SHOULD RETAIL LEASE LEGISLATION IN AUSTRALIA BE SIMPLIFIED?

DARREN JOHN CATTON

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SUPERVISORS

Principal Supervisor: Professor Sharon Christensen

Associate Supervisor: Professor Bill Duncan

School of Law, Faculty of Law

Queensland University of Technology

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ABSTRACT

Retail shop leasing in Australia is controlled by different legislation in each state and territory. With each review the size and complexity of such legislation has increased resulting in greater regulatory burden on both lessors and lessees, especially where such lessors or lessees operate in more than one jurisdiction. The purpose of this thesis is to determine whether such retail shop lease legislation in Australia should be simplified taking into account the benefits of such simplified legislation to both lessors and lessees in relation to five major topics of concern. Such a determination will be achieved by identifying the benefits of simplified legislation, analysing and comparing the different legislation in each Australian jurisdiction as well as the Voluntary Codes for England and Wales to ascertain common provisions, considering other simplified legislation, and preparing a framework for simplified retail leasing legislation. In an environment where businesses deplore high compliance costs, where decisions about investment in a particular jurisdiction can be influenced by likely compliance burden and where governments actively institute inquiries to reduce such burden it is an appropriate time to consider whether the benefits to lessors and lessees, if not to the economy as a whole, demand simplification of retail shop leasing legislation.

CONTENTS

Statement of Original Authorship

The work contained in this thesis has not been previously submitted to meet requirements for an award at this or any other higher education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made.

QUT Verified Signature

Signature:

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CHAPTER ONE

INTRODUCTION

1. Introduction

1.1 Background

Despite the fact that issues faced by lessor and lessees are common throughout Australia, retail shop leasing is controlled by different legislation in each state and territory.[1] Retail lease legislation was first enacted in Australia in 1984.[2] Since then, not only has similar legislation has been established in each state and territory, but in some jurisdictions original legislation has been completely replaced by new legislation.[3] Expansion of retail lease legislation continued unabated as attempts were made to "plug the gaps" in retail lease legislation to provide greater protection to the lessee.

Subsequent government enquiries have recommended simplified retail lease legislation [4] together with uniform retail lease legislation [5] or uniform code of

1 *Retail Shop Leases Act 1994* (Qld), *Retail Leases Act 1994* (NSW), *Retail Leases Act 2003* (Vic), *Leases (Commercial and Retail) Act 2001* (ACT), *Fair Trading (Code of Practice for Retail Tenancies) 1998* (Tas), *Retail and Commercial Leases Act 1995* (SA), *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), *Business Tenancies (Fair Dealing) Act 2003* (NT).

2 *Retail Shop Leases Act (Qld)*1984.

3 For example in South Australia, the *Retail and Commercial Leases Act 1995* replaced Part 4 of the *Landlord and Tenant Act 1936* which was entitled "Commercial Tenancy Agreements" which was put in place by the *Statutes Amendment (Commercial Tenancies) Act 1985*.

4 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008),* 258.

5 House of Representatives Standing Committee on Industry Science and Technology, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia*, (1997). ("Reid Report 1997"); Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure, A Review of Australia's Retailing Sector*, August 1999, 199-200; Senate Economics Reference

conduct [6] and industry organisations have made submissions and issued press releases calling for more uniformity in legislation.[7] No such recommendation has been realised and, if anything, the differences in the legislative schemes have become more pronounced through successive amendments.

The purpose of this thesis is to determine whether such state and territory based legislation should be simplified by analysing the benefits of such a reform in relation to selected common areas of conflict between lessors and lessees where the legislation, arguably, in its current form has not met the original objectives of the regulation of this form of transaction.

Determining the benefits of less complex legislation requires the consideration of the historical development of retail lease legislation to identify the reasons for the enactment of such legislation and the objectives of the legislators.

Simplified legislation must at least deliver the same benefits as provided by the current state and territory based legislation. In addition, the voluntary leasing code of the United Kingdom will be considered to determine whether any aspects may be relevant to Australia.

Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18 March 2015, [4.57].

6 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008),* 242.

7 Shopping Centre Council of Australia, Submission No 83 to the Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, 31st March 2008, 38; Australian National Retailers Association, Submission to the Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, 31st March 2008, 10.

Consideration of the development of retail lease legislation must include an analysis of: -

(a) the nature of leasing law affecting retail premises as it existed before the enactment of the state based commercial leasing legislation both at common law and in statutes;

(b) the deficiencies in the prior leasing law that led to the enactment of the retail leasing legislation;

(c) the benefits that were envisaged from such legislation (i.e. in what way would retail lease legislation "fix" the deficiencies?); and

(d) the steps if any taken either by the retail leasing industry or by the government, prior to the introduction of retail lease legislation, to regulate retail leasing by voluntary codes of practice or other form of regulation?

Factors must be identified to evaluate the existing regulation to determine its failures and successes. Such factors can be formulated from the leasing regulation itself, and from the consideration of voluntary codes elsewhere.

1.2 Why this research is necessary

There have been numerous enquiries into retail shop leases in Australia. As early as 1999 Federal inquiries received submissions recommending the simplification of retail leasing legislation.[8] These recommendations have

8 Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure, A Review of Australia's Retailing Sector*, August 1999, 25.

been echoed by other enquiries;[9] however, no government has resolved to change the status quo to this time.

No previous research or enquiry has considered the historical reasons for retail leasing legislation. Rather, such enquiries, informed by public submissions, dealt with the problems relevant to them without considering the origin of the problem, their extent and the steps taken in the past in various jurisdictions to address them. In addition, given the jurisdictional limitation of the legislation, most state enquiries consider leasing problems from a regional view point only and not a national view. Such problems are only considered holistically in Federal enquiries.

1.3 Research Question and Hypothesis

The purpose of this thesis is to consider whether the current state and territory based legalisation is too complex and whether such legislation, in five core areas could be simplified by analysing the benefit of such reform in relation to selected common areas of conflict between lessors and lessees where the legalisation, arguably, in its current form has not met the original objective of retail leases.

This thesis identifies the areas of such complexity and considers that the existing retail lease legislation should be simplified or "rolled back" to allow the lessor and lessee to negotiate a mutually beneficial arrangement that will see fairer outcomes and economic benefits for the parties and society as a whole.

9 For example see - Productivity Commission, *The Market For Retail Tenancy Leases in Australia*, Report No. 43 (31 March 2008), 249; Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (December 2011, 262.

1.4 Methodology

This thesis will use comparative methodology to consider the retail leasing legislation in all States and Territories of Australia and the voluntary leasing codes in the United Kingdom which are supported by the *Landlord and Ten ant Act 1954* (UK).

The keys factors of such comparison are space and time. Spatially, the approach adopted by different Australian jurisdictions regarding retail leasing regulation will be compared with each other. In addition the legislative approach adopted in Australia would be compared with the voluntary approach promoted in the United Kingdom. Historically, retail leasing prior to regulation would be compared with the current retail leasing heavily regulated landscape.

The benefit of such methodology is that it will show to what extent the imposition of retail leasing regulation has altered the retail leasing marketplace.

The success or failure of such retail leasing regulation revealed as a result of such comparison will allow conclusions to be drawn regarding how such regulation could or should be simplified in the future. Review of retail leasing regulation will proceed on a normative review basis to ensure that any simplification will not only provide financial and economical benefits but also limit the power imbalance between the lessor and lessee.

1.5 Limitation of Thesis

This thesis does not attempt a doctrinal analysis of the retail leasing area. Rather this thesis proceeds on the basis that retail leasing legislation in Australia in well and truly established and seeks to determine whether such legalisation should be simplified and if so to what extent. It is also not proposed to compare retail leasing legislation with the franchising code of conduct as, although, franchising and leasing share commonalities such as a powerful lessor/franchisor negotiating with the weaker lessee/franchisee there are substantial differences between the two areas. For example:-

(a) The lessor, unlike the franchisor, has real property rights in relation to the shopping centre which should be protected;

(b) The Franchising Code of Conduct is a “light touch” by government in the franchising area consisting of 45 clauses. The *Retail Shop Leases Act 1994* (Qld), for example, has over 150 clauses.

(c) The demand for franchises is based on the quality of the franchised product or service and the franchising system adopted by the franchisor. These items are created by the franchisor. On the other hand, the demand for shopping centre leases, although based partially on the quality of the shopping centre is also based on the drawing power guaranteed by the monopoly granted to the shopping centre lessor as a result of town planning restrictions. The bargaining power of the shopping centre lessor is therefore greater than the franchisor and the retail lease legislation must therefore address this issue.

(d) Franchisees are normally granted exclusivity for their business within their allocated region. It is very rare for any such exclusivity to be granted by shopping centre lessors. Introduction of competitors into a shopping centre is one of the issues raised by lessees in the committees of inquiry.[10]

(e) The modern day franchise can be traced back to 1850 or thereabout with the Singer sewing machine[11] whereas leases have been in existence for centuries and have a much greater body of case law.

The differences between retail leasing and franchising outweigh the similarities and, as such, the Franchising Code of Conduct has not been examined in this thesis.

1.6 Chapter Outlines

Chapter One – Introduction

This chapter is an introduction to the thesis and to leases generally. It analyses the leasing market, the nature of leases and the relationship between the lessor and lessee in particular the concepts of good faith, unconscionability, inequality of bargaining power, and freedom of contract as they relate to leasing. This is undertaken against a background of the importance of the leasing market to the Australian economy[12] and the effect of regulation upon that market.[13]

10 Reid Report 1997, 68; PC Report 2008, 154.
11 Mario L. Herman, *A Brief History of Franchising,* http://www.franchise-law.com/franchise-law-overview/a-brief-history-of-franchising.shtml.
12 Shopping Centre Council of Australia, Submission No 83 to the Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 5. See also

Chapter Two – Areas of Focus and Drivers for Reform

The first part of Chapter 2 will identify the particular areas of conflict between lessors and lessees which have arisen time and time again and do not appear to have been remedied by legislation. The second part of Chapter 2 will discuss the drivers for reform for each such area of conflict. Suich areas of conflict and drivers for reform will be identified by examining the recommendations of the inquiries established in various jurisdictions relating to such problems.

Chapter Three – Performance of Past Retail Leasing Reform Legislation.

This chapter traces the performance of retail leasing regulation since its inception in 1984 to the present time by considering the initial purpose for establishing such regulation and the methods adopted to achieve such regulation, by examining reports of various enquiries between 1984 and the present[14] and by the assessment of such legislation enacted including

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Shopping Centre Council of Australia, *Key Facts*, (24 December 2015) <www.scca.org.au./industry-information/key-facts/>.

13 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 95.

14 House Standing Committee on Industry, Science and Technology*, Small business in Australia: Challenges, Problems and Opportunities*, January 1990; House of Representatives Standing Committee on Industry, Science and Resources, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia*, May 1997; Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure, A Review of Australia's Retailing Sector*, August 1999; Productivity Commission, *The Market For Retail Tenancy Leases in Australia*, Report No. 43 (31 March 2008); Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (December 2011); Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade* (September 2014); Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18 March 2015; *Report of the Committee of Enquiry into Shopping Complex Leasing Practices*, Queensland (19 November 1981) 9. ("Cooper Report 1981"); *Report of the Retail Tenancies Advisory Committee*, Victoria, (February 1984) ("Arnold Report 1984"); *Report of the Inquiry into Shopping Centre Leases*, South Australia, (1983) ("Hill Report 1983"); *Report of the Inquiry into Commercial Tenancy Agreements*, Western

amendments to such legislation to determine whether the initial purpose has been achieved, abandoned or altered in some way.

Chapter Four – Evaluative Factors

This chapter considers the current retail leasing legislation in Australia to determine the effectiveness of such legislation and compares such legislation in each state and territory with each other using benchmarks. Such benchmarks are identified by considering common problems that occur in all Australian jurisdictions and the United Kingdom as well as other uniform legislation to determine common principles that led to such reform.

Chapter Five – Conclusion and Recommendations

This chapter draws conclusions based upon the content of the previous chapters. It identifies the problems with retail lease legislation in Australia, discusses the different solutions adopted in Australia and the United Kingdom (i.e. Legislation versus Voluntary Code) and considers each of the 5 areas of concern and makes recommendations for change.

Australia, (February 1984) ("Clarke Report 1984"); *Report of the ACT Working Party on Business Leases Review Legislation*, ACT (1984). ("ACT Report 1984"); Department of Justice and Industrial Relations (Tas), *Review of the Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998 Final Report*, March 2002; *Report of the Review Committee on the Commercial Tenancy (Retail Shops) Agreements Act*, Western Australia, 2003.

2. Leases

2.1 Leases Generally

Whether residential or commercial, leases are common business documents. Unlike residential leases, which vary only slightly from property to property, the terms of a commercial lease change depending upon the property which is the subject of the lease. Industrial property leases differ from showroom leases and professional office leases differ from retail shop leases.[15]

The terms of shop leases themselves vary depending upon whether the shop is located in a freestanding building, a strip shopping centre or an enclosed shopping centre complex.

At first glance, a commercial lease would appear to document a simple transaction – occupation of premises is given by the lessor in exchange for the lessee paying rental and complying with various conditions of occupation.

Leases, however, represent a significant investment by lessees.[16] The success of the lessees' business may depend, amongst other things, not only on the location of the leased premises but also on the terms of the lease

15 The Victorian Retail Tenancy Advisory Committee, despite having the drafting of a uniform lease as one of its terms of reference, formed the view that the complexity of such a lease and the lease premises it must cover would make it extremely difficult to draft such a document. See Arnold Report 1984, 6.

16 *Commercial Tenancy (Retail Shops) Agreements Act (WA)* 1985, Tenant Guide for New Retail Shop Leases, Form 6.

> 'Recognising the worth or value of the goodwill of your retail business is directly related to the tenure you hold. The balance of the current lease term and any options are prime factors that the market will assess in determining the goodwill attached to your business.'

itself. Lessees are, often, small business people who have mortgaged their homes and redeemed investments to establish their business.[17]

Although, at one stage, not considered to be a contract,[18] the authorities now establish that a lease, as well as conferring upon the lessee an interest in land, is also a contract.[19] It is subject to the same principles as any contract[20] including the principle of freedom of contract which envisages that the parties to the contract, approaching each other in the traditional adversarial way, and at arm's length, are free to offer and accept any conditions they choose and it is not for any other party to interfere with such agreements, especially where the parties have means or are experienced commercial entities.[21] The doctrine of laissez-faire liberalism stresses the importance of freedom of contract without intervention from the state as a means to allow the individual to pursue their own self-interest. [22]

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17 Victoria, *Parliamentary Debates,* Legislative Assembly, 12 November 1986,1939 (McGrath).

18 K Lewison, Commercial Property – Are Leases Different?, (1989) *The Law Society Gazette*, 86.45(23).

19 *Progressive Mailing House v Tabali* (1985) 157 CLR 17, Mason J [29] citing William O. Douglas and Jerome Frank in "Landlords' Claims in Reorganizations" (1933) 42 *Yale Law Journal* 1003, nn 6.

> As the law of landlord and tenant had outgrown its origins in feudal tenure, it was more appropriate in the light of the essential elements of the bargain, the modern money economy and the modern development of contract law that leases should be regulated by the principles of the law of contract.

See also *Highway Properties Ltd v. Kelly*, *Douglas & Co. Ltd* (1971) 17 D.L.R. (3d) 710; *Apriaden Pty Ltd v Seacrest Pty Ltd& Anor* [2005] VSCA 139; Willmott Growers Group Inc v Willmott Forests Pty Ltd (Receivers and Managers Appointed) (2013) 251 CLR 592, [39].

20 Rhodes, Williams and Rhodes, *Canadian Law of Landlord and Tenant* (5th ed, 1983) [1:1].

> At common law the relation of landlord and tenant is a contractual one, arising when one party, retaining in himself a reversion, permits another to have the exclusive possession of a corporeal hereditament, for some definite period or for a period which can be made definite by either party. The contract may be express or it may be implied by law. It is more than a mere contract, as it vests in the tenant taking possession an estate or interest in the land or premises demised.

See also *Progressive Mailing House v Tabali* (1985) 157 CLR 17, 29; *Apriaden Pty Ltd v Seacrest Pty Ltd & Anor* [2005] VSCA 139; *Gumland Property Holdings Pty Limited v Duffy Bros Fruit Market (Campbelltown) Pty Limited* (2008) 244 ALR 1, [58].

21 *GSA Group Limited –v- Siebe PLC* (1993) 30 NSWLR 573,579 (Rogers J).

22 Ian Adams, Political Ideology Today (2002) *Manchester University Press*, 20.

At one stage elevated to the level of a sacred concept,[23] the modern view of the doctrine of freedom of contract is that it is a reasonable ideal only where the parties to the contract are of equal bargaining power and there is no harm to the community at large.[24]

The principles of freedom of contract are relevant in any examination of commercial leasing legislation in Australia because the various governments, when passing such legislation, have had to balance the "freedom of contract perspective" as advanced by the lessors as opposed to the "consumer protection perspective" advanced by the lessees.

The lessors submit that the government should not intervene in the market place and that market forces will ensure ultimate fairness whereas the lessees submit that the market place is so much in favour of the lessors that true market forces are distorted.

The principles of freedom of contract were more relevant many years ago when the prevailing legal opinion was that a private agreement which was in the interests of both parties must also be in the interest of the public. Today, however, externalities and the effect of a contract on third parties such as

23 *Printing and Numerical Co –v- Sampson* (1875) LR 19 EQ 465 (Jessel MR).

> If there was one thing which more than another public policy requires, it is that men of full and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider in that you are not likely to interfere with this freedom of contract.

24 J Beatson, *Ansons Law of Contract* (30th Edition Oxford University Press 2016) 4. See also JW Carter, Elisabeth Peden and G J Tolhurst , *Contract Law in Australia* (5th Edition, Australia, 2007) 8.

the public must be considered and any harmful effects of contracts on third parties must be nullified.[25]

Generally, governments have always been willing to interfere with the relationship between lessors and lessees[26] to mitigate undesirable market outcomes. In the case of leases, such undesirable market outcomes include the number of businesses that fail or suffer damage because of issues arising from the lessor/lessee relationship [27] which, in turn, causes social and economic damage to the community at large.[28]

According to Pollock: -

> The truth is … that the law of landlord and tenant has never, at least in any usual conditions, been a law of free contract. It is a law of contract partly expressed, partly supplied by judicial interpretation, and partly controlled by legislation and sometimes by local custom.[29]

Such government interference has substantially been to protect the lessee and has traditionally been about the terms and enforcement of leases.[30] In the past three decades, however, such interference has concerned the entire

25 P S Atiyah, *Essays on Contract* (Clarendon, Oxford 1990) 359. See also *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 194.

26 As far back as The Code of Hammurabi 1760BC Clause 45 and 46. See the Avalon Project, Code of Hammurabi <http://avalon.law.yale.edu/ancient/hamframe.asp.publisher and date?> at 15 December 2014.

27 House of Representatives Standing Committee on Industry, Science and Resources, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia*, May 1997, [2.10].

28 'New Deal: Fair Deal - The Federal Government's Fair Trading Statement - Giving Small Business a Fair Go', Ministerial Statement, House of Representatives, September 1997, 4. (Peter Reith, Minister for Workplace Relations and Small Business.)

29 Sir Frederick Pollock, *The Land Laws* (3rd Ed, UK, 1896), 150.

30 For example, the *Property Law Act 1974* (Qld).

retail leasing relationship including pre-lease negotiations between the lessor and lessee.

For example, in Queensland, prior to the enactment of the first retail leasing legislation in Australia, the *Retail Shop Leases Act (1984),* limited protection for a retail lessee was afforded by property legislation[31] which provided some remedies to a lessee in many areas including relief against forfeiture,[32] relief against loss of an option[33] and ensuring that the lessors consent to assignment must not be unreasonably withheld.[34] Torrens system leases were also protected by registration and the short lease exception to indefeasibility.[35]

The general leasing provisions[36] however concern only the relationship between the lessor and lessee after they have entered into the lease.[37]

It was not until 1984 that the first retail shop lease legislation in Australia was introduced in Queensland[38] as a result of numerous complaints by lessees

31 *Property Law Act 1974* (Qld), Part 8; *Landlord and Tenant Act 1936 (SA),* ss9 - 12; *Conveyancing and Law of Property Act 1884* (Tas), s15; *Property Law Act 1958* (Vic), s146; *Property Law Act 1969* (WA), s81; *Law of Property Act 2000* (NT), s137; *Conveyancing Act 1919(NSW),* s129; *Civil Law (Property) Act* 2006 (ACT), s426.
32 For example*, Property Law Act 1974* (Qld), s124.
33 Ibid, s128.
34 Ibid, s121.
35 *Real Property Act 1900* (NSW) s42(1)(d); *Land Titles Act 1994* (Qld), s185; *Transfer of land Act 1952* (Vic) s42(2); *Transfer of Land Act 1893* (WA), s68; *Real Property Act 1886* (SA), s69; *Land Titles Act 1980* (Tas), s40; *Land Title Act 2000* (NT), s189; *Land Title Act 1925* (ACT), s85.
36 Property Law Act 1974 (Qld), Part 8; *Landlord and Tenant Act 1936 (SA),* ss9 - 12; *Conveyancing and Law of Property Act 1884* (Tas), s15; *Property Law Act 1958* (Vic), s146; *Property Law Act 1969* (WA), s81; *Law of Property Act 2000* (NT), s137; *Conveyancing Act 1919(NSW),* s129; *Civil Law (Property) Act* 2006 (ACT), s426.
37 Legislation in other states and territories of Australia provided similar protection to lessees. For example, relief against forfeiture appears in *Landlord and Tenant Act 1936 (SA),* ss9, 10; *Conveyancing and Law of Property Act 1884* (Tas), s15; *Property Law Act 1958* (Vic), s146; *Property Law Act 1969* (WA), s81; *Law of Property Act 2000* (NT), s137; *Conveyancing Act 1919(NSW),* s129.
38 *Retail Shop Leases Act 1984* (Qld).

and failure by shopping centre owners to satisfy the Queensland government that a voluntary code of conduct could work. The ongoing result has been that retail leasing legislation has now been enacted in all States and Territories in Australia with the last such legislation being enacted by the Northern Territory Government in 2004.[39]

With such legislation now accepted in the market place, it is unlikely that any Australian government will repeal their retail leasing legislation. Putting aside any aspects of fairness to the economically weaker lessee, the importance of the retail leasing sector to the economy itself requires government regulation.[40]

The current landscape for retail lease legislation in Australia is as follows: -

Retail Shop Leases Act 1994 (Queensland)[41]

Retail Lease Act 1994 (New South Wales)[42]

Retail Leases Act 2003 (Victoria)[43]

Retail and Commercial Leases Act 1995 (SA)[44]

Leases (Commercial and Retail) Act 2001 (ACT)[45]

Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (TAS)[46]

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39 *Business Tenancies (Fair Dealings) Act 2004* (NT).
40 Reid Report 1997, [2.10]; Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Report No. 43 (31 March 2008), 95; Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure: A Review of Australia's Retailing Sector*, August 1999, xi.
41 "the Queensland Act"
42 " the NSW Act"
43 "the Victorian Act"
44 "the SA Act"
45 the ACT Act"

Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)[47]

Business Tenancies (Fair Dealings) Act 2004 (NT)[48]

In contrast, in the United Kingdom, despite heavy government scrutiny and the continued threat of legislation for the past 25 years, the retail leasing industry still operates under a voluntary code[49] which contains general recommendations about lease negotiations, lease terms, use of premises, bonds, guarantees, rent review, assignment, service charges, repairs and insurance. There is no formal disclosure document required however the lessor is required to clearly state in writing the length of the term, whether the lessee will have security of tenure under the *Landlord and Tenants Act 1954 (UK),* the lessee's rights to assign, rent review and repair obligations. The voluntary code contains a warning to the lessee that the lessee should obtain legal advice regarding the lease however there is no dispute resolution clause nor any stated consequences for any breach of lease. The lessor is exhorted to be clear in its dealings with the lessee and the word "clear" appears frequently in the code. Despite this, there is no disclosure required by the lessor of any future alterations or plans regarding the premises.

Although voluntary codes have been attempted in Australia they have not been found to be effective. The New South Wales Retail Tenancy Leases Code of Practice was adopted in 1992 but only lasted 2 years and was

46 "the Tasmanian Code"
47 "the Western Australian Act:
48 "the Northern Territory Act.
49 The Commercial Leases Working Group, *The Code for Leasing Business Premises in England and Wales* (2007).

replaced by legislation in that state. In Queensland, the Cooper Inquiry[50] recommended a voluntary code and in fact such a code was drafted by the Building Owners and Managers Association however that code did not proceed.[51] The Productivity Commission also recommended a voluntary code of conduct, noting that a mandatory code would not be much different to legislation.[52] The voluntary code suggested by the Productivity Commission would contain provisions regarding fair trading standards, transparency, lodgement of leases, information provision and dispute resolution and would not interfere with ordinary commercial decision making items such as lease terms, rent levels and security of tenure.[53]

Each of the States and Territories in Australia now has mandatory legislation controlling a significant portion of commercial lease transactions. The legislation applies to retail leases except for stated exemptions, such as, where the premises are over 1000 square metres in size[54] and leased by a listed corporation or subsidiary[55] or where the occupancy costs exceed $1,000,000.00[56] or where the lease is for a limited period such as less than 6 months[57] or 12 months[58] or for a lengthy period such as more than 25 years.[59]

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50 *Report of the Committee of Enquiry into Shopping Complex Leasing Practices*, Queensland (19 November 1981) 9. ("Cooper Report 1981").

51 In NSW the Retail Tenancy Leases Code of Practice (NSW) was found to be unworkable. In Queensland the Building Owners and Managers Association prepared a voluntary code in 1983 in an unsuccessful attempt to stave of legislation.

52 Productivity Commission, *The Market For Retail Tenancy Leases in Australia*, Report No. 43 (31 March 2008), 257.

53 Ibid.

54 *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s3(1); *Retail Leases Act 1994* (NSW), s5. *Business Tenancies (Fair Dealings) Act 2003* (NT), s6.

55 *Retail Shop Lease Act 1994* (Qld) s5.

56 *Retail Leases Act 2003* (VIC) s4.

57 *Retail Leases Act 1994* (NSW), s6; *Business Tenancies (Fair Dealings)Act 2003* (NT) s6.

58 *Retail Leases Act 2003* (VIC) s4.

59 *Business Tenancies (Fair Dealings)Act 2003* (NT), s6.

In the United Kingdom, the retail leasing industry has operated under three voluntary codes. The first came into operation in 1995.[60] It was replaced by the second voluntary code[61] in 2002, which was, in turn, replaced, by the third voluntary code in 2007.[62] The UK Voluntary Codes contain general recommendations and do not descend into the same details as the Australian legislation. The 2007 Code consists of a lessor's code, occupiers guide and model heads of terms of lease and recommends, for example, that: -

(a) lessors provide written offers to lease which clearly state the terms of the lease and that the lessor be flexible and offer alternative lease terms if such lease terms are available;

(b) If the right to renew a lease under the *Landlord and Tenant Act 1954* is to be excluded that the lessee be advised of that position and encouraged to seek legal advice;

(c) The length of lease term must be clear and the pre-conditions to lessees exercising break clauses should be minimal;

(d) The lessee should offer an alternative to upward only rent reviews and if alternative rent review cannot be provided then the lessor should state reasons for such a position;

(e) Lessors should provide best estimates of service charges;

60 The Commercial Leases Working Group, *A Code of Practice for Commercial Leases in England and Wales* (1995).
61 The Commercial Leases Working Group, *A Code of Practice for Commercial Leases in England and Wales* (2nd ed, 2002).
62 The Commercial Leases Working Group, *The Code for Leasing Business Premises in England and Wales* (2007).

(f) Lessees repair obligations at end of lease should be to return the premises to the condition they were in at start of the lease. Repair obligations during the lease should be appropriate to the length of the lease term and the condition of the premises.

(g) Lessees should not be required to remove permitted alterations or make good at the end of the lease term unless it is reasonable to do so. Decisions about consents for alterations should be made within 15 days;

(h) Required insurance should be fair and reasonable and rent suspension should apply if the premises are damaged or destroyed.

(i) Lessors should request any further information when considering a request from a lessee within 5 working days.

For each version the UK government commissioned a Report[63] into the effectiveness of the voluntary code and threatened to enact legislation to control the leasing process. So far both lessors and lessees seem to have successfully worked together to stave off such legislation[64] because of their unwillingness to accept government intervention into the market.[65]

The National Retailers Association in their submission to the Productivity Commission in 2008 made the following comment regarding voluntary codes in Australia: -

63 Crosby N & Murdoch S, *"The Cutting Edge 2000 – Monitoring the UK Commercial Leases Code of Practice Colin Code, What Code?"* RICS Research Foundation, University of Reading) and Crosby N, Murdoch S and Hughes C, '*Monitoring the 2002 Code of Practice for Commercial Leases*' (Reading University, March 2005).

64 The Australian experience of nation-wide retail leasing legislation may have had some influence on lessors and lessees in this regard.

65 British Retail Consortium, *Yearbook 2005*, (2005), 211; A Baum et al, *Statutory Valuations*, (Routledge, 4th ed, 2014) 16.

> ‘Based on experience and commercial imperatives, no landlord would unilaterally and voluntarily enter into and observe a voluntary code that was enforceable.’[66]

It is unlikely, therefore, that existing Australian legislation would be repealed to be replaced by a voluntary code.

2.2 Retail Leasing Market

(a) The Importance of the Retail Leasing Market

In 2008, there were around 290,000 retail tenancy leases in Australia with an estimated 58,000 new or renewed leases every year.[67] About 192,000 leases involved businesses retailing goods and the other 98,000 involved businesses retailing services.[68] About 60,000 of such businesses were located within shopping centres with the remainder located in retail shopping strips and stand-alone retail premises.[69] Shopping centres comprise 38% of total retail space, 35% of all retail shops and generate 40% of total retail sales.[70] Besides the role that shopping centres play as community meeting places, shopping centres are additionally a major generator of employment and made a direct contribution of 2.8% to the Australian Gross Domestic Product.[71]

By 2014, retail trade was the second highest contributor to employment and 7% of the Australian work force was employed in the retail trade in shopping

66 National Retailers Association, Submission No DR162 to the Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 3.
67 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 13.
68 Ibid, 14.
69 Ibid, 14.
70 Ibid, 10.
71 Shopping Centre Council of Australia, Submission No 83 to the Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 5.

centres. Retail sales through Australian shopping centres amounted to $120 billion dollars which represented 7.7% of the Australian Gross Domestic Product.[72]

In view of the large contribution made by the retail leasing industry (and shopping centres in particular) to the Australian economy, it is a reasonable government concern, therefore, to ensure that that market operates efficiently and provides a continued benefit to the community. Simplification of retail leasing legislation does not only involve the adoption of what may be considered to be the best elements of legislation from one or more jurisdictions. It is acknowledged that there may be rational differences between jurisdictions still to be maintained, but, at the same time there must be some cogent reason to do so.[73] In order to ensure the continued benefit to the community, it is necessary to consider the issues affecting the current retail leasing market and whether such issues affect the efficient operation of the retail leasing market.

(b) Operating an Efficient Market.

An efficient market allocates its resources such that the community receives the highest possible net return and businesses within that market achieve such an efficient outcome by making the best use of available resources.[74] The question is whether the lessor and lessee are making the best use of their available resources and whether retail leasing legislation helps or

72 Shopping Centre Council of Australia, *Industry Information Key Facts* (24 December 2015) <www.scca.org.au/industry-information/key-facts/>.
73 House of Representatives Standing Committee on Industry, Science and Resources, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia*, May 1997, 2.
74 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 6.

hinders such use. An imbalance of power between lessors and lessees does not necessarily mean that the retail tenancy market is operating inefficiently[75] nor is failure of the retail leasing market implied by any restriction upon that market.[76] Any restriction on a market, such as monopoly power, will however reduce efficiency and, thereby, reduce the benefit to the community.[77]

Areas of the retail leasing market which have been identified as operating inefficiently are: -

(i) Over regulation of the market.

Over regulation can cause distortions in the marketplace because: -

1. The conduct of the parties is limited thereby reducing commercial activity and minimising commercial options for either or both parties to a lease.[78] For example, requiring the lessor to agree to a new rental before the lessee decides whether to exercise its option to renew or not may simply result in lessors refusing to grant options to renew.[79] Where a lessor is required by legislation to offer a new lessee a minimum 5 year lease term then the lessor may favour an incumbent lessee to whom the lessor can offer a lesser lease term.[80]

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75 Ibid, 5.
76 Ibid, 7.
77 Dawson G "The Market and Efficient Resource Allocation" (1989) 9(5) *Economic Affairs*, 40.
78 Ibid, 91.
79 For an example see Department of Justice and Industrial Relations Consumer Affairs (Tas), '*Review of the Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998 Final Report*' March 2002, 46.
80 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November 1986, 1931 (Hayward).

2. Different level of regulation for different types of premises, businesses, or lessees may result in a lessor preferring a certain type of business causing market inefficiencies.[81] If current regulation favours a particular class of business, then the entry of new business may be restricted.[82]
3. Overly definite provisions may become inflexible and unresponsive to changing views on acceptable conduct.[83]
4. Regulation to reduce negotiating power imbalances may result in lower incentives to develop negotiating skills.[84]
5. The weaker party relies upon the government to 'fix' the problems which have arisen as a result of the lessee's bad decisions thereby becoming more dependent upon the government and more likely to make bad decisions in the future.[85]
6. Complex legislation will discourage investment in shopping centres resulting in fewer shopping centres and creating a shortage of retail space.[86]

Government intervention can only be justified where the benefit of such intervention less the compliance costs are greater than the costs to the community of the original perceived market

81 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 91.
82 Ibid, 89.
83 Ibid, 90.
84 Ibid, 89.
85 Ibid, 91.
86 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November 1986, 1931 (Hayward).

failure.[87] Australia has the highest level of regulation for the retail leasing market in the world.[88] Some countries, such as New Zealand, have no specific regulation of retail leases. As a result of retail shop leasing legislation being enacted in each State and Territory together with the provisions of the Australian Consumer Law regarding unconscionable conduct, the increasing complexity of the regulation can cause compliance costs to increase without delivering results.[89] Any extra compliance costs incurred by lessors are incorporated into the cost of the lease itself which are then passed on by the lessee to the consumer. Excessive regulation, therefore, causes the retail leasing market to operate inefficiently.[90] In addition, complex legislation impacts upon the certainty and efficiency of the retail leasing market.[91] Reduction of inconsistencies in regulation of retail leases and in the regulation of leases across jurisdictions would reduce compliance costs to business. [92]

(ii) Lack of transparency and accessibility to information.

Despite the current regime of disclosure statements being provided to lessees, information gaps still exist.[93] Too much

87 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 7.

88 Shopping Centre Council of Australia, Submission No 83 to the Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 7.

89 Eileen Webb "The Productivity Commission Enquiry Report: The Market for Retail Tenancy Leases in Australia" (2009) 16 *Australian Property Law Journal* 219, 220.

90 Shopping Centre Council of Australia, Submission No 83 to the Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, August 2008, 17.

91 Eileen Webb "The Productivity Commission Enquiry Report: The Market for Retail Tenancy Leases in Australia" (2009) 16 *Australian Property Law Journal* 219, 220.

92 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 264.

93 Ibid, 163.

information, however, can be confusing to lessees and be an impediment to effective decision making[94] especially where the lease itself is expressed in complex terms.[95]

(iii) Lack of clarity.

Lack of clear legislation may result in the lessee, as the more poorly resourced and less sophisticated party, making costly errors or maintaining a legal position which is not defensible.[96] Specifically, the lack of clarity regarding acceptable conduct of the parties and what amounts to unconscionable conduct.[97] Defining the boundaries of acceptable conduct would make it easier for lessors to stay within those boundaries and would protect small business from harmful conduct and reduce restrictions on negotiation options and decision-making.[98]

(iv) Harsh or unfair conduct of parties.

Irrespective of retail leasing legislation unfair behaviour continues. Such conduct often falls short of being unconscionable and may be outside dispute resolution arrangements as well.[99] Examples of such conduct, mainly involving shopping centres, included aggressive and evasive negotiating tactics by lessors, open use of turnover data by lessors in lease negotiations and slow registration of leases to

94 Ibid, 251.
95 Ibid, 252.
96 *D & D Ventures Pty Ltd v Evans* [2000]NSWADT, 30.
97 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008, 254.
98 Ibid, 264.
99 Ibid, 202.

establish indefeasibility of title.[100] Retail tenancy legislation has not been successful in improving the relationship between lessor and lessee and may have made such relationship worse.[101]

(v) Inefficient resolution of disputes which leads to greater costs, delay and uncertainty.

In 1997 the Reid Committee found that dispute resolution procedures for retail leases were costly and were not resolved in a timely fashion.[102] Over a decade later, in 2008, the Productivity Commission found that parties to a retail lease now had access to low cost dispute resolution but that such dispute resolution differed in each jurisdiction and that some of the dispute resolution procedures duplicated provisions in the fair trading law.[103]

Such areas of inefficient operation of the retail leasing market must be taken into account in considering any simplified retail leasing legislation.[104]

(c) Restrictions on the supply of retail space.

