

Settling rental (and other retail lease) disputes by Expert Determination

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Preface: This article was originally prepared for rental determinations in the Australian market, however many of the principles and procedures referenced may be relevant for other markets.

Summary

Historically, Australian landlords hold the negotiating power. Specialty shop tenants occupying 30% of the floor space of shopping centres typically generate 70% + of their “value”. Their information systems are poor, resulting in tenants operating in an uninformed environment. Legislation is inconsistent and there is a reluctance to enforce it.

Experts can be called in as independent expert determiners when landlords and tenants cannot agree on the current market rent and this paper seeks primarily to help those valuers who act in this role to navigate the expert determination minefield and to avoid their findings being challenged. This paper concentrates on the retail property market.

Introduction

“... a looming rent increase was threatening veteran St Kilda restaurant Cicciolina ... The day was saved when it went through an independent rental determination.” - Tony Eldred, a Melbourne-based owner of Eldred Hospitality - Australian Financial Review Magazine (2007). “The bottom line is that, if your rent amounts to more than 8 per cent of your turnover, you may have a millstone around your neck...”.

Expert determination is not for the faint hearted. A party wishing to retain its position may frustrate proceedings. Related issues which the parties want the determining valuer to resolve should be isolated from the rental dispute but, if relevant, quantified and weighted.

Here are important issues for valuers to consider:

- Firstly, the expert determination procedure advocated by IAMA (Institute of Arbitrators & Mediators);
- Secondly, the consequences if market rent is not properly quantified^{i ii};
- Thirdly, there are some valuers who still fail to understand that the rental market can rise and fall (except for some old leases with ratchet clauses not yet outlawed by state tenancy legislation, with legislation taking precedent over a lease).

We often read about the negative outcomes of determinations but seldom about positive outcomes. Those in fiduciary positions are better protected in an informed, transparent market.

The valuer is only mentioned when a determination does not comply with the contractⁱⁱⁱ ^{iv} which falls under legislation or market rent as defined^v, or when a party seeks an unrealistic result or attacks a weakness in the determination. This paper seeks to reduce the possibility of determinations being challenged. It also considers the consequences if rental income streams do not reflect market rent and capital value if the statutory provisions of the retail lease legislation^{vi} are not complied with.

1. Background

The greater the disparity between “engineered” rents and market rents, the greater the need to settle disputes by Expert Determination for financiers; landlords; tenants; franchisors; franchisees; investors; developers; legislators and regulators.

There is extensive research by organisations like Urbis JHD^{vii} but few have analysed the consequence of rent disproportionate with business opportunity, particularly in the retail arena.

The wider industry's aim is to maximise income streams for the stronger party who “controls” the weaker party’s “business” environment.

In the UK a tenant has an automatic right of renewal and rental disputes can be settled by expert determination^{viii}, thus moderating rentals^{ix}, whereas rentals in Australia have risen over a sustained period without adjustment and governments here do not appreciate the pressure placed on specialty shop operators by those in the retail industry, many of whom also earn performance fees as a percentage of all revenue collected.

It is for these reasons that mall relationships here are adversarial. Our media does not understand or cover these issues, resulting in an “uninformed” market.

Landlords, particularly in shopping centres, require tenants to disclose their trading figures, giving a landlord a significant advantage over the tenant's "business".

Originally, this data was used to calculate turnover rent and manage tenancy mixes.

Today it is used to maximise rental income – see AASB below.

Access to this information raises the landlords' duty of care. They issue leases, manage and change tenancy mixes without recourse and monitor centre performance, specialty, category and individual performance levels and measure occupancy costs, to the benefit or detriment of businesses^x. Occupancy costs can also be measured against Key Performance Indicators (KPIs), relevant to most business categories, but the data from shopping centres is not made available for tenants to use for fully informed and transparent negotiations.

Without statutory obligations to make bona fide offers at "market rent", such as the Australian Capital Territory has legislated, the states and territories have:

- Distorted markets;
- Not legislated for compulsory mediation and reference to expert determinations if mediation fails;
- Limited independent information such as lease registers, centre, specialty shop, category performance levels and occupancy cost data (for informed negotiations);
- Little unconscionable conduct precedent.

This has important consequences. At the rents charged, the centre owners via LPTs add more supply^{xi} because the floor price is above "market rent" and businesses trade over longer hours viz. 7 days, incurring higher variable costs and producing riskier income streams^{xii}.

Eventually, the fiduciary responsibility of officers of our major corporations will be called to question^{xiii} and the asset valuer could become a scapegoat for these imbalances. Landlords instruct Asset valuers to revalue shopping centres on a "passing rental" basis with little reference to defined "market rent".

2. International Accounting Standards 38^{xiv} or AASB 138, the Australian equivalent

The accountability of intangibles, AASB 138, includes leases and is critical for financiers; landlords and tenants; accountants; valuers (for consideration and weighting where rent is above market rent); legislators and regulators^{xv} - see Washington Post Tuesday 12th June 2007.

AASB 138 requires the accountant to bring into the balance sheet all intangibles viz. intellectual property, goodwill, trademarks, leases, etc.

