Submission to Productivity Commission regarding Retail Leases.

Submitted by Michael Blythe, Owner of Angus and Robertson at Edwardstown in South Australia.

Background

We are a small business, operating as a franchisee of a large national company in the retail book industry.
As such whiles we are able to seek assistance from property experts in our National Office, we are required to enter into a retail lease as a single entity and have the same issues as other small business operators.

Retail leases are a binding agreement on both parties. On the one hand they ensure some level of certainty of continuation, at least for the term of the lease, for the business operator, and on the other lock in an operator to a lessor for a period of time, ensuing the shopping centre as a whole can proceed and maintain its operation.

We have no issue with the concept of leases and understand they are a necessary means to undertake business, both in the provision of space and corresponding use of space.

Recommendations to the Commission.

I would urge the commission to make the following changes to legislation to allow small business to survive and prosper in the future;

1. Make it illegal to have terms in leases which lessen common law entitlements.
2. Establish an industry commission which manages bond money and bank guarantees, as well as a first call negotiation centre for disputes between commercial tenants and landlords.
3. Differentiate between a real estate lease (a tenant rents a premises) and a real estate management lease (a tenant leases a premises that is subject to rules governing what can occur, operating hours and requirements such as fit out and operations). In the former case the landlord would not be responsible beyond common law requirements for a tenant's situation and in the latter, the landlord would be responsible for managing the centre for the betterment of the tenants and held accountable.
4. Make it totally illegal for large corporations to require any financial contribution to dispute resolving from small business and for this to be resolved by third parties at an industry commission.
5. Remove requirements for guarantors where the relative position of the lessor to lessee is large (greater than 10: 1), as professionals in the retail industry have sufficient experience to select the correct mix and type of business for their centre and therefore failures would be extremely rare and guarantors uncalled for.

Issues

We have 5 major issues with the content of the leases and the relative power of the lessor (multi billion dollar companies) over individual lessees.
These are set out below and will be expanded on with examples later.

1. The terms of the lease are absolute over the 5 to 6 year timeframe. They are portrayed as standard leases with no provision for negotiation, have clauses within them which use the relative powers of the lessor to dominate the situation, and are well above common law entitlements to the lessor.
2. The lease is not a true property lease, at least in shopping centres, but is in fact a “management “lease. The lessor controls all aspects of the business by making rules which specify opening times, approve fit outs and approve what can be sold in the premise. This also extends to charging for, but entirely controlling advertising, including charging Centre Management cost to this fund, thereby increasing their profit on the rental position. At the same time as totally managing the centre and its business operations, clause within the lease, allow the lessor to introduce any additional tenets into the centre without reference or compensation to similar business that are “locked in” to a lease which cannot be changed even though the trading conditions have been severely altered by the lessor.. If the lessor chooses to lease property only this is reasonable, but if the lessor choses to “manage” the centre as a whole, then they should be responsible to mange it for the betterment of the tenants.
3. There are no provisions for reasonable negotiations under disputed circumstances. Leases now have provisions that all the lessors’ costs in a dispute are to be covered by the lessee. As well as this there are clauses which allow the lessor to use the bank guarantee to cover their costs at no reference to the lessee. This bank guarantee can also be held by the lessor until the lessee signs off that there are no outstanding issues at the finalisation of the lease. This is direct standover tactics and I would have thought illegal.
4. The Bank Guarantee or bond is held by the lessor, and can be used against the lessee under a large number of circumstances, beyond what it is essentially for, the failure to return the premises leased in reasonable order at the finalisation of the lease.
5. The requirement to provide a personnel guarantee for a business is unreasonable. The shopping centre owners (lessors) have a wide range of professional experience in retail, and should be able to sort out businesses which will be successful and those which are unlikely to be successful. A lessor should do their homework and not rely on selling a business operators house to make up for poor decision making on the lessors part.

Summary

In summary, shopping centre operators are using their relative positional powers over small business to coerce outcomes which are advantageous to the lessor by ignoring basic common law entitlements and making costs to rectify these situations horrendous for the small business operators.
As well as this they are manipulating the situation to their advantage, by imposing management rules within the lease, which allow flexibility to themselves without any requirements to mange the situation for the tenets.
This situation allows big business to dominate the retail sector at the expense of small business (the cash cows) and will ultimately be at the consumer’s expense.

Examples of detrimental clauses within our current lease.

All of these clauses are in a standard lease and are not specific to our business.

- Landlord must use the promotions contribution to promote the centre (including associated administration and management cost) in such a manner as the landlord reasonably considers appropriate.

These funds are consistently used for dubious purposes to pay for administration and management of the centre as opposed to being used as a promotion expense. As well as this the business operators, who pay the funds, have no say in how the centres promoted.
To rectify this situation the advertising funds need to be held in a separate account, administered by a group which has centre management and tenet representation in parts equal to the input to the fund. The lessor treats this as "his "money when the majority of it is in fact tenant's money.