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100 Ibid, 204.

101 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry - Report No. 56* (December 2011), 273.

102 House of Representatives Standing Committee on Industry, Science and Resources, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia*, May 1997, [2.45].

103 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 80.

104 Department of Industry Innovation Science Research and Tertiary Education, Commonwealth Governments *Response to the Productivity Commissions Report 'The Market for Retail Tenancies in Australia'* (August 2008), 2.

The Productivity Commission, in its 2008 Report, although recognising the benefit of planning restrictions and zoning controls, believed that such restrictions reduced the amount of available retail space, and, thereby reduced competition and proposed that State and Territory governments should relax such zoning and planning restrictions that unduly limit the supply of retail space.[105] In its 2011 Report the Productivity Commission once again proposed that planning restrictions be reduced as such restrictions created a less intense competition for retail space which removed pressure from lessors to offer favourable terms.[106] Such a proposal seems to be based on the premise that by relaxing planning restrictions more shopping centres may be built which will result in more competition between lessors thereby causing lower and more competitive rents and that these price savings will be passed on by lessees thereby providing a greater benefit to the community.

The Productivity Commission has observed: -

> Part of the cost of unnecessarily restrictive planning and zoning systems is ultimately passed on to Australian consumers in the form of higher prices for retail goods. However, where Australian retailers face growing competition from international online traders, the former may find it more difficult to continue to pass on any extra costs arising from inefficient planning and zoning systems to Australian consumers.[107]

105 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 259-260.
106 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry - Report No. 56* (December 2011), 271 -272.
107 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade* (September 2014), 124.

This proposal, however, seems to disregard the fact that the planning restrictions have been put in place for the same reason i.e. the greater benefit to the community. Such benefit is achieved by ensuring optimum results in relation to traffic flow, parking, residential and environmental concerns. In addition, planning restrictions are not simply pronounced by the relevant local authority and accepted by all interested parties. Often planning disputes take years to litigate and require input from senior counsel, town planning experts and judges before they are settled or resolved. Simply urging local authorities to relax their town planning requirements fails to take into account the complexities of such law. The monopoly given to lessors as a result of town planning restrictions must be considered in relation to any simplification of retail leasing law.

2.3 The Nature of Leases

In assessing the effectiveness of current retail lease legislation it is necessary to consider the nature of the lease itself. The very nature of a retail lease may require more specific legislation.

The purpose of a lease is to effect two results. Firstly, to grant the lessee an interest in land and, secondly, to record the contractual arrangements between the parties.[108] Retail leases have been described as relational contracts[109] containing features such as: -

108 WD Duncan "The Implications of a Term of Good Faith in Commercial Leases" (2002) 9 *Australian Property Law Journal* 1, 2.

109 Eileen Webb and Luke Villiers "Using Relational Contract Principles to Construe the Landlord / Tenant Relationship: Some Preliminary Observations" (2011) 1 *Property Law Review* 21, 25.

(a) the existence of a business relationship between the parties and the need to maintain that relationship;

(b) the extensive commitment by one party to the other;

(c) the difficulty of reducing important terms to well defined obligations and adjusting the relationship over time to provide for unforeseen contingencies;

(d) incompleteness in that the risk between the parties is not shared fairly; and

(e) expectations of loyalty and inter dependence which becomes the basis for the economic planning of the parties.[110]

The significance of the relational nature of retail leases is that any less complex proposed legislation must, if necessary, take into account such factors. Such regulation may be, if appropriate, existing legislation contained within one or more jurisdictions. Alternatively, such regulation may have to be something completely new. The features of a lease as a relational contract are considered below.

A. <u>The existence of a business relationship between the parties and the need to maintain that relationship and the extensive commitment by one party to the other.</u>

Relational contracts are not discrete transactions and require varying degrees of ongoing cooperation between the parties to the contract.[111] Similarly, a lease is a contract governing a long term relationship between

110 *Bobux Marketing Limited –v- Raynor Marketing Limited* [2002] 1 NZ L R 506, 516 (Thomas J). See also *Gough and Gilmore Holdings Pty Ltd –v- Caterpillar of Australia Limited* (No 11) [2002] NSWIRComm 354.

111 IR McNeil, "Contracts: Adjustment of Long Term Economic Relations under Classical, Neo-classical and Relational Contract Law" (1977-1978) 72 *North Western University Law Review*, 84.

lessor and lessee, containing numerous complicated arrangements regulating the conduct between the parties, most of which relate to traditional lease provisions (such as rent, duration of lease etc.) but some of which are not traditionally lease provisions (such as the obligation to contribute to a marketing fund or the establishment of a tenants' association).

In a leasing context, the financial commitment of the lessee to the leased premises is greater than that of the lessor. However, the interest of both parties is the same in that the lessee and the lessor both stand to benefit economically from leasing the premises and the lessor's benefit is directly related to the lessee's benefit. The result is a continuing relationship established for the benefit of both parties.[112] This continuing relationship is, however, likely to alter during the course of the lease term such that the benefits received by both parties will increase or decrease depending upon events. Any legislation must take into account the fact that the continuing relationship between the parties will be dynamic and fluid.

B. <u>The difficulty of reducing important terms to well defined obligations and adjusting the relationship over time to provide for unforeseen contingencies and incompleteness in that the risk between the parties is not shared fairly.</u>

The long term nature of the lease results in the parties but, in particular the less experienced lessee, being unable to foresee all possibilities which

112 Eileen Webb and Luke Villiers "Using Relational Contract Principles to Construe the Landlord / Tenant Relationship: Some Preliminary Observations" (2011) 1 *Property Law Review* 21, 36.

results in the lease containing clauses which provide imprecise and indeterminate benefits or burdens.[113]

The nature of a long term commercial lease can be summarised as follows:

(a) It is a continuing transaction;

(b) there is a mutual wish to maximise gain from the one asset where both lessor and lessee stand to gain financially if the relationship is harmonious and co-operative;

(c) although each party will wish to protect its own interest in the premises from harm by the other it is not possible for all contingencies to be foreseen when the contract is formed and the lessee, in particular, is unable to fully protect its' own interests; and

(d) opportunities become available to the lessor when a situation arises not contemplated by the parties and not addressed in the contract documentation.[114]

The long term nature of the relationship between the lessor and the lessee, coupled with the inability to foresee all factors in advance,[115] and therefore the inability to properly allocate risk between the parties results in the ability of the lessor, as the stronger commercial party, to act opportunistically, with

113 William M Dixon, "Common Law Obligations of Good Faith in Australian Commercial Contracts – A Relational Recipe." (2005) 33 *ABLR* 87 94, 94.
114 William M Dixon "What is the Content of the Common Law Obligation of Good Faith in Commercial Leases?" (2007) 14 *Australian Property Law Journal* 113, 114.
115 Adam Thatcher "Reflections on Malsons' Case" (1992)8 *QUTLawJl* 161, 163.

the risk of such opportunism arising particularly at the expiry of a lease that contains no option to renew.[116]

Examples of how the power imbalance between the parties and the imprecise,[117] long term nature of a lease can be used by a lessor for its benefit include situations where: -

(a) A lessor has an uncontrolled discretion to grant or withhold consent to the lessee's conduct or to act unreasonably.

In such a case a lessor can withhold its consent and such conduct may not be unreasonable[118] as a lessor has a right to take into account the benefit to the lessor in refusing consent[119] even where the intention of the lessor in refusing consent is not just to protect its existing position, but to secure additional advantages to itself such as forcing the lessee to agree to lease terms more favourable to the lessor.[120]

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116 Eileen Webb and Luke Villiers "Using Relational Contract Principles to Construe the Landlord / Tenant Relationship: Some Preliminary Observations" (2011) 1 *Property Law Review* 21, 37.

117 Gleeson J, "Individualised Justice - The Holy Grail" 1995 69 *ALJ* 421, 428

117 R Mulheron "Good Faith in Commercial Leases: New Opportunities for the Tenant" (1996) *Australian Property Law Journal* 223,233.

> "..for a number of reasons, some to do with the work of legislatures, some to do with judicial law making, and some to do with the temper and spirit of the times, we can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract."

118 R Mulheron "Good Faith in Commercial Leases: New Opportunities for the Tenant" (1996) *Australian Property Law Journal* 223,233.

119 *Tredegar v Harwood* [1929] AC 72. In this case the lessor refused consent to the lessee insuring with one particular insurance company as it was more convenient to the lessor for the lessee to take out insurance with the same insurance company who insured the lessor's other properties. See also *Bandar Property Holdings Limited v JS Darwen (Successors) Limite*d [1968] 2 ALL ER 305 where the lessee was required to pay the premiums for the insurance over the leased premises as selected by the lessor. The Court found that the lessor had complete discretion as to where to place the insurance irrespective of the high premium cost.

120 *Australian Mutual Provident Society v 400 St Kilda Road Pty Limited* [1990] VR 646.

Where the refusal of the lessors consent would leave the lessee entirely at the mercy of the lessor,[121] and cripple the lessees' ability to use the premises for its business,[122] then an implication of a term that the lessor would act reasonably may be necessary to give business efficacy to the lease.[123] Alternatively, where the lessor grants a lease for a certain business use and the conduct of the lessor means that the lessee cannot operate such a business from the premises, the lessor may be found to be acting in derogation of grant. [124] This principle has been incorporated into retail leasing legislation such that a lessor who causes significant disruption to the lessees trading may be liable to pay compensation to the lessee.[125]

Where a lessor is not required to proceed reasonably, it is impossible for a lessee to predict future outcomes. Even where the lessor is expressly or impliedly obliged to act reasonably, for example, in granting or refusing consent, it is still impossible for a lessee (and, for that matter, the lessor) to predict future outcomes because neither party can know the circumstances the parties may find themselves in the future nor predict the actions of third parties and how such actions will affect them over the course of the lease.

For example, in *Opera House Investments Pty Ltd v Devon Buildings Pty Ltd*[126] the lease provided that the lessee would pay rent plus interest on a loan taken out by the lessor to construct buildings on the leased premises at

121 *Tribalant Pty Limited v Kirshu Pty Limited* [2008] V ConvR 54-742, [25].
122 Ibid, [26].
123 Ibid.
124 *Harmer v Jimbil (Nigeria) Tin Areas* [1921] 1 Ch 200; *Orsay Holdings Pty Ltd v Chas Straker Pty Ltd as trustee for Dianne Crea Family Trust and Anor* [2012] QCATA 264; *Christodoulou & Nobilio v ISPT Pty Ltd* A.C.N. 064 041 283 [2013] QCAT 206.
125 See, for example, s43(i)(c) *Retail Shop Leases Act 1994* (Qld).
126 [1936] 55 CLR 110.

4% for five years and thereafter at whatever rate the lessor could negotiate. After 5 years the lessor, who had other debts, was offered a mortgage for the original loan at 4.25% interest rate but was also offered another mortgage at 4.5% interest rate which would include all of its debts in the one mortgage. The lessees position was that it should only be responsible for interest rate at 4.25 percent however the court held that the lessor could take into account its own interests such as the commercial convenience of having only one mortgage and that if the lessor took out a second mortgage to cover its other debts that the rate of any second mortgage on the property would be higher than 4.5 percent.[127]

At the commencement of the lease neither party could have known what the borrowing position of the lessor would be like in 5 years or what loan products would be available to the lessor. For the lessee to agree to pay interest after five years at whatever rate the lessor could negotiate gives the lessee no control over the lessors' actions. Presumably, the lessee assumed that the lessees and the lessors' interests were aligned in that the lessor would seek the lowest interest rate possible so as not to financially injure the lessee. Considered in isolation such an assumption would be reasonable however, in reality, the lessor, as a business entity, is likely to be involved in a kaleidoscope of financial dealings and it may be in the lessors' interest to allow one business interest to suffer for another business interest to prosper. In this case, the lessor chose the advantage of a consolidated loan over its relationship with the lessee. The business relationship between the parties

127 Ibid, 116.

does not require the lessor to favour the interests of the lessee over the lessors' own interests. There was no obligation on the part of the lessor to inform the lessee of its intentions prior to entering into the new loan even though the lessor would have been aware that the lessors conduct was likely to cause financial expense to the lessee over and above the level of expense the lessee would have anticipated. In such a circumstance, should the lessor be required to notify the lessee prior to acting (as part of the "expectation of loyalty") and should the lessee then have the ability, for example, to require a rent review as a result of the greater financial burden that has now been placed upon it?

In reviewing retail lease legislation from a national perspective , it is relevant to consider the effect that any lease as a the long term contract will have on the lease and the parties as well as the future expectations that each party will have of the other and of the transaction and whether particular regulation may be required to ensure that such expectations are met.

(b) Where the lessor is able to use a lease provision to secure a result that neither the lessee nor lessor originally intended or envisaged at the commencement of the lease.

For example, in *Cuge Pty Limited v Gibo Pty Limited*[128] the lessor required the lessee to undertake repairs to the premises. The lessee had refused on the basis that the damages pre-dated the lease. The lease, however,

128 (2001) 10 BPR 18,641.

contained a provision that the lessee had to comply with any notices from the local authority.

The lessor, therefore, approached the local authority to have them issue an order for repair work with which the lessee would be obliged to comply. The lessee submitted that the conduct of the lessor in approaching the local authority was a breach of the implied obligation of good faith however the Court accepted that although the lessor had an ulterior motive in contacting the Council, that the predominant motive was the legitimate purpose of ensuring that the building complied with the Council requirements. The relational nature of the retail lease did not prevent the lessor from exploiting the terms of the lease.

Although an implication of a term of good faith may assist a lessee such a term may not necessarily be implied and even if implied it may be difficult to show that the lessor lacked good faith.

In addition, such terms are only implied into a contract when they are necessary to give business efficacy to the contract[129] and it is unlikely that a term of good faith would be implied into a commercial lease as commercial leases are normally unique documents rather than standard form contracts and effectively cover most important aspects all aspects of the relationship between a lessor and a lessee.[130]

Whether a term of good faith is implied at law or in fact, a lessor would not be in breach of such a term where the lessor did not act capriciously,

129 E Peden, "Incorporating Terms of Good Faith in Contract Law in Australia" (2001) 23 *Sydney Law Review* 222, 228.

130 WD Duncan "The Implications of a Term of Good Faith in Commercial Leases" (2002) 9 *Australian Property Law Journal* 1, 15.

irrationally or in circumstances where there was no objective explanation for its conduct [131] A lessor is still entitled to prefer its own self-interest over that of a lessee[132] even in circumstances where the lessor has damaged the lessee[133] or where the lessor is guilty of an ulterior motive[134] or improper commercial conduct[135]. Although the Courts will commonly examine the motives of a lessor regarding its conduct[136] if there is a rational and objective basis for the lessor's behaviour, the fact that the lessor may have another motive for its conduct will not necessarily result in a breach of the implied obligation of good faith.[137] The long term nature of the lease can result in unforeseen events occurring affecting the relationship not catered for by the terms of the lease. Any revision of legislation must consider this relational contract aspect of a retail lease.

C. <u>There are expectations of loyalty and inter dependence which become the basis for the economic planning of the parties</u>.[138]

Although it is likely at the start of the lease that the lessee and the lessor are committed to each other, such loyalty will, during the lease term, start to

131 Ibid, [83].
132 S Ongley "Joint Ventures and Fiduciary Obligations"(1992) 22 *Victoria University Law Review* 265, 267; Eileen Webb "Break Clauses, Self Interest, and Notions of Good Faith – Blackler v Felpure" (2000) 8 *Australian Property Law Journal* 175; *Advanced Fitness Corporation Pty Limited v Bondi Diggers' Memorial & Sporting Club Limited* [1999] NSWSC264, [122] (Austin J).
133 Bill Dixon "What is the Content of the Common Law Obligation of Good Faith in Commercial Leases?" (2007) 14 *Australian Property Law Journal* 113, 118.
134 *McIntosh v Dylcote Pty Ltd* (1999) BPR 16805, [26].
135 Bill Dixon "The Implications of a Term of Good Faith in Commercial Leases – A Brief Response" (2003) 10 *Australian Property Law Journal* 1, 8. See also *Advanced Fitness Corporation Pty Limited v Bondi Diggers' Memorial & Sporting Club Limited* [1999] NSWSC 264, [128] (Austin J).
136 WD Duncan "The Implications of a Term of Good Faith in Commercial Leases" (2002) 9 *Australian Property Law Journal* 1, 8.
137 William M Dixon "What is the Content of the Common Law Obligation of Good Faith in Commercial Leases?" (2007) 14(2) *Australian Property Law Journal* 113, 123.
138 *Bobux Marketing Limited –v- Raynor Marketing Limited* [2002] 1 NZ L R 506, 516 (Thomas J). See also *Gough and Gilmore Holdings Pty Ltd –v- Caterpillar of Australia Limited* (No 11) [2002] NSWIRComm 354.

wane as other opportunities become available to both parties. Where either party acts in a disloyal fashion the other party is likely to be unprepared and will suffer economically as a result of such conduct. For example:

(a) Where a lease allows the lessor to form an opinion that will affect the lessee.

In the common case where a lease contains a provision that the lease may be terminated where the premises are damaged to such an extent that, in the lessor's opinion, trading from the premises is not possible and repair of the premises is not financially viable then the lessor may have a right to terminate the lease. In the absence of any lease provision requiring the lessor to obtain expert opinion before making a decision, in such a case, the opinion of the lessor does not have to be reasonably formed but simply honestly held.[139]

The use of a subjective test (the lessor's honest opinion) as opposed to an objective test (reasonable opinion) seems to make it difficult, if not impossible, for a lessee to challenge the opinion of the lessor.[140] In circumstances where the lessee is at the mercy of the lessor's opinion, the lessee is unable to plan for the future in the long term. A lessee may be confident of the current lessors' opinions but the property may be sold at any time and a new lessor take over whose thoughts and motivations are unknown to the lessee.

139 *VL Credit Pty Ltd v Switzerland Genuine Insurance Co Limited (No. 2)* [1999] 2 VR 311.
140 Ibid, 315. Cf *McIntosh v Dylcote Pty Ltd* (1999) BPR 16805, [16].

(b) Where an express term of the lease allows the lessor to unilaterally act to the detriment of the lessee.

In *Blackler v Felpure Pty Limited*[141] the lease contained a provision permitting the lessor to terminate where the lessor wished to renovate the premises. The lessor intended to terminate the lease so that they could renovate the building and then replace the lessee's premises with offices from which they, the lessor, could conduct their business.

The lessee alleged lack of good faith on the part of the lessor because the true reason for the termination was to put the lessor in possession of the lessee's premises and not to renovate the premises. The Court accepted that there was a genuine proposal[142] by the lessor to renovate the premises and that the notice to terminate was therefore valid.[143] The demolition clause was a "contractual opportunity"[144] which allowed the lessor to terminate the lease.[145]

A lessor, therefore, is entitled to exercise an express contractual right to their own advantage to the detriment of the lessee and such exercise of a contractual right does not necessarily amount to unconscionability[146] or show

141 (2000) 9 BPR 17.

142 Section 35 of the *Retail Leases Act 1994* (NSW) provides that a lessor can only terminate a lease if there is a genuine proposal to demolish a building which includes substantial repair, renovations or reconstruction.

143 *Blackler v Felpure* (2000) 9 BPR 17, [61].

144 Ibid.

145 See also *Skiwing Pty Ltd v Trust Company of Australia Pty Ltd* [2006]NSWCA 276. Cf *Eddie Azzi Australia Pty Ltd v Citadin*[2001]NSWADT 79.

146 N Crosby, S Murdoch and E Webb, "Landlords and Tenants Behaving Badly? The Application of Unconscionable and Unfair Conduct to Commercial Leases in Australia and the United Kingdom" (2007) 33 *University of Western Australia Law Review* 207, 230.

lack of good faith[147] even though such conduct may be "disloyal" for the purposes of relational contract theory. The lessor may take advantage of contractual opportunities that may arise, not only from changing circumstances, but also from changing interpretation of the law by the courts. It is unlikely that the lessee would even be aware of any change in law until there is litigation between the parties. The more well-resourced and better advised lessor may not only be aware of the change in law but have altered its leasing patterns accordingly. The longer the term of the lease, therefore, the more likely it is that the legal and economic landscape existing at the time the lease was entered into has altered to the detriment of the unknowing lessee.

(c) Where the lease does not require the lessor to co-operate with the lessee.

For example, in *Alcatel Australia Limited v Scarcella*[148] the Court implied a term of good faith into a long term commercial lease and determined that the lessor had not acted unconscionably or breached that term.[149]

The lessor had sought a fire safety inspection from the local authority which resulted in a list of requisitions being issued. Pursuant to the terms of the lease, satisfying the requisitions were the responsibility of the lessee.

The lessee wished to appeal the decision of the Council as the lessee considered the requirements to be onerous, however, any appeal could only

147 WD Duncan "The Implications of a Term of Good Faith in Commercial Leases" (2002) 9 *Australian Property Law Journal* 11.
148 (1998) 44 NSWLR 349.
149 Ibid, 369 – 70.

be undertaken by the lessor as owner and the lessor refused to instigate such an appeal.

The Court rejected the argument that there was an implied term of good faith that the lessor would co-operate with the lessee to ensure that the lessee was not subject to onerous fire safety requisitions and, moreover, found that a property owner did not breach any implied term of good faith by ensuring that the requirements for fire safety had been put in place and it was the contractual duty of the lessee to meet the requirements of Council.[150]

Although parties to a contract are required to co-operate to achieve the results envisaged in the contract[151] such an implied term cannot override express provisions of the contract.[152] Additionally, the implied duty to co-operate does not necessarily extend to co-operation in all areas and may extend to fundamental terms only. Where terms are not fundamental, a party may decide for itself whether it will co-operate even if failure to co-operate will disentitle the other party to a benefit.[153]

If a lessor, therefore, complies with the terms of a lease, but refuses to co-operate with a lessee where external difficulties arise (such as local authority requisitions), the lessor is not in breach of the lease and the lessee is left without a remedy even where the motivation of the lessor is to have the

150 Ibid, 369 – 70.
151 *Mackay v Dick* (1881) 6 App Cas 251, 263; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, [61].
152 *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 368.
153 *Secured Income Real Estate (Australia) Ltd V St Martins Investments Pty Ltd* (1979) 26 ALR 567, 569.

lessee vacate the premises.[154] Standard terms of a lease that provide no warranty regarding fitness of the premises for the lessees' use allow the lessee to manipulate the circumstances and the terms of the lease for the lessor's benefit.

The above cases make it clear that in circumstances where the lessor's conduct can be explained as an attempt by the lessor to protect or advance its own interests, the courts will be reluctant to find lack of good faith and in order to show lack of good faith the lessee may be required to show there is no other reason for the lessor's conduct except to harm the lessee.[155]

Such a situation arose in *ACCC –v- Lee Lee Pty Ltd*[156] where consent to the grant of an under lease was withheld allegedly to inflict economic harm on the lessee due to the ill will between the parties. Although the matter settled before a final hearing the consent orders filed in the Court contained an acknowledgement by the lessor that it had breached Section 51AC (1) of the *Trade Practices Act 1974*.[157]

Lack of good faith is one aspect that the courts can take into account in determining the existence of unconscionability under the Australian

154 *Advanced Fitness Corporation Pty Limited v Bondi Diggers' Memorial & Sporting Club Limited* [1999] NSWSC 264. See also *Brilee Consultant Pty Limited v Tibal Holdings Pty Limited* (1984) 3 BPR 9272.

155 William M Dixon "What is the Content of the Common Law Obligation of Good Faith in Commercial Leases?" (2007) 14(2) *Australian Property Law Journal* 113, 118.

> …to obtain relief for breach of the implied obligation of good faith, It may well be necessary to demonstrate that the motive of the party whose conduct was impugned was solely or predominantly calculated to be inimical to the contractual relationship and therefore beyond the parameters of the parties reasonable expectations.

156 (2000) ATPR 41-472.

157 Repealed, now section 22 of the *Australian Consumer Law*.

Consumer Law.[158] However, if such lack of good faith can only be shown where the sole motive for the lessor's conduct is to harm the lessee, it is unlikely that lack of good faith could ever be proven as the lessor could conceal its real intent to harm the lessee by seemingly making legitimate demands upon the lessee under the lease. In considering simplified retail lease legislation, it is necessary to consider the shortfalls in the current law.

The relational nature of leases, therefore, provides opportunities for the lessor to secure advantages at the expense of the lessee and results in a power imbalance in the lessors' favour which the basic laws of contract cannot remedy. The principles of freedom of contract are of no comfort to the lessee where it is bound for a lengthy term into a relational lease contract which contains clauses which are necessarily vague because they are widely drafted in an attempt to deal with matters in the long term.[159]

2.4 The Bargaining Power of Lessee and Lessor

The relational nature of the lease contract and the nature of the parties themselves results in a power imbalance in favour of the lessor. Such imbalance in bargaining power requires that there be statutory protection for a retail lessee. This may be exacerbated by the relational nature of leases requiring the maintenance of contractual relationships over a relatively lengthy period.

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158 *Competition and Consumer Act 2010* (Cth), Schedule 2, s22(2)(l).

159 William M Dixon "What is the Content of the Common Law Obligation of Good Faith in Commercial Leases?" (2007)14(2) *Australian Property Law Journal* 113, 114.

> A feature of a relational contract, such as a long term lease, is that it is not possible for all possible contingencies to be foreseen when the contract is formed. Opportunism constitutes a response to a situation not contemplated by the parties ex ante and accordingly not addressed in the contract documentation.

Retail leases, like most contracts, are made between parties of unequal bargaining power.[160] Such imbalance of power provides opportunities for the more powerful party to act in an unfair or oppressive manner.

The more powerful party, however, is not required to surrender any advantages it may have for the sake of equality.[161] There is a distinction between a party using power in a relationship for its own benefit and the abuse of that power to the extent that a party could be said to be acting unconscionably.[162]

Besides the advantages provided to a lessor arising from the relational nature of a lease contract the bargaining power of a retail lessor is enhanced by other non-contractual reasons such as:

a) The Nature of the Parties

(i) The lessor is usually an experienced "professional" lessor who deals with retail lease issues on a daily basis whereas the lessee is not in the business of leasing premises and is only required to deal with these issues either at the start or renewal of the lease. An

160 Markets themselves are also made up of parties of unequal bargaining power. According to Galloway:

> … from a critical perspective, a market is really nothing more than the operation of inequality; contractual relations are nothing more than a manifestation of the power held by some over others. Acknowledgments of inequality of bargaining power within the law of contract therefore cannot go so far as to cancel every inequality of power or knowledge, for to do so will ultimately undermine a contract system.

Kate Galloway "Statutory Modification of Contract Law in Queensland: A New Equilibrium or Entrenching the Old Power Order?" [2008] *James Cook University Law Review,* 4.

161 *ACCC vs CG Berbatis Holdings Pty Limited* (2003) 214 CLR 51, [11] (Gleeson J).

> 'Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interest.'

162 *ACCC vs CG Berbatis Holdings Pty Limited* (2003) 214 CLR 51, [14] (Gleeson J).

> 'Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence.'

unsophisticated lessee cannot foresee the consequences of their own actions let alone the consequences of the lease terms.[163]

Putting aside the need for legal advice regarding a lease, an experienced lessee will take additional steps to protect its interests which would not occur to a novice lessee. Such steps may include, before the commencement of a lease, taking advice from a tenants' committee, examining the local area for similar shops, or having the equipment that forms part of the lease and the premises inspected or tested. For example, in *D & D Ventures Pty Limited vs Evans*[164], the lessee thought that they were entitled to terminate a lease for a restaurant because of a mistaken belief that the lessor should have advised the lessee of the leaking roof during the leasing negotiations. It was held that lessee's due diligence enquiries should have included a building inspection before signing the lease[165] and that there was no implied warranty that the premises would be fit for use as a restaurant.[166] It is likely that an experienced lessee would carry out an inspection of the premises and make other inquiries regarding the premises prior to entry into the lease.[167]

In the writer's experience, a novice lessee not only knows nothing about the lease but does not *want* to know anything about the lease. Such lessees resent being forced to obtain legal and financial advice prior to signing the lease because of their mistaken view that: -

163 Eileen Webb, "Unconscionable conduct in Australian Competition and Consumer Commission v Dukemaster Pty Ltd — A Recognition of 'Acoustic Segregation' in Retail Leasing Transactions?" (2010) 18 *Australian Property Law Journal,* 48.
164 [2004] NSWADT, 130.
165 Ibid, [77].
166 Ibid, [72] - [74].
167 *Fitzpatrick v Young* [2010] QCAT 327.

A. all leases are the same and therefore it is unnecessary to examine their contents;

B. in any event the lessor will not negotiate;[168]

C. the time involved in obtaining advice and cooling off periods simply delay the lessee from operating their business;[169]

D. it is too expensive to comply with the legislation[170]

E. the lessor, at all times, wants the lessee to succeed and will take no steps to disadvantage the lessee or its business; and

F. the lessor, as the more experienced party, knows better than the lessee and therefore the statements of the lessor or its agents should not be challenged.[171]

Such lack of experience and distorted views about leases, lessors and lease legislation may be cured by bitter experience or, perhaps, by education and training. Leasing regulation must not only protect the lessee from the lessor, but also from the lessee itself.

(ii) In addition to the lessor's greater experience, a retail lessor will have access to leasing professionals such as lawyers, valuers and managing agents, whereas it is unlikely that the lessee would be able to afford such assistance. Retail leasing law can be quite complex in both interpretation and application.

168 Arnold Report 1984, 10.
169 Ibid.
170 Small Business Development Corporation (Vic) *Report and Recommendation on a Fair Standard Lease*, Melbourne 1981, referred to in Arnold Report 1984, 2.
171 *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] ATPR 42-290., [218] (Gordon J).

In *Hasler Transport Co Pty Ltd v. Avelian Pty Ltd and Pied Properties Pty Ltd*[172] the lessee, after assigning its lease, sought compensation from the lessor for disruption of trade pursuant to section 43 of the *Retail Shop Leases Act 1994* (Qld), misrepresentation and unconscionable conduct of the lessor. Although the lease contained a provision that the lessor would not be liable for any disruption to the lessee's business, Section 19 of the *Retail Shop Leases Act 1994* (Qld) provided that a lease could not contain a clause excluding a provision of the Act. It was held unnecessary to consider section 19 as the lessee had signed a Consent to Assignment Deed that provided that the lessee released the lessor from all liability arising under the lease and as the Consent to Assignment Deed was not a lease, section 19 did not apply. The lessor could therefore rely upon the release clause in the Deed. A lessee with appropriate legal advice would not have executed the Deed in that form and would have reserved its' rights under the lease. Lack of proper legal advice affects the lessee not only in relation to the provisions of the lease but also in relation to legal procedure generally, specifically, in presenting a case before a tribunal.[173]

(iii) The lessor, in a shopping centre or a multi-lease complex, has knowledge about the other leases in the complex, including rent details. Such knowledge includes not only the current leases but also historical

172 [2009] QRSLT 7.

173 *Mharina Rossi Pty Ltd v Perpetual Nominees* Ltd [2011] QCAT 585. In that case the lessee failed to follow directions, filed material in the incorrect format, failed to call witnesses, failed to provide crucial evidence of damages and attempted to lodge material on a USB stick.

data.[174] It is very unlikely that the lessee will have access to any such information. The asymmetry of available information increases as a result of confidentiality clauses inserted into a lease[175] and because there is no obligation upon the lessor to make such information available.[176] Although in some jurisdictions registration of leases are common the value of such information is questionable where it is possible for the parties to enter into side agreements such as incentive agreements which are not registered.[177]

(iv) The lessor has different priorities to the lessee, in that the lessor requires that the shopping centre as a whole to be a success. The success of any one individual lessee's business is secondary to the success of the majority of lessees as the success of the majority is likely to lead to success for the lessor.

For this reason, the lease normally has: -

A. A re-location clause allowing the lessor to move a lessee where the lessor believes that altering the mix of lessees is in the best interests of the shopping centre as a whole or the majority of the lessees in the centre.

B. A development or demolition clause allowing the lessor to terminate the lease where the lessor wishes to make improvements to the centre or to make alterations to improve the profitability of the centre.

174 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 165.
175 Ibid, 164.
176 Ibid, 163.
177 Ibid.

C. Where the lessee is obliged to provide turnover information to the lessor the lease may also contain a performance clause whereby, if the lessee does not maintain a certain level of performance, then the lessor may terminate the lease.

(b) The location of the Premises

(i) The zoning of a shopping centre is such that it is unlikely that there would be a competing shopping centre close by with the result that the lessor has a monopoly in relation to the provision of shopping centre premises in that area. The restriction on the supply of retail space lessens competition between lessors and increases the lessor's bargaining power.[178]

The monopoly granted to the lessor by the zoning laws provides the lessor with a super-title, in that the lessor has all the benefits of a normal land-owner with the added benefit provided by that monopoly.

(ii) Where similar premises within the local area are not available the pressure upon the lessee to agree to the lessors' terms are magnified. A business's goodwill may be able to withstand being forced to vacate premises within a shopping centre but only if it is able to move into premises within the same locality. Otherwise, the lack of convenience will cause the businesses regular customers to fall away.[179]

(c) The Timing of Negotiations.

178 Ibid, 235.

179 Australian Retailers Association, Submission No 71 to Productivity Commission, *Economic Structure and the Performance of the Australian Retail Industry*, December 2011, 71.

The lessor's position is greatly enhanced where the lessee finds himself or herself at a negotiating disadvantage, for example, at the expiry of the lease term where the lessee has no option to extend.[180] In *Humphries & Cooke Limited v Essendon Airport Limited*,[181] a lessee who had expended considerable sums on the leased premises, found itself at the end of its lease term. The lessor agreed to grant a new lease provided the rental increased by 340%. The lessor's conduct was not unconscionable because the lessee did not have any contractual entitlement to a grant of a new lease. In circumstances where the lessor is not required to grant a new lease then the granting of a new lease could be on such terms as a lessor may determine as a lessor cannot be forced to enter into a new lease.[182]

Similarly, in *ACCC vs CG Berbatis Holdings Pty Limited*[183] the court found that a lessor was not behaving unconscionably where the lessor, in return for granting an extension of a retail lease term, demanded additional advantages from the lessee. In that case the lessee wished to obtain an extension of their lease to allow them to sell the business. At that time the lessee was involved in ongoing court proceedings which had been brought by multiple lessees against the lessor regarding the overcharging of levies by the lessor. The lessors were prepared to grant the extension but only on the basis that the lessee released the lessors from all claims and consent to the dismissal of any current legal proceedings against them. The lessee reluctantly agreed.

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180 See *ACCC vs CG Berbatis Holdings Pty Limited* (2003) 214 CLR 51, [11] (Gleeson J).
181 [2001] VCAT 2439.
182 *Australian Property Buyers vs Kowalski* [2006] VCAT 24, [27].
183 (2003) 214 CLR 51.

The ACCC subsequently brought proceedings on behalf of the lessee alleging unconscionable conduct by the lessor pursuant to s51AA of the *Trade Practices Act 1974* but were unsuccessful.

According to Gummow and Hayne JJ: -

> …a person in a greatly inferior bargaining position nevertheless may not lack capacity to make a judgement about that person's own best interest. The respondents submit that the facts in the present case show that [the lessees] were under no disabling condition which affected their ability to make a judgment as per their own best interests in agreeing to the stipulation imposed by the owners for the renewal of the lease, so as to facilitate the sale by [the lessees] of their business. Those submissions should be accepted.[184]

In this case the Court found that the lessor had no obligation to grant a new lease to the lessee and therefore could demand such terms that the lessor deemed fit. The issue of the lease renewal and the litigation were related as they both arose from the same lease and the lessor was therefore entitled to take all of these matters into account in its negotiations. Even if the issues were not related the lessor could still have included them in their negotiations as the abandoning of claims is simply ordinary commercial dealing.[185]

In such a case, a lessor can drive a hard bargain because a lessee has no contractual right to insist upon an additional lease term, the lessee has invested considerably into the leased premises both in terms of time and money and the only way for the lessee to recover its investment is to sell the business in circumstances where such sale would be unlikely where there is

184 *ACCC vs CG Berbatis Holdings Pty Limited* (2003) 214 CLR 51, [56].
185 Ibid, [16].

no term left on the lease. Although the lessee may be vulnerable, such vulnerability is only in the commercial sense[186] and any disadvantage suffered by the lessee is not at a special disadvantage sufficient to allow a lessee to claim that the lessor's conduct was unconscionable. A lease provision may be unfair but still not be unconscionable.[187]

That situation would be different, however, where the lessor had an obligation to enter into a new lease. For example, in *Goldberg Enterprises Pty Limited vs Online IT Services Pty Limited*[188], a lessee was required to provide vacant possession within one (1) month. Prior to termination, the lessor represented to the lessee that if the lessee complied with certain conditions regarding fixtures installed by the lessee then the lessor would grant the lessee a lease.

The lessee complied with those conditions however the lessor still re-entered the premises, changed the locks and forced the lessee to relocate. The lessors conduct was unconscionable (even though the lessor was entitled to terminate the monthly lease) because of the representation it had made to the lessee that it would grant a new lease where the lessor had obviously no intention to do that.[189]

186 *Tang v Williams Company Ltd* [2010] VCAT 411, [34].
187 *Pacific Lifestyle Financial Services v El Safty Enterprises Pty Ltd* [2000] QRSLT 6, [49].
188 [2011] NSWADTAP 21.
189 Ibid, [36]-[37].