Depending on tenure, rent paid, lease flexibility and extent of fitout, a business might have positive or negative value attached to its lease.

If a business costs \$250,000 to set up with negative lease terms, it might be reduced on the balance sheet! This will change every year but will decline over the lease period. A problem with the lease will act as a warning to a buyer.

If a high percentage of businesses have little “value”, fewer tenants will take up leases.

Valuers will be forced not to capitalise unsustainable short-term, high-risk income streams into long-term capital, which could be fraudulent for reporting purposes.

Factors adding or decreasing the “value” of a lease

Factors adding “value”	Reducing or negative value	Comment
Long tenure say 5+5+5+5 years	Shorter tenure say 4 – 6 years	Leases in the UK can be 10+10+10 years, with automatic renewals. With less tenure, one must amortise set-up costs over shorter term
“Market rent” can be ordered by court in UK	Rent well above “market rent”	Rent established using principles in tenancy legislation and definition of market rent vs gazumping viz. duress, misrepresentation etc
Lower set-up costs	Higher set-up costs	Affects amount to amortise over term and residual available for rent
Flexible lease terms, regular reviews to market rent	Inflexible lease, rigid rental structure viz. CPI + 1.5% pa	Flexible leases result in market rental outcomes and lower risk on income streams. Rents must be able to rise and fall without a ratchet
A combination of	Same	With no options or renewal opportunity, a business

the above		must proceed with selling down stock and close
Other factors which will increase and decrease the value of a lease		
Good and poor management of tenancy mix		Diminution of cash flows must be taken into account under AASB 138, eg. failure to manage tenancy mixes, causing higher risk.
Valuers who do not adopt market rental into rental valuations or cannot interpret “evidence”		A valuer who cannot adopt or “test” evidence and separate the business and site goodwill should not determine market rents and produce inflated valuations which often require forensic financial analysis.
Failure to provide quiet use and enjoyment		Reduces business potential and decreases value of lease
Failure by Tribunals and Courts to enforce legislation and make decisions in equity		This will put pressure and force our judicial systems to award damages in equity
Investment in a court or tribunal action		An “investment” to protect one’s position viz. a director of a retail business, forced to protect their asset under corporations law via a court action, might see a favourable outcome as an “asset” on the balance sheet

Some examples

Two scenarios, two businesses in two similar centres with similar business potential:

- First, the landlord with flexible leases and security of tenure; who manages tenancy mixes; procures, apportions, charges and audits outgoings and utility charges efficiently; properly promotes and allows market forces to drive development;
- Secondly, the landlord who develops centres he owns and manages; duplicates tenancy mixes; erodes the cash-flow via profit on management fees, outgoings and utility charges; inflates refits via subsidiary companies before they are depreciated; whose leases are inflexible, have fixed increments and limited/short tenure.

Comparing and contrasting the two is easy. Dough nut franchise No 1 will have a strong balance sheet and goodwill whereas franchise No 2, which also cost \$250,000 to set up, will have little or negative value because AASB 138 requires the value of the lease to reflect any negative value of the intangible assets, including the lease.

Double whammy – intellectual property and goodwill

The double whammy will be the adverse affect on intellectual property, trademarks and goodwill of a business.

Staff with limited employment, because the business has no tenure, will move on; intellectual property associated with the business or customer lists and addresses, shown as an “asset”, must be given negative “value”.

A business making no net return has negative goodwill, so the host that houses it – a shopping centre will have significantly diminished value!

AASB 138 will become an important consideration, from a valuer's point of view, to determine rents and asset valuations and will provide a "check and balancing factor" for the professional valuer to lean on.

3. The nomination and appointment of the independent expert

Firstly, the valuer is nominated to determine the market rent as an expert. Often this appointment is made by a Tribunal Registrar and, in some states, the API Divisional President for some retail leases (and commercial and industrial leases). The process commences with a referral to valuation by an express term in a lease.

Sometimes there is an attempt to reach agreement on a valuer by submitting the names of three valuers who are often rejected due to perceptions of bias or a matter of protocol.

On being nominated by the Registrar, one should seek as many details as possible in order to avoid any conflict of interest. If there is any doubt, one should disclose a possible conflict, at which time the parties can accept or reject the appointee. There is nothing precluding a valuer from making a submission on behalf of a party to an appointed expert.

4. Confirmation of valuer's acceptance and terms of appointment

A standard letter of appointment can become a binding "Expert Determination Agreement" and many principles and procedures from IAMA are of considerable use, and must observe the requirements of the legislation.

A letter of appointment should seek to:

- Set the businesslike "tone", inferring that process will be firm and the outcome objective – the "*Expert Determination normally conducted as an inquisitorial investigation.*"^{xvi};
- Acknowledge this is a "dispute" to be settled by determination;
- Address both parties in the same letter, signalling that they will be treated equally;
- Confirm that natural justice and fairness^{xvii} can be expected;
- Point out how the appointment has arisen;
- Set out one's professional fees and payment terms;
- Use a method of charging to assist to settle the dispute;
- Ask the parties for information that will be required;
- Establish whether there are other agreements that could affect the outcome eg. verbal or customary practice;
- Assess whether the dispute may have been "settled";
- Set out who may rely on the valuation and seek immunity from suit^{xviii}, noting one cannot contract out of legislation;

- Provide for acceptance of the terms of engagement by someone with capacity to contract; and
- Provide an information base to guide the parties about definitions and legislation that the valuer may refer to amongst a wide range of factors^{xix} which hypothetical landlords and tenants might consider before entering leases.