- Liquidated damages. If a tenet is in breach of certain clause, without predigest to the Landlords rights (***but not the tenants***) in addition to any payable amount under the lease for every day or part of a day the beach continues the tenant must pay the landlord an amount by way of liquidated damages (being a genuine pre estimate of the landlords loss), equal to the base rent for the day.

The landlord already will receive interest to cover any late payment. This would also not be a genuine estimate of any loss either. This is typical standover tactic's used by lessors and should be made illegal.

- Use of security amount. If the tenant does not comply with any of the tenants obligations under this lease (including extensions or holding over) the landlord may draw on the Bank Guarantee or Cash deposit without notice to the tenant.

The security deposit should only be used if the tenant does not hand back the premises in reasonable condition at the end of the lease and nothing more. Any security deposit or BG should be held by a third party and not the landlord and negotiation should occur before it is used as a last resort.

- Use of Premises. Use the premises for the permitted use.

This is unreasonable unless the lessor enters into a reasonable management agreement to manage the centre as a whole to the advantage of the tenants. A lessor can have an existing tenet that establishes a business on a certain basis and is reasonably successful. The lessor can then bring in numerous similar businesses recking the original business and sending the tenet bankrupt because they are unable to change their permitted use. Whiles this may constitute unconscionable conduct other clauses within the lease prevent a tenet taking this to court due to cost constraints and requirements to pay for all of the lessors cost. In the end the tenant's house is taken by

the lessor without recourse. This is only reasonable if the lessor enters into a meaningful management arrangement to manage the centre on behalf of the tenants.

- Keep the premises open during the trading hours
- Keep the business stocked and operate with diligence and efficiency
- Keep windows and displays well lite
- Keep the design lighting and presentation of the preemies to an acceptable standard to the landlord

The above are “managed” by the landlord without recourse by the lessee. Whiles they are necessary to run a business, these are none of the lessors business particularly when they attaché a fine or the Bank Guarantee may be used to rectify them. These types of clauses need removing from leases.

- Without landlords consent install fixtures, fittings, equipment facilities or illumination at the premises
- Impact or detract from the architecture, form, style or appearance of the premises

The above are “managed by the landlord without reasonable recourse to the lessee. Whiles they may be necessary to maintain the look of the centre they need to be tempered so that the landlord must work in a cooperative fashion with a tenant ant his own cost and approval cannot be unreasonably withheld by the landlord.

- Repainting and refurbishment of premises. The landlord is able to issue a notice to undertake repainting and refurbishment work within the lease term.

Lease terms are relatively short (5 or 6 years) compared to fittout longevity (10 to 15 years). This is an unreasonable requirement with a very heavy cost attached to it. Removal of this clause with a tenancy fittout which is less than 15 years old at the finalisation of the lease is necessary to make the situation more affordable. Likewise if a tenancy refurbishment is agreed to by a tenet and automatic 5 plus 5 year lease duration should be available.

- Tenant to comply with refurbishment notice within 30 days to submit detailed plans etc.
- Commence work within 3 months
- Complete works within a 30 days of commencement
- Pay landlords costs

This entire clause should be illegal and all refurbishment activities agreed at lease commencement. This unreasonable requirement can send a tenet into bankruptcy and consequently loss of house. Because there is no recourse or negotiation it is used as a punishment for tenants with issues with the landlord.

- Landlord Obligations during refurbishment. They have none and tenant is expressly denied common law entitlement for loss or damage caused by the landlord’s instruction.

This clause should be made to comply with common law and tenets should have recourse at low cost to compensation from landlord.

- Assignment of Lease. Tenant may assign lease, provided he can show to the landlords reasonable satisfaction that the perspective assignee is respectable, responsible, solvent person of a high financial standing with at least equal trading and turnover potential and capable of adequately conducting a business substantially similar to that of the tenant and to a standard similar to the tenant.
- The tenet will not be released from the tenant's liabilities under this assignment.
- A warranty that the tenant is not aware of any unresolved claims against the landlord
- The tenant pays all of the landlords cost
- The assignment does not result in a change to the Permitted use.

The above restrictive clauses override common law entitlements to a greater or lesser degree and continue to show how large corporation uses positional power over a small business.

- Securities. A tenant must not allow to come into existence a lease, security or charge affecting the tenant's property, without the landlord consent.

This is an unreasonable requirement as the landlord doe not own the tenants property, which is often used to finance the business. It is also unclear what property is in question.

- Compliance with Centre Rules. These rules can be changed without reference during the course of the lease, without recourse to the lease.

This is unreasonable clause unless it states that the rules will not change during the lease term or they are incorporated as part of the lease.