Many of the abovementioned factors arose in *ACCC v Dukemaster*,[190] where the court found that the lessor engaged in unconscionable conduct involving the negotiations and renewals of multiple retail leases.

Over a period of some years the lessor, in negotiating new leases, had: -

(i) suggested a new rental figure and given the lessee a limited time in which to respond such that the lessee would have difficulty in obtaining legal advice.

(ii) made representations to the lessee in English when in fact (as the lessor knew) the lessee spoke little English.

(iii) had sought a renewed rental at an exorbitant figure which for which there was no basis beyond the lessor's decision to seek the amount stated;

(iv) had refused to address the lessee's complaint about the excessive rental,

(v) eventually delivered to the lessee a lease that contained terms different to the terms of the original lease;

(vi) placed pressure upon the lessees by threatening eviction and refusing to address the lessees concerns regarding the rent increase.

(vii) suggested that the new rental had already been determined by experts, the rental offered by the lessor was discounted from that determination and if the lessee did not agree to the new rental figure the lessor would withdraw its offer of the discount.

190 [2009] ATPR 42-290.

The evidence given by one of the lessees at trial was that she thought she had little choice except to agree to the lessee's terms. The lessor's conduct, was unconscionable because, of amongst other things, the lack of bargaining power[191] of the lessee. The lessee: -

(i) at the time of the renewal had been operating her food shop for a short period;

(ii) had limited ability to speak or read English which made it difficult for her to understand the process or the documents provided by the lessor;

(iii) had no knowledge of her legal rights and did not understand that she could seek a rental determination;

(iv) was operating a small business with limited scope of growth in revenue; and

(v) needed to renew the lease to recoup the investment she had made.

Although the lessor in return suggested, for different reasons, that there was parity of bargaining power between the parties, the court disagreed but did accept that the balance of bargaining power could be effected by: -

(i) In circumstances where the lessee had little English, the availability of an interpreter;

(ii) The availability of legal advice;

(iii) The assistance of other lessees or lessee committees;

191 According to s51AC(3)(a) of the *Trade Practices Act 1974* (Cth) (now s22 of the *Australian Consumer Law*) the court may, in determining whether a party acted unconscionably take into account the relative strengths of the bargaining positions of the supplier and the business consumer.

(iv) The business experience of the lessee;

(v) Simple and straightforward lease documents;

(vi) Flexibility of market i.e. the availability of other locations and the transferability of the lessees' goodwill;

(vii) The lessor advising the lessee of its rights.[192]

To protect itself against claims of unconscionable conduct a lessor must, therefore, not merely conduct itself in the classic mode of self-interested hard bargaining[193] but must also consider the nature of the lessee. Where, to the lessors' knowledge, the lessee suffers from a disadvantage then the lessor should take steps to minimise such a disadvantage, provided that such steps do not result in a reduction of the lessors own bargaining power. For example, where a lessee does not speak English then the lessor should insist upon the lessee obtaining the services of an interpreter. The nature and characteristics of the parties to the lease and their surrounding circumstances, therefore, can affect the balance of power between them.

A lessee at the start of a lease who has the option to enter into the lease or not is in a more powerful position then that same lessee, years later, who has invested considerably into fit-out and marketing of its business who has no option to renew. Similarly, a lessee who is experienced and well informed and has the benefit of both legal and financial advice is more empowered than a novice lessee who has only a tenuous grasp of the terms of the lease

192 *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] [2009] ATPR 42-290, [137] (Gordon J).

193 As was the case in *ACCC vs CG Berbatis Holdings Pty Limited* (2003) 214 CLR 51.

because of some disadvantage such as inability to speak English or lack of education.

Simplification of retail leasing law must consider the nature and characteristics of the parties and their ability to redress the power imbalance between the parties.

3. Conclusions

The purpose of this Chapter has been to provide an introduction to this research and to leases generally including the relationship between lessors and lessees and the leasing market. The following conclusions can be drawn from the material discussed in this chapter: -

3.1 Leases Generally

1. Significant investment by lessees into their business can be frustrated by the conduct of the lessor, in particular, the refusal of a lessor to grant an extension of a lease.

2. Traditional principles of freedom of contract will not apply as the bargaining power of a shopping centre lessor is so great that the market place is distorted. The lessors bargaining power arises primarily because of the monopoly granted to the lessor by town planning laws which will restrict the construction of another shopping centre nearby thereby restricting competition.

3. Legislation must balance freedom of contract principles and traditional land rights of lessors against consumer protection perspectives requiring the protection of the lessee.

4. Retail leasing legislation has existed in Australia for so long that it is unlikely that it will be repealed in the future. In addition, voluntary codes have not been successful in Australia nor in the United Kingdom.

3.2 Retail Leasing Market

1. The retail leasing market provides a significant contribution to the Australian Gross Domestic Product. In 2008 there were 209,000 retail tenancy leases of which 60,000 were in shopping centres. The retail leasing market also provides significant contributions to employment in Australia.

2. Imbalance of bargaining power in the retail leasing market reduces market efficiency. Such imbalance causes the intervention of the Government and the passing of legislation which, over the years, becomes larger and more complex.

3. Over regulation of the market will cause distortions in the market by limiting the parties conduct or by limiting their commercial options, thereby restricting flexibility and stunting negotiation skills and

reducing incentives to invest. Compliance costs will therefore increase to the detriment of the lessee and consumer. Certainty and consistency are also reduced.

4. Too little or too much information or complexity of information may confuse the lessee. Lack of clarity of legislation may result in parties adopting an incorrect legal position or making costly errors.

5. Despite extensive regulation, relations between lessors and lessees have not improved.

6. Resolution of retail lease disputes must be timely and cost effective and provide a certain and reliable result.

3.3 Nature of Leases

1. Leases are relational contracts governing the parties conduct over a number of years where not all eventualities can be predicted and the risks of any such future events are primarily borne by the lessee because of the terms of the lease as drafted by the lessor.

2. Leases require the parties to co-operate where both the lessor and lessee stand to benefit. This results in expectations of loyalty and interdependence which influence the economic planning of both

parties, however, the lessor as a strong commercial party can act opportunistically at the expense of the lessee.

3. The lessor can choose not to co-operate with the lessee and even financially harm the lessee's business and such conduct will not necessarily be in breach of good faith or unconscionable.

3.4 Bargaining Power of Lessees and Lessors

1. The lessor is often more experienced and professional than the lessee because the lessor is in the business of providing lease space whereas the lessee is running its own business and sees the lease and lease negotiations as a hurdle to be dealt with as quickly as possible. This results in the lessee often not taking steps to fully comprehend the terms of the lease and the obligations contained therein and/or accepting the first offer made by the lessor.

2. The lessee has a distorted view about the lease itself, its relationship to the lessor and retail leasing legislation. Problems for the lessee can arise often as a result of such views. The lessee must be protected not only from the superior bargaining power of the lessor, but also from the lessee's own folly.

3. The lessor is better resourced and has access to leasing professionals such as lawyers and valuers whereas it is unlikely that

the lessee could afford such resources. Lack of professional advice increases the chances of a lessee not understanding the terms of the lease or the terms of legislation to its detriment.

4. The lessor has greater access to information of current leases and previous leases. The asymmetry of information in favour of the lessor is enhanced by confidentiality clauses and disclosure of turnover clauses contained in leases.

5. Although a lessor benefits if a lessee is successful the success of an individual lessee is not the lessor's primary concern. Rather the lessor simply wishes to make the lessor's shopping centre as profitable if possible even if that means that a particular lessee has to be relocated or have their lease terminated.

Chapter Two will discuss why legislation has been imposed in all Australian jurisdictions and voluntary codes have been promulgated in the United Kingdom. It will also discuss and justify the various areas of concern to be considered by the study.

CHAPTER 2

AREAS OF FOCUS AND DRIVERS FOR REFORM

1. Introduction

As outlined in Chapter One, the purpose of this thesis is to determine whether State and Territory based retail shop lease legislation should be made as uniform as possible nationally by analysing the benefits a reduction in regulation in relation to specific significant areas of conflict. These selected areas of conflict are present nationally in the sector.

This Chapter will be divided into two parts. The first part of this Chapter will examine the particular areas of conflict between lessors and lessees which have been common and enduring, which have proved problematic since retail lease legislation was first introduced and which continue to be problematic despite the retail leases legislation.

The second part of this Chapter will analyse the various drivers for reform of the legislation in relation to such areas of focus.

2. Areas of Focus

Large multi tenanted shopping centres first commenced trading in Australia in the late 1950's with the first major planned shopping centre opening in Queensland in 1957 at Chermside ("the Chermside Drive-In Shopping Centre"). In the same year the Top Ryde Shopping Centre was the first

shopping centre to open in Sydney. In 1960 the Chadstone shopping centre opened 10 miles from Melbourne. Shopping Centres at Warringah Mall, Miranda Fair, Roselands, Burwood Shoppingtown and Bankstown Square opened in Sydney between 1963 and 1966. In Queensland the Toombul Shopping Centre was built in 1967 followed by Indooroopilly and Mt Gravatt in 1970.[194]

The rapid proliferation of shopping centres occurred from 1975 such that, in 1983, there was sixty (60) large integrated shopping complexes in Australia, most of which had been built since 1975.[195]

The concept behind a shopping centre is simple: Put a large variety of retailers (both large and small) together in the one air-conditioned space with convenient parking and the customers will patronise those retailers in large numbers because of the convenience and comfort.[196] Shopping Centres now often contain cinemas and other entertainment precincts which attract patrons beyond the retail experience.

The owner of the shopping centre enjoys enhanced bargaining power because: -

(a) The capital cost of constructing a shopping centre is so large that the number of competitors will be few;

194 *Report of the Committee of Enquiry into Shopping Complex Leasing Practices*, Queensland (19 November 1981) 9. ("Cooper Report 1981").
195 Professor H Tarlo, "The Great Shop Lease Controversy" (1983) *University of Queensland Law Journal* 13 (1), 7.
196 Ibid. See also Cooper Report 1981, 10.

(b) Zoning regulations place an artificial restriction on the number of retail places. The zoning regulations of most local authorities would not allow the construction of another shopping centre close by because of environmental and traffic issues; and [197]

(c) The shopping centres themselves focus the retailing activity within an area to the extent that the retailers within that area feel that they must have a shop within the shopping centre for their business to succeed.[198]

(d) There is a strong bias towards the utilisation of shopping centres by customers[199] as compared with stand-alone shops.

A popular shopping centre has many small existing and prospective lessees competing for space, particularly those that rely upon the drawing power of the centre and major chain stores, called anchor tenants, rather than their own drawing power. The drawing power of the centre is increased by the presence of major lessees and the success of the other businesses within the centre.[200]

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197 Productivity Commission, "*A Market For Retail Tenancy Leases in Australia*" Report No.43 (31st March 2008), xx.

> The retail market operates within the confines of zoning and planning controls. While such controls can have merit in preserving public amenity and contributing to the cost effective use of public infrastructure, their application can limit competition and erode the efficient operation of the market for retail tenancies. They restrict the number and use of sites, can confer some negotiating power on incumbent landlords and retail tenants, and restrict commercial opportunities of others.

198 Preece A, "Property: The Retail Shop leases Act 1984" 1984 April, *Queensland Law Society Journal*, April, 25.

> In the case of large shopping centres there is the consequential factor that they often represent such a large proportion of the retail business in a particular locality that competition amongst prospective tenants for leases is artificially increased. To put it briefly, so much of the consumers dollar is spent in shopping centres that too many retailers will do virtually anything to obtain a lease for premises there.

199 Victoria, *Parliamentary Debates*, House of Assembly, 12 November 1986, 1931 (Hayward).

200 Productivity Commission, "*A Market For Retail Tenancy Leases in Australia*" Report No.43 (31st March 2008), xxi.

In short, the shopping centre once built, effectively in terms of a market, gives the owner a monopoly[201] regarding the provision of shopping centre services in that area. This monopoly is preserved by the planning and zoning regulations of local authorities[202] and is further enhanced by the attitude of tenants that they must trade within the shopping centre in order to operate an effective business. Retailers are aware of the monopoly but also believe that they will receive better returns in the shopping centre than outside the centre which ensures that demand for shopping centre space is constant. A shopping centre is, in fact, a mechanism whereby the lessor, for a price (rent plus the reimbursement of a proportion of outgoings) may share the privileged position it enjoys with others (lessees). If, through some relaxation of town planning regulation, the construction of another shopping centre nearby is proposed the lessor and the lessees would collectively object to the proposal to ensure that no such new shopping centre was built.[203]

Proliferation of shopping centres from 1975 onwards led to the concentration of power in the hands of a limited number of large shopping centre

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201 House of Representatives, Standing Committee on Industry, Science and Resources, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia*, (May 1997), 20. According to Preece:

> 'It is suggested that the reason that the landlord is able to impose a hard bargain on the initial grant of the lease is that he enjoys to a greater or lesser degree a monopoly position as a result of the existence of zoning controls which artificially restrict the supply of suitable business premises.'

A Preece, "Property: The Retail Shop Leases Act 1984" (1984) April, *Queensland Law Society Journal*, 25.

202 A Preece, "Legislative Regulation of Lease of Business Premises" (1985) 1 *Queensland Institute of Technology Law Journal*, 140.

203 Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 March 1985, 501 (Court).

owners.[204] Abuse of power by the shopping centre owners or their managers in the early 1980s led to many small businesses failing which, in turn, led to complaints to governments throughout Australia. This, in turn, led to the establishment of inquiries[205] which resulted in a number of government reports.[206] Some Australian State governments[207] reacted in the early 1980s however several others[208] did not react until much later. Inquiries were called and reports issued in Queensland,[209] Victoria,[210] South Australia,[211] Western Australia[212] and the Australian Capital Territory (ACT).[213] Subsequent inquiries occurred in all other States and Territories. Original retail lease legislation has been repealed and replaced by new legislation to deal with ongoing problems, changes in retail marketing practices, shortfalls in the drafting or to reflect the policy of a new government. Inquiries and reports have also occurred in the Federal sphere over the past 25 years.[214]

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204 Murdoch, Rowland and Crosby, "Looking after Small Business Tenants with Voluntary Codes or Statutory Intervention: A Comparison of Australian and UK Experiences" (Paper presented at the 7th Pacific Rim Real Estate Society Conference, Adelaide Australia, 21 – 24 January 20011) 25.

205 The Committee of Enquiry into Shopping Complex Leasing Practices ("Cooper Inquiry") was formed in Queensland in 1981. In 1983 the Victorian Retail Tenancies Advisory Committee ("Arnold Inquiry")was formed. The Western Australian Inquiry into Commercial Tenancy Agreements ("Clarke Inquiry") and the ACT Working Party on Business leases ("ACT Working Party") were formed in 1984. The South Australian Working Party on Shopping Centre Leases ("Hill Inquiry") was formed originally in 1981 and then again in 1983.

206 See below nn 204 – 208.

207 Queensland, Victoria, South Australia, Western Australia, Australian Capital Territory.

208 New South Wales, Tasmania, Northern Territory.

209 Cooper Report 1981.

210 *Report of the Retail Tenancies Advisory Committee*, Victoria, (February 1984) ("Arnold Report 1984").

211 *Report of the Inquiry into Shopping Centre Leases*, South Australia, (1983) ("Hill Report 1983").

212 *Report of the Inquiry into Commercial Tenancy Agreements*, Western Australia, (February 1984) ("Clarke Report 1984").

213 *Report of the ACT Working Party on Busin*ess *Leases Review Legislation*, ACT (1984) ("ACT Report 1984").

214 House Standing Committee on Industry, Science and Technology, *Small Business in Australia: Challenges, Problems and Opportunities*, January 1990 ("Beddall Report 1990"); House of Representatives Standing Committee on Industry, Science and Resources, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia, May,* 1997 ("Reid Report 1997"); Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure: A Review of Australia's Retailing Sector*, August 1999; Productivity Commission, *The Market for Retail*

Retail leasing legislation often contains provision for a five (5) or seven (7) year review giving rise to regular inquiries.[215]

Although the complaints to governments by lessees were numerous and addressed a variety of small retailer concerns, it is the intention of this thesis to consider only five major areas of complaint. Selection of such areas will be on the basis that: -

(a) The area of complaint existed prior to the enactment of retail lease legislation and, in this regard, it is intended to examine the reports of the early inquiries held in the 1980s; and

(b) Such complaint did not disappear after the enactment of legislation but has continued to the present. The evidence of the continued existence of the areas of complaint appears in the various reports of inquiries held to date.

2.1 The Subject of Early Inquiries

States and Territories that enacted retail leasing legislation in Australia can be divided into two groups. The first group consists of the States that introduced such legislation in the early 1980's and includes Queensland, Victoria, Western Australia and South Australia with Queensland being the first State off the mark in 1984.

Tenancy Leases in Australia, Report No. 43 (August 2008); Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (December 2011) ; Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade* (September 2014); Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18 March 2015.

215 For example, *Retail Shop Leases Act 1994* (Qld) s122; *Retail Leases Act 1994* (NSW), s86*; Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s31.

The second group consists of those States and Territories that introduced such legislation later, such as the Australian Capital Territory,[216] New South Wales, Tasmania and the Northern Territory.

Analysis of the agitation for change in first group of States is more productive when identifying drivers for reform as the second group of States had the benefit of the experiences of the first group. New South Wales introduced legislation in 1994 only when a voluntary code was found unworkable. Analysis of the Queensland legislation is most important because, as the first of such legislation in this country, it provided a blue print for other legislation that was to follow.[217]

Each of the areas of security of tenure, assignment provisions, dispute resolution, rent and rent review and disclosure form part of the reports issued prior to the enactment of legislation in each State and Territory. It is intended to determine the causes for initial reform in the 1980's and analyse such causes.

2.1.1 Lack of Security of Tenure

The reason behind retail lease legislation in Queensland came from numerous complaints made to Government Ministers and to the Queensland Small Business Development Corporation by lessees in shopping centres. As a result of these complaints the Queensland Government commissioned

216 Although the Australian Capital Territory did not introduce legislation until 1994 that legislation came about after 20 years of debates, two sets of draft Business Lease Ordinances and a report of the Working Party on Business Leases Review of legislation prepared in November 1984.

217 W D Duncan, 'The Regulation of Commercial Tenancies – Heading for the Sunset' (1990) 2 *Bond L R* 28.

two reports from the Small Business Development Corporation (Qld) which were completed in June and August 1981.

The Small Business Development Corporation (Qld) report of 22nd June 1981[218] was based on representations made to the Corporation by over 200 lessees. The Small Business Development Corporation was limited, in its reports, to leases contained in shopping centres only and did not apply to leases contained in strip shopping centres or individual leases. The complaints of Lessees were not universal.[219]

In this Report the Small Business Development Corporation (Qld) isolated the specific problems faced by lessees of shopping centres which included lack of options for renewals of leases[220] and recommended that each lease should have a minimum initial term with two option periods.[221]
The Queensland Government, however, did not act upon such recommendations but instead in September 1981 appointed a committee of inquiry chaired by Russell Cooper ("Cooper Inquiry") into shopping complex leasing practices.[222]

The Cooper Inquiry although generally agreeing with the report of the Small Business Development Corporation stated: -

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218 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2.
219 Cooper Report 1981, 22.
220 A situation that still prevails to this day in Queensland.
221 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2.
222 Committee of Inquiry into Shopping Complex Leasing Practices ("Cooper Inquiry"). The terms of reference of which were to examine the reports of the Small Business Development Corporation, undertake such further enquiries and investigations and then report to the Minister.

> The Committee appreciates the concern of small traders for the security of their tenure and considers that, in general, a five (5) year term would be reasonable. However, it feels that as the terms are understood by the tenant before he commits himself, it becomes a matter for market judgment whether he signs a lease or not. The Committee also considers that the important aspect is the total period for which a tenant has security of tenure and sees no difference whether this period is expressed as one (1) term or a term with options.[223]

The phrase "it becomes a matter for market judgement whether he [the tenant] signs a lease or not." indicates that the Cooper Inquiry accepted the submissions of lessors that there was a free enterprise system in place with lease terms that were freely negotiable and that such free enterprise system should not be disturbed.[224]

Although, obviously, a lessee can, prior to the commencement of the lease, make a "market judgment" as to whether the lessee will accept the terms of a lease offered by a lessor, such freedom is not available where, for example, a lessee is coming to the end of a lease term. In such a case, the lessee is not free to make a market judgment and in fact the lessee has to either accept the (sometimes excessive) rental as offered by the lessor or forfeit their business. [225] Many lessees contended that they should have protection from such excessive increases in rent.[226]

223 Cooper Report 1981, 30.
224 Cooper Report 1981, 29. See Chapter One for a discussion of Freedom of Contract.
225 Cooper Report 1981, 30.
226 Ibid.

The Cooper Inquiry determined that the trend for shorter lease terms for small lessees placed an extremely effective bargaining tool in the hands of lessors, and evidence suggested that this practice had been abused by some lessors.[227]

After the Cooper Report 1981 was published attempts at self-regulation followed. BOMA[228] prepared a voluntary code which was not accepted by small lessees and eventually, in 1983, the Government convened a joint parliamentary committee[229] which found that the most common complaint by lessees was that they were required to accept forms of leases which contained conditions beyond those accepted as normal in traditional leasing relationships.[230] The Queensland Joint Committee proposed that in any retail shop lease it should be implied that the lessee has an option to extend the lease by a period equal to the initial term provided that the total of the initial period and the extension did not exceed five (5) years.[231]

Like Queensland the drive for reform in Victoria came from lessees' complaints to the Victorian Small Business Development Corporation (Vic). In its' report dated 8th October 1982[232] it identified that a major problem was the inability of lessees to understand the terms of the lease before execution

227 Ibid, 4.
228 BOMA stands for the Building Owners and Managers Association. It has since been replaced by the Shopping Centre Council of Australia.
229 Joint Parliamentary Committee of Enquiry into Retail Shop Leases (Qld) "Discussion Paper on Retail Shop Leases" (January 1983) ("Queensland Joint Committee Report 1983").
230 Queensland Joint Committee Report 1983, 1.
231 Ibid, 5.
232 Small Business Development Corporation (Vic), *Report and Recommendation on a Fair Standard Lease*, Melbourne, 1981 referred to in Arnold Report 1984, 2.

and their reluctance to incur the expense of legal advice.[233] The recommendations of the Victorian Small Business Development Corporations were primarily that disclosure be provided to the lessee.[234] After the issue of the report the government established the Retail Tenancy Advisory Committee chaired by Michael Arnold ("Arnold Inquiry") charged with considering how the government should legislate for a standard lease having regard to problems associated with, amongst other things, lease terms and options.[235]

Submissions by lessees to the Arnold Inquiry were that: -

(a) Without security of tenure they could not plan for the future;

(b) A longer lease would allow a longer period to amortise fixtures and fittings;

(c) A longer lease would allow a lessee to offer more to a prospective purchaser of the business;

(d) A reasonable lease period was required to allow a lessee to establish their business and recover capital outlays;

(e) The inequality of bargaining position between the lessor and the lessee meant that without the benefit of a long lease term or option that the lessees are "held to ransom by the lessor".[236]

233 Ibid, 2.
234 Ibid, 3-4.
235 Arnold Report 1984, terms of reference.
236 Ibid, 32.

Lessors claimed that they needed flexibility in determining tenant mix most suitable for the centre and it was easier to control tenant mix through the use of shorter leases.[237]

The Arnold Committee found that the duration of a lease was of prime importance to both lessors and lessees, but as there was no compulsion on a lessee to enter into a lease,[238] there should be no regulation regarding lease term.[239] Instead it was proposed that lessors be required to advise lessees of their intention to renew or terminate the lease at least three months prior to the expiry date of the lease.[240]

The ACT Working Party noted that some of the submissions from the lessees were "emotive complaints centred on the refusal by lessors to renew their leases" rather than legitimate submissions.[241] Such submissions were:

(a) Security of tenure was essential to allow a lessee to obtain the reward for their efforts in establishing their business and that this concern would cause a lessee to yield to unfair demands by a lessor because in the event of refusal to renew the lessee would lose their business;

(b) That a short lease with no option for lease extension effectively eliminated rent reviews and forced the lessee to pay the rent demanded by the lessor;

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237 Arnold Report 1984, 31.
238 Ibid, 31.
239 Ibid, 15.
240 Ibid. A similar provision now appears as *Retail Shop Leases Act 1994* (Qld), s46AA; *Retail Leases Act 2003* (Vic) s 64; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 29; *Retail & Commercial Leases Act 1995* (SA) s 20J; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 13B; *Retail Leases Act 1994 (NSW)* ss 44, 44A; *Leases (Commercial and Retail) Act 2001* (ACT) s 108; *Business Tenancies (Fair Dealings) Act 2003* (NT) s 60.
241 ACT Report 1984, 46.

(c) Under a short lease a lessee could be coerced into spending a large amount of money for refurbishment as a condition of lease renewal and in a three year lease period this situation could be repeated every three years;

(d) A short lease would cause the lessee to lose the benefit of its goodwill. One example submitted by a lessee was where a lessor had refused to renew the lease and the lessor had taken up the goodwill of the business by opening the same type of shop in the same premises. In effect the lessor had hijacked the lessee's business.[242]

Lessors objected to the automatic renewal of leases because: -

(a) Such automatic renewal gave the lessees "tenancy at will" thereby negating the certainty of the lease and that all tenancy agreements were for finite period and there should be no interference with that principle;[243] and

(b) Lessors must be able to change tenant mix to suit customer demand;[244] and

(c) It was unreasonable to expect a lessor to be forced to accept a lessee who was having a detrimental effect upon the shopping centre or upon other lessees.[245]

In Western Australia the Government formed a Retail Liaison Committee in September 1981 which determined that a voluntary code of practice was preferable to legislation in relation to commercial leases. In 1983, that Government commissioned a further inquiry into commercial tenancies to be

242 Ibid.
243 Ibid, 214.
244 Ibid, 216.
245 Ibid.

conducted by Nigel Clarke ("Clarke Inquiry"). [246] The terms of reference of the Inquiry included a requirement that it receive and evaluate submissions on problems associated with commercial tenancy agreements.[247]

Once again one of the main points of conflict identified by the Clarke Inquiry was the lack of options to extend the lease period and that lessors normally gave option-free leases which would allow the lessor to: -

(a) refuse to renew a lease without being required to give a reason;

(b) maintain standards within the shopping centre to allow lessors to terminate the lease of an underperforming lessee. A failing business may not only reduce the amount of rent to be received by a lessor but may also affect the reputation of the shopping centre and other businesses within the complex;

(c) modify lessee mix and re-locate businesses;

(d) avoid disputes as to whether an option has been validly exercised and also avoid arbitration of rental upon the exercise of the option.[248]

Complaints by lessees included that the lessor would delay dealing with applications for renewal and then demand an exorbitant rent for such renewal. If the lease was not renewed and the lessee had to remove their business the lessor could then operate the same business from the premises and take advantage of the lessee's good will.[249] Lessees claimed that they had a moral right to such good will whereas the lessors claimed that the

246 Clarke Report 1984.
247 Clarke Report 1984, Terms of Reference.
248 Clarke Report 1984, 25.
249 Ibid.

lessor's property rights should not be diluted and that continuous options were offensive to town planning regulation.[250] Such assertions by the lessors were not accepted in the Clarke Report 1984 which stated: -

> A shopping centre is simply a community of shop keepers, the individual identity of whom is a matter of indifference to the landlord. The latter may have good "shopping centre" reasons for refusing renewal. In their absence the satisfactory sitting tenant should enjoy some prior claim to remain.[251]

In view of such "claims to remain" two options in relation to renewal of a lease presented themselves. The first option was that the lessee have the first right of refusal to renew a lease. The second option (which resembles provisions contained in the *Landlord and Tenant Act* 1954 (UK) in relation to renewal of leases) was that a lessor refusing to renew a lease would have to justify such a refusal before an arbitrator. Grounds for refusal may be that the premises are required for structural alteration, that the sitting lessee had failed to comply with lease provisions, or that the premises were reasonably required for the lessors own purposes.[252]

Most of the recommendations of the Clarke Report 1984 were accepted by the government and incorporated into the *Commercial Tenancies (Retail Shops) Agreement Bill 1985* (South Australia). During parliamentary debate regarding the Bill the following comments were made: -

> '…the Landlord gives one only a three year lease. One struggles for the first couple of years to build up the business and, in the third year,

250 Ibid, 26.
251 Ibid, 27.
252 Ibid.

> the Landlord says, 'I've got you. If you want to stay on longer, you have to meet these terms for the fourth and fifth years.'[253]

The difficulties illustrated in this speech are similar to the difficulties faced by lessees in other jurisdictions being the inability under a short term lease to amortize the fit-out costs or to capitalize on the goodwill generated by their business. As a result of a short term lease the "good years" as referred to above never come because once the lessee has endured years of paying back fitout costs and other set up fees, the lessee then has to contend with the lessor dictating a new increased rent to the lessee. Failure to agree to such rental will result in either the lessee losing his business, moving his business to other premises at a significant cost or even having the lessor evict the lessee and then operate a similar business from the same premises.[254]

During parliamentary debates regarding the *Retail Shop Leases Bill 1995* (SA) the opposition proposed that the legislation contain a provision that there would be an automatic renewal of shop leases unless the lessor could show good reason why the lease should not be renewed such as misconduct by a lessee, or the lessor receiving a better offer or the lessor wishing to change the nature of the centre[255] which was another proposal that appeared very similar to the provisions of the *Landlord and Tenant Act 1954* (UK). The proposal was unsuccessful and instead a provision was inserted

253 Western Australia, *Parliamentary Debates*, Legislative Assembly, 5th March 1985, 503 (Court).
254 South Australia, *Parliamentary Debates*, 23 March 1995, p 2152 (Atkinson)
255 South Australia, *Parliamentary Debates*, House of Assembly, 23 March 1995, 2152 (Atkinson).

into the legislation that a party to a lease should not act vexatiously although the legislation did not define what is vexatious.[256]

Problems relating to limited lease term do not occur in the United Kingdom where lessees have the benefit of the *Landlord and Tenant Act 1954* (UK) which allows lessees to automatically renew leases subject to certain exceptions.

Conclusion

It would appear therefore that the drivers for reform regarding the issue of security of tenure were that: -

(a) Short lease terms granted by lessors were insufficient to allow a lessee to establish their business and amortise their fitout costs and made the lessees business unattractive to a potential buyer. Additionally, lessees argued that leases of short duration could force lessees to incur expenditure to refurbish the premises upon the grant of each new lease period.[257]

(b) At expiry of the lease term or when attempting to sell their business (when the outgoing lessee would be seeking a longer lease term to attract a buyer) the lessee was completely at the lessor's mercy as to whether a new lease term would be granted.[258] As a result, a lessee would yield to excessive rent increases or unfair demands by the lessor;

(c) Once a lessee vacated the premises, the lessor could take over the premises previously occupied by the lessee, run a similar business and profit from the goodwill generated by the hard work of the lessee without paying the lessee for such good will.[259]

256 *Retail Shop Leases Act 1995* (South Australia), s75.
257 ACT Report 1984, 47.
258 A Preece, Legislative Regulation of Leases of Business Premises, (1985) 1 *QIT Law Journal*, 140.
259 ACT Report 1984, 211.

Lessors argued that lessees know what is in their lease when they sign it and they should not be able to complain later. Alternatively, lessors argued that granting a right to a lessee to extend the lease term interfered with their rights as landowners, negated certainty of the lease and tied their hands in relation to tenancy mix.

A shopping centre is a shop whose products are all the other shops within the shopping centre. The shopping centre must be attractive to customers and in order to do so the shops within the shopping centre must also be attractive and vibrant. Although a lessor must be free to change the look of a shopping centre by changing tenancy mix (in much the same way that a shopkeeper may change the look of a shop), many of the examples considered by the various inquiries had nothing to do with tenancy mix but were simply money grabs by lessors at the expense of the lessees.

The complaints of lessees seem valid and logical rather than the “emotive complaints” referred to by the Arnold Committee whereas the lessors concerns regarding erosion of certainty of contract do not appear to have much substance as the regulation of the retail leasing market will simply alter the playing field rather than promote uncertainty.

The advantages provided to the lessor of having a short term lease are wide and varied. The legitimate advantages are: -

a) The lessor is able to control lessee mix and thereby ensure that customer’s demands are met;

b) Redevelopment of the shopping centre by the lessor is easier as the lessor does not need to relocate a lessee or pay compensation to a lessee. The lessor simply has to wait the expiry of the short term lease;

c) Rental may be determined in accordance with market forces rather than using an artificial method annual method such as a fixed percentage or based on changes in the consumer price Index.

d) The ability to avoid the risk of being unable to remove an unsuitable lessee over a long term, either because a lessee is unsuitable or their business is underperforming.

Other less legitimate advantages provided to lessors as a result of short term leases are the ability: -

(a) To evict a successful lessee and take over their business;

(b) To frustrate a potential business sale and then convince the proposed purchaser to take premises elsewhere in the centre operating a similar business. If, for example, a lessor was to have vacant space within a shopping centre and was to become aware that an existing lessee had found a purchaser for its business and was seeking consent to assignment then that lessor, by making such assignment process too difficult or protracted could cause the purchaser to terminate negotiations with the existing lessee. The lessor could then approach the purchaser and offer to lease to the purchaser the vacant space. The lessor has the advantage of having 2 lessees whereas the existing lessee has not only lost a purchaser but now must compete with the new lessee;

(c) To extort extremely high rentals from lessees who have no other option except to agree or lose their business.

(d) To “stand over” a lessee to obtain favourable rents, fitouts and lease terms.

The most relevant issue raised by lessors is that lack of security of tenure is often "self-inflicted" in that the lessee knew what they were getting when they signed the lease. It is difficult to understand why a lessee would enter into a lease which the lessee knows has a lease term which is insufficient to allow a lessee to amortise its outlays or to sell its business with sufficient lease term to be attractive to a buyer. The only answer seems to be that the lessee believes (incorrectly) that their interests and that of the lessor are aligned and that the lessor would not do anything to harm the lessee. In fact, the lessor is only marginally aligned with the lessee in that the lessor wishes the lessee to be a success so that the lessor can receive its rent but if a better opportunity arrives (such as another lessee willing to pay greater rent) then the interests of the existing lessee and lessor become opposed. The "true" nature of the lessor-lessee relationship may only be made clear to the lessee by greater disclosure by lessors and perhaps education of lessees.

2.1.2 Disincentives to Assignment of Leases.

Complaints were also received regarding the lessor's practice of taking a share of the outgoing lessees' sale price on assignment of the lease. Suggested solutions to such a practice were a limitation on the amount that the lessor could charge[260] or that the practice be wholly proscribed.[261]

260 Ibid.
261 Arnold Report 1984, 36; Clarke Report 1984, 9.

It was generally accepted that the lessor should not be entitled to take any premium upon the assignment of the lease[262] except the lessor's costs of the assignment.[263] However, as a disincentive to the buying and selling of leases, it was suggested a lessee who assigned within a short period should pay a penalty to the shopping centre promotions fund.[264]

The Hill Inquiry formed a view that where the lessor made a continuous contribution to increasing the value of the lessees' business, the lessor should be entitled to a proportion of goodwill provided that the lessor has applied to a Tribunal for authorisation.[265] This proposal appeared extremely prejudicial to lessees as not only was it likely that the lessor would be able to claim a proportion of the lessees' good will but in addition the lessee might have been forced to participate in costly court proceedings.

The Arnold Committee accepted that lease premium could be charged, but only where there was a legitimate advantage to both the lessee and the lessor.[266] It is difficult to envisage any circumstance where the charging of a lease premium to a lessee would be of any advantage to the lessee.

The practice of taking a portion of the lessees' good will upon the sale of its business has now been proscribed.[267] Prior to retail lease legislation, the practice was common, the lessor reasoning that the good will of the business

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262 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2 and the Report of the ACT Working Party on Business Leases Review Legislation, ACT (1984), 33.