The last point implies that retail rental valuations are more subjective than objective. A landlord may seek a rent of X based on development costs, plus return, letting up time etc, but a tenant, with fiduciary responsibilities not to trade as an insolvent company, may see no merit in the "asking" rent.

In simple terms, no “acceptance” for a binding contract, free from duress, misrepresentation and so on: no agreement and no lease. The test, under the definition and legislation, would fail^{xx} and so would the determination under the particular retail lease with a particular permitted use because willing, informed hypothetical parties should not accept lease terms that are not market based.

The expert must determine the rent according to the “*contractual provisions giving rise to the Expert Determination*”^{xxi} where legislation applies under that Act. If the expert acts outside the terms of the agreement and the prescriptive requirements under legislation, his determination is susceptible to attack^{xxii}.

5. Leases and lease terms

The original motivation to write the paper "Market rent: what is it?" (Gilbert 1995), was to define market rent in a retail context. Until then little research had been done, even world- wide^{xxiii}. Since the IVSC introduced its definition in 2000, the topic has been extensively written about - see Google.

Early research showed that leases prepared by different landlords each instructed valuers how to do their task in various ways, which could distort the rent.

Without prescriptive lease rent renewal dispute resolution mechanisms in legislation, it could be used as a sword at lease renewal.

The greater the disparity with leases procured under non-market conditions, the greater the risk that income streams and capital value distortion will increase, raising the stakes for reporting and governance^{xxiv}.

Reducing the process to a single definition would reduce subjectivity. Retail leases, however, are more complex and so, as tenancy law evolved in Queensland, the concept of "*reasonable rent under the lease or a substantially similar use*" became a prescriptive requirement for Specialist Retail Valuers to follow and was drafted into the legislation.

It follows that any term in a lease that contradicts the Act or definition could be null and void. On the other hand, relevant instructions that carry weight and do not contradict legislation can be taken into account.

The valuer must peruse the lease before commencing with a market valuation^{xxv}.

6. Handling procedure

The state Commercial Arbitration Acts refer to "*misconduct*."^{xxvi} "Misconduct" must be avoided and IAMA's "Expert Determination Rules" introduce a framework and procedures to prevent an expert from inadvertently carrying out an act where one is guilty of misconduct.

Alan Hyam's book refers to an "arbitrator's award" challenged in the WA Supreme Court, where Owen J in *EMS Holdings Pty Ltd v Industrial Lands Development Authority* [1994] states "*Valuation is not an exact science and opinions will almost always differ on questions of value.*" So, while the courts allow some latitude, the question must be "Was the rent determined in accordance with the contract" viz. legislation, definition, convention?

To avoid "misconduct", a valuer's knowledge about expert determination process and arbitration procedure is vital.

Firstly, the letter of appointment introduces "natural justice and fairness" principles as to how the parties can expect the process, procedure and outcome to be conducted.

Secondly, IAMA's "Expert Determination Rules" cover "The Procedure" under Part II Rules 5 – 10, summarised cover:

- Role of the Expert Rule 5 to: determine the dispute as an expert and not as an arbitrator; avoid delays and expenses; adopt suitable procedure; be independent; act fairly; give opportunity to submit its case and make submissions; and the "Rules" or "Process" (including the Expert's jurisdiction) shall be submitted and determined by the expert;
- General Duty of the Parties Rule 6 to: do all things to assist with the Process; attend the Preliminary Conference (or be represented); comply with directions or ruling ordered by the Expert; take steps to obtain decisions of a Court on questions of law;
- Confidentiality Rule 7 to; keep all information confidential; sign Confidentiality Agreements except if compelled by law or the extent necessary to give effect to the Agreement or enforce the determination;
- Preliminary Conferences Rule 8: the Expert shall convene a Preliminary Conference unless otherwise agreed, to discuss issues in dispute, formulate procedure, plan and agree on Process, sign Confidentiality Agreements, make any other planning administration arrangements including the terms of appointment of the Expert;

- Conduct of the Process Rule 9: subject to rule of law or equity or agreement the Expert makes directions rulings with regard to Process as he or she sees fit and to agree in writing as to how procedure should be followed; and
- The Expert's Determination Rule 10: that the Expert must determine the Dispute in writing as soon as reasonably practicable, that the determination shall contain reasons, that the expert may correct a clerical mistake, error from accidental slips or an omission, a material miscalculation or material mistake, description of person, thing matter or defect of form.

Under Rule 17 of IAMA's "Expert Determination Rules", *"The parties agree that the Expert, the Institute (IAMA) and its Officers and employees are not liable to any party for or in respect of any act or omission in the discharge or purported discharge of their respective functions under these Rules unless such act or omission is shown to have been fraudulent."*

To avoid "misconduct", arbitration proceedings prohibit the arbitrator dealing with either party on his or her own. Unrepresented parties do not always make written submissions and should be encouraged to seek assistance. Sometimes the Specialist Retail Valuer might be entrusted to be the "gatekeeper" with confidential business records, so some discretion might be called for with regard to retail rent determinations.