- Method of payment. Includes a clause, in the manner the landlord requires and without set off, counterclaim, withholding or deduction.

Apart from the clause being misleading in its content, the requirements are unreasonable and outside of common law entitlements and need removing from the lease.

- Confidentiality. This clause is inserted to prevent reasonable disclosure of rentals within centres. There should be no reason to maintain this clause.

- Notice of loss or damage. This clause requires the tenant to give immediate notice to the landlord, which may give rise to a claim of compensation.

Whiles this clause is reasonable in itself, when combined with other clauses which give the landlord rights to on charge any costs they incur to the tenant, this clause can send a tenant bankrupt either because it is invoked and the landlord passes all his cost

on, or it is not invoked in time (immediately) and compensation is denied. The clause should be modified so that a 3rd party is notified and a meaningful dialogue is established at no cost to the tenant

- Landlord's reservations. Despite anything else in the lease the landlord reserves the right to; grant the same use rights to other tenants

If this was a pure lease of property and not a "managed" lease where tenant's rights are severely restricted on what they can and can't do, it would not be an issue. In a managed situation the wording needs altering to protect the incumbent tenant who has made a substantial outlay and established a business under certain parameters for a period of time, with necessary compensation to manage the situation without going bankrupt and loosing their house.

- Centre additions and alterations; the tenant must not make a claim or commence any action against the landlord for a breach of covenant for quiet enjoyment whether at common law or under clause (relating to quiet enjoyment).

This is clearly beyond common law entitlements. If the landlord causes problems then compensation should be paid accordingly.

- Trading Hours. Landlord can change trading hours.

This should be a tenant's option, within law, not the landlords.

- Relocation. The landlord can make a tenant move or get out, without paying reasonable compensation, during the lease term.

The landlord can insist on a tenant moving location, or they must vacate the centre without any compensation. If a tenant moves the conditions can change dramatically and a new fittout is required. This is unreasonable and should be removed from any lease.

- Events of default by Tenant. The tenant or guarantor, being an individual, becomes bankrupt or commits a n act of bankruptcy or brings his/her estate within the operation of any law relating to bankruptcy, including appointment of a receiver, liquidator etc.

This is unreasonable in several areas. Firstly if the bankruptcy is caused by actions of the landlord which cause a drop in sales/ income, in which case this clause should be removed. Secondly, appointment of an admonitory allows a business to extract itself from possible bankruptcy and should be negotiated out. In any event a guarantor should not be required where the landlord is a professional within the retail community and should be able to reasonably assess a business proposal to determine if it is viable.

- Landlord rights during process of repudiation of lease are involitile, even if action by the landlord has caused the issue

Landlords should be withdrawn if the breach of lease has been caused by the landlord's acts. This is another complete disregard for common law and typical intimidation by large shopping centre owners.

- Power of attorney; the tenant appoints the landlord to be the power of attorney of the tenant to act. The tenant will ratify and confirm all actions the attorney lawfully does.

This clause gives the landlord cart Blanc on any act he choses to make without recourse to the tenant, at the tenants cost. This negates the tenant's common law entitlements and compromises his position. This clause should be removed from all leases.

- Retail and Commercial Leases Act 1995 (SA). This section is inserted in to lease but lease does not reflect the act and is deliverable misleading in what applies

The lease document should be made to reflect what the lease is and remove all sections which do not comply with the act.

- Guarantee and indemnity. The guarantor irrevocably and unconditionally agrees to; pay to the landlord all moneys payable by the tenant. Indemnify the landlord against all actions etc
- The guarantor waives any rights to the landlord to proceed against the tenant, any claim against the landlord and any legal rights

This is totally unreasonable for a professional retail organisation to request as they should be in a position to judge whether a business will succeed or not. All requirements should only against the business, not a person. This would give perspective lessees a better opportunity to participate and would also make the large centre owners more careful in their selection of tenants as a fairer balance is introduced into the system

- Costs and interest. The guarantor must pay the landlord on demand; the landlords cost, charges and expenses including legal costs on a full indemnity basis) in connection with anything done by the landlord under the guarantor clause.

This again is totally unreasonable to expect a small business to bear and is the biggest restriction on participation.

Conclusion

Small Business represents a significant force within the Australian industrial environment.
Most Small Business is family owned and operated, but at the same time employs may hundreds of thousands of Australian workers.
Almost universally people's houses are on the line with regard to financing these businesses.

Most of the retail space in Australia is owned and operated by 3 mega corporations. Leases from these companies vary, but all that I have seen are heavily weighted in favour of the lessors. Lessees have lost almost all of their common law rights, and those remaining are compromised by standard lease clause which cause severe to crippling financial stress to Small Business owners.

This relative positional power of the Mega Corporation over the micro enterprise needs addressing by regulation, as the large companies are unable to self regulate this situation (except in making leases even more advantageous to themselves).

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