263 Clarke Report 1984, 10.

264 Arnold Report 1984, 38.

265 Hill Report 1983 (referred to in ACT Report 1984, 31).

266 Arnold Report 1984, 37.

267 *Retail Leases Act 2003* (Vic) s 23(1); *Retail Shop Leases Act 1994* (Qld) s 39(1); *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 9(1); *Retail & Commercial Leases Act 1995* (SA) s 15; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 9(1); *Retail Leases Act 1994* (NSW) ss 14, 40, 45; *Leases (Commercial and Retail) Act 2001* (ACT) s 38; *Business Tenancies (Fair Dealings) Act 2003* (NT) s 24.

had been built up, at least partially, by the lessors marketing efforts for the centre as a whole. It is difficult to see the logic of such a proposition where the marketing of a centre has been paid for out of a marketing fund consisting of payments from lessees. In addition, the original purpose of a lessor taking a portion of the lessee's good will was to prevent a lessee selling its business and assigning the lease within a short period after commencement of the lease. It was, in fact, a disincentive to assign rather than an attempt to share in the lessees' good will. However, the payment came to be regarded as an unwarranted bonus to the lessor.[268]

One of the problems with a lease within a shopping complex is that the right to assign a lease is often heavily restricted and specifically that charging by the lessor of a portion of the goodwill on the sale of the lessees' business was an extreme restriction.[269]

The Cooper Inquiry found that lessees were concerned that cost and delays in receiving advice from lessors about consent to assignment were excessive.[270] Most leases provided that lessees were not able to assign away their obligations under the lease once the assignment of the lease was approved. This meant that after assignment of the lease that the outgoing lessee would still be liable under the original lease such that if the new lessee should fail the lessor could sue that lessee and the outgoing lessee for loss of rent**.**

268 Clarke Report 1984, 9.
269 Arnold Report 1984, 34.
270 Cooper Report 1981, 31.

Lessees believed that having assigned their lease all of their connections to the lessor should be severed. The Cooper Inquiry agreed that it was unreasonable for an assignor to remain responsible for the future performance of the assignee.[271]

Subsequently each jurisdiction (except ACT and Tasmania) has passed legislation removing the liability of the original lessee upon assignment.[272] The Productivity Commission was critical of such amendments as under common law the outgoing lessee had an incentive to introduce an assignee who would be most likely to be successful. With the removal of ongoing liability, the outgoing lessee now only has an incentive to find a buyer who will pay the most for the business thereby increasing the reluctance of the lessor to consent.[273]

The ACT Working Party considered a draft ordinance in relation to commercial leases which provided that a lessee may apply to the courts for approval of the assignment of the lease where the lease contained a covenant against assignment without the lessor's consent and such consent is refused or where the lessor fails to advise his consent within 60 days after his consent was requested. Most submissions received by the ACT Working Party regarding this draft ordinance were from lessors who condemned the draft ordinance,[274] which is understandable, as the effect of the draft

271 Ibid.

272 *Retail Leases Act 2003* (Vic) s 62; *Retail Shop Leases Act 1994* (Qld) s 50A; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 9(1); *Retail & Commercial Leases Act 1995* (SA) s 28; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 10; *Retail Leases Act 1994* (NSW) s 41A; *Business Tenancies (Fair Dealings) Act 2003* (NT) s 58.

273 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 234.

274 ACT Report 1984, [162].

ordinance would have been to take the power in relation to assignment of leases away from lessors.

The Clarke Report 1984 recommended that all disputes concerning assignment of lease be referred to arbitration whereas the Hill Report 1981 did not refer to the issue at all.[275]

The original *Retail Shop Leases Act 1984* (Qld) provided that if the lessee's request for assignment of the lease was not answered by the lessor within forty-two (42) days, the matter may be referred to a mediator and that only the cost reasonably incurred by the lessor in investigating the suitability of the assignee could be recovered from the lessee and that the amount of these costs could be submitted to arbitration.

In the United Kingdom, lessees had the benefit of the *Landlord and Tenant Act 1988* (UK) which required the lessor to respond to a request for assignment within a reasonable time and conditions for assignment or reasons for refusal must be reasonable.[276]

An assignment of a lease is normally requested when a lessee is selling its business. It is likely that the buyer has other opportunities available to them to purchase similar businesses in another location. Accordingly, the existing lessee/vendor is obviously concerned that the buyer does not become tired of waiting for a response from a lessor or that the lessor's requirements are not too onerous for the buyer.

275 Clarke Report 1984,11.

276 *Landlord and Tenant Act 1988* (UK), s1.

Lessors are required to not unreasonably withhold their consent to an assignment of a lease and to respond to a request for consent to an assignment expeditiously.[277] The lessors' obligations however, under retail lease legislation, differ in each jurisdiction. For example: -

(a) Delay - the lessor is deemed to consent to an assignment of lease if the lessor does not respond to a request within 28 days (in NSW)[278] or 42 days (in South Australia).[279]

(b) Reasonableness of Refusal- grounds for a lessor in refusing consent are set out in the legislation in NSW, Victoria, ACT and Northern Territory but not in Queensland. Western Australia provides that a lessee has a statutory right to assign a lease subject to the lessor's right to refuse consent on reasonable grounds. Those grounds are not specified.

(c) Request for Information- the Australian Capital Territory is the only jurisdiction to specify what information a lessor can request before consenting to an assignment.

Each of these areas represent opportunities for a lessor to interfere (for whatever reason) with the lessee's ambitions of selling its business and realising its goodwill. Each of these areas must be considered in any simplified lease legislation.

Conclusion

277 *Retail Leases Act 2003* (Vic) s 23(1); *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) s 28*; Retail & Commercial Leases Act 1995* (SA) s 43; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 10; *Retail Leases Act 1994* (NSW) s 39; *Leases (Commercial and Retail) Act 2001* (ACT) s 100; *Business Tenancies (Fair Dealings) Act 2003* (NT) ss 53, 55.

278 *Retail Leases Act 1994* (NSW) s 39.

279 *Retail & Commercial Leases Act 1995* (SA) s 43.

It would appear that most lessees acknowledged that it was reasonable that they obtain the consent of a lessor before assigning their lease, however the concerns of the lessees regarding assignment were as follows: -

(a) Delay in obtaining consent of the lessor;

(b) Unnecessary costs incurred by the lessor which had to be paid by the lessee;

(c) Refusal to consent to the assignment of the lease for reasons other than the suitability of the incoming lessee. For example, where the lessor wished to obtain vacant premises, or where the lessor wished to force the lessee to vacate the premises by regularly rejecting any potential assignee thereby making it clear that no assignment would be granted.

(d) Constructive refusal to consent whereby the lessor, although not refusing consent, makes the granting of consent so difficult that the proposed buyer of the lessee's business abandons the transaction subject to the assignment of the lease.[280]

(e) Payment to lessors of a portion of the goodwill of the lessees' business upon sale was also objected to by most lessees on the grounds that the goodwill of the business had been built up by the lessees themselves.

In summary, any potential problem regarding the assignment of the lease must be a cause for concern for the lessee. The potential buyer is aware that at some stage it will also want to sell the business and a lease that contains provisions making it difficult or unprofitable to assign the lease, or knowledge that a lessor is unco-operative regarding such assignment might cause the buyer to pursue other business prospects.

280 William Dixon, "Unreasonable Withholding of Consent?" (2011)*The Queensland Lawyer,* 31(2), 63-65.

In some jurisdictions, it was also recommended that the lessor be restrained from unreasonably withholding [281] or delaying consent to the assignment of the lease.[282] Obviously, in circumstances where a lessee had a limited period remaining in the lease term, the conduct of the lessor in delaying consent to the assignment (and the ongoing erosion of the lease term) could result in the potential purchaser of the business deciding to buy elsewhere. This is an easy tactic for the lessor to adopt to punish a troublesome lessee or to obtain vacant possession of lease premises for the lessors own purposes. Thus, the greater regulation of assignments became the focus of most retail lease legislation.

2.1.3 Costly Dispute Resolution

Prior to the advent of retail lease tribunals, the lessee's only redress was to the ordinary courts. Often, the amount involved was not financially large. The adjudication of the dispute was comparatively of smaller moment to the lessor than the lessee with the lessee effectively losing the benefit of any determination in the payment of legal costs.[283]

The ACT Working Party was required to consider a proposed leasing ordinance regarding dispute resolution. Although a number of submissions were received by the ACT Working Party in favour of mediation and conciliation,[284] the draft ordinance being considered did not include

281 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2.
282 ACT Report 1984, 40 -41.
283 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008),* 67; Reid Report 1997, 28 – 29.
284 Ibid, 66.

mediation as a means of resolving disputes and instead proposed the creation of a Board which would have the power to determine rent where a dispute existed, determine operation costs, determine compensation and to vary and set lease clauses and conditions.[285]

Most of the submissions received from lessors by the ACT Working Party were not in favour of the creation of a Board and suggested self-regulation whereas the submissions by lessees were more concerned about the conduct of proceedings before the Board being expensive and formal with delays and rigidities. Lessees submitted that the emphasis should be on a mediation and conciliation with recourse to a legal tribunal only where mediation and conciliation failed.[286] The ACT Working Party considered that settlement of disputes could be achieved by education of lessees and mediation[287] and that a mediator be appointed to discuss all lease issues between lessors and lessees including those concerning the amount of rent paid.[288]

A common criticism by lessees was that, if a dispute arose, the lessee could not afford legal representation.[289] The original Report of the Queensland Small Business Development Corporation recommended that an arbitration clause should be mandatory in each lease and consideration should be given to the establishment of an independent board to arbitrate on all grievances at no charge.[290]

285 Ibid, 58.
286 Ibid, 60.
287 ACT Report 1984, 65.
288 Ibid, 67.
289 Clarke Report 1984, 14.
290 Cooper Report 1981, Appendix 2, 3.

The Cooper Inquiry did not recommend the establishment of a tribunal [291] and made no mention of mediation although they thought that the practice of having arbitration clauses in a lease was desirable [292] and they were also in favour of proposals by BOMA that a retail tenancy advisory body be established whose role was to investigate legitimate complaints from lessees and lessors and to provide recommendations to both parties to resolve the complaint.[293] According to the Cooper Inquiry: -

> While the Committee hold the view that the creation of a Retail Tenancy Advisory Body would not in itself solve the problems currently affecting Owner/Tenant relationship, it feels that such a body could well have a place as part of an overall package of measures which could be adopted to achieve industry self-regulation and administration.[294]

Subsequently, the Queensland Joint Committee stated that retail shop leases legislation should provide for the creation of the office of mediator to provide a low cost forum for parties to resolve disputes.[295]

The Arnold Inquiry stated that many of the submissions received related to the difficulties that smaller lessees had in seeking redress for problems arising from their leases in that Court proceedings could be costly and time consuming[296] and that some problems although appearing serious did not warrant full Court procedures.[297]

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291 Ibid, 40.
292 Cooper Report 1981, 35.
293 Ibid, 39.
294 Ibid, 40.
295 Queensland Joint Committee Report 1983, 6.
296 Arnold Report 1983, 28.
297 Ibid.

The Arnold Inquiry supported the concept of an inexpensive relatively informal tribunal dealing with matters in dispute and that such tribunal consist of two tiers. The lower tier would consist of a one-member tribunal assisted by an expert with jurisdiction to hear disputes up to a certain level with no appeal being allowed thereby ensuring that there are no additional costs of the appeal. A dispute would be heard by the higher tier (which would be a three-member tribunal) where the effect of any judgment would exceed ten thousand dollars ($10,000.00) or where the parties agreed or if the member on the lower tier decided that a case should be referred to the three-member tribunal.[298]

The Clarke Inquiry recommended that all rental disputes be determined by the Valuer General and that non rental problems be referred to the Small Claims Tribunal, a Magistrate or a Judge and that such authority would attempt reconciliation, failing which either the dispute would be ruled upon or referred to an existing system of arbitration.[299]

Submissions received by both the Arnold Inquiry[300] and the Hill Inquiry[301] from lessees pointed out that there was no cheap alternative to going to court and, in this regard, the Hill Inquiry recommended the establishment of a specialist tribunal to resolve disputes.[302]

298 Arnold Report 1983, 29.
299 Clarke Report 1984, 38.
300 Arnold Report 1984. 29.
301 Hill Report 1981 referred to in Clarke Report 1984, Appendix B, 3.
302 Hill Report 1981 referred to in Clarke Report 1984, Appendix B, 3; Arnold Report 1984, 30. Details in relation to the Tribunal appeared as Appendix D to the Committee's Report; Victoria, *Parliamentary Debates*, (Second Reading Speech of Retail Leases Bill), Legislative Assembly, 8 May 1986, 1961 (Fordham).

In summary, the primary complaint of lessees was that taking disputes to the traditional Courts was too expensive and that the shopping centre lessor could afford such expense but the lessee could not.[303] Issues of dispute were generally widespread but issues that arose again and again concerned lack of repair, failure to return a security deposit, rent and outgoings calculation and assignment issues.[304]

Lessees sought a cost effective and timely dispute resolution procedure free from formalities so that the lessor could not use such formalities against the lessee. Both lessors and lessees agreed that formal court procedures took too long to be resolved.

The use of alternative dispute resolution, instead of formal court procedures, was favoured by many inquiries as a means to reduce expense and preserve the lessor-lessee relationship.[305] This included not only specialist mediators and arbitration[306] but also early intervention/informal resolution by an organisation such as a small business advisory service.

Conclusion

The drivers for reform in relation to dispute resolution were follows: -

(a) Although the complaints listed by the various committees of enquiry and mentioned in Hansard in every jurisdiction were varied and widespread there was little in the way of case law about regarding such complaints. It is likely that a lessee when faced with a business suffering from the attentions

303 Arnold Report 1984, 14.
304 Cooper Report 1981, 23.
305 ACT Report 1984, 66; Clarke Report 1984, 33; Queensland Joint Committee Report 1983, 3.
306 Cooper Report 1981, 8.

of an aggressive or uncooperative lessor decided to cut his losses rather than insist upon his rights under the lease.

(b) There was a need to establish a dedicated retail lease tribunal familiar with retail lease issues;

(c) Dispute Resolution proceedings were too expensive and took too long.[307] In the early years a lessee could only assert their rights through the courts and remedies such as mediation and low cost arbitration through tribunals did not exist. The lessee was required to meet the expense of court proceedings at a time when the lessee's business, because of the conduct of the lessor, was suffering. In addition, the professional lessor had the benefit of deep pockets, experienced lawyers, real estate managers and exclusive access to a large amount of information both current and historical. Ensuring that proceedings were inexpensive and swift would include ensuring that neither the lessor nor lessee could drag a minor matter out by appealing to a higher tribunal. In this regard the 2 tier approach suggested by the Arnold Inquiry may be effective such that only major disputes may be appealed;[308]

(d) Tribunal proceedings were too formal. Informal proceedings may result in legal representation not being required. Again, this is to reduce expense. Legal representation may be prohibited unless the tribunal allows it.

(e) Alternative Dispute Resolution was not available. There was no opportunity for any attempts at mediation prior to determination by hearing to minimise expense and to attempt to preserve the lessee-lessor relationship.

307 ACT Report 1984, 14; Clarke Report 1984, 8; Queensland Joint Committee Report 1983, 6; Arnold Report 1984, 28.
308 Arnold Report 1984, 29.

As a result of the lessor's numerous advantages in any lease dispute, giving the lessee access to cheap, fast and effective[309] dispute resolution was seen as a priority in many of the jurisdictions. Recommendations included: -

(i) mandatory arbitration clauses;[310]

(ii) establishment of an independent board;[311] and

(iii) mediation.[312]

(f) No early intervention. There was no specialist retail commissioner or bureau whose officers could attempt to resolve smaller matters even before they were referred to mediation

2.1.4 Difficulties with Rent Review

For the lessor, it was a matter of ensuring control over the tenant mix and thus the protection of the revenue base. Conversely, lessees wished to ensure a return on their investment. The two objectives were not necessarily congruent. The lessees return on investment could be eroded after a rent review, an increase in outgoings or a decline in the attraction of their products or services or, indeed, in shopping habits, for example, the increased frequency of on line purchasing. Probably the second most common areas of complaint of lessees recorded in the early inquiries were the lack of transparency in rent reviews and the charging of percentage

309 Ibid, 28.
310 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2.
311 Arnold Report 1984, 28; Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2; Hill Report 1983 (referred to in ACT Report 1984, 56).
312 Clarke Report 1984, 38.

rents, the requirement of a lessee to provide turnover figures to the lessor and the methods of assessing the charges for centre outgoings.[313]

A common complaint regarding rent and rent review was that lessors would determine the rent in the way most beneficial to the lessor with little regard to the lessee or the lessee's business. Reviews were artificially based upon full rent being the base rent when effective rent was much lower due to incentives. In the early stages the payment of key money was also identified as a problem.

According to the Arnold Inquiry many submissions and complaints were about the method of determination of rental not only at the renewal of the lease but within the term of the lease itself.[314] Although many of such complaints were about initial rentals negotiated upon entering the agreement, it was accepted that a lessee had the choice to accept or reject such an initial offer of rent.[315] Lessees also complained that they were not aware of rent review provisions and rent review formulas were too complex.[316]

Subsequent rent variation, during the lease term, however, caused difficulties[317] as often lessees, especially first time lessees, were inexperienced in relation to the process or failed to notice pitfalls in the lease.[318]

313 Cooper Report 1981, 22.
314 Arnold Report 1984, 22.
315 Ibid.
316 Ibid, 26.
317 Ibid, 23.
318 Clarke Report 1984, 13.

Lessees complained that rent reviews were arbitrary[319] and that the system of rent determination was unfair, biased in favour of the lessor and costly for the lessee.[320] For example, the Queensland Small Business Development Corporation stated in its report that rent should be determined based upon a fixed amount per square metre.[321] The Arnold Committee suggested that there be three different possible methods of rent review being either a market review, rent based on turnover or a fixed incremental increase. Interestingly, the Arnold Committee also stated that a rent review fixed to the consumer price increases be prohibited.[322]

The Hill Inquiry recommended that the parties to a lease be free to negotiate the terms of rent and rent review[323] provided that the lessee was offered a realistic choice of rent calculations when entering into the lease. There was no guidance as to whether an upward only rent review clause underpinned by "ratchet clauses" would be considered realistic.

The ACT Working Party also accepted that an upward only rent review clause was void however was prepared to accept that the new rent should not be less than the initial rent paid under the lease.[324] This type of formulation mandated in a lease presumed that rents could not ever fall which defied economic logic.

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319 ACT Report 1984, 25.
320 Ibid.
321 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2, 3.
322 Arnold Report 1984, 17.
323 Similarly the Tasmanian Consultative Committee took the view that there should be no restriction on the form of rent calculation. See *Report of the Consultative Committee into Commercial Leases, Tasmania* (1993).
324 ACT Report 1984, 30.

Despite complaints received about turnover rental, the Arnold Inquiry believed that turnover rental had wide acceptance and therefore did not recommend intervention in the system.[325] Specifically, it was accepted that the turnover rental method was fair because it allowed the rent to vary with the success of the business.[326]

Although lessees' argued that the lessor in effect became a partner in the lessee's business (because the harder the lessee worked the more money the lessor received)[327] the Arnold Inquiry took the view that, commonly, it wasn't until some years after the commencement of the business that a turnover rental became payable however: -

(a) Problems could arise when turnover rental became a substantial figure and created a dis-incentive to increase sales; and

(b) Disclosure of turnover figures was an invasion of the lessee's privacy.[328]

The first problem could be resolved by giving the lessee the right to review the base rent to market every three (3) years[329] and the second problem could be resolved by requiring the lessor to maintain confidentiality and that if this duty of confidentiality was breached, a remedy could be sought through a specialist tribunal.[330]

325 Ibid, 23.
326 Ibid.
327 Ibid, 25.
328 Ibid.
329 Ibid.
330 Ibid.

Lessors who did not use turnover rental or fixed percentage rent increases generally used the consumer price index to vary rental. The Arnold Inquiry expressed a view that although the method was definite it was not suitable as a rent review method because it was not related to ability to pay by the lessee, nor to a realistic market rental, nor was it related to the profitability of the business[331] and therefore the method of tying rental increase to increases in consumer price index was unfair to lessees and should be prohibited. In addition, only three methods of rental review should be permitted (or any combination of such three) which were: -

(a) By mutual agreement and if no agreement by recourse to a valuer;

(b) By a set formula specifying specific monetary amounts or percentages; or

(c) By a formula where a percentage of turnover forms the basis for the rent review.[332]

The Queensland Small Business Development Corporation identified as a specific problem, rents being calculated on the basis of a minimum sum plus a percentage of turnover[333] and recommended that rent should be based on a fixed amount per square metre per annum only[334] Subsequently the Cooper Inquiry found that the provision for small lessees to pay percentage rents based on turnover was not a desirable practice in the form as appearing at the time in most leases and further that the provision of monthly turnover figures by small lessees to lessors was an intrusion into the

331 Ibid.
332 Ibid, 26.
333 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2.
334 Ibid.

lessee's right of privacy.[335] Owners should either cease charging rent as a percentage of gross turn-over or formulate a more equitable structure of percentage rents.[336]

The Cooper Inquiry also found that in practice at the time the lessors who used a turnover rent review clause invariably fixed the base rent at a market rent for the space being leased. If the turnover rental clause provided for payment of a base rental, where the base rental was in fact a market rental, the extra amount to be paid, being a percentage of the lessee's turnover, was not a method to give to the lessor a market rental but was in fact a method to allow the lessor to share in the profits of the lessee's business.

According to the Cooper Inquiry: -

> It became obvious to the Committee that the base rent for small traders in many complexes had all the appearances and substance of a market rent for the space rented. There was indeed a remarkable uniformity between the rents levied as base rents in the various complexes and it appeared that there were more direct correlations between rental levels and floor areas than rental levels and the types of business or turnovers involved. If the Committee's contention is accurate then it can be argued that the percentage rent sought in excess of the base rent is not in essence a rent at all. It could be held that it is indeed a device by which the owner can share in the profits of the business. By sharing in the profits of the business the owner becomes a partner in the business and the tenant becomes a partner with the Landlord; a state of affairs which is prohibited in Federal Legislation governing the activities of chemists.[337]

335 Cooper Report 1981, 4.
336 Cooper Report 1981, 7.
337 Cooper Report 1981, 24.

The Cooper Inquiry had received submissions from lessees which showed an almost universal opposition to the levying of turnover rents[338] because: -

(a) the lessees felt that they were being penalised for their own efforts and initiative;

(b) an increase in turnover disclosed to the lessor would give the lessor the basis for lifting the base rent;

(c) the percentage figure being charged of turnover was always disputed; and

(d) increases of rent based on turnover took no account of the effect of such increases on either gross or net profit.[339]

The Cooper Inquiry formed a view that turnover rents had been used to attract major lessees into shopping complexes and that the application of turnover rents to small traders extended this principle into areas for which it was never really intended.[340] However, they did not form the view that turnover rent should be prohibited, but concluded that where a turnover rental method was adopted that the percentage of turnover to be paid by the lessee should reduce as turnover increased as a straight line method failed to take into account that gross profit can decline as sales and the cost of sales increase.[341]

338 Ibid.
339 Ibid.
340 Ibid.
341 Ibid, 25.

The Cooper Inquiry also stated that it had received many complaints about provision of turnover details in that the lessees considered that the provision of that information was an invasion of privacy. The lessee's concerns were that: -

(a) Information provided would be used by the lessor against them in future rent reviews;

(b) Information could be used by the major retailers to improve their sales at the expense of the small retailer;

(c) In provincial cities, lessees were concerned about the confidentiality of information supplied to Centre Managers who employed local staff.[342]

The Cooper Inquiry believed if that percentage rents were not applicable then turnover figures should not be provided to the lessor.[343] They accepted that the lessee had a basic right to be allowed the undisturbed occupancy of space in return for the payment of rent.[344]

Subsequently, the Joint Parliamentary Committee in discussing the Cooper Report 1981 formed the view that retail shop lease legislation was required and stated: -

> The legislation must specifically require that: -
>
> 1. The Tenant must be offered at least two (2) alternatives rent methods, one of which shall be a rent stated as a cost per square metre of leased area.
> 2. The Tenant shall have the right to elect the alternative desired;

342 Ibid, 26.
343 Ibid.
344 Ibid, 27.

3. The basis and/or the formula for calculating rent reviews shall be stated in the lease;
4. In any review of rent during the currency of the lease, the method of rental review shall be clearly stated in the retail shop lease. If the rent is to be adjusted on the basis of 'market rent', there must be provision for arbitration if agreement between the landlord and tenant cannot be reached.
5. If the tenant elects to accept a percentage rent, the retail shop lease shall contain a clear formula of how it is derived.
6. If the tenant accepts a percentage rent then the tenant has an obligation to provide turnover figures to the landlord.
7. If the tenant elects to accept a rent other than a percentage rent then there shall be no obligation upon the tenant to provide the landlord with turnover figures."[345]

Once again the Queensland Joint Committee, consistent with the recommendation of the Cooper Inquiry, was not prepared to prohibit turnover rental clauses, however by allowing the lessee to choose the rental methods that would apply to the lessee to the lease, a lessee could effectively exclude a turnover rental clause from the lease document.

In the second reading speech on the Queensland Retail Shop Leases Bill 1984 it was stated that the new legislation was designed to regulate a number of specific practices that had been identified by the various committees and enquiries to be the most onerous on the small lessee which

345 Queensland Joint Committee Report 1983, 4 – 5.

included the charging of percentage rent and the collection of turnover figures by the lessor where the lessee has not requested percentage rent.[346]

The Clarke Inquiry also did not support rent as determined by a percentage of turn-over unless the lessee had refused another firm method of fixing and reviewing rent and that a dispute concerning fair market rent should be determined by the Valuer General.[347] Further, the Clarke Inquiry formed a view that a provision in the lease that provided the rent would not be reduced on review or shall be increased by a fixed percentage should be void but that rent adjustment by reference to a statistical index which had been freely accepted by a lessee should not be void.[348]

Although some lessees were indifferent to such method of rent determination[349] other lessees resented the intrusion into their business affairs and believed that turnover rent was a tax on their success,[350] an invasion of privacy,[351] a disincentive to expansion and employment[352] and that the necessity to provide turnover figures gave the lessor a bargaining advantage on a renewal.[353]

Delays in rent reviews were also a problem for the lessees. Once the new rent was determined the lessee could often not, because of the delay, afford to pay the retrospective amount due as from the review date.[354] Time was

346 Queensland, *Parliamentary Debates*, Legislative Assembly, 20th December 1983, 1015 (MJ Ahern, Minister for Industry Small Business and Technology).
347 Clarke Report 1984, 13.
348 Clarke Report 1984, 38.
349 Ibid.
350 Clarke Report 1984,11.
351 Ibid, 25.
352 Ibid.
353 Ibid, 14.
354 Ibid, 18.

rarely the essence of a rent review and lessors often delayed determinations.

The Hill Inquiry did not prefer one method of rent determination or review to another and considered that the parties should be free to negotiate the rent and rent reviews, provided lessees are offered a realistic choice of rent reviews.[355]

The ACT Working Party was required to consider a draft ordinance in relation to business leases that provided that an application could be made to a Business Review Board in relation to rent review.[356] Many of the submissions received by the ACT Working Party supported a method of rent review being by arbitration with an independent valuer although other submissions were to the effect that too many restrictions placed upon lessors regarding their right to control rental and manage their properties would cause a decline in investment in real estate.[357]

Submissions received by the ACT Working Party in relation to a rent review were as follows: -

(a) Fixed maximum rate per square metre should not apply differently in large shopping centres between large and small lessees;

(b) Adjustment of rent should be based on the movement of the affected commodity group applying to the lessee's business;

355 Hill Report 1981 (referred to in ACT Report 1984, 46.)
356 ACT Report 1984, 23.
357 Ibid, 25.

(c) Detrimental effects of building works and alterations should be accounted for in rent;

(d) Turn-over should not be used as the basis for rental determination or that lessees should not be offered percentage rentals without being given a choice of a different method of rent review;

(e) Method of rental calculations and basis for rent reviews should be clearly stated in the lease; and

(f) Rent increases should not be arbitrary in either timing or amount.[358]

The ACT Working Party accepted that either party to a rental dispute should be able to apply to the Review Board who could nominate a panel of experts to make a determination for both parties[359] but rejected the proposal that, upon review, a rent could not be less than the current rent and instead recommended that any lease clause stipulating that reviewed rent could not be less than the current rent should be void.[360]

The ACT Working Party also proposed that a rent calculated by reference to turnover should not be compulsory and the lessee should be offered an alternative of at least one of the following methods of fixing rent: -

- Market Rent,
- Agreed Base Rent subject to annual CPI adjustment,
- Agreed Base Rent subject to annual percentage adjustment;
- Agreed rental;

358 Ibid.
359 Ibid, 26.
360 Ibid, 26.

- Or any combination of the above.[361]

Conclusion

The main concerns in relation to rent and rent review therefore in the early stages of retail lease legislation were as follows: -

(a) Initial rental payable pursuant to the lease was able to be negotiated between a lessor and a lessee and was not of concern to any of the inquiries;

(b) The payment of rent based on a percentage of turn-over was of concern to lessees, specifically in that they were concerned about breach of their privacy or that the information provided could be used by their competitors or by the lessor to increase the base rental. In addition, turnover rent was a disincentive to succeed. It was recommended that turnover rental be banned or that its use limited by giving the lessees the right to choose other methods of rent review;

(c) A turnover rent clause that employed a base rent plus turnover rent form was unfair where the base rent was already market rent. In such a case the lessor was not receiving just market rent but was in fact receiving market rent plus a share of the lessees profits;

(d) Lessees were concerned about the arbitrary nature of rent reviews in relation to the timing or amount;

(e) Use of ratchet clauses was unfair and that instead the lessee should be given the choice between 2 different methods of rent review (which could thereby effectively preclude a turnover rent clause);

361 Ibid, 28.

(f) A fairer method of turnover rent was for the turnover rent percentage to reduce as turnover increased rather than using a straight line method;

(g) Rent review clauses were not sufficiently detailed within the terms of the lease to allow a lessee to know their potential obligations before signing the lease.

Rent review provisions may be based on turnover, movement in the consumer price index, a market review, or a fixed amount or fixed percentage. None of these methods of review are per se objectionable although the use of ratchet clauses by a lessor to allow the lessor to choose the greatest rent increase is unfair. If the market review method is the most likely method to achieve a fair result (albeit at the cost of employing valuers) then a simple solution appears to be to regulate to provide that whatever method of rent review is used that either party may, at their cost, refer the matter to a valuer for determination.

In relation to confidentiality of turnover information, although regulation can provide that a lessor or a valuer may not provide such information to a third party, this does not take away the lessors advantage in having that information to hand during negotiations about rental with the lessee. A solution to this problem does not appear to be available however the effect of the lessor having that information would be greatly reduced where the lessee has a statutory right to have rent reviewed by a valuer as suggested above.

2.1.5 Lack of Disclosure by Lessors.

Lack of disclosure of salient features of the leasing arrangement was another issue that caused a great deal of concern to lessees. Most retail leases were non-standard, long and complex documents requiring legal intervention to properly explain to an incoming lessee. This was a significant transactional cost to the small trader money and, in most cases, the lessor operated on a “take it or leave it” basis without being open to amendment. Large complex owners could afford to pay for experienced lawyers to protect their position. This led to information asymmetry when an increasing number of small traders were either not properly advised, or advised at all, about the obligations to which they were becoming subject either upon an assignment or the taking of a new lease.

At the start of a lease, there is a vast information gap between the well informed lessor who may have leased the subject premises on multiple occasions and the new lessee who has no information regarding the premises they propose to let except what they are told by the lessor’s employed leasing manager or what they can glean from other lessees or advertising material.

The terms of the lease are also unknown to them although extremely familiar to the lessor who prepared it. The retail lessee, therefore, required information, not only to determine profitability in taking the lease (rent and outgoings being one of the largest expenses) but also to be certain regarding its obligations under the lease.

The conditions of leases are invariably in favour of the owner, communication between lessors and lessees was generally poor and there was a great variation in the form and substance of leases. Such leases were

often not available prior to the lessee taking occupation and potential lessees, therefore, committed to an overreliance on oral representations by the lessor.[362]

Although such difficulties could arise because of exaggerated or untruthful representations by the lessor or their leasing agents, they could also stem from the lessee not being aware of certain critical conditions existing in their leases.[363]

The Queensland Small Business Development Corporation in their report of 22nd June 1981 identified as one of the problem areas for lessees, the poor levels of communication between Centre Management and lessees[364] and recommended that lessors should be required to produce a copy of the proposed lease before any prospective lessee gave a letter of intent or took up occupancy or is committed financially.[365]

The Cooper Inquiry received a number of complaints by lessees regarding the failure of lessors to produce leases prior to occupation and that

> 'there is an almost unanimous opinion that the legal profession is entirely to blame for not reacting quickly to the needs of shopping complexes.'[366]

362 Cooper Report 1981, 5.
363 Arnold Report 1984, 20.
364 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2.
365 Ibid.
366 Cooper Report 1981, 32.

Although the more efficient lessors provided lessees with heads of agreement or arranged for letters of intent, in many cases, information provided was too complex or not sufficiently detailed to give the lessee a clear picture of its obligations.[367] As a result, it was determined that in all cases, a document covering the major provisions of the lease expressed in layman's terms should be exchanged between the parties[368] together with an industry standard lease.[369]

Finally, the Cooper Inquiry, in 1984, found that many problems could have been resolved by intelligent, flexible or understanding attitudes in responses by management.[370] Their report suggested that the provision of a pro forma lease by a lessor should be encouraged or alternatively "a document covering in detail the major provisions of the intended lease, but expressed in layman's terms, should be exchanged between lessor and lessee."[371] However, this proposal, at that stage, proved far too inflexible a basis to operate a business for the lessor.

This is the first appearance of the suggestion that what was to become a disclosure statement be provided by a lessor the purpose of which was to prevent the lessee from entering into an agreement that the lessee did not understand.[372]

According to the Arnold Inquiry many misunderstandings arose because the lessee was not aware of certain conditions existing in their lease or because

367 Ibid, 33.
368 Ibid, 34.
369 Ibid, 24.
370 Ibid.
371 Cooper Report 1981, 33.
372 Victoria, *Parliamentary Debates* (Second Reading Speech of Retail Lease Bill), Legislative Assembly, 8 May 1986, 1959-1960 (Fordham).

of exaggerations by the lessor.[373] Such exaggerations included matters such as estimated turnover, profitability, initial rents, rent reviews and the possible profitability of the business.[374]

It was considered that such a problem could be resolved by the provision of a disclosure document[375] to a proposed lessee at least three (3) days prior to the signing of the lease.[376]

Such a suggestion concurrently also found favour with the Arnold Inquiry: -

> A form of documentation known as a Disclosure document which sets out matters of a material nature in relation to statements about the tenancy and details of the lease has been recommended. The document would require both the landlord and tenant to attest to all disclosures which have materially influenced them to enter into the lease. Facts in regard to rent payable, cost payable (outgoings in shopping complexes) and a number of other specified matters will also be included. The Committee envisages that many of the complaints raised about lack of information and misrepresentation would be overcome by the introduction of the disclosure document. [377]

373 Arnold Report 1984, 20.
374 Ibid, 2.
375 The information to be contained in the Disclosure Statement was:- A warning to obtain advice from a solicitor, trade association, bank manager or accountant; details of the parties and the premises; term of the lease and any options to renew; how rent is to be calculated and for what period; any additional amounts to be paid by the lessee including legal fees, insurance premium, outgoings; the amount required for security bond; amounts to be paid for promotional funds; use of premises; title particulars including mortgage details; amount of car parks; details of building works to be carried out to the premises by the lessor and lessee; a warranty by the lessor that any representations to the lessee are contained within the disclosure statement; details of any change to tenant mix or alterations to the building or proposals for roadwork or parking schemes known to the lessor; a warranty by the lessee that any material representations are contained within the disclosure statement and that the lessee has not relied upon any other statements. See Arnold Report 1984, 56.
376 Arnold Report 1984, 21.
377 Arnold Report 1984, 20. Appendix A to the Report contains a model disclosure statement with a warning notice and details of the parties, term of lease, options, rental, rent review, outgoings, use of premises, title particulars and mortgages, car parking, building works and warranties by lessor and lessee.

As well as enhanced disclosure, the Inquiry recommended that a form of fair standard lease be prepared for common use [378] and that a lessee be given an option to lease the premises which would bind the lessor for seven (7) days after the lessee had received the disclosure statement and a copy of the lease and that the lessee not be able to sign the lease for the first three (3) days of the option period. Meanwhile, the lessor would have the right to reject a lessee within fourteen (14) days from the start of the option period. From a practical point of view this meant that the lessee would have the right to sign the lease towards the end of the initial seven (7) day option period and the lessor could then refuse to accept a lessee within the following seven (7) days.[379]

The ACT Working Party did not go so far.[380] It recommended that a potential lessee should be provided with a proposed lease, however they did not consider that a disclosure document was necessary because: -

(a) The problems of a lessee being unaware of conditions in a lease could be solved by lessee education;[381]

(b) lessees may view the disclosure document as a substitute for the lease;

(c) A disclosure document would result in increased costs for lessees who are normally liable to pay the lessors costs of drawing up lease documents;

(d) The remedies suggested in other jurisdictions of making a lease voidable if the disclosure document was not supplied would not be

378 Ibid, 53.
379 Ibid, 21.
380 ACT Report 1984, 19.
381 The Hill Inquiry also believed that many disputes could be resolved by lessee education. See Hill Report 1983 (referred to in ACT Report 1984, 64.)

appropriate as in most cases the lessee will have invested significant funds in establishing the business and the decision to avoid the lease would not be commercially viable.[382]

(e) A more appropriate remedy would be for industry bodies to produce less complicated leases.[383]

Although lessee education would result in lessees better equipped to lease premises it is unlikely that problems involving lack of disclosure could be solved merely by lessee education. How and when this would be achieved was not stated. Some information is solely within the knowledge of the lessor, for example, proposed tenant mix and other future plans for the centre such as redevelopment. Although the suggestion that there be less complicated leases has some merit, it is a totally impractical suggestion where there is no standardised lease and lessors and their advisors seek to cover as many eventualities as possible in the leasing arrangement. Disclosure of information seeks to enhance the bargaining power of the lessee and bring the power of the lessor in negotiations into greater balance with that of the lessee. A disclosure statement allows an unsophisticated lessee to more easily discern the important lessee rights and obligations of the lease and give some insight into the lessors' future plans to enable the potential lessee to make a properly informed decision to avoid disputes at a later date. Standard disclosure statements contain the principal elements of the lease which might guide the decision making process of a lessee in determining whether to enter into the lease or not.