Conversations should be short and to the point and communication with one party kept to a minimum.

Both parties should be given equal time. One could try to carry out a joint inspection of the premises, as recommended in IAMA's procedures.

A pro-forma questionnaire is useful, divided into centre/property specific, centre performance and business specific questions. These "benchmark" the hypothetical and actual status of the parties and one can form some views of how they are relevant.

Finally, both parties should have the right to add anything they believe is relevant for the valuer to consider.

7. Evidence and submissions from the parties

The aim of this paper is not to tell the valuer what evidence to use or not use, what is arms-length and what is not, only how to avoid the valuation being challenged. The job is to ensure the determination is carried out to satisfy the legal and contractual provisions that gave rise to it.

S 14 of the state Commercial Arbitration Acts permits arbitrators to conduct proceedings in any manner they see fit. When the arbitrator is not required to follow the rules of evidence, he has greater discretion which applies to expert determinations, but which must still comply with the provisions of prescriptive provisions of the state tenancy legislation. To avoid "misconduct", applying the common law rules of natural justice is essential.

Where the laws of evidence do not apply, an arbitrator may adopt an inquisitorial approach (rules of natural justice) and what is relevant is whether the procedure adopted by the valuer is fair.

The evidence submitted^{xxvii} by the landlord or tenant may be relevant or irrelevant. The evidence must be capable of being tested and given appropriate weight.

Some valuers do not “test” evidence or adjust evidence for size, frontage, location, permitted use, terms of the lease or business opportunity, etc. to produce an outcome that discharges their responsibility under the agreement and the state tenancy law. Some valuers try to “find” evidence to produce an “engineered” outcome. Subsequently, a company director could seek to overturn the said determination and seek damages.

What is appropriate is that, not only must natural justice and fairness be seen to be done: it must be reflected in the outcome.

8. The report

The report should set out the basis of the dispute; reasons for the appointment; the lease and lease terms; references to legislation; definitions; reasons for the determination; agreed facts and issues; and documents reports and material relied upon. The report should be set out simply and clearly^{xxviii}.

Analysis of material lease terms assist to establish lease risk and flexibility related to tenure availability to the tenant in perceived periods of decline and, equally, the lease risk to the landlord for periods of upward momentum^{xxix xxx}, as well as changes in supply and demand for retail tenancy space.

As at the date of the valuation, Key Performance Factors, key economic trends that are motivating landlords or tenants, the catchment of the property, local population trends, the demographic profile of the area, socio economic factors, competition and combined consumer confidence perceptions will influence business risk and capacity to pay and will reflect in reasonable business performance.

This information can remain on file in case a determination is challenged.

From this information, a report can focus on evidence: evidence relevant to the catchment; relevant to the use or similar permitted uses; relevant to similar socio-economic factors.

This is where considering evidence at "face value" differs from objective analysis. While retail refers to the business opportunity a site offers and highly specific permitted use^{xxxii}, commercial and industrial properties rely on supply and demand for "space" and there are far fewer variables. This could include prestige (Premium grade, A, B, C & D grade in commercial for example) and location whilst, for all, efficiency of space related to location is important.

With regard to retail rent determinations, which are far more complex, the valuer's judgement and skill comes into the equation.

An objective analysis of the "subjective" material will reduce subjectivity and will assist in avoiding "misconduct" that could cause a party to attack the determination.

If one can link three or four conclusions after "objective" analysis of the subjective material, having "stress tested" that evidence, it is very useful. This could be done with broad reference to centre performance and category performance data, trends linked to the wider industry, such as accountancy based benchmarks and adjusted analysis of a businesses financial records and then specific rent levels.

Sometimes, linear regression analysis is useful to "check" a "micro market".

Adjustments can then be made for many reasons viz. flexible vs rigid lease terms but, usually, if one's weighting is right and one's assumptions are reasonable, no adjustment is required.

What is important is that, while rents might be "spiking" at a point in time, a tenant must still be able to meet the rental fixed cost over the term of the contract period.

9. Methodology to analyse evidence

A. Direct comparison

Obviously, direct comparison is the primary method of forming an opinion of rents in the market place. The evidence must be arms-length and stand up to prescriptive requirements under legislation, common law precedent, definitions, etc.

With regard to retail, “evidence” must come from the same or “*a substantially similar use*”^{xxxiii} related to the specific permitted use under the lease. From an article the author wrote in the Australian Retail Magazine, (April 2005), comparison is extremely relevant.^{xxxiii}

The total quantum with outgoings must be considered. Rent/M2 analysis alone, without considering the rent as a whole in relation to business opportunity, is also important^{xxxiv}. Any findings should be “stress tested” in accordance with “reasonableness” provisions in the legislation, thereby reducing subjectivity.

Local market evidence (similar catchments) must carry more weight due to similar demographic profiles and competition. This can change quickly; particularly in shopping centres where tenancy mixes are not properly managed.

