

In either entering into a new lease for the first time or the renewing of an existing lease the most contentious issue will always be the amount of rent the supplier (Landlord) seeks under the lease (Contract).

We must clearly note that it would be offensive to the process and the market to suggest promoting a legislative outcome to what must remain market forces.

But there is evidence to suggest that there remains concern the circumstances surrounding or the processes leading up to the formation of a retail lease (which includes the amount of rent) contract.

The huge amount of data available to the resources (personell) of the larger Landlords has since the inception of Shopping Centres created an enormous imbalance in these circumstances.

Noting that the majority of this information is in fact provided to the Landlord by the Lessee (in the form of sales/performance outcomes) under the guise of "turnover rental" or other such contractual clauses contained in the lease, has grossly compounded the significance of this imbalance.

Any active industry operative will confess to the reliance upon "Portfolio Averages", "Category Occupancy Costs" or such third party resources as 'URBIS Industry Averages", when seeking to set the terms and conditions of a lease contract.

(Examples and a fuller understanding of these circumstances and processes will be presented at the Stakeholders Meeting as some content is commercially sensitive).

A further area which may be described best under substantive unfairness is the issues surrounding the level or standard of fitout (or rather capital required) a Landlord will insist upon within the contract which does not fairly relate to the type of business, the reasonable and fair return on investment nor the commercially acceptable allocation and amortisation of the capital required to meet the Landlords fitout standard.

This is more pronounced at the end of a lease where the Lessee has not realised the investment of the capital applied to the fitout and where the Landlord either:



- A. Does not seek to renew the lease; or
- B. Seeks to renew the lease with a substantial rental increase; or
- C. Seeks to renew the lease with further onerous and substantive fitout requirement by the Landlord.

The compelling case is the end of lease where the Lessee was unfairly contracted to install a fitout (usually in the \$100,000's) and the Landlord promotes a rental level to renew the term with the full knowledge the Lessee is in no financial position to walk away.

*(Again specific case examples can be provided at a stakeholders meeting on the basis of the possible ramifications upon Lessees providing such evidence.)*

#### **ii. Unconscionable Conduct**

Although unconscionable conduct is noted in most States & Territory Retail Tenancy Legislation and referred to the Australian Competition and Consumer Commission as the applicable industry code.

As the meaning of unfair and the test for unfairness under Schedule 2, 5.24(1) of the Act and Schedule 128G of the ASIC Act are in essence similar and is more clearly set out in plain English in the "A guide to the unfair contract terms law" than the varying provisions about unconscionable conduct.

It is our view that encompassing small business via extending the Unfair Contract Term Protections to Small Business will provide a better understanding to small Retailers when seeking to interpret such terms as 'significant imbalance', 'not reasonably necessary', 'detriment' and 'a transparent term'.

*(Actual case examples of Landlord/ Lessors Agent(s) acting unconscionably can be made available at a stakeholders Meeting.)*

#### **iii. False Misleading and Deceptive Conduct**

The issues here can vary significantly and from our experiences grossly under reported noting again the feeling of powerless when faced with the non-negotiable and resource rich advantage of the Landlord.

Many examples of false, misleading or deceptive conduct can be described as unconscionable conduct in whole or at least in part.

The basis of the majority of instances are derived from the significant imbalance in resources and information between Landlord and Lessee when addressing a lease contract event.

The common result is an unfair negotiation leveraged by the relatively superior strength of the Landlord.

The outcomes can further be described across this process as representing Substantive and Procedural unfairness.

*(Case examples available at Stakeholder Meeting)*



#### **iv. Information disclosure arrangements**

Although there remains in place varying formats of Lease (contract) disclosure arrangements between the parties to the lease contract.

These do vary between the States and Territories, a copy of comparable matrix across these jurisdictions is attached for reference.

It would be ideal to seek a standard form contract for all retail tenancy leases, however given the nature, structure and commercial diversification of the Landlord stakeholders and the legislative road blocks the States and Territories have evidenced in the past, achieving such a standardisation is not realistic.

However the promotion of a National Standard Form Lease Disclosure Document has the very real potential to resolve a major portion of the issues covered in this submission.

Having such a single format disclosure to the lease contract publicly accessible would transform the significant imbalances over time and would result in a major reduction in red tape.

The concept of a National Standard Form Lease Disclosure has bipartisan support from Industry Stakeholders including Landlords and Retailers Associations.

A draft example has been prepared in readiness for presenting to the Small Business Commissioner and the Stakeholder Meeting for consideration of adoption in lieu of a standard form lease contract.

Further we see that the introduction of a National Standard Form Lease Disclosure as being the catalyst to the harmonisation of minimum retail tenancy lease standards nationally.

There has been some interim discussion amongst stakeholders as to the costs and benefits of the Standard Form Disclosure being publicly accessible and such submissions on this subject should best be addressed more specifically under separate cover.

#### **Summary**

This submission does not seek to introduce more proscriptive retail lease legislation as the current separate State and Territory legislations are already a mine field of red tape.

But this submission does seek to address the failures or lack of action (willingness) to address the inherent imbalance in the contractual arrangement between the parties when processing a retail tenancy lease negotiation.

We have deliberately sought not to seek government input into the quantum of the rent, this must remain commercial between the parties but there must be adopted more transparent and open processes in the negotiation of such commercial considerations.

Otherwise there will remain the current culture of unfair contractual (lease) outcomes.



## **Conclusion**

Within this submission, we have offered to provide case examples of conduct and outcomes in support of extending the Australian Consumer Law to encompass Small Business in this case Small Retail Lessee's. It would represent not only a breach of confidence to our Retailer Clients but may result in placing such businesses at risk to publish same.

We do however look forward to presenting cases at a Stakeholder Meeting in conjunction with our endorsing Retailer/ Lessee Association representatives.

We invite you to contact our offices on 1300 766 369 e: [info@lease1.com.au](mailto:info@lease1.com.au) to discuss this submission further.

Yours Truly

**Lease1**



**Phillip Chapman**  
**Director**