382 Ibid, 20.
383 Ibid.

Conversely the Hill Inquiry recommended that lessors should be encouraged to increase communication with minor retail lessees and to form a voluntary code, but that no action be taken regarding legislation.[384]

Conclusion

In summary, lessee concerns regarding disclosure were: -

(a) insufficient time given to peruse the terms of a lease;[385]

(b) lease documents not being given at all to a lessee prior to the start of a lease;[386]

(c) no standard industry lease;[387] and

(d) insufficient disclosure by lessors or exaggeration by lessors regarding the terms of the lease.[388] This included misleading information regarding future rates or commitments under the lease[389] as well as to estimated turnover or profitability of the shopping centre.[390]

2.2 Later inquiries into retail leasing

Each of the early inquiries considered that the areas of security of tenure, assignment, disclosure, dispute resolution rent and rent review were topics of concern to both lessors and lessees. Although the reasons found for such concern differed between each inquiry, it was recognised that such problems could only be solved legislatively and not by submission to an unenforceable voluntary code.

384 Hill Report 1983 referred to in Arnold Report 1984, 83.
385 Arnold Report 1984, 21.
386 Cooper Report 1981, 32.
387 Arnold Report 1984, 53 and Cooper Report 1981, 24.
388 Arnold Report 1984, 20.
389 Clarke Report 1984, 4.
390 Arnold Report 1984, 2.

These five areas raised in the government Reports from the early 1980s have continued to be concerns for lessors and lessees to date. Whilst all of these issues have been raised in earlier inquiries they remain unresolved in the minds of lessees.

2.2.1 Security of Tenure

In 1997 the Reid Inquiry identified the major business issue raised by small retail lessees as being lack of security of tenure.[391] This concern was raised again a decade later in the enquiry by the Productivity Commission,[392] whose report devoted a whole chapter to the subject.[393]

In 1996 the South Australian government convened the Joint Select Committee on Retail Shop Tenancies which provided a Report in July of that year. One of the issues considered by the Joint Select Committee was the difficulties lessees faced in having their leases renewed without the benefit of an option. The Joint Select Committee recommended that the legislation be amended to provide that a lessor must give an existing lessee (who has no option to renew) the first right of refusal for a new lease subject to certain exceptions. These exceptions included where the centre would benefit from a change of tenancy mix, where the lessee has been in breach of the lease, where the lessor can obtain a higher rent for the lease, where the lessor had plans to redevelop the centre or it can be established that the lessor would be disadvantaged by the granting of the right.[394] The recommendation subsequently became Part 4A Division 3 of the *Retail and Commercial*

391 Reid Report 1997,[2.6].
392 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008),* 99.
393 Ibid, Chapter 6.
394 South Australia, *Parliamentary* Debates, Legislative Council, 28 November 1996, 611 (Levy).

Leases Act 1995 (SA). The benefit provided to the lessee was, however, illusory as the provisions could be excluded if there was a simple certified exclusionary clause in the lease.[395]

Similar preferential rights were introduced in the Australian Capital Territory in 2002 with the passing of the *Leases (Commercial and Retail) Act 2001* (ACT). The ACT legislature took the view that the South Australian amendments should be adopted because of lack of balance between lessors and lessees.[396] It was acknowledged that the availability of certified exclusionary clauses in the legislation may cause lessors to exert undue influence on lessees to agree to such clauses.[397]

During its 2008 Inquiry, submissions were made to the Productivity Commission that the supposed ability of a lessee, at the end of its lease, to relocate from within a shopping centre to the strip outside the shopping centre, was an illusion and that such relocation would result in business failure.[398] Issues regarding lease duration were also considered by the Senate Economics Reference Committee in 2015.[399] In essence, no jurisdiction has devised a means of advancing the rights of a sitting tenant to a fresh lease. In all cases, the final decision on re-leasing the premises to the sitting lessee remains ultimately in the discretion of the lessor.

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395 *Retail and Commercial Leases Act 1995* (SA), s20K. A certified exclusionary clause is a certificate signed by a lawyer not acting for the lessor which states that the lawyer has explained the effect of the provisions to the potential lessee and the effect if such provisions were to be excluded and the lessee gave assurances to the lawyer that they were not acting under coercion.

396 Australian Capital Territory, *Parliamentary Debates*, Legislative Council, 6 March 2001, 647 (Rugendyke).

397 Ibid.

398 Australian Retailers Association, Submission No 71 to Productivity Commission, *Economic Structure and the Performance of the Australian Retail Industry*, December 2011, 71.

399 Senate Economics Reference Committee, *Need for a National Approach to Retail Leasing Arrangements*, 18 March 2015, [3.29].

2.2.2 Dispute Resolution

In relation to dispute resolution, the Beddall Inquiry recommended that shop lease Tribunals be introduced in all jurisdictions to arbitrate disputes between lessors and lessees.[400]

In New South Wales, after briefly using both voluntary and non-voluntary codes of practice,[401] the government abandoned the use of codes when it became obvious that the voluntary code had failed, in particular, in relation to resolution of disputes.[402] Subsequent legislation to meet this failure included the establishment of government sponsored mediation services to avoid the cost consequences of court proceedings.[403]

The Reid Inquiry also received many submissions regarding the unnecessary complexity and cost of dispute resolution. That Inquiry found that the overarching concern of lessees was for disputes to be dealt with out of court.[404] The Productivity Commission also considered dispute resolution matters in depth in 2008[405] and found that all States and Territories, by that stage, had dispute resolution mechanisms that were low cost, accessible and timely.[406]

400 Beddall Report 1990, [4.72].
401 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 April 1994, 1548 (Mr R Chappell, Minister for Small Business).
402 New South Wales, *Parliamentary Debates,* Legislative Assembly,(Second Reading Speech for Retail Leases Bill 1994) 13 May 1994, 2640 (Mr Chappell, Minister for Small Business).
403 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 May 1994, 2640 (Mr Murray).
404 Reid Report 1997, [2.43].
405 Ibid, Chapter 4.
406 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008)*, 71.

Issues regarding delays in dispute resolution[407] were raised by the ACT Working Party Review of Commercial and Retail Tenancy Legislation in 1997. As a result of the recommendations of the Working Party and subsequent submissions by interested parties the government determined to transfer lease disputes from the Tenancy Tribunal to the Magistrates Court who would have the power to order alternative dispute resolution. In addition, the Registrar could convene a preliminary conference to resolve matters.[408] With all jurisdictions giving parties access to mediations and Tribunals, low cost dispute resolution has been achieved.

2.2.3 Disclosure

According to the Reid Inquiry gaps existed in retail leasing legislation in that despite earlier complaint from lessees about the lack of information concerning the centre, information asymmetry between the lessor and lessee had not been addressed.[409] The Joint Select Committee on the Retailing Sector urged the government to re-visit the recommendation of the Reid Inquiry to create a retail tenancy code to deal with the information gap between lessor and lessee.[410] Numerous submissions were received by the Productivity Commission in relation to disclosure requirements.[411] According to the Productivity Commission:-

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407 It was taking 170 days to get to a first directions hearing in the Tenancy Tribunal and 292 days to get to a trial. Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 18 October 2000, 3170 (Chief Minister Humphries).
408 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 December 1998, 3578 (Chief Minister Humphries).
409 Reid Report 1997, [2.27].
410 Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure, A Review of Australia's Retailing Sector*, August 1999, Recommendation 7.
411 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008)*, [154-170].

> The Commission was repeatedly told that there is an information imbalance in the relationship between shopping centre landlords and retail tenants. One retailer association stated that retailers often find themselves in an information "vacuum" when negotiating or accessing their leases. While such claims are not new (similar concerns were expressed to the Reid Enquiry), they are made in the context of extensive information disclosure requirements under current regulations, considerable public information available from tenancy authorities and the development of a lease information and advisory sector.[412]

The Joint Select Committee on Retail Shop Tenancies (SA) also found that there was a shortfall in the disclosure requirements and recommended that lessors provide greater disclosure in relation to fit out requirements, details of any margin the lessor was applying to the cost of services supplied by the lessor, details of current tenancy mix in a retail shopping centre and any changes to such mix contemplated by the lessor and clarification as to whether there is any guarantee of exclusivity.[413]

2.2.4 Rent Review

The Reid Inquiry, in 1997, identified rent review as one of many gaps in retail tenancy legislation in Australia in that rent review clauses allow for unpredictable and potentially large rent increases.[414]

In 1995, the South Australian Joint Select Committee determined that problems still persisted in relation to rent reviews and proposed that the

412 Ibid, [153].
413 South Australia, *Parliamentary* Debates, Legislative Council, 28 November 1996, 526 (Levy). The Joint Committee's Report had been submitted in July 1996.
414 Reid Report 1997, [2.27].

Magistrates Court have jurisdiction for an application by a lessor to review the rent if it was harsh and unconscionable. This submission of the Joint Select Committee was not taken up by the government.[415]

The ACT government, in 1998, received evidence of problems regarding rent review and, in response, proposed an alteration of the law regarding multiple rent review clauses to cover clauses which allowed the lessor to dictate the rate of rent to apply and streamlining provisions regarding determination of market rent.[416]

The Productivity Commission received numerous submissions in relation to rents and rent reviews including complaints regarding the differentiation of rentals being paid by small retailers and anchor tenants and submissions that rents and outgoings should be regulated, in particular at time of renewal. Such regulation was said to ensure that all lessees in a shopping centre pay the same rent, that limits be placed on what can be charged as outgoings and that rent is determined at market rent. The Productivity Commission believed that rent regulation would result in an inefficient market and rent should remain the subject of commercial negotiation.[417] Many of these suggestions were obviously impractical especially given the degree of regulation already.

2.2.5 Assignment

The Reid Inquiry received evidence regarding assignment from lessees in circumstances such as: -

415 South Australia, *Parliamentary* Debates, Legislative Council, 28 November 1996, 612 (Levy).
416 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 December 1998, 3575 (Chief Minister Humphries).
417 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008)*, 142-143.

- A lessee who lost his business when the lessor refused to consent to the assignment of the lease. The lessor then entered into an agreement with the proposed purchaser to lease another shop in the same centre for a similar purpose; and
- A lessee lost a sale of its business because of the delay of the lessor in consenting to an assignment.[418]

Issues regarding the lessors conduct arising from a lessees request for consent to assignment were considered by the ACT government in 1998. Such issues included lessors unreasonably refusing consent to an assignment or taking too long to provide a response to a request for assignment. It was considered that the lessor's grounds for refusal must be reasonable and that such reasonable grounds should be explicitly stated in the legislation.[419] The lessor bore the burden of proving that any other ground for refusal relied upon by the lessor was reasonable.[420] In addition, the lessor should be given only a limited time period to respond to any such request.[421]

Complaints made to the Australian Competition and Consumer Commission in the five years ended 30th June 2007 mostly included allegations of unconscionable conduct and the primary grounds behind such allegations concerned a lessor obstructing the sale of a business.[422]

418 Reid Report 1997, [2.96].
419 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 December 1998, 3578 (Chief Minister Humphries). Such provisions now appear in the *Leases (Commercial and Retail) Act 2001* (ACT), s100.
420 *Leases (Commercial and Retail) Act 2001* (ACT), s100 (3).
421 *Leases (Commercial and Retail) Act 2001* (ACT), s99 (2).
422 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008)*, 197.

It was clear that lessees had some cause for grievance in relation to the process of assignment where the lessor's conduct was often unbusinesslike and dilatory which, upon occasions, meant the loss of a sale of the business conducted on the leasehold premises.

2.3 Recent Inquiries

The relationship between retail lessees and lessors continues to generate controversy. This has sparked further Inquiries. More recent Inquiries have been dominated by Commonwealth agencies and have had a national focus. The Senate Economics Reference Committee 2015 Report considered the principal issues of conflict between lessors and lessees to include: -

(a) security of tenure issues such as minimum lease terms and first right of refusal upon renewal;

(b) disclosure issues such as the disclosure of side incentive agreements;

(c) turnover rent and the use of market reviews at lease commencement; and

(d) The process of dispute resolution.

In its submission to the Committee, the Shopping Centre Council opposed giving lessee's mandatory rights to renew or a right of first refusal. The Council also opposed a third party setting rent upon renewal on the basis that such a determination might result in the lessor receiving a smaller return on investment which could discourage investment in the retail sector.[423]

423 Shopping Centre Council of Australia, Submission No 17 to Senate Economics Reference Committee, *Need for a National Approach to Retail Leasing Arrangements*, August 2014, 11.

In 2008, the Productivity Commission found that restrictive planning and zoning regulation imposed by local authorities allowed lessors to amass power as such regulation restricted the availability of retail space and its use.[424] Such restriction reduced competition between shopping centre lessors and decreased the bargaining power of lessees by reducing their ability to re-locate near to the shopping centre and thereby preserve their business after their lease has expired. The Productivity Commission repeated such findings in 2011: -

> Planning and zoning constraints appear to be the root cause of many of the concerns in the retail tenancy market expressed to the Commission. Simply put, occupancy rates are extremely high in shopping centres due to strong demand for retail space in the face of constrained supply. This places smaller retailers — who do not have the bargaining power of anchor tenants or chain specialty stores — in a very tough bargaining situation. While it is possible for these retailers to 'vote with their feet' and move to shopping strips or other locations, the alternative sites are not always commercially attractive.[425]

In a further Report in 2014, the Productivity Commission found that some retail lease issues such as lack of transparency, disclosure and dispute resolution had never been properly resolved by existing legislation and that many such problems could be solved by changing the existing zoning system.[426]

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424 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008)*, 94.
425 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (December 2011), xxvii.
426 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade* (September 2014), 138.

It is clear that major issues have never been properly resolved by any Inquiry nor by legislative means. These are security of tenure of sitting lessees, issues around the lessor's interaction at lease assignment, the efficiency of dispute resolution, rent review and the adequacy of disclosure. For these reasons this thesis will examine these five major continuing areas of contention between lessors and lessees in greater detail with the ultimate aim of recommending further reform.

3 Consideration of Voluntary Codes

3.1 Introduction to Voluntary Codes

Voluntary codes are codes adopted by an industry and amount to self-regulation. They may be entirely the creation of industry bodies or formed in conjunction with government. In contrast, mandatory codes are codes that are prescribed by legislation and may be enforced by the government. Voluntary codes are more flexible than mandatory codes as the industry bodies can quickly identify any requirement for changes and no approval by the government of such change is required. The rules or standards are determined by industry members with industry knowledge and the likelihood of compliance with those rules is increased because of industry involvement in creating them.[427]

The purpose of voluntary codes is varied. They may be used: -

(a) where failure to have a voluntary code will result in government regulation. For example, the Plastic Bag Code of Practice was adopted by

427 Nicola Howell, "Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards?" [2015] *UNSWLawJl* 19, 20.

the Australian Retailers Association because of government requirements that the environment be protected.[428] The voluntary Code for leasing business premises[429] in the United Kingdom came about because of threats by the government of regulation.

(b) By an industry as an ethical choice or to show that the industry is a responsible corporate citizen.[430]

(c) To promote certainty within an industry.[431]

3.2 Voluntary Leasing Codes in Australia

The Cooper Committee referred to a voluntary code that had been drafted by the Building Owners and Managers Association[432] in an attempt to stave off legislation. The Cooper Committee believed that legislation was not required and that the industry should self-regulate.[433] This proposal was subsequently rejected by the Joint Parliamentary committee who instead recommended legislation.[434]

428 Australian Retailers Association, *Codes of Practice*, (4 January 2016) <http://www.retail.org.au/codes-of-practice.aspx>.
429 The Commercial Leases Working Group, *The Code for Leasing Business Premises in England and Wales (2007).*
430 Dr Tapan Sarker, *A Comparative Analysis of Voluntary Codes of Conduct in the Australian Mineral and Petroleum Industries*, (University of Queensland, May 2009), 4; Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008)*, 238.
431 For example, the Food and Grocery Code of Conduct is meant to promote certainty between suppliers and supermarkets. See Australian Food and Grocery Council, *Food and Grocery Industry Code of Conduct*, (4 January 2016) <http://www.afgc.org.au/our-expertise/industry-codes/food-and-grocery-industry-code-of-conduct/>.
432 The Code of Practice dealt with goodwill, negotiation of leases, methods of setting rentals, lease duration, assessment and recovery of outgoings, tenants turnover, integrated shopping complexes, merchants associations, promotion funds, arbitration and assignment and included a model lease. See Clarke Report 1984, Appendix B, 1.
433 Cooper Report 1981, 6.
434 Queensland Joint Committee Report 1983, 5.

A voluntary code was introduced in NSW in 1991[435] however the code failed because it was not used in the vast majority of transactions[436] and legislation was introduced. A joint review of the voluntary code in 1993 by the Property Council of Australia and the Retail Traders Association of NSW found: -

> 'that the code had many deficiencies and was basically unworkable. The procedures set up to deal with disputes had failed to resolve them, and there was significant non-compliance with the code.'[437]

The Casual Mall Leasing Code is a voluntary code in all Australian jurisdictions except for South Australia where it is a schedule to the *Retail and Commercial Leases Act 1995* (SA). The Code governs casual mall or common area leasing (of 6 months or less) in shopping centres. It seeks to protect not only casual lessees but also other lessees within a shopping centre. It requires amongst other things that the lessor not grant a licence to an external competitor of an adjacent lessee.[438] The Code has been authorised by the Australian Competition and Consumer Commission (ACCC) which provides statutory protection from court action for conduct that might otherwise raise concerns under the competition provisions of the *Competition and Consumer Act 2010* (Cth).

The Code was originally developed in South Australia in 2002 and has been successfully in operation since that time. The ACCC renewed its authorisation in 2012 extending such authorisation until 2017.

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435 *Retail Tenancy Leases Code of Practice 1991*. The Code was promoted both by the Property Council of Australia and the Retail Traders Association of NSW.

436 S Murdoch, P Rowland and N Crosby, *Looking after Small Business Tenants with Voluntary Codes or Statutory Intervention: A Comparison of Australian and UK Experiences*, (PPRES Conference, January 2001) 19.

437 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 April 1994, 1548 (Mr R Chappell, Minister for Small Business).

438 *Retail and Commercial Leases Act 1995* (SA), Schedule, 6(1).

3.3 Voluntary Leasing Codes in the United Kingdom

In the period from 1984 to 1990 there was a huge demand for limited high street lease sites in the United Kingdom. As the demand increased rents soared such that between 1984 and1988 retail sales grew by twenty-five percent whereas rents increased by sixty percent.[439] After a commercial property crash in 1990 many lessees were trapped in long leases with upwards only rent review provisions.[440] Inevitably, they complained to the UK Government who identified three areas as being burdens on small business: -

(a) upward only rent reviews;

(b) outdated arbitration system; and

(c) confidentiality agreements.[441]

In particular, it was considered that the upward only rent review provisions were not able to reflect the market values for rent which ultimately led to rental aberrations and an inefficient market.[442]

Although initially considering legislation to remedy the situation UK Government was eventually persuaded that there was some flexibility in the market[443] and encouraged the retail leasing industry to put in place a voluntary code of practice. There have now been three codes of practice,

439 United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1992, Volume 13 Column 851, (A. Browning).

440 At this time the upwardly only rent review was almost universal and more than 90% of tenants were in 20-25 year leases. See Neil Crosby, 'Commercial Lease Reform in the UK: Can we Learn Anything about the Awareness of Small Business Tenants?' in *Findings in Built and Rural Environment* (RICS, September 2006) 1.

441 United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1992, Volume 13 Column 858, (T. Baldry, Parliamentary Secretary of State for the Environment).

442 J Burton, *Retail Rents: Fair and Free Market?,* (Adam Smith Institute, London, 1992), 82.

443 Department of Environment (UK), *Government Proposes Code of Practice on Upward Only Rent* Reviews, (Media Release, 1984).

the first in 1995,[444] the second in 2002[445] and the third in 2007.[446] The three leasing codes have not been a success. They have been poorly disseminated, little used and have had no direct influence on leasing practice.[447]

In contrast to the English government approach of voluntary codes, the Irish Government reacted to upward only rent review clauses by legislating to abolish such clauses in 2010.[448] The Irish situation is an illustration of the effect that government regulation can have on an industry as opposed to self-regulation. The Irish legislation was not retrospective so that any lessee in a long term lease existing prior to February, 2010 suffered a disadvantage as the lessor would, obviously, not terminate the lease and any potential buyer of the lessee's business would obviously prefer a lease that did not have upward only rent review clauses. The result has been attempts by lessees to either get out of their "old leases" or have the rent review clauses read down.[449]

Upward only rent reviews have always been an area of concern for the UK government however other concerns have also arisen. In the 2005 review of commercial leasing the UK government formed the view that another area of

444 The Commercial Leases Working Group, A Code of Practice for Commercial Leases in England and Wales (1995).
445 The Commercial Leases Working Group, A Code of Practice for Commercial Leases in England and Wales (2nd ed, 2002).
446 The Commercial Leases Working Group, The Code for Leasing Business Premises in England and Wales (2007).
447 Cathy Hughes and Neil Crosby, The Challenge of Self-Regulation in Commercial Property Leasing: a Study of Lease Codes in the UK, *IJLBE* (2012) 4(1) 23, 24.
448 *Land and Conveyancing Reform Act 2009* (Ireland), s132.
449 *Ickendl Ltd v Bewleys Café Grafton Street Ltd* [2014] IESC, 41.

concern was inflexible leasing practices[450] and, in 2009, asymmetry of information.[451]

Unlike Australia the UK Government has not been concerned with leases of too short a duration. In contrast, initially, the complaints of lessees were that they were trapped in leases which were long in duration but with upward only rent reviews.

Concerns in relation to lease duration are dealt with by the *Landlord and Tenant Act 1954* (UK) which gives a lessee a right to extend the lease term subject to certain exceptions.[452] In relation to assignment of leases, the UK, like Australia, has legislation that requires a lessor not to unreasonably withhold consent to assignment of a lease[453]. Additionally, UK lessors have a duty to respond to a request to assign a lease within a reasonable time[454] and the burden of showing that the lessor has responded within a reasonable time is on the lessor.[455] A breach of that duty is actionable by way of civil proceedings[456] which may include a claim for exemplary damages.[457]

Despite the passing of 25 years since problems first arose, the UK Government has still not legislated in relation to retail leases. Reasons for this maybe that, even though the Codes have been failures, that the constant threats by the government have been sufficient to secure a change

450 United Kingdom, *Parliamentary Debates*, House of Commons, 15 Mar 2005 : Column 9WS (Yvette Cooper, Deputy PM).
451 United Kingdom, *Parliamentary Debates*, House of Commons, July 2009 : Column 30WS (I Austin, Parliamentary Under-Secretary of State for Communities and Local Government).
452 *Landlord and Tenants Act 1954* (UK), Part 2.
453 *Landlord and Tenants Act 1927* (UK), s19(1) .
454 *Landlord and Tenant Act 1988* (UK), s1(3).
455 Ibid, s1(6).
456 Ibid, s4.
457 Exemplary damages were awarded in *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324.

in leasing practices[458] or, alternatively, that other legislation[459] has dealt with major problems such that new retail leasing legislation is not required.

3.4 Other Australian Voluntary Codes

Examples of other Australian voluntary codes include the Australian Code of Banking Practice ("Banking Code"). The Banking Code is a purely voluntary code in that there is no government sanction for breach of its rules. The first edition of the code appeared in 1993 and the code is now in its third edition.[460] Despite its length of operation, the code has been criticised as a "toothless tiger" and much of its regulations have been superseded by legislation.[461] It is possible that the Banking Code will become redundant as legislation takes its place.[462]

The General Insurance Code of Practice is another completely voluntary code which is overseen by the Financial Ombudsman Service. The Insurance Code was introduced in 1994 by the Insurance Council of Australia and revised in 2006. The Code deals with issues such as service standards, complaints and making of claims. Despite being introduced by the Insurance Council of Australia; many employees of insurance companies

458 Cathy Hughes and Neil Crosby, The Challenge of Self-Regulation in Commercial Property Leasing: a Study of Lease Codes in the UK, *IJLBE* (2012) 4(1) 23, 25.
459 *Landlord and Tenant Act 1954* (UK); *Landlord and Tenant Act 1988* (UK).
460 The Banking Code deals with topics such as disclosure of fees and changes to fees, privacy and confidentiality, direct debit, chargebacks, credit assessment, financial hardship, debt collection, complaints, guarantors and co-borrowers and vulnerable customers.
461 Nicola J Howell, "Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards?" [2015] *UNSWLawJl* 19, 19.
462 Ibid.

were unaware of the Codes importance as were many consumers. The Code itself was found to be generally "inherently unsatisfactory".[463] Generally speaking, a voluntary code without some sort of sanction for non-compliance is not an effective method to curb unacceptable behaviour.[464]

4. Conclusion

The purpose of this chapter was two-fold. Firstly, to identify particular areas of focus being items of conflict between lessors and lessees originally identified as problems prior to the enactment of retail leasing legislation which have endured, such that these areas of conflict continue to be problematic to the present time.

Secondly, to analyse the various drivers for reform in relation to such areas of focus.

Common across all Australian jurisdictions, prior to the enactment of retail leasing legislation, was the dissatisfaction of lessees with the conduct of lessors.

Lessees in both Australia and the United Kingdom had been the victims of change in the market place or in the economy. In the United Kingdom it was the property crash in the early 1990s whereas in Australia it was the rapid proliferation of shopping centres that occurred from 1975 and into the early 1980s. While the lessees were the victims of these changes of circumstance, the lessors were protected from such effects by leasing

463 House of Representatives, Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Operation of the Insurance Industry during Disaster Events*, (February, 2012), 35.

464 "Persuasion unbacked by sanctions does not influence the worst offenders against a code of good practice. That is really all that self-regulation can employ."
Clarke Report 1984, 7.

practices or by the terms of their leases such as upward only or ratchet rent review clauses.

Although the areas of complaint were many and varied, five major issues in Australia centred on assignment provisions, security of tenure, rent and rent reviews, sufficiency of disclosure and dispute resolution. In the United Kingdom issues also included rent reviews,[465] lack of disclosure[466] and dispute resolution.[467]

These five (5) areas of concern were considered by all of the early committees of inquiry in the early 1980's, subsequently leading to retail leasing legislation in all Australian States and Territories. Despite the recommendation of such inquiries and legislation, these five (5) areas of conflict continued to plague the retail leasing industry as shown by subsequent committees of inquiry up to the present time

The drivers for reform in relation to those 5 areas of conflict were also documented by the numerous government inquiries held since 1981 to the present time and were as follows: -

(a) Security of Tenure – lessees were unable to obtain a lease term of sufficient length to allow them to amortise their fitout cost, or to enjoy the benefits of their hard work in the business, or to have sufficient time left on

465 Upward only rent reviews.
466 Confidentiality agreements and asymmetry of information.
467 Outdated arbitration system for determination of lease disputes.

their lease term to make the business attractive to any buyer. The lessee therefore was required to request the lessor to provide an additional lease term at a time when the lessee had no negotiating power. The subsequent power thereby given the lessor was the subject of complaint in all jurisdictions.

(b) Assignment – at the time when the lessee wished to sell the business and assign the lease, the lessor was able to control the situation for the lessors' ultimate benefit. For example, the lessor could demand a portion of the good will upon sale or refuse or delay consent to the assignment of the lease. By frustrating the lessee's attempts to sell their business the lessor could persuade the unsuccessful assignee to lease different premises within the same centre or allow the lessor to drive the lessee out and take over the good will of the lessee's business.

(c) Rent Review - Rent reviews were often arbitrary in relation to time or amount. The use of a ratchet clause in a lease was regarded as unfair. Turnover rent was commonly charged and this was considered a disincentive to succeed. The provision of turnover information was seen as a breach of privacy which gave the lessor an advantage when negotiating a new rent with the lessee. Lessees were also concerned about lack of confidentiality regarding turnover information and the extent to which a lessor may use such information in relation to other lessees.

(d) Disclosure – Lack of a standard lease and lessor leasing practices meant that lessees were not given lease documents prior to a lease starting or were given insufficient time to peruse the lease. Disclosure by lessees was often incorrect or exaggerated and included information such as

unsupported statements as to the likely success of the lessee's new business or of the shopping centre generally.

(e) Dispute Resolution – Lessees complained that the dispute resolution process through normal courts was too costly or time consuming. In addition, the formal nature of court proceedings favoured the lessor over the lessee. Methods of alternative dispute resolution were sought by lessees to avoid cost, delay and formality and to preserve the business relationship with lessors.

It is necessary when considering any simplified legislation to ensure that such legislation addresses the drivers for reform referred to above. Although legislation has been introduced in each State and Territory in relation to the 5 areas of concern and such legislation has been amended on numerous occasions the 5 areas of concern continue to be problematic to the present day which indicates that so far regulation has not been entirely successful. Chapter 3 of this thesis will consider whether the various regulation imposed has been effective and, if so, to what extent. Chapter 4 will consist of a determination of factors to allow the evaluation of any proposed new legislation which will be discussed in Chapter 5.

CHAPTER 3

SUCCESS OR FAILURE OF LEGISLATION

1. Introduction

Chapter 1 outlined that the purpose of this thesis was to determine whether State and Territory based retail shop lease legislation should be simplified by analysing the benefits of this proposal in relation to selected , significant areas of conflict.

Chapter 2 considered various areas of conflict between lessors and lessees which have been common and enduring and in addition determined the various drivers for reform in relation to such areas of conflict.

This chapter considers to what extent existing retail lease legislation has been a success or a failure by considering the initial purpose for establishing retail shop legislation, the methods adopted to achieve that purpose and, by examining the amendments to legislation, inquiries and journal articles since the introduction of retail shop lease legislation, determining whether such purpose has been achieved.

Legislatures have multiple objectives, in that they not only must protect the weaker lessees but they must also ensure that the leasing market stays strong so that investment in that market continues. If the balance is tipped too far in favour of lessees then investors will abandon shopping centres as an investment vehicle with the result that the centre will suffer and perhaps close, shop-owners/lessees would suffer as fewer shopping centres would make competition for such space (and thereby rentals) even greater. Jobs

would be lost and at the end of the line the consumer would pay more for their goods. It is this "balance" that governments seek in creating retail leasing legislation.

Although shopping centres have been abandoned in the United States of America the closure of such shopping centres has not arisen because of any change in regulation but simply because supply exceeds demand. The gross lettable area of shopping centres in the United States of America per 100 persons in that country is 219 square metres whereas the gross lettable area in Australian per 100 persons is 94 square metres.[468]

In addition changes in demographic has also affected shopping centres such that a population decline in the particular area plus a slump in wages can cause customers of a shopping centre to significantly and quickly decline. Such decline results in the shopping centre no longer being financially viable.[469]

It is not intended to consider the situation in the United States of America in this thesis.

2. **Purpose of Legislation**

In enacting retail shop lease legislation, the principal stated intentions of the various legislatures were to: -

468 Shopping Centre Council of Australia, *Key Facts* (March 2016) <http://www.scca.org.au/industry-information/key-facts/ obtained 30th September 2016>.

469 Amanda Kolson Hurley, *Shopping Malls Aren't Actually Dying* (25 March 2015) CityLab < http://www.citylab.com/design/2015/03/shopping-malls-arent-actually-dying/387925/>.

(a) Foster the further development of small business and to promote a vigorous retail sector;[470]

(b) Preserve the interests of consumers;

(c) Maintain a competitive environment;

(d) Achieve a balance between large and small businesses and thereby strengthen the economy;[471]

(e) Establishing a regulatory framework which was fair to both lessors and lessees;[472]

(f) Resolve problems arising from lack of awareness of lessees;[473]

(g) Cause minimum interference with market forces in relation to retail leases;[474]

(h) Ensure harmony within the retail lease Sector;[475]

(i) Improved the position of lessees in retail shops while maintaining the essential rights of lessors.[476]

(j) Ensure that the parties to the lease are fully informed.[477]

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470 Victoria, *Parliamentary Debates*, Legislative Assembly, 8th May 1986, 1957(Fordham) (Minister for Industry Technology and Resource, Second reading speech of Retail Tenancy Bill)
471 Western Australia, *Parliamentary Debates*, Legislative Assembly 21st February 1985, 184, Mr Brice, Minister for Small Business, Second Reading Speech of Commercial Tenancy (Retail Shops) Agreements Bill.
472 South Australia, *Parliamentary Debate*, Legislative Council, 30th November 1994, 1010 (KT Griffin, Attorney General, Second Reading Speech of Retail Shop Leases Bill); Australian Capital Territory, leases (Commercial and Retail) Bill 2000 Explanatory Memorandum, 2.
473 Western Australia, *Parliamentary Debates*, Legislative Assembly 21st February 1985, 184, Mr Brice, Minister for Small Business, Second Reading Speech of Commercial Tenancy (Retail Shops) Agreements Bill.
474 Ibid.
475 Ibid, 185.
476 Queensland*, Parliamentary Debates*, Legislative Assembly 28th February 1984, 1576 (MJ Ahern, Minister for Industry Small Business and Technology)
477 Australian Capital Territory, Leases (Commercial and Retail) Bill 2000 Explanatory Memorandum, 2.

In order to achieve the abovementioned objectives within the context of the five (5) areas of dispute identified in Chapter 2 the various legislature sought to increase the bargaining power of lessees by: -

1. Inserting a minimum five (5) year lease term;[478]
2. Establishing alternative dispute resolution mechanisms and/or specific retail lease tribunal;[479]
3. Restricting the lessor's methods of rent review;[480]
4. Limiting the ability of the lessor to collect turnover information;
5. Restricting the lessor's rights in relation to assignment specifically requiring the lessor to answer a lessee's request for assignment within a limited period;
6. Requiring disclosure by the lessor to the lessee of features of the lease including a copy of the draft lease.[481]

3. **Amendments, Repeals and Alterations**

478 *Retail Tenancies Act 1986* (Vic) s21; *Retail Leases Act 1994* (NSW) s16; *Retail and Commercial Leases Act 199*5 (SA) ss20B,20K; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s13; *Leases (Commercial and Retail) Act 2001* (ACT) s1; *Fair Trading (Code of Practice for Retail Tenancies) Regulation 2008* (Tas) s10(3) and 10(4); *Business Tenancies (Fair Dealings) Act 2003* (NT) s26.

479 Retail Tenancies Act 1986 (Vic) s81; *Retail Shop Leases Act 1994*(Qld) s63; *Retail Leases Act 1994 (NSW)* s61; *Retail and Commercial Leases Act 1995* (SA) Part 9; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s16; *Leases (Commercial and Retail) Act 2001* (ACT) Part 14; *Fair Trading (Code of Practice for Retail Tenancies) Regulation 2008* (Tas) s39; *Business Tenancies (Fair Dealings) Act 2003* (NT) ss86, 119.

480 *Retail Tenancies Act 1986* (Vic) s35; *Retail Shop Leases Act 1994*(Qld) s27; *Retail Leases Act 1994* (NSW) 18; *Retail and Commercial Leases Act 1995* (SA) s22; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s11; *Leases (Commercial and Retail) Act 2001* (ACT) ss47,50; *Fair Trading (Code of Practice for Retail Tenancies) Regulation 2008* (Tas) s12; *Business Tenancies (Fair Dealings) Act 2003* (NT) s28.

481 *Retail Tenancies Act 1986* (Vic) s17; *Retail Shop Leases Act 1994*(Qld) s22; *Retail Leases Act 1994* (NSW) s11; *Retail and Commercial Leases Act 1995* (SA) s12; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s6; *Leases (Commercial and Retail) Act 2001* (ACT) s36; *Fair Trading (Code of Practice for Retail Tenancies) Regulation 2008* (Tas) s6; *Business Tenancies (Fair Dealings) Act 2003* (NT) s19.

Retail lease legislation has been significantly amended since first commencement. For example, the *Retail Shop Leases Act 1984 (Qld)* was amended on several occasions[482] until being completely replaced by the *Retail Shop Leases Act 1994*.[483] That legislation itself has been significantly amended[484] as has legislation in all other jurisdictions.[485]

Drivers for amendments to legislation were that: -

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482 *Retail Shop Leases Act Amendment Act 1985*(Qld)*; Retail Shop Leases Act Amendment Act 1988*(Qld)*; Statute Law (Miscellaneous Provisions) Act 1989*(Qld)*; Retail Shop Leases Act Amendment Act 1989*(Qld)*; Retail Shop Leases Act Amendment Act 1990*(Qld)*; Statute Law (Miscellaneous Provisions) Act 1990*(Qld)*; Land Tax Legislation Amendment Act 1991*(Qld)*.*

483 The *Retail Shop Leases Act 1994* (Qld) commenced on the 28th October 1994. It repealed the *Retail Shop Leases Act 1984* (Qld). The *Retail Shop Leases Act 1994* (Qld) has been the subject of further review and the Retail Shop Leases Amendment Bill 2015 is currently before parliament.