B. Hypothetical rent as a residual method

Just as the Hypothetical Development Method is a method used to calculate site value for income producing properties, in conjunction with Direct Comparison, so a mini Business Plan based on a businesses known trading performance can be used viz. “ Rent as a Residual Method” can establish the reasonable capacity to pay rent.

After meeting reasonable operating costs, wages, amortisation of set-up costs over the lease term, this leaves a sum reasonably payable to the landlord in the form of “rent”.

The Hypothetical Rent as a Residual Method:

- Can stand on its own when there is no comparable information; and
- Can support “tested” evidence from the market.

Table 1 - rent as a residual^{xxxv} CCH All Firms Average - specialty food shops excl GST			
Key performance indicators	\$ Value	% Age	Comment/reference point

Total income (sales)	546,395	100.00	Consider in relation to: macro, micro & local economic environment, trends and projections; local competition; supply of floor space; spending & whether for discretionary or essential goods and services; socio-economic factors and demographics; test sales for the "average hypothetical" operator vs centre performance and trends ahead; establish landlord's leasing policies in relation to managing tenancy mix; breaches of TPA such as vertical restraints of trade, etc.
Less cost of goods sold	331,716	60.71	Variations from “benchmarks” compared to actual business occur for hundreds of reasons eg. exchange rates, fuel costs, transfer pricing, breaches of TPA, etc.
Gross profit (before operating costs, including rent)	214,679	39.29	Directly related to the above, including specific mix of goods or services, competition, socio economic profiles, offered for sale under the lease. Depending business type range can be 8 - 80%
Operating expenses (excluding rent)	96,985	17.75	Adjust for legitimate costs such as motor vehicle expenses, interest payments, pro-rata head office expenses – refer to profit and loss accounts

Amortisation factors, net profit, depreciation	67,370	12.33	Accounting convention calls for set-up costs to be written off over lease term. State tenancy legislation states valuers must disregard “value” of lessee's fixtures and fittings, but “reasonable” cost of fitout must be amortised, as a willing informed business proprietor would not start a business without a “risk reward”; it defies commercial logic and accounting convention
Available for gross rent with outgoings	50,322	9.21	Rent as a residual can be "tested" against direct comparison.

C. Legitimate benchmark sources – useful as a “guide” and “stress testing”

Legitimate benchmark sources include PRACDEV Hartley, CCH Business Benchmarks (previously FMRC), industry associations and larger franchise and retail categories that may have done advanced modelling. Specialist Retail Valuers should develop a working knowledge across a wide range of retail businesses and apply this convention for most business categories.

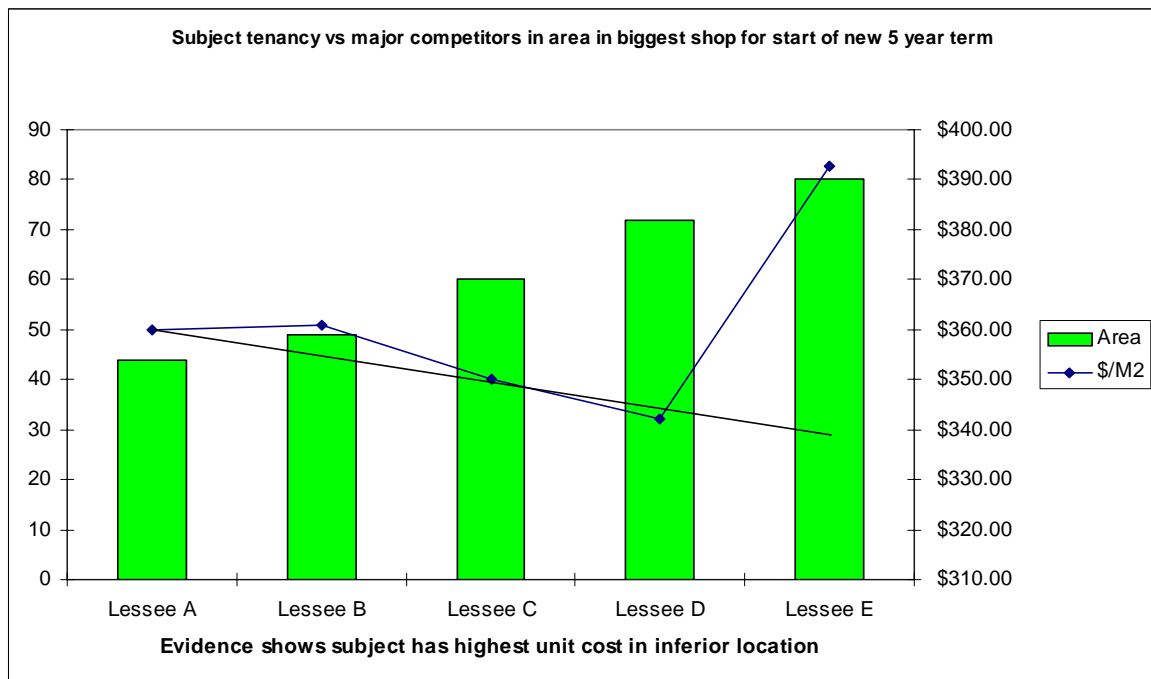
Benchmarks can be compared to the "actual" business performance levels, provided they meet the attributes of the "average hypothetical" business operator. If not, adjustments must be made for high (or low) factors.

