

## Retail Leases - The (Sometimes Surprising) Powers of the ADT

We have, from time to time, been approached by both landlords and tenants in relation to issues associated with Retail Leases.

Sometimes, it has been necessary to bring proceedings in the Administrative Decisions Tribunal ("ADT"), Retail Leases Division, which is the first port of call when dealing with disputes which arise pursuant to Retail Leases generally, and disputes under the Retail Leases Act specifically.

It is helpful (for both landlords and tenants) to understand the range of matters with which the ADT may deal, and the types of orders which it may make.

This brief survey may also act as a reminder for landlords and tenants about the types of disputes which may arise in a Retail Lease setting, and how disputes can be avoided.

### General Scope of the APT's Powers

In general terms, the ADT has power to hear both "Retail Lease" disputes, and "unconscionability" claims.

Retail Lease disputes are disputes which go to the specific terms and conditions of the lease - the payment of rent, the permitted use of the premises, the payment and level of outgoings, and so on.

Unconscionability claims relate to any alleged misconduct (either by landlord or tenant) which is not specifically countenanced in the lease, but which the law regards as being a matter which is "unfair", and which therefore should be stopped.

### Lock-outs - Non-Payment of Rent

One of the main reasons that Retail Lease matters end up before the ADT is because of non-payment of rent by tenants, and in circumstances where the landlord has taken the step of purporting to terminate the lease by locking out the tenant.

Although one cannot make a blanket rule, normally the Tribunal will allow a tenant who has defaulted on the payment of rent under a lease to have the right to re-enter the premises, provided that outstanding rental payments are brought up to date.

However, this is an indulgence which is normally only granted once - repeat offenders will not be assisted by the Tribunal.

### Unconscionable Conduct

Thanks to the disclosure provisions of the Retail Lease Act, there are fewer instances where landlords are being brought to the Tribunal by tenants for claims which are based on the general notion that the landlord has been involved in making "false and misleading" statements to the tenant. However, such matters still arise from time to time.

A recent (and somewhat novel) example occurred with one of our tenant clients, who took a Retail Lease in a well known shopping precinct on the basis that the use to which they were going to put the shop was the same as that to which the shop had been used by a previous tenant, who had vacated the premises.

Early in the lease term our client suffered significant trading difficulties, and made some investigations with nearby tenants about the previous use of the premises. It transpired that the premises had in fact been used as a "massage parlour", and a significant part of our client's energies were in fact being used in turning away disappointed potential "customers".

Because of our client's trading difficulties, the landlord originally sought to bring proceedings in the Tribunal to enforce the rent which had become outstanding. Our client counter-claimed based upon the landlord's unconscionable conduct in failing to disclose the true purpose to which the premises had previously been put.

Although the matter ultimately was settled without requiring the decision of the Tribunal, it is a matter which is illustrative of the powers which are available to the Tribunal in dealing with Retail Lease disputes.

### Disputed Rent Review Provisions

Another large area of dispute between landlords and tenants is in relation to what the proper amount of new rent should be when dealing with "market review" provisions.

Significantly, the Tribunal now has power to actually appoint a valuer from its list to determine the market rent for premises, and therefore bring to an end the dispute between parties.

### Ending Disputes Before They Begin - Compulsory Mediation

Perhaps one of the most significant aspects of the Retail Leases regime is the requirement for parties to attend compulsory mediation before proceedings progress too far.

Too often in other Court proceedings, it is our experience that parties become engaged in the process of litigation at a very early stage, and therefore become entrenched in their positions and unable to properly engage in considering compromise as a way of dealing with a dispute.

The process of compulsory mediation enables the parties to engage with each other in the presence of a neutral party (the Mediator), and opens the possibility for the dispute to be settled at an early stage, and before significant legal costs are incurred.

In addition, a resolution which is reached at mediation is normally more satisfactory to the parties because it is one which they are in control of. A decision made by the Tribunal or a Judge is often less satisfactory because it is imposed on parties.

### Conclusion

This brief article has only touched on some of the powers which are available to the Tribunal.

If, as either a landlord or a tenant, you suspect that you may be involved in a dispute regarding a Retail Lease, we recommend that you speak with one of our team who can guide you in dealing with the potential dispute in a way which is possibly more satisfactory and economical, and at least protects your rights.

Should you wish to discuss anything please contact either Robert Kirby, email address: [rkirby@tebutts.com.au](mailto:rkirby@tebutts.com.au)