484 *Statute Law (Minor Amendments) Act (No. 2) 199*; *Statute Law Revision Act 1995*; *Retail Shop Leases Amendment Act 1999 ; Retail Shop Leases Amendment Act 2000 ; Duties Act 2001; Statute Law (Miscellaneous Provisions) Act 2003 ; South Bank Corporation and Other Acts Amendment Act 2003 ; Legal Profession Act 2003 ; Legal Profession Act 2004 ; Revenue Legislation Amendment Act 2005 ; Retail Shop Leases Amendment Act 2006 ; Legal Profession Act 2007 ; Justice (Fair Trading) Legislation Amendment Act 2008 ; Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009 ; State Penalties Enforcement and Other Legislation Amendment Act 2009 No. 48 ss 1,; Fair Trading (Australian Consumer Law) Amendment Act 2010 ; Criminal Code and Other Legislation Amendment Act 2011; Commercial Arbitration Act 2013.*

485 Victoria. The *Retail Leases Act 2003* (Vic) commenced 1st May 2003. This Act repealed the *Retail Tenancies Reform Act 1998* (Vic) which in turn had repealed the *Retail Tenancies Act 1986* (Vic).

Tasmania. *The Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* commenced 1st September 1998. No changes have occurred to the legislation despite a review occurring in 2002.

South Australia. The *Retail and Commercial Leases Act 1995* commenced 30th June 1995. This Act repealed Part 4 of the *Landlord and Tenant Act 1936*. Part 4, which dealt with commercial tenancies, had been inserted in to the Act by the *Statutes Amendment (Commercial Tenancies) 1985* (SA) on the 14th March 1985.

Western Australia. The *Commercial Tenancy (Retail Shops) Agreements Act 1985* commenced 1st September 1985 followed by the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1988* commencing 1st July 1999 and the *Commercial Tenancy (Retail Shops) Agreement Amendments Act 2011* commencing partially on 14 December 2011 and partially 1st January 2012.

New South Wales. The *Retail Leases Act 1994* commenced 1st August 1994. The *Retail Leases Act 1994* has been significantly amended in particular by *Retail Lease Amendments Acts* in 1997, 1998, 2002, 2004 and 2005.

Australian Capital Territory. The *Leases (Commercial and Retail) Act 2001* commenced 1st July 2002. It consolidated and replaced the *Tenancy Tribunal Act 1994* (ACT) and the *Commercial and Retail Leases Code of Practice 1994* (ACT). The Code of Practice had been amended 8 times between 1997 and 2001 whereas *the Leases (Commercial and Retail) Act 2001* has been amended 13 times since coming into operation.

Northern Territory. The *Business Tenancies (Fair Dealings) Act 2003* commenced 1st July 2004. It repealed the *Commercial Tenancies Act 2002* (NT) which was an amalgam of the *Tenancy Act 1979* (NT) and numerous other pieces of amending legislation.

(a) the retail leasing environment has changed thereby requiring a change in legislation. For example: -

(i) The development of a retail lease advisory section to provide information to retail lessees. The market and rental information and benchmark data about retail leases and occupancy costs available from such commercial lease advisory services will reduce the pressure for information disclosure from lessors and thereby reduce the demand for more detailed disclosure statements.[486]

(ii) The rise of online shopping. In the same way that shopping centres originally made shopping more convenient as customers were not required to visit the central business district in order to do their shopping, online shopping provides even greater convenience than that provided by regional shopping centres.[487] Although a customer may be reluctant to purchase on line items which are personal to the customer such as clothing or shoes, there is no such reluctance in purchasing impersonal items such as compact discs, DVDs or books.[488] The capture of online sales in turnover rent clauses is seen as inappropriate by lessees as the income is distinct from the income derived from the bricks and mortar store. In addition, the locational advantage enjoyed by a lessor, as reinforced by zoning regulations, is eroded as online sales increase and the sales in shopping centres

486 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 162.
487 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (December 2011), 105.
488 Ibid, xix.

decrease. A decrease in sales or a shift by retailers to online shopping stores will result in a lesser demand for shopping centre space[489] and the lessors bargaining power reduces accordingly.[490] As the bargaining power gap between lessor and lessee closes the outcomes sought by government are achieved as a result of ordinary market forces[491] so the need for further or more prescriptive legislation decreases.

(b) changes in legislation or enquiries in other jurisdictions which prompted changes in every other jurisdiction. For example, the findings of the Productivity Commission in 2008 that procedures could be made less difficult to apply by greater harmonisation of lease information and disclosure statements led to a national form of disclosure document in 2009 which was adopted in Queensland, Victoria and New South Wales.[492] The ability to have a fully harmonised disclosure document and more uniform procedure will however not be possible until more fully harmonised legislation has been

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489 Red Group, Submission No 89 to Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (December 2011), 22.

490 Interestingly, Professor Tarlo, writing in 1984 predicted that regional shopping centres would set the pattern for shopping in the future, at least until: -

> "… the computer finally takes over our lives and people become almost totally sedentary (and bug-eyed) in front of their video screens, selecting their purchases with a touch on the keyboard."

Professor H Tarlo, 'The Great Shop Lease Controversy' (1983) University of Queensland Law Journal 13(1), 7.

491The introduction of a voluntary code of practice in 1995 in the United Kingdom was found to have had negligible effect on retail leasing practices but that a poor lettings market had caused the changes to such practice in line with the governments objectives. N Crosby & S Murdoch, *"The Cutting Edge 2000 – Monitoring the UK Commercial Leases Code of Practice Colin Code, What Code?"* RICS Research Foundation, University of Reading, 1; Crosby N, "Small Business Lease Reform – Can the UK Learn from the Australian Experience." (Working Papers in Real Estate and Planning 14/06, University of Reading Business School, 2006), 2. <http://centaur.reading.ac.uk/20611/1/1406.pdf.>

492 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (December 2011), 267.

achieved.[493] Given the political realities, fully harmonised legislation, may be too difficult to achieve in the short term but this does not detract from the hypothesis that a more unified approach to the regulation of certain processes would not be commercially beneficial to both parties.

(c) The effect of retail lease legislation upon shopping centres generally and the expectation of both lessors and lessees. For example: -

(i) allowing a lessee to obtain a market valuation of rental prior to deciding whether or not to exercise an option to renew a lease led to lessors no longer granting options to renew. As a result, demands by lessees for legislation to provide extended lease terms increase.

(ii) The existence of legislation alone results in a lessee relying upon the legislation to protect them rather than upon their own due diligence enquiries.[494]

(iii) The imposition of a minimum 5 year lease term resulting in lessors only granting 5 year lease terms.

(d) the original legislation was ineffective and therefore required amendment.[495]

The constant tinkering with the legislation has arisen because of demands of lessees and lessors but also because of the mandatory review sections contained within the legislation.[496] The initial enactment of retail lease

493 Ibid.

494 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008)*, xxv1.

495 Reid Report 1997, [2.24].

496 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008)*, 45.

legislation in Australia was seen as pioneering legislation[497] The effect of the legislation upon the retail leasing market could not be predicted and so many jurisdictions established mandatory review clauses requiring the review of the legislation every 5 or 7 years[498] or alternatively put in place a committee to constantly review the legislation.[499]

Such arbitrary review periods seem likely to produce legislation for its own sake rather than legislation reacting to a real problem. A better course would be to appoint a committee or government official to monitor any difficulties that may arise. Such a body may react swiftly to such difficulties and provide recommendations to the government about required amendments to legislation.

Conclusion

Although some of the amendments referred to above may have been motivated by mandatory review provisions the constant flow of inquiries, reports and amendments suggest that areas of dispute between lessors and lessees are still very much active and that legislation has not been effective in fixing areas of dispute.

497 Queensland, *Parliamentary Debates*, Legislative Assembly 20 December 1983, 1014 (Honourable MJ Ahern, Minister for Industries, Small Business and Technology)
498 *Retail Leases Act 1994* (NSW), s86 (Seven years); *Business Tenancies (Fair Dealings) Act 2003* (NT), s144 (Seven years). *Retail Shop Leases Act 1994* (Qld), s122. In Queensland the review period was initially 5 years then increased to seven (7) years. This mandatory review provision has been deleted in the Retail Shop Leases Bill 2015 (Queensland).
499 *Retail and Commercial Leases Act 1995* (SA), s73 – 74.

4. **Inquiries and Developments Since Commencement of Retail Lease Legislation.**

4.1 Introduction

Examining the various enquiries and other investigations in relation to Retail Shop Lease Legislation since the commencement of such legislation in 1984 will reveal whether such legislation has been successful or whether there are shortfalls within the legislation. If particular legislation has been successful in achieving its stated purpose, then such legislation may be adopted as part of any review of retail lease legislation. Conversely, if a particular method of dealing with a retail lease problem has been implemented and such method, according to such enquiries and investigations, has failed then such method of dealing with that problem should be excluded from such retail lease legislation. It is proposed to deal with various topics considered since the commencement of retail lease legislation and to specifically consider the Reid Report as it directly relates to the failure of retail leasing legislation.

4.2 Reid Report 1997.

(a) Issues Considered by the Reid Committee.

In 1997 the Federal Government convened the Reid Committee[500] which was asked to, amongst other things,[501] specifically consider whether the retail lease legislation at the time was effective.

500 House of Representatives Standing Committee on Industry, Science and Resources, Parliament of Australia, Finding a Balance: Towards Fair Trading in Australia, May 1997 ("Reid Report 1997")
501 The terms of reference of the Reid Committee were to: -
(a)investigate and report on the major business conduct issues arising out of commercial dealings between firms, including, but not limited to, franchising and retail tenancy;

The factors leading to the formation of the Reid Committee can be summarised in the phrase issued by the committee:-

> 'it is war out there between the retailers and the owners and managers.'[502]

The major business conduct issues raised by small lessees concerned lack of security of tenure, calculation of rent and review of rent to market value, calculation of variable outgoings, lack of disclosure or misleading information provided by lessors or their agents, changes in tenancy mix and exercise by the lessor of their discretion to redevelop shopping centres and to compulsorily relocate lessees.[503]

The Reid Committee made various recommendations in relation to the abovementioned topics. In addition the Reid Committee was concerned about access to justice[504] and education.[505]

The concern of lessees was that the imbalance of power in favour of the lessor in relation to these abovementioned items would cause an unfair result in favour of the lessor. In addition the lessor could use such provisions to oppress a lessee and to achieve a result not originally intended by such provisions. For example, the use of continual relocation notices to

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(b)investigate and report on the economic and social implications of the major business conduct issues, particularly whether certain commercial practices might lead to sub-optimal economic outcomes; and
(c) examine whether the impact of the business conduct issues identified were sufficient to justify government intervention; and
(d) examine options and make recommendations as to strategies.
502 Reid Report 1997, 15.
503 Ibid, 16.
504 Ibid, 187-188.
505 Ibid, 191.

bankrupt a lessee or the insistence of new fit out which would result in the business being unable to trade during such fit out causing cessation of income.[506]

Lessees also expressed concern because they were not consulted nor compensated for changes in a shopping centre tenancy mix. In circumstances where, the commencement of their lease, a lessee may have been the only proprietor in relation to a certain product or service then in the absence of an exclusivity clause in the lease the lessor may introduce any number of competitors to that lessee and be required to pay no compensation to them even where the lessor had represented that no such competitors would be introduced.[507]

Despite mandatory disclosure in many jurisdictions incorrect information or gaps in such information still occurred. Such incorrect information included representations in relation to traffic flow, impending closure of a major store, tenancy mix and proportion of a centre already leased.[508] Lessees were also concerned about outgoing charged to the lessees and their lack of control over such expenditure outgoings and promotions.[509] Additionally there was concern by lessees that sitting lessees were held to ransom particularly at the end of a lease period.[510]

506 Ibid, 76.
507 Ibid, 68.
508 Ibid, 65-66.
509 Ibid, 57.
510 Ibid, 55.

The Reid Committee found that complaints from lessees indicated that there were substantial gaps in retail lease legislation in Australia.[511] Such complaints were not about unconscionable conduct by lessors but were primarily about the large degree of control held by the lessor and the subsequent "hard bargaining stance" that such control would allow the lessor to adopt. For example, lessees had very little power in relation to relocation of the lessees premises or redevelopment[512] of the shopping centre.

There was a continued substantial imbalance of power between lessors and lessees at the expiration of an existing lease despite the fact that this problem has been identified over a decade previously.[513]

Other issues identified by the Reid Committee centred around unfair rent review provisions, information asymmetry, lessors control over outgoings and unfair conditions imposed on the sale of business.[514]

At the time of the hearing of the Reid Committee the issues referred to above were causing a great deal of concern not only for lessees but for lessors. The Committee concluded from the fact that these issues were still prevalent that retail lease legislation to that time had not been effective[515] although there had been some result in increasing the bargaining position of lessees such as the minimum five (5) year lease terms and low cost dispute resolution mechanisms such as mediation or low cost retail lease tribunals.

511 Ibid, 23.
512 Ibid, 22.
513 Ibid, 23 and 55.
514 Ibid, 40.
515 Ibid, 23.

Problems which had existed prior to the retail lease legislation still existed and had not been remedied by that legislation.

Reasons for the failure of retail lease legislation, as identified by the Reid Committee were: -

(i) A recession in Australia in the early 1990's which led to a downturn in business for both lessors and lessees;[516]

(ii) Subsequently lessors sought to maximise their return on investment by taking every opportunity to increase revenue at the expense of lessees;[517]

(iii)Disparity in bargaining strength between lessors and lessees which was identified in the early inquiries and which was never properly dealt with. Specifically, the problem of the sitting tenant had never been addressed[518] such that the lessee at the end of the lease remained an "economic captive" of the lessor.[519]

Additionally, the bargaining power of the lessor allowed it to adjust the terms of the lease depending on whether the lessee was a small speciality lessee or a large anchor tenant. Normally, anchor lessees are offered leases with turnover rent where there is no minimum rent to be paid so that as turnover decreases so does the anchor tenants rent.[520] In contrast, smaller lessees who have turnover clauses in their lease have a minimum rental provision such that the rent can never reduce below a certain amount. The obligation for a lessee to pay turnover rent on top of a minimum amount where that

516 Ibid, 20.
517 Ibid.
518 Ibid, 23.
519 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 102.
520 Reid Report 1997, 49.

minimum is in fact market rent was the subject of criticism in the early inquiries[521] and may in fact be unconscionable.[522] By paying an amount above market rental the lessor is in effect sharing in the good will of the business itself.[523]

(iv) The inability of lessees to have their disputes dealt with outside of the formal court system in order to limit legal costs. Litigation through the courts was too expensive and took too long. In addition, if the lessor had rights of appeal then the matter could be protracted and the lessor would win the case by attrition;[524]

(v) Retail leasing legislation was not drafted well enough to prevent lessors from exploiting loop holes. For example, lessees being put on temporary leases that were not subject to retail lease legislation.[525]

(vi) Retail leasing legislation was not drafted well enough to protect lessees from themselves. For example, legislation giving a lessee a right (such as a right to a minimum 5 year lease term) which could be waived by the lessee would result in the lessor advising that they will not provide a lease to the lessee unless the lessee waives that right thereby rendering that legislation worthless.[526]

(vii) Unavailability of rental information to lessees thereby increasing the information asymmetry at time of lease renewal and rent negotiation.[527]

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521 Cooper Report 1981, 24.
522 Webb E, "Unconscionable Conduct and the Retail Shop Wars – The Lessees Strike Back" (2000) 8 *Australian Property Law Journal*, 12.
523 Cooper Report 1981, 24.
524 Ibid, 27.
525 Ibid, 32.
526 Ibid.
527 Ibid, 47.

As a result of the Reid Report the Federal Government enacted legislation to: -

(i) Protect small businesses against unconscionable conduct by the enactment of Section 51AC of the *Trade Practices Act 1974* (Cth) in July 1998. The Federal Government rejected the recommendation that it prohibit unfair conduct adopting instead unconscionable conduct which is a higher standard than unfair conduct;[528]

(ii) Allow Industry–Designed codes of practice to be legally underpinned and to be made mandatory under the *Trade Practices Act 1974* (Cth) and also enforced by the Australian Competition and Consumer Commission. The subsequent 1999 report of the Joint Select Committee on the Retailing Sector proposed the drafting of a retail industry code of conduct by the Australian Competition and Consumer Commission.[529] No such industry code was implemented, however, as the Federal Government disagreed with such a proposal preferring self-regulation;[530] and

(iii) Allowing the Australian Competition and Consumer Commission to take representative actions on behalf of small businesses for misuse of market power. Representative actions by the ACCC in the retail leasing area have been scarce probably because such proceedings are difficult and expensive to run and the ACCC has limited financial resources.[531] Such an

528 Webb E, "Almost a Decade On – A (Reid) Report Card on Retail Leasing" (2006) 13 *Australian Property Law Journal* 240, 242.
529 Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure, A Review of Australia's Retailing Sector*, August 1999, Recommendation 5.
530 Webb E, "Almost a Decade On – A (Reid) Report Card on Retail Leasing" (2006) 13 *Australian Property Law Journal* 240, 244.
531 Associate Professor Frank Zumbo, Submission No 20 to Senate Economics Committee, Parliament of Australia, *Inquiry into the Provisions of the Trade Practices Amendment (Small Business Protection) Bill 2007*, 5 September 2007, 2.

action was however successfully completed in *ACCC v Dukemaster*[532] which is the first finding by the Federal Court of unconscionable conduct by a lessor for the purposes of s51AC of the *Trade Practices Act 1974* (Cth). The ability of the ACCC to bring representative actions on behalf of multiple lessees is important as current retail lease legislation does not appear to allow lessees to bring their own representative or class action against a common lessor through a low cost tribunal and instead any such proceeding must be taken only through the Federal Court.[533]

(b) Conclusions

The Reid Report makes it very clear that as of 1997 there were still substantial areas of dispute between lessors and lessees. Numerous complaints were received regarding the conduct of lessors in seeking to maximise their return from their investment by taking every opportunity to wring the last dollar from lessees. Issues surrounding security of tenure had not been solved by existing legislation and the sitting tenant[534] problem remained.

Although the Reid Inquiry found that there had been some headway made in relation to giving lessees more bargaining power because of the low cost dispute resolution procedures and 5 year minimum lease terms granted in most state legislation there had otherwise been little gain. Criticism may be levelled against the Reid Inquiry for their emotive view of the lessee-lessor relationship nevertheless at the time of the report New South Wales had enacted retail lease legislation and both Queensland and South Australia

532 [2009] ATPR 42-290.

533 W D Duncan and S Christensen, "Safety in Numbers? Not Really; Limits of Joint Action by Retail Lessees against a Common Lessor" (2001) 8 *Australian Property Law Journal* 1, 14.

534 Suggested by the Reid Inquiry to be "sitting ducks". See Reid Report 1997, [2.16].

had repealed and replaced their previous legislation. Such changes obviously had had little effect in improving the lot of lessees.

Despite legislation restricting the bases for a lessor in refusing consent to assignment, lessors and their managing agents were still able to act unfairly or unreasonably. [535] Similarly, the Reid Inquiry found that there were ongoing problems with rent review provisions and in particular that lack of access to information by valuers skewed any market rent review[536] and that secrecy clauses in leases in relation to rental made it difficult for a lessee to properly negotiate the terms of their lease.[537] The existence of secrecy or confidentiality clauses in leases prohibiting a lessee form disclosing the rent they pay for their premises may result in a finding that a lessor has acted unconscionably where the rent paid by a particular lessee is exorbitant or much more than other lessees within the same complex are paying.[538]

4.3 Industry Wide Standard.

The 1990 report of the House of Representatives Standing Committee on Industry Science and Technology ("Beddall Committee") considered the situation regarding shopping centre leases and found there was a disparity in bargaining power between lessees and lessors which could result in the lessor abusing its position including imposing unfair conditions in the lease. The Beddall Committee suggested that there should be an Industry wide standard from which negotiations could begin to protect the rights of both

535 Reid Report 1997, 41.
536 Ibid, [2.166].
537 Ibid, 56.
538 E Webb, "Unconscionable Conduct and the Retail Shop Wars – The Lessees Strike Back" (2000) 8 *Australian Property Law Journal,* 12.

lessors and lessees[539] however the terms of that industry wide standard were not stated by the Beddall Committee. The suggestion of an "industry wide standard" is a suggestion repeated in the federal inquiries that were to follow. For example, the Reid Committee would recommend a uniform tenancy code which would draw together all the effective elements of existing State and Territory legislation.[540] The Productivity Commission recommended that the more prescriptive elements of retail lease legislation be removed and that there only be a voluntary code of conduct which would:

> …include provisions for standards of fair trading, standards of transparency, lodgement of leases, information provision and dispute resolution; and avoid intrusions on normal commercial decision making in matters such as minimum lease terms, rent levels, and availability of a new lease.[541]

So far there has been no industry wide standard nor any national code, voluntary or otherwise. The benefits of such a document to multi-jurisdictional lessors or lessees is obvious, in that, the obligation of such parties to be able to deal with different legislation in each Australian jurisdiction would disappear. This would only be achieved where such national code or standard was not merely an overlay of ongoing state legislation.[542]

539 Ibid, [4.59].
540 House of Representatives Standing Committee on Industry, Science and Resources, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia*, May 1997, 33.
541 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), xxxiii.
542 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (December 2011), 34.

4.4 Assignment

(a) Initial Complaints

Prior to the enactment of retail leasing legislation lessees complained of the problems caused by lessors in providing consent to an assignment of lease.[543] A lessee, in order to realise the good will of its business, must sell the business and assign the lease to the buyer as the goodwill of the business is intrinsically bound to its location. Frustration of the assignment of the lease will result in frustration of the sale of the business itself thereby causing economic harm to the lessee.

Ongoing issues in relation to assignment of leases revolved around the inability of lessees to have a lessor's refusal to consent to an assignment of lease reviewed quickly and cheaply, the delay of lessors in responding to requests for consent to assignment,[544] onerous conditions imposed as part of the lessor's consent to assignment and the ongoing liability of lessees after the lease had been assigned to new lessees. It is proposed to consider each of these complaints.

(b) Remedies

Current retail lease legislation controls most of the assignment process including review of the lessor's refusal to consent to assignment and any delay in responding to such a request.

(i) Lessors Refusal to Consent to Assignment.

543 Reid Report 1997, 2.100.

544 Professor H Tarlo, "The Great Shop Lease Controversy" (1983) *University of Queensland Law Journal* 13 (1), 18.

As part of determining whether to consent to a request from a lessee for the lessor to consent to an assignment of a lease, a lessor may request information reasonably required to make a commercial decision (such as proposals by the assignee to change the use of the premises[545] or details as to the lessees financial or business standing)[546] and as a result of that information the lessor may determine to refuse their consent to an assignment or sub-letting for relevant grounds. Current retail lease legislation provisions provide that the lessor may not unreasonably withhold consent to an assignment.[547] A breach of these provisions gives the lessee the right to claim compensation from the lessor.

(ii) Limitation on Lessors Discretion to Refuse Consent.

The Reid Committee believed that a fair balance between lessors and lessees could be achieved by legislative guidance as to what circumstances would allow the lessor to refuse consent.[548] Legislation in multiple Australian jurisdictions[549] now provide that the lessor is only entitled to withhold consent in limited circumstances such as: -

1. Where the assignee proposes a change of use;[550]

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545 Ibid.

546 W Duncan, "The Regulation of Commercial Tenancies – Heading for the Sunset", (1990) 2 *Bond Law Review*, 34.

547 *Retail Leases Act 2003* (Vic), s60; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), s10; *Leases (Commercial and Retail) Act 2001*(ACT), s100; *Business Tenancies (Fair Dealings) Act 2003* (NT), s53; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas), s28; *Retail Shop Leases Act 1994* (Qld), s50; *Retail and Commercial Leases Act 1995* (SA), s43; *Retail Leases Act 1994* (NSW), s39.

548 Reid Report 1997, 2.100.

549 In Queensland and Western Australia there are no prescribed grounds for refusal of consent and the general law applies. See *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s10 and *Retail Shop Leases Act 1994* (Qld) s50;

550 *Retail Leases Act 2003* (Vic) s60; *Business Tenancies (Fair Dealings) Act 2003* (NT) s53; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s28; *Retail and Commercial*

2. Where the assignees financial resources or retailing skills is inferior to the existing lessee;

3. Relevant leasing procedures have not been complied with;

4. The proposed assignee does not enter into a written agreement with the lessor;[551] or

5. The existing lessee has not provided sufficient disclosure to the assignee.[552]

The difficulty with such highly prescriptive regulation is that by prescribing what factual conditions must exist for the lessor to be allowed to refuse to consent, other grounds for refusal of consent are excluded even when such grounds for consent may be reasonable.

Additionally, the ability of a lessor to refuse consent where the assignee has financial resources or retailing skills inferior to the existing lessee is deficient as it allows a lessor to form a subjective opinion regarding the assignee. The lessor may arbitrarily decide that an assignee has retailing skills inferior to the existing lessee.[553]

(iii) Review of Lessors Decision to Refuse Consent to Assignment

Where the lessors consent was refused there was, prior to retail leasing legislation, no simple low cost mechanism to give to the lessee a remedy where the lessor's reasons for refusal are, according to the lessee,

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Leases Act 1995 (SA) s43; *Retail Leases Act 1994* (NSW) s39; *Leases (Commercial and Retail) Act 2001*(ACT) s100.

551 *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s28.

552 *Retail Leases Act 2003* (Vic) s60.

553 New South Wales, *Parliamentary Debates*, Legislative Council, 13 May 1994,2575 (RSL Jones)

unreasonable or a condition imposed upon assignment or sub-lease was unjust.[554] Any such remedy had to be pursued through the traditional courts system.

Current retail lease legislation provides that where the lessee has given the lessor full particulars of a proposed assignment and the lessor has refused consent then such refusal may be referred, after mediation is attempted or considered, for resolution to a tribunal[555] or court.[556]

The availability of low costs dispute resolution is perhaps one of the success stories of retail lease legislation in Australia as it allows the lessee to have the lessor's decision regarding refusal of consent reviewed quickly and cheaply. The question of the speed of such resolution is also highly relevant where the lessee has a contract for the sale of its business dependent upon the lessor's consent to assignment.

(iv) Onerous Conditions Imposed as Part of Lessors Consent.

In Queensland, legislation[557] provides that a retail tenancy dispute exists where a lessor, in granting consent to an assignment imposes on the assignee an obligation not imposed on the lessee, or seeks to remove a right

554 Department of Justice and Industrial Relations (Tas), *Review of the Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998 Final Report*, March 2002, 54; Small Business Commissioner (SA), *Discussion Paper re The Retail and Commercial Leases Act 1995*, December 2014, [1.7].
555 *Retail Shop Leases Act 1994* (QLD) Part A Division 2; *Retail Leases Act 2003* (Vic) s81; *Retail Leases Act 1994* (NSW) s70; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) Part 3.
556 *Retail and Commercial Leases Act 1995* (SA) s68;*Leases (Commercial and Retail) Act 2001*(ACT) s144; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s139; *Business Tenancies (Fair Dealings) Act 2003* (NT) Part 11.
557 *Retail Shop Leases Act 1984* s 50(2).

from the assignee conferred on the lessee. Such a provision appears to be unnecessary as such rights exist already at common law.[558]

(v) Lessors Delay in Providing or Refusing Consent.

Where the lessor delays in providing a response to a request for consent to an assignment of lease current retail lease legislation provides that a retail tenancy dispute arises that may be referred to a tribunal for determination[559] or that after a certain period the lessor shall be deemed to have consented to the assignment.[560] Where consent is deemed to be granted there is however no guidance regarding on what terms the assignment is granted and the lessee is uncertain as to such matters until the lessee applies to the courts or tribunal for a determination.[561]

(vi) Release of Lessee from Liability Upon Assignment.

Prior to retail lease legislation, lessees complained that upon assignment of their lease they remained liable under the lease and if the incoming lessee was to default that they could be sued as a result of such default. Current retail lease legislation now provides that the liability of outgoing lessees is, subject to complying with certain disclosure requirements, extinguished upon

558 W Duncan, "The Regulation of Commercial Tenancies – Heading for the Sunset", (1990) 2 *Bond Law Review*, 34.
559 *Retail Shop Leases Act 1994* (Qld) s50.
560 *Retail Leases Act 2003* (Vic) s61(6); *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s10(2); *Leases (Commercial and Retail) Act 2001*(ACT) s99; *Business Tenancies (Fair Dealings) Act 2003* (NT) s55; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s28(5); *Retail and Commercial Leases Act 1995* (SA) s45; *Retail Leases Act 1994* (NSW) s41.
561 Small Business Commissioner (SA), *Discussion Paper re the Retail and Commercial Leases Act 1995*, December 2014, [1.7].

assignment.[562] In South Australia however such liability is only extinguished on the earliest of the following dates: -

1. 2 years after assignment;
2. The date the lease expires; or
3. The date the lease is renewed or extended after assignment.[563]

Privity of contract meant that the lessors and lessees interests to a certain extent were aligned as the existing lessee had a financial interest in ensuring that a lessor received a good new lessee. The lessee would therefore have to make their own assessment as to the suitability of the incoming lessee before presenting them to the lessor for approval.

The removal of ongoing liability of outgoing lessees has the ability to damage the retail leasing market as without privity of contract the outgoing lessee has no incentive to choose an assignee who will be likely to be a good ongoing lessee. The outgoing lessee will therefore choose a potential buyer simply based upon how much the buyer is willing to pay. This mis-alignment of the lessors and lessee's interests will result in lessors being warier about incoming lessees and more reluctant to consent to assignments.[564]

562 *Retail Leases Act 2003* (Vic) s62; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s10; *Business Tenancies (Fair Dealings) Act 2003* (NT) s58; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s28; *Retail Leases Act 1994* (NSW) s41A; Retail Shop Leases Act 1984 (Qld) S50A.

563 *Retail and Commercial Leases Act 1995* (SA) s45A.

564 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 234.

In the United Kingdom where original lessee liability has also been removed[565] lessors are still able to require that the outgoing lessee guarantee the performance of the incoming lessee by requiring the existing lessee (and the existing lessee's guarantor)[566] to guarantee the performance of the incoming lessee.[567]

Providing for a lessee to be released from liability upon assignment and then allowing lessors to demand that the outgoing lessee guarantees the performance of the incoming lessee seems pointless. Allowing lessees, however, to simply walk away from their contractual obligations after saddling the lessor with an optimistic lessee who has paid too much to the outgoing lessee for the business does not seem fair to the lessors. A fairer solution would appear to be a provision whereby the outgoing lessor's liability is not wholly extinguished but merely reduced such that the outgoing lessee still has an interest in ensuring that the incoming lessee is suitable.

(c) Conclusions

Retail lease provisions that provide that the lessors consent to an assignment must not be withheld are redundant as similar provisions appear in pre-existing legislation. Similarly, a provision that a lessor must not, as part of the lessor's consent to an assignment impose conditions on or remove benefits from the incoming lessee are also redundant as the courts have already determined that such a practice amounts to unreasonably withholding consent.

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565 Landlord and Tenant (Covenants) Act 1995 (UK) s5.

566 K/S Victoria Street v House of Fraser (Stores Management) Limited **[**2010] EWHC 1120 (Ch).

567 Referred to as an Authorised Guarantee Agreement. See *Landlord and Tenant (Covenants) Act 1995* (UK) s16.

Providing for deemed consent where the lessor takes too long opens up other problems such as lack of documentation evidencing such deemed consent.

Releasing a lessee upon assignment of a lease from any further liability under the lease will result in lessors being more suspicious regarding any incoming lessee and more likely to refuse consent.

Prescribing the grounds upon which the lessor may refuse consent seems unfair to lessors. The ability to have the lessor's decision reviewed through low cost tribunals, however, is reasonable and is an effective tool for the lessee.

4.5 Lack of Security of Tenure

(a) Initial Complaints

Prior to the enactment of retail leasing legislation lessee's problems with lack of security of tenure were: -

(i) a lease of short duration would not allow them sufficient time to amortise capital outlays such as fitout costs;[568]

(ii) a lessee could not afford to lose its lease and move its business as it would also lose any site goodwill developed during the trading period. This meant that the lessee was at the lessor's mercy in relation to negotiation of a

568 ACT Report 1984, 47.

rental for a new lease period[569] or alternatively the lessor could deny a new lease and effectively acquire the lessee's goodwill for nothing by opening the same type of business[570]

(iii) without security of tenure a lessee could not obtain the reward for its efforts in establishing the business and operating the business through its early years.[571] Such rewards could either be the ongoing enjoyment of a successful business or the ability to sell a successful business to a purchaser. Any such purchaser would of course consider the amount of time left on a lease term before agreeing to purchase a business.

Lessors objected to the automatic renewal of leases because such automatic renewal gave the lessee's a tenancy at will, thereby negating the certainty of the lease[572] and that lessors must be able to change lessee mix to suit customer demand[573] and it was unreasonable to expect the lessors to be forced to accept a lessee who was having a detrimental effect upon the shopping centre or other lessees[574]

(b) Remedies

The Clark Committee believed that in the absence of good reasons for refusing a renewal that a satisfactory sitting tenant should enjoy some prior claim to remain[575] and that in this regard two remedies were available: -

(i) That the lessee have first right of refusal to renew the lease; and

569 Preece A, Legislative Regulation of Leases of Business Premises (1985) 1 *QIT Law Journal*, 140.
570 ACT Report 1984, 211.
571 Ibid, 46.
572 Ibid, 214.
573 Ibid, 216.
574 Ibid, 216.
575 Clark Report 1984, 27.

(ii) That a lessor refusing to renew a lease would have to justify such a refusal before an Arbitrator and that such refusal must be on prescribed grounds such as structure alterations, the existing lessee failing to comply with the lease provisions or that the premises were reasonably required for the lessor's purposes.[576]

In order to satisfy the complaints raised by lessee's legislation has been enacted in every jurisdiction of Australia which provides as follows: -

(i) Term of the lease must be at least five (5) years.[577]

A five year minimum lease term is now common throughout all Australian jurisdictions except Queensland. A five-year minimum lease term was originally contained in the *Retail Shop Leases Act 1984* (Qld),[578] however, such a provision was subsequently removed because: -

> …such a provision would be too prescriptive and would not necessarily advantage all tenants. In fact, many tenants prefer to negotiate shorter lease terms, depending on the circumstances of the retail shopping centre, their own personal situation or their assessment of the market opportunities available to them.[579]

The section was flawed in any event as it provided that the right to a five-year lease did not apply where the lease was a sublease which meant that a shopping centre lessor could escape the effect of the clause by subleasing the entire centre to a nominee corporation.[580]

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576 Ibid, 27.

577 *Retail Tenancies Act 1986* (Vic) s21(1); *Retail Shop Leases Act 1994*(Qld) s63; *Retail Leases Act 1994 (NSW)* s16(1); *Retail and Commercial Leases Act 1995* (SA) s20B; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s13(1); *Leases (Commercial and Retail) Act 2001* (ACT) s104; *Fair Trading (Code of Practice for Retail Tenancies) Regulation 2008* (Tas) s10(3); *Business Tenancies (Fair Dealings) Act 2003* (NT) s26.

578 *Retail Shop Leases Act 1984* (Qld) s13.

579 Queensland, *Parliamentary Debate*, 1994, 9546-9547 (Sullivan).

580 Pretty WA, Options Under s13 of the Retail Shop Leases Act 1984, (1984) *QLSJ,* 83.

The minimum lease term of five (5) years does not apply if the lessee obtained a certificate from a Government Official (such as a Small Business Commissioner),[581] or from the lessee's solicitor verifying that legal advice has been given to the lessee about the effect of a reduced lease period.[582] Alternatively, a lessee could obtain an order from a Tribunal that the minimum lease term does not apply.[583]

The advantage of a minimum lease term is that its application is simple. Lessors are required to provide such a minimum term in their lease and if they fail to do so such a term is implied into the lease. The problems with a minimum lease term are: -

1. The minimum term is an arbitrary period and may or may not allow the lessee to effectively amortise the costs of fitout;[584]

2. A five year term may not be sufficient to allow a lessee to realise its goodwill upon the sale of the business if the remaining lease term is insufficient to attract a buyer. The lessee therefore is still at the mercy of the lessor as the lessor can determine whether or not to grant an extension of the lease.[585]

3. A finite term (of any duration) does not solve the "captive tenant" problem at the end of the lease term in that the lessor may demand

581 *Retail Leases Act 2003* (Vic) s21.
582 *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s10(4); *Retail and Commercial Leases Act 1995* (SA) s20B; *Retail Leases Act 1994* (NSW) s16; *Leases (Commercial and Retail) Act 2001*(ACT), s104; *Business Tenancies (Fair Dealing) Act 2003* (NT) s26.
583 *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s13.
584 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 100.
585 See, for example*, ACCC –v- Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

whatever rent or other conditions the lessor wishes if the lessee wishes to remain in the premises.[586] The provision of a five-year minimum lease term is a: -

> 'poor substitute for the far greater security of tenure required by tenants who may build up their businesses over a total term of five years and then be at the mercy of their landlords.' [587]

(ii) Lessors Notice of Intention

Section 46AA of the *Retail Shop Leases Act 1994* (Qld) provides that if there is no option for renewal in a lease, the lessor must, by written notice, offer the lessee an extension of the lease on terms as stated in the notice or tell the lessee that the lessor does not intend to renew the lease. Other jurisdictions have similar provisions, however, such other jurisdictions also have minimum lease terms[588]

The notice must be given:

(i) Between three (3) months and six (6) months before the lease expires for a lease term of not more than one (1) year or;

(ii) Between six (6) months and one (1) year before the lease expires for a lease term of more than one (1) year.[589]

If the lessor fails to give the notice, the lease term is extended until six (6) months after the notice is given.