Benchmarks are not absolutes and adjustments must be made for local market conditions, socio economic factors, local competition, actual turnover levels and margins and for that type of permitted use (even within a given permitted use the capacity to pay can vary substantially).

There is also a summary of 50 or so retail categories at www.leaseconsultant.com.au

D. Linear regression analysis - see Graph below – useful for “stress testing”

Here is an example of a submission to a determining valuer. Reasonably "tested" local market evidence is graphed below viz. the subjectivity has been partially removed; the evidence reasonably stress tested. Skill and judgement that comes with experience is required for every case.



For the subject tenancy, there is an inverse relationship between the size of the shop and the rent being paid on a M2 basis. At the end of a five-year term, the tenants believed they were paying above market rent for the option. It would be important to consider rigid versus flexible lease terms for example, including tenure.

If one adjusts Lessee E downward to \$320/M2 for a dysfunctional tenancy mix, for poor location and catchment area, the outcome would be almost exactly as represented with a strong correlation between a lower rental rate as the floor area increased.

10. Rent/M2 analysis – beware

Rent/M2 analysis will be objective if it is factual, unless used with other methods^{xxxvi}.

For example, adjustments can be made for inefficient or efficient space and high or low business opportunity.

Measuring the actual dollar amount and testing it back to the requirements under state tenancy law, including the “reasonableness” test and the definition of market-rent, reduces subjective analysis^{xxxvii}.

11. Inclusions in tenancy legislation and “hiding behind the corporate veil”

Our state arbitration, legislation and procedures drawn up by IAMA provide useful pointers for the API and state legislators to protect valuers and users of their services.

There is merit in:

- The New South Wales legislation that protects Valuers from frivolous or vexatious legal suit.
- S 51 of the Arbitration Acts that makes an arbitrator or umpire “*not liable for negligence*” “*But liable for fraud*”;
- S 30 which gives an arbitrator the power to correct an award for accidental slips and omissions; and

- Allowing valuers with a letter of appointment to be able to request lease rental data from any party/person/organisation to assist with determinations.

There are many ways to “test” evidence such as industry and accountancy benchmarks; a “rent as residual” exercise involving a forensic interpretation of financial records; one may seek and test market evidence, opening up many avenues that will assist an intelligent, objective valuer with a determination.

Whilst state licensing authorities must review valuers who repeatedly breach prescriptive provisions under tenancy law, valuers need reasonable protection from suit. Sometimes mistakes are made and valuers should to be able to correct errors. The Queensland Act makes provision to set determinations aside and appoint another valuer, thereby undermining the original valuer’s work.

For years, company officers in this country have “hidden behind the corporate veil”, seemingly separated from the actions of their employees. The fiduciary responsibility is entrenched in corporations law for directors of landlord and tenant companies to protect the assets of their organizations, not their tenants. There is a need to “pierce the Corporate veil”.

The best outcome is a fully informed market in which to operate, adopting the principles that AASB 138 submits, bringing equity and return by separating business goodwill from site goodwill.

Increasingly, both parties will refer disputes to expert determination to protect their respective fiduciary responsibilities and the outcomes will not please everyone.

Effective tenancy law reform is already being debated in Australia^{xxxviii} and has an international audience. Only the Legislators and Regulators are in denial.

12. Scott LJ in Robinson Brothers (Brewers) Ltd v Houghton and Cheser-Le-Street Assessment Committee [1937] 2 KB 445 at 468 – 471

Alan Hyam, in “The Law Affecting Valuation of Land in Australia”, sets out details of the Robinson Bros case. It is a unique case.^{xxxix} Today, in intensely managed shopping centres, one party has all the power and the other very little. There is no protective legislation,^{xl} and no access to settle rental disputes.

The Robinson case argues for the determining valuer to go the extra mile. It justifies finding credible evidence that the major corporations subvert.

Ironically, there has always been appropriate law, but a lack of political will to apply it^{xli} to ensure equity and bargaining power.

Conclusions

Professor Spike Boydell's paper, "The Emperor's New Clothes - the truth about shopping centres", concluded, *"It is only a matter of time before there is major litigation, which will expose the 'insider trading' nature of this investment (shopping centre industry) sector."*

This is not an objective market: it is subjective and subverted. Australian Wheat Board Ltd "AWB" is a case in point where court action is possible^{xlii} for aiding and abetting non- market practices.

The greater the disparity between "market rent" and the rents charged for leases negotiated in non-market conditions, the more rental disputes there will be^{xliii}. Executive decision-makers will refer disputes to expert determination.

As in New South Wales, where the determining valuer is protected, the API must incorporate protection for its members, unless there is blatant misconduct.

If one cannot evaluate and test evidence, understand property - business - and economics per se, expert determination should be avoided. If one cannot determine the "reasonable rent"^{xliv}, rather avoid accepting appointments. Courts and Tribunals must back the experts they appoint.