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586 See *ACCC v Dukemaster Pty Ltd* [2009] ATPR 42-290.

587 Professor H Tarlo, Pioneering in the Deep North: Tinkering with Shop Leases, (1987) 8 *Qld Lawyer* 67, 82.

588 *Retail Leases Act 1994* (NSW) ss 44, 44A; *Retail Leases Act 2003* (Vic) s64; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s13B; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s29; *Business Tenancies (Fair Dealing) Act 2003* (NT) s60*; Retail and Commercial Leases Act 1995* (SA) s20J.

589 *Retail Shop Leases Act 1994* (Qld) s46AA.

On the face of it, it would appear that the provision causes a reduction in the lessor's bargaining power in that the lessor is required to notify the lessee at a prescribed time as to whether or not the lease will be renewed. The perceived benefit to the lessee is that the lessee will have certainty as to whether or not the lease will be extended and then can start making plans accordingly to either remain or to move.

The bargaining power lost by the lessor is the ability to keep the lessee "on the hook" while the lessor negotiates with other potential lessees resulting in the lessee and the potential lessees entering into a bidding war by agreeing to a greater rental for the premises.[590]

In reality, the section provides no disruption to the lessor's power in that there is nothing in the legislation to prevent a lessor from giving a notice to a lessee that the lessor does not intend to extend the term of the lease eleven (11) months before the conclusion of the lease term and then to later notify the lessee that the lessor is willing to contemplate an extension of the lease. As a result of this process, the lessor is able to maintain its bargaining power as there is no real effect on the bargaining positions of the parties. In addition, as part of market forces negotiations between the parties in the final year of a lease would occur in any event.[591] From a cost perspective however the parties have had to comply with meaningless legislation.

(iii) Request to Advise

590 Commercial and Property Law Research Centre, Queensland University of Technology, Submission No 12 to the Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 2014, 6.
591 Ibid.

In the last twelve (12) months of a lease term the lessee may request the lessor to advise whether or not the lessor proposes to renew the lease and the lessor must provide a response within thirty (30) days.[592]

There is only a marginal benefit to a lessee in making such a request in that although the lessee may become aware of the lessors plans earlier than at the end of the lease itself however a prudent lessee would approach a lessor about possible renewals in any event. To legislate for such an event to occur is unnecessary.[593]

(iv) Reminder to Exercise Option.

Lessors are now required to remind lessees as to when their option to renew a lease shall expire.[594] The purpose of such a provision is to protect the lessee where the lessee fails to or incorrectly exercises its option to renew. [595] This shifting of onus from the lessee to the lessor significantly increases the lessees bargaining power.[596]

Although it may be thought that the lessee should take responsibility for its own options to renew a lease the provisions are appropriate because: -

1. The loss of an option by a lessee through inadvertence would be devastating to the lessee and its business;

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592 *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s13B; *Leases (Commercial and Retail) Act 2001*(ACT), s107.

593 Commercial and Property Law Research Centre, Queensland University of Technology, Submission No 12 to Senate Economics Reference Committee, *Need for a National Approach to Retail Leasing Arrangements*, 18 March 2015, 18.

594 *Retail Leases Act 2003* (Vic), s28; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), s13C; *Retail Shop Leases Act 1994* (Qld) s46.

595 Western Australia, *Parliamentary Debates*, Legislative Assembly, 2011, 144, Troy Buswell, Minister for Commerce, Second Reading Speech of Commercial Tenancy (Retail Shops) Agreements Amendments Bill 2011.

596 R Loiacono, The Effect of Amendments to the Commercial Tenancy (Retail Shops) Agreements Acts Act 1985 on the Balance of Power between Landlords and Tenants, (2013) 22 *Australian Property Law Journal* 134.

2. The lessor, who is likely to be a leasing professional, is more likely to have appreciated the value of such option and diarised the exercise of option dates; and

3. The lessor, in agreeing to the option to renew in the first place, loses nothing in making sure that the lessee is aware of its rights.

(v) Preferential Rights

In South Australia and the Australian Capital Territory an existing lessee of a shopping centre has a preferential right to extend the term of the lease except where the lease contains an exclusionary clause (Lawyer's Certificate). Such preferential right will also not be given where the lessor requires a change in tenancy mix, the lessee is guilty of substantial or persistent breach of the lease, the lessor requires vacant possession for the purpose of demolition etc., the lessor does not propose to re-let the premises within six (6) months from end of lease term, or renewal of the lease would substantially disadvantage the lessor;[597]

If a lessee in a Shopping Centre does not have a right of preference the lessor, must at least six (6) months but not twelve (12) months before the end of the lease notifies the lessee of this fact and state why there is no right of preference.[598]

In theory the provision of a preferential right to renew granted to an existing lessee would appear to give a significant advantage to such a lessee. In

597 *Retail and Commercial Leases Act 1995* (SA) s20D; *Leases (Commercial and Retail) Act 2001*(ACT), s108.

598 *Retail and Commercial Leases Act 1995* (SA) s20F.

practice however, the current legislation in both South Australia and the Australian Capital Territory provide illusory rights in that the lessor has many methods available in which to avoid such provisions. In particular, the lessor is able to inform a lessee that the lessor will not grant the initial lease to the lessee unless the lessee provides a Solicitors Certificate which will exclude the preferential rights.[599]

Even if the preferential rights provisions were made mandatory, (i.e.; that they could not be excluded) difficulties would remain as: -

(i) Government intervention reduces the parties' ability to negotiate a mutually beneficial outcome;

(ii) Additional regulation to enhance security of tenure for lessees create additional complexity and frustrates negotiations;

(iii) Limiting rent increases on a subsequent lease would reduce the efficient operation of the market by maintaining underperforming lessees; and

(iv) Preferential right provisions would cause inefficiencies in the market that would raise costs for lessors and lessees and lower benefits to consumers and constrain the efficient operation of the market through reduced flexibility in allocating retail space to its best possible use.[600]

(c) Conclusion

Legislation which requires the lessor or the lessee to negotiate with the other party are redundant as normal market forces would result in the parties

599 Senate Economics Reference Committee, *Need for a National Approach to Retail Leasing Arrangements*, 18 March 2015, 18.

600 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 124-125.

carrying out such negotiations in any event. Regulations therefore that require the lessee to request details of the lessor's intention or where the lessor is required to advise the lessee of its intention are unnecessary.

Minimum lease terms are also ineffective in that they provide only arbitrary lease periods and although may partially solve the problem of the Lessee being unable to amortise its fit-out costs such minimum lease terms do not solve the other problems which is that the Lessee wishes to be able to sell its business for a profit and will be unable to do so unless the incoming lessee receives an additional lease term and also the problem at end of lease where the lessee is completely at the mercy of the lessor.

Additionally, the imposition of legislation in relation to minimum lease terms has resulted in such minimum lease terms becoming the standard lease term granted by lessors.[601]

A minimum lease term of five (5) years would only be effective where the lessee's business is such that where the lessee intends that there be no goodwill attached to the business.

Preferential rights of renewal in their current form in South Australia and Australian Capital Territory are flawed in that they contain multiple ways for a lessor to escape the operation of those provisions. If those provisions were to be made mandatory however they would have a significant effect upon the efficiency of the market and would result in additional costs to lessors, lessees and customers.

601 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 100.

4.6 Disclosure

(a) Initial Complaints

Prior to retail leasing legislation complaints by lessees about lack of disclosure were: -

(i) Lessors or their agents would provide false or exaggerated information[602] to a potential lessee about the likely prospects of the business the lessee intended to operate or about the prospects of the shopping centre generally;[603]

(ii) Information about the lessor's future intentions for the shopping centre was not disclosed to the lessee;[604]

(iii) An information asymmetry existed between the lessor and lessee in that the lessor had a lot of information about the shopping centre and the premises generally whereas the lessee had virtually nothing. Where the lessor commonly used turnover rent clause the lessor also knew what rents were being paid by other lessees in the shopping centre.

(iv) Lessees were often not provided with a copy of the lease until after they had taken possession.[605] If they were given copies of a draft lease they did not have sufficient time to peruse it.[606]

(b) Remedies initially proposed to solve these problems included lessee education so that they could understand the lease and their obligations [607] and that lessees be provided with a draft lease before becoming bound as

602 Arnold Report 1984, 20.
603 Cooper Report 1981, 5; Arnold Report 1984, 20.
604 Arnold Report 1984, 2.
605 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2; Cooper Report 1981, 32.
606 Arnold Report 1984, 21.
607 ACT Report 1984, 19; Hill Report 1983 (referred to in ACT Report 1984. 64).

well as a disclosure statement to include a summary of the lease as well as future proposals for building works and tenant mix and a warning statement to obtain legal and financial advice.[608]

Legislation in all Australian jurisdictions now makes provision for disclosure as follows: -

(i) The lessor must provide the lessee with a copy of a proposed lease during the negotiation phase;[609]

(ii) The lessor must provide a lessee with a disclosure statement commonly 7 days before a lease commences;[610]

(iii) The lessee may terminate the lease (commonly within 6 months from commencement of lease) if the disclosure statement is incomplete or has false or misleading information;[611]

(iv) The lessee must provide a disclosure statement to the lessor prior to the start of the lease;[612]

608 Cooper Report 1981, 33; Arnold Report 1984, 20.

609 *Retail Leases Act 2003* (Vic), s15; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), s6; *Leases (Commercial and Retail) Act 2001*(ACT), s28; *Business Tenancies (Fair Dealings) Act 2003* (NT), s17; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas), s5; *Retail Shop Leases Act 1994* (Qld), s22; *Retail and Commercial Leases Act 1995* (SA), s11; *Retail Leases Act 1994* (NSW), s9.

610 *Retail Leases Act 2003* (Vic), s17; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), s6; *Leases (Commercial and Retail) Act 2001*(ACT), s30; *Business Tenancies (Fair Dealings) Act 2003* (NT), s19; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas), s6; *Retail Shop Leases Act 1994* (Qld), s22; *Retail and Commercial Leases Act 1995* (SA), s12; *Retail Leases Act 1994* (NSW), s11.

611*Retail Leases Act 2003* (Vic), s17; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), s6; *Business Tenancies (Fair Dealings) Act 2003* (NT), s20; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas), s7; *Retail Shop Leases Act 1994* (Qld), s22; *Retail and Commercial Leases Act 1995* (SA), s12; *Retail Leases Act 1994* (NSW), s11.

612*Business Tenancies (Fair Dealings) Act 2003* (NT), s21; *Retail Shop Leases Act 1994* (Qld), s22A; *Retail Leases Act 1994* (NSW), s11A.

(v) The lessee may seek compensation for pre-lease misrepresentations.[613] In New South Wales, the misrepresentation must be made with the knowledge that it was false and misleading.[614]

Despite the existence of retail leasing legislation and the obligation to provide disclosure statements and copies of proposed leases to a lessee, problems with disclosure issues continued to arise[615] resulting in further tinkering with the legislation. For example: -

(i) Compensation for Misrepresentations

In Queensland significant amendments occurred in 2006[616] after the appointment of an Industry working group.[617] These amendments provided, amongst other things, for new compensation provisions because of false or misleading information contained in Disclosure Statements;[618]

(ii) Termination Periods

Under existing legislation, if the lessor did not provide a disclosure statement at least 7 days before entering into the lease, or if it contained false or misleading information, the lessee could terminate the lease within sixty days after the lease was entered into. Subsequently that termination period was expanded to 6 months as lessees often did not receive the disclosure

613 *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), s6; *Leases (Commercial and Retail) Act 2001*(ACT), s37; *Business Tenancies (Fair Dealings) Act 2003* (NT), s18; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas), s5; *Retail Shop Leases Act 1994* (Qld), s43; *Retail and Commercial Leases Act 1995* (SA), s12; *Retail Leases Act 1994* (NSW), s10.
614 *Retail Leases Act 1994* (NSW), s10(1).
615 Reid Report 1997, [2.27]; Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure, A Review of Australia's Retailing Sector*, August 1999, Recommendation 7.
616 *Retail Shop Leases Amendment Act 2006* (Qld).
617 W Dixon, 2006 Amendments to 1994 Retail Shop Leases Act, 27 *Queensland Lawyer* 2006, 5.
618 Retail Shop Leases Act 1994 (Qld), s 43A.

statement until after the sixty-day period had expired.[619] Such a proposal seems unfair as a lessor could lose its lease simply because of an oversight by the lessor in circumstances where the lessee may have simply changed its mind about the lease. Rather than allowing the lessee to terminate the agreement a better course would appear to be to have the lessee's obligations to pay rent suspended until the lessor has complied with its disclosure obligations.

(iii) Additional Information

The amount of information required to be disclosed and the types of disclosure increased. For example, disclosure statements were required to include: -

1. Details on the deadlines and method for exercise of any option to renew the lease;
2. Specification of costs borne by the lessor and those to be borne by the lessee;
3. Identification of the location of common areas and kiosks on a floor plan to be attached to the disclosure statement;
4. Details of any proposed changes to the current lessee mix; and
5. Details as to whether the premises met all current zoning requirements for the proposed use.

619 Findlaw, Commercial Tenancy (Retail Shops) Agreements Act Review (25 November 2015) <http://www.findlaw.com.au/articles/1587/commercial-tenancy-retail-shops-agreements-act-rev.aspx>.

6. A marketing plan detailing the lessor's proposed advertising/promotional expenditure;[620]

7. Details of any current or previous arrears/breaches and rent abatement in favour of the assignor.

(iv) The circumstances when disclosure was to be provided also increased for example: -

1. An obligation for the lessor to give any proposed assignee the original disclosure statement and a copy of the lease;[621]

2. An obligation for the lessee to give a disclosure statement to the lessor at lease commencement and another disclosure statement to any potential assignee;

3. Additional lessor disclosure on renewal of an existing lease under an option;[622]

4. A potential assignee who is not a major lessee may waive or shorten the disclosure period by giving the lessor written notice of such waiver and legal and financial advice reports;

5. A franchisor must give to a franchisee a copy of any disclosure statement provided to the franchisor by the lessor and any changes which the franchisor could be expected to be aware of that effects that information contained in the disclosure statement;[623]

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620 Ibid, 5.

621 Findlaw, Commercial Tenancy (Retail Shops) Agreements Act Review (WA) (25 November 2015) <http://www.findlaw.com.au/articles/1587/commercial-tenancy-retail-shops-agreements-act-rev.aspx>.

622 Department of Justice and Attorney General (Qld), *Report on Statutory Review of the Retail Shop Leases Act 1994,* November 2014, 6.

623 Ibid, Attachment 3, Part 2, 7.

6. Amending the required Legal Advice report to provide that the lawyer has given advice about requirements in the lease for indemnification of the lessor and brought to the lessee's attention the need to obtain advice from an Insurance Broker about the lessee's insurance obligations.

(c) Despite legislative efforts information gaps continued to plague the leasing relationship widening the information asymmetry between lessors and lessee.[624] Attempts to provide a lessee with information by way of disclosure documents had simply led to longer and more complicated documents which did not improve the lessee's understanding of the lease.[625]

Additional methods of disclosure were proposed such as the public disclosure of lease information by requiring mandatory registration of all leases[626] in the Titles Office or by the establishment of a separate lease registry.[627] A separate lease registry would allow a potential lessee to obtain information about potential lease sites and, more importantly, would allow valuers to obtain detailed information regarding leases which would allow them to carry out more effective valuations not only for lessors and lessees but also for lenders and potential purchasers of the lessee's business or the

624 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), xxx; Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (December 2011), 262.
625 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 157.
626 Ibid, 175.
627 Department of State and Regional Development (NSW)," *Discussion Paper on Issues Affecting the Retail Leasing Industry in NSW*", April 2008, 10; Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18th March 2015, 22.

lessors building.[628] The proposal for a separate lease information registry was heavily resisted by lessors[629] although mandatory registration of leases was not opposed.[630]

Even though leases could currently be registered at the Titles Office, registration of leases will not be effective as an information tool as the lease documents fail to include any incentive agreements and are therefore misleading.[631] Lessors do not object to mandatory registration of leases but do object to a dedicated registry of all lease information, as they wish to conceal information regarding side deals. A separate lease register where all lease information would be recorded[632] would be difficult to enforce and give rise to onerous prescriptive requirements.[633] It would involve an administrative burden to Government and a cost to lessors,[634] however without access to information regarding incentive agreements or side deals market reviews may not reflect true market value.

The issue of disclosure obviously remains a relevant topic between lessors and lessees. The proposed obligation upon a lessee/assignor[635] to give details of rent abatement to a potential assignee is a partial solution of the

628 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), xxx.
629 Shopping Centre Council of Australia, Submission in Response to the *Discussion Paper on Issues Affecting the Retail Leasing Industry in NSW*, May 2008, [3.4].
630 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Report No. 43 (31 March 2008, 175.
631 Ibid, 23.
632 Ibid, 23.
633 Law Society of New South Wales, Submission 9 to Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Report No. 43 (31 March 2008), 26.
634 Ibid, 24.
635 Department of Justice and Attorney General (Qld), *Report on Statutory Review of the Retail Shop Leases Act 1994*, November 2014, Attachment 3, Part 2, 7.

“Incentive Agreement” problem referred to previously; i.e. the terms of a lease document alone do not adequately set out the relationship between the lessor and lessee where any side agreements or incentive agreements are not disclosed. Rent abatement, however, is only one way in which a lessor can provide an incentive to a lessee. For example, the lessor may, instead of providing rent abatement choose to either pay for or carry out the fitout of the lessee’s premises. The alteration would be more effectively drafted if the lessee / assignor was required to provide details to any assignee of any benefit provided to the lessee / assignor which is not referred to in the lease.

Taking a broader view, if lessors were required to disclose all side deals then it is likely that side deals would cease to exist. Consider this scenario: -

Lessee A is struggling because of a change of law in relation to his business. The lessor acknowledges that the lessee’s situation is not of the lessees fault and grants concessional rent for a 6-month period to allow the lessee to afford the expenditure required to comply with such new law. This agreement is documented in a side agreement containing a confidentiality clause.

If the other lessees were to discover the terms of that side agreement, then they would demand similar concessions from the lessor. If the lessor was required to disclose all side deals in a public registry, then it is likely that the lessor would simply not grant side deals so that the lessee would not have to

deal with suggestions of favouritism and possible disputes with other lessees.[636]

4.7 Rent Reviews

(a) Initial Complaints

Prior to enactment of retail lease legislation problems identified in relation to rent review were as follows: -

(i) A lack of transparency in rent reviews in that the lessor had much more information as to rent than the lessee. Where the lessor employed turnover rent clauses, that information not only included the lessees own rent and turnover but also the rent and turnover of all other lessees within the shopping centre;

(ii) The requirement of a lessee to provide turnover figures to the lessor.[637] Such rent review clauses were seen as an intrusion into the lessee's business[638] and gave the lessor a bargaining advantage.[639] In addition, when using a turnover rent clause the lessor would fix the base rent at a market rent with the result that any extra amount paid above that, being a percentage of the lessee's turnover, was not a method to provide the lessor's market rent but was in fact a method to allow the lessor to share in the lessee's profits;[640]

636 QUT Property Law and Research Centre, Submission No 12 to Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18th March 2015, 12.
637 Cooper Report 1981, 22.
638 Clarke Report 1984, 11; Arnold Report 1983, 25, Cooper Report 1981, 4.
639 Clarke Report 1984, 14.
640 Cooper Report 1981, 24.

(iii) The use of "ratchet" clauses where by the lessor could determine the rent in the way most beneficial to the lessor;[641]

(iv) Rent reviews were arbitrary and costly for a lessee;[642]

(v) Delays in rent reviews were also a cause for concern as when the rent was finally reviewed the lessee could not afford to pay the retrospective amount due as from the review date.[643]

Lessors countered the complaint by lessees by stating that too many restrictions placed upon the lessor's right to control rental would cause a decline in real estate investment.[644]

(b) Remedies

Suggested solutions to the abovementioned problems were: -

(i) That a Court have jurisdiction for an application by a lessee to review rent if it was harsh or unconscionable.[645] The Productivity Commission also received submissions from lessees that rents and outgoings should be regulated, in particular, at time of renewal, however the Productivity Commission believed that rent regulation will result in an inefficient market and rent should remain the subject of commercial negotiation.[646] A system of arbitration for the adjudication of fair rents was a radical interference with the rights of both lessor and lessee and inappropriate for commercial leases.[647]

641 ACT Report 1984, 30.
642 ACT Report 1984, 25.
643 Clarke Report 1984, 18.
644 ACT Report 1984, 25.
645 South Australia, *Parliamentary Debates*, Legislative Council, 1986, 612 (Levy).
646 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 142-143.
647 Professor H Tarlo, "The Great Shop Lease Controversy" (1983) *University of Queensland Law Journal* 13 (1), 26.

(ii) If a turnover rent clause was to be used, then the percentage of turnover to be paid by the lessee should reduce as the turnover increased as a straight line method failed to take into account that gross profit can decline as sales and the cost of sales increased.[648]

(iii) A reverse "ratchet" clause such that a lessee be offered at least two (2) alternative rent methods, to be chosen by the lessee, one of which shall be rent stated as a cost per square metre. The flaw with this method is that it would allow a lessor to offer to a lessee the rent alternative that the lessor preferred and another rent review method that was completely unacceptable to the lessee thereby effectively depriving the lessee of any freedom of choice.[649]

(iv) The basis and/or formula for calculating rent reviews should be stated in the lease and if rent is to be adjusted to "market" there must be a provision for Arbitration if the lessor and lessee cannot agree.[650]

(v) That the lease should not contain a provision that rent would not be reduced upon market review.[651]

Solutions to the rent reviews problems adopted in various retail lease legislation throughout Australia were as follows: -

(i) Limiting the arbitrary nature of rent reviews by requiring that the method and timing of such reviews be set out in the lease,[652] limiting the

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648 Cooper Report 1981, 25.

649 Professor H Tarlo, "The Great Shop Lease Controversy" (1983) *University of Queensland Law Journal* 13 (1), 26.

650 Queensland Joint Committee Report 1983, 4-5.

651 Clarke Report 1984, 38; ACT Report 1984, 26.

652 *Retail Leases Act 2003 (Vic)* s35; *Leases (Commercial and Retail) Act 2001*(ACT) s50; *Business Tenancies (Fair Dealings) Act 2003* (NT) s28(1); *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s12; Retail Shop Leases Act 1994(Qld) s27.

amount of times a review may occur,[653] specifying what matters could be taken into account or not in relation to market reviews[654] or turnover rent clauses,[655] and prescribing the method of rent review[656] and rent review formulae.[657]

(ii) Proscribing the use of ratchet clauses.[658] A rent review provision is void to the extent that it reserves to a party a discretion as to which of two or more methods calculating a change of base rent is to apply.[659]

(iii) Providing that a rent review clause that does not specify how the review is to be made is void and the rent, failing agreement, shall be determined by a Valuer appointed by a Government Body (In Victoria this is the Small Business Commissioner and in the Northern Territory this is the Commissioner of Business Tenancies).[660]

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653 *Leases (Commercial and Retail) Act 2001*(ACT) s47; Retail Shop Leases Act 1994(Qld) s27(2); *Retail and Commercial Leases Act 1995* (SA) s22; Fair Trading (Code of Practice) Retail Tenancies Regulations 1998 (Tas) s12(5); Retail Leases Act 1994 (NSW) s47.

654 Retail Leases Act 2003(Vic) s37; Retail Shop Leases Act 1994 (Qld) ss28, 29; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) ss13,14; *Retail and Commercial Leases Act 1995* (SA) s23; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s11; Retail Leases Act 1994 (NSW) s19(1); *Leases (Commercial and Retail) Act 2001*(ACT) s52; *Business Tenancies (Fair Dealings) Act 2003* (NT) s29(1)(c).

655 Retail Leases Act 2003 (Vic) s33(4); Retail Shop Leases Act 1994 (Qld) s9; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s15(1); *Retail and Commercial Leases Act 1995* (SA) s24; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s7(4); Retail Leases Act 1994 (NSW) s20(1); *Leases (Commercial and Retail) Act 2001*(ACT) s64; *Business Tenancies (Fair Dealings) Act 2003* (NT) s31(1).

656 Retail Leases Act 2003 (Vic) s35(2); Retail Shop Leases Act 1994(Qld) s27(5); *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s12(2); *Business Tenancies (Fair Dealings) Act 2003* (NT) s28(2).

657 Retail Shop Leases Act (Qld) s27(5); *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s12(2).

658 *Retail Leases Act 2003 (Vic)* s35(3); Retail Shop Leases Act 1994 (Qld) s36A; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s12(8) ; *Retail and Commercial Leases Act 1995* (SA) s22; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s11(2)(c); Retail Leases Act 1994(NSW) s18(4); *Leases (Commercial and Retail) Act 2001*(ACT) s46; *Business Tenancies (Fair Dealings) Act 2003* (NT) s28 (3).

659 *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s12(4); *Retail and Commercial Leases Act 1995* (SA) s22; Retail Leases Act 1994 (NSW) s18(3); *Leases (Commercial and Retail) Act 2001*(ACT) s46.

660 *Retail Leases Act 2003 (Vic)* ss35(7) 35(a); *Business Tenancies (Fair Dealings) Act 2003* (NT) ss 28(7), 28(8).

(iv) Limiting any delay of rent reviews.[661]

(c) Conclusions

Despite retail lease legislation, problems with rent reviews continue. Lessors were still able to impose turnover rent clauses in leases which allowed them access to information about the lessee's business which became useful to the lessor when it was time to re-negotiate rents or to make decisions about tenant mix and underperforming lessees. Although the purpose of a turnover rent clause is to set the lessors expectations for rental in line with the profit the lessee obtained from its business, in fact lessors often set turnover rent thresholds high such that turnover rent is never paid. The lessor simply wishes to have access to information about the lessee's business.[662] According to the Australian Retailers Association: -

> The figures are used to gouge additional rent out of a sitting tenant at the end of lease term based on the landlord's knowledge of these figures and the vulnerability of an economic captive who has his investment, goodwill and livelihood tied up in the business at the end of the lease term.[663]

The reality is that lessors require turnover information not only for rent review but also to effectively manage their shopping centre. Turnover information allows them to determine what lessees are underperforming, the performance of the centre as a whole and optimal lessee mix.[664]

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661 *Retail Leases Act 2003 (Vic)* s35(5); *Business Tenancies (Fair Dealings) Act 2003* (NT) s28(5).
662 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 131.
663 Australian Retailers Association, Submission No 119 to Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 19.
664 Ibid, 132.

Rent review clauses remain inflexible. For example, the introduction of a competitor into a shopping centre does not result in any reduction of rent in favour of the existing lessee.[665] Rent reviews remain skewed[666] because valuers are unable to access all information about leases within a centre.[667]

4.8 Dispute Resolution

(a) Initial Complaints

Prior to Retail Leasing Legislation a common complaint of lessees was that if a dispute arose that the lessee could not afford legal representation[668] and that such dispute resolution took too long.[669]

(b) Remedies

Various solutions were proposed by Inquiries over the years such as: -

(i) that there be an arbitration clause inserted into every lease and that there be established an independent board to arbitrate on all grievances at no charge.[670]

(ii) the creation of a Retail Tenancy Advisory Body to investigate legitimate complaints from either lessees or lessors. [671]

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665 Department of State and Regional Development (NSW)," *Discussion Paper on Issues Affecting the Retail Leasing Industry in NSW*", April 2008, 14.
666 QUT Property Law and Research Centre, Submission No 12 to Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18th March 2015, 12.
667 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (December 2011), Appendix B, 2.
668 Clarke Report 1984, 14.
669 N Mumford, The Retail Shop Leases Act 1984-1989- Does the Act Achieve the Purposes Identified in the Cooper Report 1981 (1992) *QLSJ*, 91, 106; Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 18.10.2000, 3170 (Chief Minister Humphries).
670 Cooper Report 1981, Appendix 2, 3.
671 Ibid, 40.

(iii) the establishment of an Office of Mediator[672] or alternatively that disputes be resolved by government councillors who would resolve minor questions of concern.[673] It was hoped that the use of alternative dispute resolution instead of formal court procedures would not only reduce expense and delay[674] but also preserve the lessor – lessee relationship.[675]

(iv) that settlement of disputes could be achieved by combined education of lessees and mediation.[676]

(v) an informal tribunal could hear disputes which did not warrant full court procedures.[677]

(vi) a tribunal be introduced in all jurisdictions to arbitrate disputes between lessors and lessees.[678] The Reid Committee received many submissions regarding the unnecessary complexity and cost of dispute resolution and found that the overarching concern of lessees was for disputes to be dealt with out of the formal court processes.[679]

The Arnold Committee supported the concept of an informal tribunal consisting of two tiers with the lower tier consisting of one-member tribunal assisted by an expert with jurisdiction to hear disputes up to a certain level

672 Queensland Joint Committee Report, 6.
673 Hill Report 1983 (Referred to in ACT Report 1984, 64).
674 According to Tarlo: -

> "The most interesting parts of the Act [Retail Shop Leases Act 1984 (Qld)] are the establishment of the Mediation Panel and Tribunals to provide an inexpensive two-tier method for the resolution of disputes. In fact, perhaps the true rationale of the legislation is the attempt to contain legal costs. It is unfortunately true that small business men are increasingly loath to resort to the courts to assert their rights, and thus for them the possible legal remedies may not even be said to exist."

Professor H Tarlo, Pioneering in the Deep North: Tinkering with Shop Leases, (1987) 8 *Qld Lawyer* 67, 90.
675 ACT Report 1984, 66; Clarke Report 1984, 33; Queensland Joint Committee Report 1983,3.
676 ACT Report 1984, 65.
677 Arnold Report 1984, 30.
678 Beddall Report 1990 [4.72].
679 Reid Report 1997, [2.43].

with no appeal being allowed thereby ensuring that there be no additional costs of appeal. The higher tier which would consist of a three-member tribunal where the effects of any judgement would exceed $10,000.00 or where the parties agreed or the member on the lower tier decided that the case should be referred to the higher tier.[680]

(c) Subsequently legislation was enacted in all jurisdictions regulating each step of the dispute resolution process as follows: -

(i) Early Intervention in Disputes

Four Australian jurisdictions[681] have introduced Small Business Commissioners who, amongst other duties, attempt to resolve retail leasing disputes in a timely fashion. The South Australian Small Business Commissioner reports that 80% of all disputes are resolved by the commission even before they are sent to mediation.[682]

(ii) Mediation

All Australian jurisdictions now provide for initial mediation of lease disputes. Either the parties are unable to proceed to court unless a Government Official has certified that mediation or some other form of alternate dispute resolution has failed;[683] or after lodging a dispute with the relevant body the matter is referred to mediation.[684] Alternatively, a Government Official may

680 Arnold Report 1984, 29.
681 New South Wales, South Australia, Victoria and Western Australia.
682 Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements,* 18th March 2015, 28.
683 *Retail Leases Act 1984* (NSW) s68; *Retail Leases Act 2003* (VIC), Part 10; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s25D; *Business Tenancies (Fair Dealings) Act 2003* (NT) Part 11.
684 *Retail Shop Leases Act 1994* (QLD) s55

be asked to investigate or negotiate and/or mediate a dispute[685] Mediation has been very successful in determining disputes.[686]

(iii) Court or Tribunal?

After failure of mediation or intervention by a Government Official the matter is then referred for determination by a Tribunal[687] or a Court.[688] In the Northern Territory where the parties fail to resolve the dispute through conciliation and the amount is less than $10,000.00 the matter proceeds to an inquiry before the Commissioner of Business Tenancies.[689]

(iv) Limits On Jurisdictions of Tribunals

The jurisdictions of all tribunals throughout Australia differ. In New South Wales, the New South Wales Civil and Administrative Tribunal has a monetary jurisdiction of $400,000.00[690] and generally has a time limit for lodgement of claims of 3 years.[691] In Queensland the monetary limit for matters to be heard by the Queensland Civil and Administrative Tribunal is $750,000.00.[692]

Other examples include: -

685 *Retail and Commercial Leases Act 1995* (SA) ss63-69; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) s39.
686 In NSW, mediation success rates are 94% and in Victoria, mediation success rates are 80%. See Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18th March 2015, 28.
687 *Retail Leases Act 1994* (NSW) ss70, 71, 71B; *Retail Shop Leases Act 1994* (Qld) s64; *Retail Leases Act 2003* (Vic), ss89-92; *Retail and Commercial Leases Act 1995*(SA), ss63-69*; Commercial Tenancy (Retail Shops) Agreements Act 1995* (WA) Part 3; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas), s39.
688 *Leases (Commercial and Retail) Act 2001* (ACT) Part 14; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas), s39; *Retail and Commercial Leases Act 1995* (SA) ss63-69.
689 *Business Tenancies (Fair Dealings) Act 2003* (NT) Division 4, Part 11.
690 *Retail Leases Act 1994* (NSW) s73.
691 *Retail Leases Act 1994* (NSW) s71 – 71A.
692 *Retail Shop Leases Act 1994* (Qld) s103(c).

1. In Queensland, the Queensland Civil and Administrative Tribunal (QCAT) does not have jurisdiction to hear a dispute regarding arrears of rent unless the dispute is also about the payment of compensation by the lessor. It also has no jurisdiction in relation to the amount of rent or outgoings payable.[693]

2. In Victoria, the Victorian Civil and Administrative Tribunal (VCAT) has no jurisdiction in relation to an application for relief against forfeiture or claims in relation to unconscionable conduct.[694] Unconscionable conduct claims are also excluded from tenancy dispute provisions in the Northern Territory.[695] In contrast the New South Wales Civil and Administrative Tribunal has jurisdiction to hear applications about unconscionable conduct.[696]

3. In Western Australia the State Administrative Tribunal of Western Australia (WASAT) has jurisdiction to hear an application for relief against forfeiture[697] and, in addition, can hear applications for a compensation order and unconscionable conduct claims or misleading and deceptive conduct claims, if at the time no civil procedures have been commenced.[698]

4. Lease disputes are heard in formal courts such as the Magistrates Court in the Australian Capital Territory.[699]

5. In Tasmania parties to a lease must attempt to resolve a dispute by negotiation and if this fails the matter may be referred to the Office of

693 *Retail Shop Leases Act 1994* (Qld) s64.
694 *Retail Leases Act 2003* (Vic) ss89-92.
695 *Business Tenancies (Fair Dealings) Act 2003* (NT) Part 11.
696 *Retail Leases Act 1994* (NSW) s71A.
697 *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s3(3).
698 Ibid.
699 *Leases (Commercial and Retail) Act 2001* (ACT) s144; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) s39; *Retail and Commercial Leases Act 1995* (SA) ss63-69.

Consumer Affairs to negotiate a solution. If the dispute remains unresolved then either party may refer the dispute to the Retail Tenancies Code of Practice Monitoring Committee for conciliation and if this also fails then either party may refer the dispute to a court.[700]

6. In South Australia either party may refer a dispute to the Small Business Commissioner for mediation[701] and if this fails the matter may be determined by the Magistrates for claims up to $100,000.00.[702] On claims over $100,000.00 the Magistrates Court must on the application of either party refer the matter to the District Court.[703]

There seems to be no reason why lease disputes cannot be heard in tribunals rather than courts except that some larger or more complex matters may require a more formal approach than others. Such matters may however be identified early by a tribunal at the first return date and then referred to a formal court. Differences in the jurisdiction of each State and Territory only add to the costs of compliance of multi-jurisdictional parties.

(v) Appeals

The ability to appeal a decision is one way that a financially superior party can prolong dispute proceedings and thereby win the dispute by attrition. [704] The ability of the financially stronger lessor must be limited in appropriate

[700] *Fair trading (Code of Practice for Retail Tenancies) Regulations 1998* (TAS) s39.
[701] *Retail and Commercial Leases Act 1995* (SA) s64.
[702] *Retail and Commercial Leases Act 1995* (SA) s68.
[703] *Retail and Commercial Leases Act 1995* (SA) s69.
704 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 68.

cases to reduce costs and to allow matters to be conclusively determined on their merits. Appeals are conducted differently in each jurisdiction: -

1. Differentiating an appeal depending on whether the decision appealed from is an appeal from a judicial or a non-judicial member;[705]

2. Allowing an appeal on a question of law and fact[706] or on a question of law alone if leave is given.[707]

3. Allowing matters to be transferred to a higher court depending on the nature of the matter. For example, in New South Wales a claim for unconscionable conduct may be transferred from the Tribunal to the Supreme Court.[708]

There is some merit in allowing complicated legal disputes to be appealed to a formal court. Many disputes will not contain such matters and any appeal could be safely contained with the bounds of the tribunal process such that any appeal is to an appeal panel of the tribunal itself.