Property is a “sunk cost”. No matter what it cost to build, no-one is entitled to an automatic return, not even the largest corporations.

Retail property is dependent on “custom”^{xlv}. Market rent is a function of that and market value a function of that, not the other way around.

An efficient market is environmentally sound. It avoids the duplication of resources; it allocates and rewards stakeholders and it stops the destruction of existing capital to distribute goods and services.

There is no reason why this Profession must “create” value rather than act as purveyors and interpreters of the nation’s wealth. That is the role of developers, owners and managers. Valuers interpret what is happening in the market at a point in time.

At the World Association of Valuation Organisations Congress in Singapore in 2006, the author said Australia has superior intellectual property and an exportable commodity. Unfortunately, due to the “culture” of the wider industry, we are undermining our own success story.

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Footnotes:

ⁱ See – IVS International Valuation White Paper, "The Valuation of Real Estate Serving As Collateral for Securitised, Instruments" – "The Valuer should investigate about prospective contractual rent,.... that the data is indeed accurate. Estimates which are unrealisable, are engineered rents; valuations based on engineered rents will not result in Market Value".

ⁱⁱ "Valuation for mortgage purposes" by R.S. Martin RICS 3rd July 1973

ⁱⁱⁱ The Law Affecting Rent Review Determinations by Alan Hyam *Sutcliffe v Thrackrah* [1974] AC 727; *Arenson v Arenson* [1997] AC 405

^{iv} IAMA's Expert Determination Course – "The Expert Determination Process" by Robert Hunt – Barrister-at-law - states on pg 3 "..... Expert is only constrained by the terms of the agreement between the parties " and on pg 5 "..... should not determine matters outside the terms of the Agreement....."

^v International Valuation Standards Committee IVSC definition of Market Rent introduced into fourth edition of IVS published in 2000

^{vi} S 29 RSLA Queensland, which calls on a specialist retail valuer to "determine the rent on the basis of the rent that would be reasonably expected to be paid for the retail shop, if it were unoccupied and offered for leasing for the use to which the shop may be used under the lease or a substantially similar use".

^{vii} Productivity of specialty shops in regional shopping centres in Australia, rose from \$19,000 per store in 1998/99 of which rent was, \$16,123 or 84.8% of turnover (Gilbert 2005)

^{viii} Only the Australian Capital Territory legislation S 51 & 52 provides for a lease renewal dispute resolution mechanism in the event the rent cannot be agreed, requiring the landlord to make a bona fide offer in writing at market rent which, if not agreed to, is referred to mediation and in the last instance, expert determination

^{ix} "An evaluation of the Policy Implications for the UK of the Approach to Small Business Tenancy Legislation in Australia" – Prof Neil Crosby, Dept of Real Estate Planning University of Reading Business School Aug 2006

^x Drawn down provisions of S 51 AC of the Trade Practices Act into most state tenancy law.

^{xi} See "Market rent: what is it?" - diagram of average rents above market rent (Gilbert 1995)

^{xii} For parity to maintain occupancy costs in 1993/94 of 13.8% in, 2002/03 specialty shop sales should have been on "average" \$922,463 or 20.7% higher analysis of Urbis JHD research (Gilbert 2005)

^{xiii} The Weekend Australian Financial Review - 24 - 25 June 2006 "An impersonation of investor protection" by Trevor Sykes pg 62

^{xiv} Presentation Ion Anghel PhD, Romania, "Intangible Assets Analysis and Valuation", WAVO Congress, Singapore Nov 2006

^{xv} <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/12/AR2007061201552.html>

^{xvi} IAMA Expert Determination Course – “The Expert Determination Process” by Robert Hunt – Barrister-at-law - states on pg 2

^{xvii} “The Expert Determination Process” by Robert Hunt pg 3

^{xviii} “The Expert Determination Process” by Robert Hunt pg 2

^{xix} “The Expert Determination Process” by Robert Hunt pg 2 – “*the expert is expected to use (and is not constrained from using) his or her expertise and personal judgement to determine the issue in dispute*”.

^{xx} S 29 RSLA Queensland “...the specialist retail valuer ... must determine the rent ...on the basis of the rent that would reasonably be expected to be paid

^{xxi} “The Expert Determination Process” by Robert Hunt pg 3

^{xxii} “The Expert Determination Process” by Robert Hunt pg 5

^{xxiii} “Valuations for Mortgage Purposes” - RS Marten 1973; “Determining Suburban Shopping Centre Rentals” – Philip Willington October 1987; “Issues Affecting Shopping Centre Market Rental Values” by Malcolm Macrae November 1996

^{xxiv} The Weekend Australian Financial Review - 24 - 25 June 2006 "An impersonation of investor protection" by Trevor Sykes pg 62

^{xxv} See Alan Hyam OAM, Barrister-At-Law and Life Fellow of the API points out in "The Law Affecting Rent Review Determinations", “*before embarking upon the task of assessing the rental value of premises for the purpose of rent reviews, [the valuer] must peruse the lease document*” and “*Such perusal should not be restricted to the rent review clause, but should extend to the whole lease, and associated documents, as provisions therein may have a bearing on the valuation task*”.

^{xxvi} “*Includes corruption, fraud, partiality, bias and a breach of the rules of natural justice*”

^{xxvii} Refer paper API "Rental Determinations - Determining Valuers Accepting Submissions and the Roles of Experts and Advocates" by Alan Hyam March 2000 who refers to "Handbook of Rent Review" by Bernstein and Reynolds, published by Sweet & Maxwell in London par 9 - 27 with regard to the legal responsibility of an expert valuer that he/she “*Provides his own valuation report as an expert, using his knowledge of the market. Does not need to receive representations but usually invites them for his own protection.*”

^{xxviii} IAMA’s Expert Determination Course – “Preparing the Expert Determination” by Graham Easton Barrister-at-law

^{xxix} See Chapter 1, Introduction to Alan Hyam’s book “The Law Affecting Rent Review Determinations” relating to “The history, purpose and operation of rent review clauses” and three English cases referring to increases in property values, the value of money giving rise to market rents rising and falling

^{xxx} See “Economics: a most useful tool for the valuer” The Valuer & Land Economist Vol 32, No. 8 (Gilbert November 1993)

^{xxxi} See www.leaseconsultant.com.au - schedule of suggested occupancy costs or Table 1 “Market rent revisited” Australian Property Journal August 2003

^{xxxii} S 29 RSLA Queensland

^{xxxiii} “*Give a man the possession of a bleak rock, and he will turn it into a garden; give him a nine year lease over a garden [short tenure in UK and for a farm], and he will convert it into a desert*” – quotation by an agriculturist over 200 years ago How does the concept apply to the Shopping Centre Industry in Australia?

Principles from economists and philosophers, such as David Ricardo (1772 – 1823), John Stuart Mill (1806 – 1873) and Adam Smith (1723 – 1790) whose work was highly relevant and related to charging economic rent, land tenure, the balance between labour, capital and landlords and so on.

The principles of lack of tenure, the abusive lease renewal process of retail shops and failure to charge market rent is causing significant concern to the stakeholders; indeed, it amounts to interference in the market place.” ... and “Some principles established 200 + years ago were that rising rents ‘gobble up profits’, that higher rent can be paid for fertile land, that different crops produce different profits and, after paying labour and capital, the residual amount goes to rent.”

In previous articles I have tabulated, from the best sources, guidelines with regard to long-term rental affordability of some 50 retail categories.”

^{xxxiv} See “Market rent revisited” Australian Property Journal rent on a \$/M2 basis vs occupancy costs (Gilbert August 2003)

^{xxxv} “Market rent: what is it?” August 1995 and CCH Business Benchmarks

^{xxxvi} See “Market rent revisited” analysis of rent on a \$/M2 vs occupancy costs

^{xxxvii} The Law relating to Expert Determination by Robert Hunt “*If the Experts Determination is in accordance with the Expert Determination agreement, then the Court cannot properly intervene.*”

^{xxxviii} Is it time for Commercial Lease, Reform in Australia? – Prof Neil Crosby, MRICS University of Reading, RICS presentation Victoria, Friday 19th January 2007

^{xxxix} "The matters to be considered in arriving at the rental value of the premises set forth in the classic judgment of Scott LJ in" ... "Which may be summarised as follows:

1. When the subject premises is let at what is plainly a rack-rent or when similar premises are so let, which are truly comparable, this is admissible evidence of what the hypothetical tenant would pay. This was amended by Lord Denning MR in *Garton v Hunter* [1969] 2 WLR 86 at 90, who added that 'it is not itself decisive. All other relevant considerations are admissible'.
2. Where such direct evidence is not available, resort must be had to indirect evidence from which it is possible to estimate the probable rent that the hypothetical tenant would pay.
3. This kind of estimating is a skilled business and it is here, especially, that the role of the skilled valuer comes in.
4. In weighing up the evidence bearing upon value, it is the duty of the valuer to take into consideration every intrinsic quality and circumstance that tend to push the rental valuer either up or down.
5. A skilled valuer is a professional and must be left to inform her or her mind of all relevant facts.
6. The rent to be ascertained is the figure at which the hypothetical landlord and tenant would, in the opinion of the valuer or the tribunal, come to terms after bargaining, in the light of competition or its absence in both demand and supply, as a result of 'the higgling of the market'.
7. Every factor, intrinsic or extrinsic, which tends to increase or decrease either demand or supply, is economically relevant and thus admissible evidence for the purposes of the assessment.
8. While the landlord and the tenant are hypothetical, the property valued is actual with all its actualities: at 474."

^{xi} S 51 & 52 of the ACT tenancy legislation

^{xli} The Weekend Australian Financial Review - 24 - 25 June 2006 "An impersonation of investor protection" by Trevor Sykes pg 62

^{xlii} <http://www.abc.net.au/news/newsitems/200612/s1817982.htm>

^{xliii} See "Market rent: what is it" - 1995

^{xliv} S 29 RSLA Queensland

^{xlv} The Impact of Pedestrian Counts on Property Values, GM (Garry) Dowse, Dept of Finance and Property Studies, Massey University, New Zealand