(vi) Unconscionability Provisions

The unconscionable conduct provisions of the Australian Consumer Law have been drawn down into the retail lease legislation of each Australian State and Territory[709] with the exception of South Australia. The purpose of drawing down such legislation was to allow the unconscionability provisions

705 *Retail Shop Leases Act 1994* (Qld) s150.
706 *Leases (Commercial and Retail) Act 2001* (ACT) s155.
707 *Retail Leases Act 2003 (Vic)* s148.
708 *Retail Leases Act 1994* (NSW) s76A.
709 *Retail Leases Act 2003 (Vic)* Part 9; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) Part IIA; *Leases (Commercial and Retail) Act 2001(ACT)* s22; *Business Tenancies (Fair Dealings) Act 2003* (NT) Part 10*; Fair Trading (Code of Practice) Retail Tenancies Regulations 1998 (Tas)* s3; *Retail Shop Leases Act 1994 (Qld)* s46A*; Retail Leases Act 1994 (NSW)* Part 7A and ss62A, 62B.

to be heard in state courts and tribunals rather than be dealt with in Federal Courts and to be tailored to retail lease circumstances.[710]

The Reid Report, in its recommendations, suggested that the appropriate test should be one of "unfairness" rather than "unconscionability" as the Reid Committee thought that the remedy should be more widely available then if it was just limited to unconscionability.[711] The government, however, when legislating, opted for "unconscionability" to allows courts to draw upon the considerable body of case law regarding unconscionability[712] and because the use of "unfairness" would introduce too much uncertainty into the contractual arrangements between the parties.[713]

The unconscionability provisions do not seem to be working well as there has been very few successful cases brought relying on such provisions.[714] The reasons for the non-existence of such successful litigation maybe that, the parties being aware of such provisions, such matters are settled rather than litigated.[715] More likely however is the fact that the threshold to prove unconscionability is too high.[716] If that is the case, then the usefulness of the unconscionability provisions at both federal level and in the various regional retail leasing legislation analogues is highly questionable.

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710 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 76.
711 Reid Report 1997, [6.57].
712 Ibid, 283.
713 Senate Economics Committee, Parliament of Australia*, The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, March 2004, Canberra, 35.
714 E Webb, "Almost a Decade On – A (Reid) Report Card on Retail Leasing" (2006) 13 *Australian Property Law Journal* 240,285
715 Ibid, 287.
716 Ibid.

(vii) Dearth of Precedents

The ongoing use of tribunals to resolve disputes means that fewer decisions are being heard in formal courts such that fewer valuable precedents[717] become available which results in uncertainty in legal advice being given. The very nature of tribunals, with their emphasis on speed, informality, not being bound by the rules of evidence and the absence of the involvement of legally qualified persons result in decisions which are of limited precedent value.[718]

(viii) Conclusions

In 2008 the Productivity Commission found that all Australian jurisdictions had dispute resolution mechanisms in place that appeared to be low cost, accessible and timely.[719] In contrast, in 2014 the Productivity Commission found that the area of dispute resolution was a key area requiring further reform.[720]

The dispute resolution provisions contained in retail lease legislation are working well.[721] Lessees and lessors have access to low cost, accessible and timely mediation or dispute resolution however some jurisdictions still

717 E Webb, "Almost a Decade On – A (Reid) Report Card on Retail Leasing" (2006) 13 *Australian Property Law Journal* 240,283

718 S Young, "Re-Examining the Bricks and Mortar: Case Law, the Doctrine of Precedent and Contemporary Legal Education" (1996) 12 *QUTLJ*, 141.

719 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 71.

720 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade* (September 2014), 138.

721 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 183.

require disputes to be heard by formal courts rather than tribunals which causes cost and delay. In addition, matters may still be prolonged by appeals.

There is a substantial difference in the pathways for dispute resolution between each jurisdiction with resulting uncertainty for multi-jurisdictional parties and substantial inconsistency between tribunals in each jurisdiction.

Unconscionability legislation is of limited use and the unconscionability provisions should be expanded. In contrast, Small Business Commissioners seem to be successful in resolving disputes and the expansion of such a scheme to all States and Territories should be considered.

Finally, the trend to having retail lease disputes resolved in tribunals rather than courts has led to a reduction in the number of valuable precedents making legal advice more difficult to provide.

5. **Conclusions**

Retail lease legislation commenced in 1984 in Queensland. Multiple retail leasing acts followed. All of the legislation was put in place only after several years of consideration and review. In 1990, six years after the commencement of retail leasing legislation, the Beddall Committee found that lessees were still complaining about disparity of bargaining power and how lessors were taking advantage of them. The situation seems to become progressively worse from there resulting in the Reid Enquiry in 1997 stating that there was a war between lessors and lessees and that lessees had lost most battles to date.[722] The Reid Committee found that issues regarding the

722 Reid Report 1997, [2.1] – [2.2].

sitting tenant continued to be a problem and that lessees who had counted on their business being their ongoing livelihood, if not their retirement, had to choose, upon lease expiry, between receiving nothing for their business or agreeing to the lessor's demands.[723]

Although the Productivity Commission in their 2008 and 2011 reports stated that the retail lease market was performing fairly well this comment must be viewed against the backdrop of the over-riding consideration of the Commission which is that there are no inefficiencies in the market. Issues regarding equity or fairness are not within the remit of the Commission except where such issues may impact upon economic efficiency.

The Productivity Commission is the sole inquiry that believes the market is performing well with all other inquiries receiving numerous complaints from lessees and making recommendations to amend legislation. Even so the Commission believes that improvements can be made in relation to disclosure, transparency and dispute resolution.[724]

The sitting tenant issue remains an unsolved problem almost 35 years after the problem was first identified in 1981. Five year lease terms had been, with the exception of Queensland, the norm across all states and territories however minimum terms will not solve the sitting tenant problem as eventually all leases must end. The statutory right of first refusal provisions enjoyed by shopping centre lessees in South Australia and the Australian Capital Territory are ineffective as the lessor can demand that a lessee obtain an exclusionary certificate prior to the lease commencing. In any

723 See, for example, *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

724 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 250.

event, giving a sitting tenant the automatic right of renewal means that new lessees are unable to enter the market which will result in the inefficient operation of the market.

Dispute resolution provisions seem to have been effective in increasing the bargaining position of lessees where such dispute resolution is low cost and time effective. In addition, the ability of either party to protract the dispute by appeal to higher tribunals must be curtailed not only to save time and cost but also to reflect the fact that although the lessor will be the lessor as long as the lessor chooses, the lessee's role as lessee in limited by the lease term. The advent of small business commissioners in four states seems to have been effective as they adopt a proactive approach to resolving disputes.

Although retail leasing legislation requires lessors to deal with requests for assignments expeditiously, lessors still have power to delay assignments by requesting more and more information from assignees. Legislation also sets out the factors that the lessor may consider in determining whether to approve a new lessee however where the lessor, after considering such information, rejects an assignee; the lessee has limited options to challenge the lessor's decision. As assignment of the lease and presumably sale of the lessee's business is the only way the lessee can release the goodwill in its business it is likely that issues regarding assignment are likely to continue to be a problem. Provisions that allow for the release from all liability after assignment to a new lessee make the lessee less selective when they

propose a new lessee. A lessee may be more selective if their liability under the lease was to continue after assignment but only for a limited period.[725]

Rent reviews, and in particular market rent reviews, remain problematic. In circumstances where much information is concealed by a shopping centre lessor pursuant to confidentiality clauses within their leases then it seems impossible for any valuer to carry out an effective valuation, which means any market rent review must be suspect. Provision of turnover information also seems to increase the lessors bargaining power at the expense of the lessee. Lack of controls as to how such information is used by a lessor means that the information can be used in lease negotiations with other lessees, not only for other premises within the shopping centre but also for the lessee's own premises with the result that at the end of a lease, a lessee may be bidding against a new lessee for the premises where such new lessee has been sought by the lessor and been provided with the sitting tenants turnover information. The new lessee knows that if they are successful in obtaining the premises then they will also receive, in effect, the sitting tenant's business without the expense of any fitout as the premises have already been fitted out by the sitting tenant. This will allow the new lessee to bid more to lease the premises which the sitting tenant must match or risk losing the lease, their business and their livelihood.

Disclosure, and the ability of such disclosure to reduce the information imbalance between the parties, has been successful to a certain extent. The amount of such disclosure required by legislation continues to increase. In

725 *Retail and Commercial Leases Act 1995* (SA) s45A.

addition, outgoing lessees are required to provide disclosure statement to both the assignee and the lessor. Such a step is to protect the assignee from misrepresentations or incorrect statements made by the lessee in its haste to sell its business. Disclosure by a lessee to an assignee of any rent abatement during the term of the lease goes someway to redressing the problems of side deals in leases as it would allow the assignee to obtain a more accurate valuation of the business. This “snowballing” of disclosure, however, results in increased delay and cost for all parties especially when legal and financial certificates are also required. The volume of information being provided may be counterproductive in that they do not necessarily improve a potential lessee’s understanding of the leasing transaction or, alternatively, a lessee may believe that only reading of the disclosure statement is required and not the reading of the lease itself. Disclosure requirements have been an issue with all of the above inquiries including the Productivity Commission. It is questionable whether disclosure of data by a lessor in a disclosure statement which is already in the lease has much value and may be redundant. Perhaps disclosure should only be limited to matters which are not contained in the lease such as the lessor’s plans for the centre and tenancy mix.

In summary, all 5 areas of dispute between lessors and lessees remain in dispute to the present day. Dispute resolution provisions have had some success in increasing a lessee’s bargaining power but the other provisions have had only limited success.

CHAPTER 4

CRITERIA FOR EVALUATION OF CURRENT RETAIL LEASE LEGISLATION

1. Introduction

In determining whether there should be a national review retail leasing legislation across all jurisdictions, it is necessary to have an understanding of the current retail leasing environment as the form of retail leasing legislation in the future will be shaped by that environment. In this regard it is necessary to consider the nature of leases, the relationship between lessor and lessee and the nature of the retail leasing market as a whole. The consideration of these subjects will define how any simplified retail leasing legislation should be framed.

It is also necessary to consider the form that such revised legislation should take. For example, the uniform retail leasing disclosure statement recently adopted by New South Wales, Queensland and Victoria was an improved form of disclosure which was better than the previous disclosure statements of all three jurisdictions[726] in that the uniform disclosure statement required the lessor to provide more information to the lessee than was required by the disclosure statements of the three jurisdictions thereby allowing the lessee to make more informed decisions. Additionally, lessors active in all three

726 The change was achieved by alterations to retail leasing regulations in all three jurisdictions. See Retail Shop Leases and Another Regulation Amendment Regulation (No 1) 2010 (Qld), the Retail Leases Amendment Regulations 2010 (Vic) and the Retail Leases Amendment Regulation 2010 (NSW)

jurisdictions would only have to be familiar with one form of disclosure statement.

To effect simplification, the current retail leasing legislation in each jurisdiction within the areas of focus[727] identified previously must be analysed to determine whether such legislation has been effective or not so as to determine whether legislation from one jurisdiction is less complex (but still effective) to legislation in another jurisdiction and therefore worthy of adoption. Alternatively, it may be that none of the current legislation is effective,[728] to the extent that any legislation should be drafted anew or that some amalgam of the existing legislation is required.

It is proposed that a comparison of the legislation in each jurisdiction should be undertaken using benchmarks that are not arbitrarily determined but based upon settled practices of lessors and lessees in each jurisdiction. It is necessary, therefore, to identify and benchmarks these practices and illustrate how these benchmarks are central to all leasing processes, if not to the leasing industry as a whole.

The benchmarks will be determined by considering common problems that occur within Australian States and Territories and by analysing relevant case law, reports and studies regarding retail lease law in Australia, as well the situation in the United Kingdom including the UK leasing codes. In addition, consideration will be given to recently enacted uniform commercial legislation and the reform to work health and safety law in Australia to

727 Such areas of focus being the issues of security of tenure, assignment of leases, disclosure, rent review and dispute resolution.

728 It is arguable that retail tenancy legislation is better in some states than in others but that there are weaknesses generally. See House of Representative, Standing Committee on Industry Science and Technology, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia*, (1997), 2. ("Reid Report 1997").

provide an insight as to what considerations of principle proved important in leading to reform of such legislation.

2. Drivers for Retail Lease Legislation in Australia

2.1 Introduction

Subjects that are important to both lessors and lessees have been exhaustively examined over the years by various committees of enquiry and have been considered in case law and journals.[729] These underlying principles are as follows:

- The Reduction of Transactional Costs - the cost of lease and associated documentation and cost caused by leasing procedures is a significant concern for any business. Such cost is increased by complexity of requirements and time taken to comply with the retail lease legislation by the parties taking into account the terms of the lease itself;
- Transactional Timeliness – delay by either party due to compliance with retail leasing processes results in continued uncertainty for both parties desiring to finalise the transaction;

729 For example W D Duncan, 'The Retail Shop Leases Act Amendment Act 1988 - A Sledgehammer to Crack a Nut' (1988) *Queensland Law Society Journal* 385; W D Duncan, "The Regulation of Commercial Tenancies – Heading for the Sunset", (1990) 2 *Bond Law Review*, 34; K Galloway, "Statutory Modification of Contract Law in Queensland: A New Equilibrium or Entrenching the Old Power Order?" [2008] *James Cook University Law Review*, 4; K Gibbings, "From the Cooper Report to Retail Shop Leases Act 1994: Prescription or Placebo?" (1996) 26(5) Queensland Law Society Journal 1996; K Lewison, "Commercial Property – Are Leases Different?" (1989) *The Law Society Gazette,* 86.45(23); R Loiacono, "The Effect of Amendments to the Commercial Tenancy (Retail Shops) Agreements Acts Act 1985 on the Balance of Power between Landlords and Tenants" (2013) 22 *Australian Property Law Journal* 134; N Mumford, "The Retail Shop Leases Act 1984-1989- Does the Act Achieve the Purposes Identified in the Cooper Report 1981" (1992) *QLSJ*, 91.

- Redundancy – legislation that repeats rights already available either at common law (such as the right to quiet enjoyment)[730] or pursuant to another statute (such as the unconscionable conduct provisions of the Australian Consumer Law)[731] unnecessarily adds to the red tape burden of business owners with increased cost and complexity. This is partly due to the party's access to low cost tribunals created pursuant to the legislation, and rights to compensation sometimes superior to the common law. These Tribunals are now used more widely in respect of ancillary disputes not directly the subject of a statutory dispute thus avoiding the costs of commencing proceedings in a superior court. For example, the *Retail Shop Leases Act 1994* (Qld) provides that all "retail tenancy disputes" may ultimately be heard by the Queensland Civil and Administrative Tribunal (QCAT).[732] The definition of "retail tenancy dispute" is "any dispute under or about a retail shop lease, or about the use or occupation of a leased shop under a retail shop lease, regardless of when the lease was entered into."[733] A dispute about a retail shop may be heard by QCAT even if such dispute arises pursuant to the Australian Consumer Law or other legislation. The need to properly balance both parties' interests – it is

730 Rights of quiet enjoyment are specified in retail leasing legislation as follows: - *Retail Leases Act 2003* (Vic) s54; *Commercial Tenancy (Retail Shops) Agreements Act* 1985 (WA) s14; *Leases (Commercial and Retail) Act 2001*(ACT) ss81,82; *Business Tenancies (Fair Dealings) Act 2003* (NT) s47; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s23; *Retail Shop Leases Act 1994* (Qld) ss 42-44; *Retail and Commercial Leases Act 1995* (SA) s38; *Retail Leases Act 1994* (NSW) s34.

731 The unconscionability provisions of Part 2-2 of the *Australian Consumer Law* now appears in every jurisdiction in Australia except South Australia. *Retail Leases Act 2003 (Vic)* Part 9; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) Part IIA; *Leases (Commercial and Retail) Act 2001(ACT)* s22; *Business Tenancies (Fair Dealings) Act 2003* (NT) Part 10; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998 (Tas)* s3; *Retail Shop Leases Act 1994 (Qld)* s46A*; Retail Leases Act 1994 (NSW)* Part 7A and ss62A, 62B..

732 *Retail Shop Leases Act 1994* (Qld) Part 8, Division 3.

733 *Retail Shop Leases Act 1994* (Qld) Schedule.

this area which causes the most difficulty for the various legislatures. The constant adjusting of law regarding retail leases and prelease negotiations demonstrates the difficulty of the legislature in finding a fair balance. As the bargaining power in the lessor/lessee relationship is heavily in favour of the lessor, protections built into retail leasing legislation lean heavily in favour of the lessee.[734] It is classic "consumer protection" legislation.[735] More cynically, it could be said that the constant change to the retail leasing landscape is a case of one jurisdiction "leapfrogging" another in order to secure the support of small business.[736]

Retail leasing legislation often has a five year review provision built into the legislation. Thus, reviews are automatically triggered whether they are needed or not. This results in a constant demand for change to existing retail leasing legislation, building upon the existing legislation. Changes in retail leasing legislation in one jurisdiction normally results in improved conditions or additional benefits for, primarily, lessees. As a result, lessees in other jurisdictions lobby their government for similar if not greater concessions or benefits together with any further innovations. Once this has been achieved the lessees in other jurisdictions begin the cycle afresh. The most

734 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 222.
735 Professor H Tarlo, 'The Great Shop Lease Controversy' (1983) *University of Queensland Law Journal* 13(1), 38.
736 M Cameron and J Blom, 'The Case for National Retail Tenancies Laws', (2004) 19(1*) Australian Property Law Bulletin* 1, 2. See also Commercial and Property Law Research Centre, Queensland University of Technology, Submission No 12 to Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18 March 2015, [4.4].

obvious example of this is the minimum lease term of 5 years which originally started in Queensland and was then copied in every other Australian jurisdiction.

- Protection of the retail leasing market - although protection of the retail leasing market may not be high on the agenda of smallest business owners, if the market failed such that there would be a reduction in retail leasing venues, businesses as a whole will suffer as a result of even greater demand for floor space driving up rents.[737]

The reasons for selecting these factors for the analysis of the retail leasing legislation in each jurisdiction are set out below.

2.2 Reducing Transactional Costs

One of the important, if not the most important issue for both lessors and lessees is the issue of transactional cost. In the leasing environment costs can increase for either the lessor or lessee by any of the following: -

(a) Delay in finalising transaction.

For example, a delay by a lessor in confirming a request for an extension of a lease may result in the lessee putting refurbishment plans on hold thereby resulting in loss of business. Lessors may also incur costs because of delay. According to the Real Estate Institute of Australia

> Landlords can now find it exceedingly difficult to remove problem tenants without detailed explanation, multiple notifications, lengthy tribunal hearings (or court

737 Reid Report 1997, 44.

> hearings), orders to assist the tenants in their business activities and significant costs arising from these delays.[738]

Any delay in determination of a dispute between the parties will increase the amount of costs payable.[739]

(b) Costs of dispute resolution.

The costs of dispute resolution are even more prohibitive for the lessees who are often small businesses and cannot afford the costs of litigation in court or, perhaps, even the lesser costs of having a dispute resolved through mediation or a low cost tribunal established pursuant to the retail leasing legislation.[740]

(c) Costs arising from lack of certainty.

Both parties require certainty in their relationship. The intention of the legislature in introducing retail lease legislation was to provide certainty to

738 Real Estate Institute of Australia, Submission No 111 to Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 15.

739 R H Burton, Chairman, Commercial Tribunal of Western Australia. Report to the Attorney-General for the year ended 30 June 1996, 14.

> 'As to dispute resolution, while there are workable provisions in all state and territory lease legislation for mediation conciliation, more needs to be done to make this avenue of dispute resolution more accessible, more consistent and to ensure that it continues to be affordable, particularly for the speciality retailers.' Evidence to the Reid Enquiry, Canberra ACT, 24 February 1997, 778 (Property Council of Australia).

both parties[741] in relation to their rights and their obligations to the other party.[742]

Standardised legislative rights are able to provide more certainty to the parties than customised contracts agreed to between the parties because the common exposure of industry participants to such legislative provisions means that the provisions are more easily understood than contractual clauses drafted from scratch.[743] In addition, such legislation is more likely to have accumulated a body of case law (although mainly in tribunals) regarding such provisions which can aid in the interpretation of such legislation. The use of standard legislation rather than bespoke contracts is more likely to protect small businesses who cannot afford the cost of legal advice for such contracts.[744]

For a lessee, because of the long term relational nature of the lease agreement many factors of importance to the lessee can change over the course of the lease, particularly tenant mix, the prospect of re-location and centre re-development. These factors are beyond the control of the lessee

741 Queensland, *Parliamentary Debates*, House of Representatives, 30 March 1984, 1579 (Retail Shop Leases Bill Second Reading by Mr M Ahern).

> 'What is now before members is a clearer and more certain piece of legislation. It will do the job it is intended to do. As I said in introducing the Bill to the House in December last, it will establish the ground rules upon which leases in future will be drafted, and it will provide the hard-working tenant and the landlord with recourse to a form of low-cost resolution of disputes.'

742 Reid Report 1997, 215.

743 Ibid, 26.

744 Attorney General Department, Commonwealth of Australia, *Improving Australia's Law and Justice Framework A Discussion Paper to Explore the Scope for Reforming Australian Contract Law* (2012) 5.

and sometimes, for example, a new centre starting nearby, beyond the control of the lessor.

Prior to the enactment of retail leasing legislation, leases were governed solely by the law of contract which had developed at common law over centuries and the principles of which were widely accepted and generally understood. Standard clauses were used in all commercial leases. It has been argued that any legislation, including retail leasing legislation, which interferes with such long accepted principles must by its very existence increase uncertainty in the negotiating process and in the interpretation of the lease contract itself. The converse argument is that standardising leases and leasing processes would actually create certainty for the lessee.[745] The period of uncertainty and, therefore increase in costs, can be limited by ensuring the early determination of issues arising from lease and by a timely and effective dispute resolution process. For example, when a lease is due to be renewed pursuant to an option to renew, the lessee will want to know as soon as possible (and before they commit to a new term) the amount of

745 Duncan WD and Christensen S, 'Section 51AC of the Trade Practices Act 1974: An Exocet in Retail Shop Leasing', (1999) 27 (4) *Australian Business Law Review*, 282.

> Large corporations and business associations have continually argued that any further inroads made by legislation into the contracting process would undermine the certainty of commercial relationships and the contracts that underpin them. This unbending position is, however, met with equal resistance by the argument that a provision regulating fair dealing in contracts would actually create certainty for the weaker party. At the moment, the weaker party to a commercial transaction has no guarantee of the environment in which the activity is to take place. For instance, a small tenant in a large shopping centre may be subjected to:-
>
> > Relocation of the tenant at the whim of the landlord;
> > The introduction of a competitor of the lessee in a more favourable position;
> > An inflexible negotiating stance by the lessor where the lessee has no choice but to accept a new lease on commercially unviable terms.
>
> On close scrutiny, it becomes evident that there may be no commercial certainty at all in some contractual relationships where one party holds all the bargaining chips.

the new rent[746] whereas the lessor will want to ensure that the lessee is bound to renew the lease before the rent is determined.[747] These rights are given to retail lessees by Statute. No lessor would voluntarily regulate this aspect of the transaction.

Similarly, a lessor will want to be certain that a lessee is at all times bound to the terms of the lease. Uncertainty can be introduced by legislation by such legislation failing to provide exclusive remedies. Where legislation does not provide an exclusive or complete remedy, for as many common disputes as possible, costly resort to the ordinary courts would be required. However, some statutory rights given a retail lessee are arguably unnecessary and unfair to the lessor.

For example, retail lease legislation in each State and Territory provides that if a lessor fails to provide a disclosure statement to the lessee or the disclosure statement is defective, the lessee may terminate the Lease by written notice within a certain period of time.[748] The lessee's ability to terminate the lease seems unnecessarily harsh for the lessor in circumstances where the lessor may have forgotten to include some information and the lessee has simply changed its mind and seeks to rely upon technical grounds to escape the lease.

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746 *Retail Leases Act 1994* (NSW) s32; *Retail Shop Leases Act 1994* (Qld) s27A; *Commercial Tenancy (Retail Shops) Agreements Act1985 (*WA) s11; *Retail & Commercial Leases Act1994* (SA) s 36; *Business Tenancies (Fair Dealings) Act 2003* (NT), s30.

747 Department of Justice and Industrial Relations Consumer Affairs (TAS), *Review of the Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998 Final Report*, March 2002, 48.

748 *Retail Leases Act 2003* (Vic) s17; *Retail Leases Act 1994* (NSW) s11; *Retail Shop Leases Act 1994* (Qld) s22; *Retail & Commercial Leases Act1994* (SA) s12; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s6; *Fair Trading (Code of Practice for Retail Tenancies) Regulations* 1998 (Tas) s7; *Leases (Commercial & Retail) Act 2001* (ACT) ss117, 118; *Business Tenancies (Fair Dealings) Act 2003* (NT) s20.

Nevertheless, the parties are entitled to expect that, in the event of some failure to comply with the legislation (i.e. failure to provide full disclosure) that the lessee would have the remedies available to it pursuant to such legislation and nothing more. Such was the case in *Corbett Court Pty Limited v Samaha*,[749] where the lessee alleged that certain representations had been made by the lessor's agent regarding the centre[750] none of which appeared in the lessor's disclosure statement and, more importantly, the lessee did not refer to any such representations in the lessee's disclosure statement.

The court found that as the lessee did not specify any such representation in its own disclosure statement, the lessee was estopped from asserting that they relied upon such representations.[751]

Such a decision is of comfort to lessors in that only those representations as disclosed by the lessor or as stated by the lessee in the lessee's disclosure statement may give grounds for a lessee to terminate on the grounds that the

disclosure statement provided was defective. However, the parties had to adjudicate in a superior court to achieve this outcome. A lessee's failure to insert a lessor's representation into a disclosure statement results in a finding that the lessee did not rely upon such representation.[752]

The lessor is therefore able to rely upon the provisions of the legislation and conduct business accordingly.

749 [2006] NSWSC 1441.

750 The representations were to the effect that the centre would be fully occupied upon opening, the tenancy mix of the centre, the possible closure of a nearby competitor and that the shopping centre would become the "hub" of the region.

751 Ibid, [71].

752 Andrew Lang, CCH, Lang's Commercial Leasing in Australia (at 28 November 2012) [85-281].

In *Armstrong Jones Management Pty Limited v Saies-Bond & Associates Pty Limited*[753] the appeal panel decided that contrary to *Corbett Court Pty Limited v Samaha*,[754] an evidentiary presumption arising because of an omission of a statement from the lessee's disclosure statement could be overcome by other evidence[755] and the lessee could be excused from omitting to include representations in its disclosure statement.

The effect of this decision is that irrespective of whether or not representations by the lessor are recorded by the lessee in their disclosure statement the lessee will still be able to rely upon such representations provided they can prove them in some other fashion. This unfortunately means that the lessor cannot rely upon the contents of the lessee's disclosure statement as providing the lessor with any degree of certainty or security[756] which tends to defeat the purpose of the statutory exercise to provide certainty to parties in respect of reliance upon representations.

The lessor would prefer that in circumstances where the lessee fails, with the benefit of legal advice, to insert representations that the lessee has relied upon in entering the lease into the lessees' disclosure statement that the lessee is estopped from the date that such lessee disclosure statement is provided.[757] Such a result provides both parties and, especially the lessor with greater certainty than the result where the lessee fails to insert representations but is allowed to lead other evidence regarding representations made.[758]

753 [2007] NSW ADTAP (RLD) 47 (6 September 2007).
754 [2006] NSWSC 1441.
755 Ibid, [21].
756 *Spuds Surf Chatswood Pty Ltd v PT Ltd (No 2) (RLD*) [2012] NSWADTAP 35, [89] – [91].
757 *Xin v Zakos* [2000] NSWADT 189, [51].
758 See, e.g. *Gizah Pty Ltd v AXA Trustees Ltd* [2001] NSWADT 116.

Certainty is also a factor in the resolution of lease disputes, in that, the resolution process needs to not only be timely and effective, but the decisions of the dispute resolution tribunals need to be consistent so that the parties can rely upon those decisions in framing their future conduct.[759] Consistent decision making process will allow the parties to be confident that their commercial dealings are within the guidelines as established by legislation.

Tribunal decisions themselves, by their very nature, can contribute to uncertainty because of their limited value as precedents. As a tribunal is not required to follow the laws of evidence and is not bound by precedent of other tribunal decisions, every decision turns on the particular facts of the case. Inconsistent decision making in the same jurisdiction by such tribunals result in a perception of arbitrariness[760] that makes it difficult for legal advisers. Some greater certainty might be achieved by national retail lease legislation although the tribunal decisions would still not be binding. Cases in superior courts of other jurisdictions on the same subject would have greater persuasive value.

Costs of complying with different retail leasing legislation across different jurisdictions[761] with different requirements adds to complexity and adversely affect national lessors.[762]

Reviews of legislation in each jurisdiction rarely lead to a cost benefit analysis. Legislatures are very reluctant to remove what they perceive as

759 Evidence to the Reid Enquiry, Canberra ACT, 24 February 1997, 778 (Property Council of Australia).
760 *Drake No 2* (1979) 2 ALD 634, 639.
761 M Cameron and J Blom, 'The Case for National Retail Tenancies Law' *Australian Property Law Bulletin*, 19(1) 1, 1.
762 Westfield, Submission No 85 to Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008).

benefits to a lessee once the benefit has been given regardless of the evidence of complexity and cost.

For example, a lessee can be required to provide to a lessor a disclosure statement, legal advice certificate and financial advice certificate. Putting aside any question as to the merits of such documents, the requirement to provide them means that a lessee must involve a solicitor and an accountant in the transaction and incur these costs. The issue for government is to ensure that there is a balance between such costs and the benefits of legislation[763] especially where costs are caused by complex legislation without delivering obvious reduction in costs.[764]

Governments regularly claim to reduce the burden of "red tape" but their efforts often have the opposite effect. This is because governments consider regulation to be the principal method to protect its citizens[765]. Such "red tape" burden includes financial costs such as filing fees, licencing fees and audit fees etc. and costs of compliance such as staff training, configuring equipment and documents and regulation induced delays such as form completion, form lodgement and waiting for approvals.[766] The result is that consumers are disadvantaged because of less competition between retailers and because, ultimately, additional compliance costs are added to the sale price of items.[767] Some of the measures that had been introduced in the retail

763 Government of Victoria, *Regulatory Impact Statement on the Proposed Retail Leases Regulation*, March 2003.
764 Eileen Webb "The Productivity Commission Enquiry Report: The Market for Retail Tenancy Leases in Australia" (2009) 16 *Australian Property Law Journal* 219, 220.
765 Government of Western Australia, *Reducing the Burden – Report of the Red Tape Reduction Group* (2009), 23.
766 Government of South Australia, *Reducing Red Tape for Business in South Australia* (2010/2011), 5.
767 Government of Western Australia, *Reducing the Burden – Report of the Red Take Reduction Group* (2009), 23.

leasing legislation over the years have not achieved a significant benefit to either party and simply raised costs of compliance.[768]

Poorly drafted regulation may contain unclear or questionable objectives and/or a failure to sufficiently target a perceived problem.[769] For example, a move by the Western Australian government to prohibit the recovery of management fees as an outgoing encouraged many lessors to alter their leases to move from a net rent plus outlays position to a gross rent position which would allow them to recover the management fees by incorporating those fees into the gross rent. The lessees incurred costs in altering their leases and the result of the change was that accountability and transparency in relation to the component of cost was lost.

In addition to such compliance costs, poorly drafted regulation can impose costs on government and damage the marketplace as additional compliance costs make it more expensive for new businesses to enter the market with the result that there will be less new business entering the market and therefore less competition with existing businesses.[770] It is in the interests of both the lessor and the lessee that legal processes and business practices be as simple as possible to allow:

(i) easy entry and exit[771] from a lease and flexibility regarding lease term;

768 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 249.

769 Australian Government*, Rethinking Regulation – Report of the Task Force on Reducing Regulatory Burdens on Business* (January 2006), [2.2].

770 Government of Western Australia, *Reducing the Burden – Report of the Red Tape Reduction Group* (2009), 23.

771 For example, when assigning a lease, prior to retail lease legislation, a lessee only had to obtain the consent of the lessor. Pursuant to retail lease legislation a lessee now has to ensure that additional steps occur such as the lessee providing formal disclosure documents to the assignee, obtaining formal disclosure and certificates from the assignee and ensuring additional disclosure from the lessor to the assignee. Such steps increase the complexity of "exiting" a lease.

(ii) a full understanding of the terms of the lease and the leasing relationship;[772]

(iii) a full and effective due diligence process to be carried out by both the lessor and the lessee prior to any formal relationship being entered into;

(iv) an improvement of the understanding by individuals entering into small business about their commitments under the lease to reduce the perception that a lessor or its agent is misleading or deceiving the lessee during negotiation.[773]

Leases and the leasing process can be made more understandable by the use of simple language, simplification of lease charges and simplified and concise disclosure of key clauses.[774] This can be achieved by the lessor providing a simpler document than the typical lengthy disclosure statement.

Alternatively, legislation could provide for a standard lease document where certain basic lease terms are provided. The UK Voluntary Lease Code 2007 contains within it a Model Heads of Terms of the lease containing basic details such as property details, party details, lease term, initial works, security requirement, use, assignment and subletting provisions, service charges, insurance and whether the lease has a mandatory right of renewal under the Landlord and Tenant Act 1954 (UK).

This is particularly pertinent as section 21 of the Australian Consumer Law ("ACL")[775] provides that in determining whether a person has engaged in

772 N Crosby, C Hughes and S Murdoch, 'Flexible Leasing and the Small Business Tenant' (Paper presented at the Pacific Rim Real Estate Society, Auckland, January 2006) [6.2].
773 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 171.
774 Ibid.
775 *Competition and Consumer Act 2010* (Cth), Schedule 2 ("Australian Consumer Law").

conduct which is unconscionable a court can take into account whether a customer was able to understand a document relating to the supply of goods and services.[776]

These suggestions are not new. In 1997 the Reid Committee formed the view that it was fundamental that small retailers be given documentation and information that they could understand[777] while the Victorian Small Business Development Corporation in its report of October 1982 stated that most of the abuses by lessors arose from the language the lease and the lessee's lack of understanding of that language.[778] Many lessees were very reluctant to obtain independent advice thus compounding the problem. Lessees and lessors would often only be looking at their lease after a dispute arose many seeing the relevant clause for the first time.

Courts have always been willing to overturn contracts because of the unconscionable conduct of one party to the contract in circumstances where such conduct involves exploiting a special disadvantage of the other party.[779]

Such special disadvantage includes situations such as illness or impaired faculties and circumstances where the complexity of a document is an issue in cases involving ignorance and inexperience,[780] lack of legal advice, [781]

776 *Australian Consumer Law*, s22(i)(c).
777 Reid Report 1997, 66.
778 Referred to in the Retail Tenancies Advisory Committee (Vic), *Report of the Retail Tenancies Advisory Committee,* Victoria, (February 1984), 1. ("Arnold Report 1984").
779 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.
780 *Blomley v Ryan* (1956) 99 CLR 362, 415 (Kitto J).
781 *Bridgewater v Leahy* (1998) 158 ALR 66, [41].

lack of education [782] or "lack of assistance or explanation where assistance or explanation is necessary."[783]

Where a lessee has a sound understanding of the terms of a lease, through access to independent advice, it becomes more difficult for that lessee to later claim that the lessor has behaved unconscionably in insisting upon the terms of the document[784] especially where both parties bargained on an equal footing.[785]

The introduction of a requirement for the provision of disclosure statements to prospective lessees to simplify the leasing process was a common recommendation of several enquiries.[786] A lease consists of many pages of legalese and it is impossible to "anticipate the ingenuity of lawyers or the stipulations which may be required in leases by some landlords."[787]

Disclosure statements were not initially part of retail lease legislation however they are now required in each Australian jurisdiction.[788] The amount of information required in disclosure statements has gradually increased over the years.[789] In 2008, the Productivity Commission found that further improvements could be made in relation to disclosure[790] and that a uniform

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782 *Wilton v Farnworth* (1948)76 CLR 646, 655 (Rich J).
783 *Blomely v Ryan* (1956) 99 CLR 362, 406 (Fullagar J).
784 *Golden Harvest (Aust) Pty Ltd v Paing Pty Ltd* [2002] NSWADT 102, [42].
785 *Ull v Adwell Holdings* [2009] NSW ADT 246.
786 Retail Liaison Committee (WA), *Report of the Inquiry into Commercial Tenancy Agreements* (February 1984), 29. ("Clarke Report 1984").
787 Ibid, 29 -30.
788 *Retail Leases Act 1994* (NSW) s11; *Retail Shop Leases Act 1994* (Qld) s22; *Retail Leases Act 2003* (Vic) s17; *Retail and Commercial Leases Act 1995* (SA) s12 *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s6; *Leases (Commercial and Retail) Act 2001*(ACT) s30; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s6; *Business Tenancies (Fair Dealings) Act 2003* (NT) s19.
789 E Webb, "Almost a Decade On – A (Reid) Report Card on Retail Leasing" (2006) 13 *Australian Property Law Journal* 240,276.
790 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), xxvi.

disclosure statement, with uniform terminology, would be preferable.[791] In 2010, a uniform disclosure statement was agreed to for New South Wales, Victoria and Queensland[792] which required even greater disclosure then the previous disclosure statements in the individual states.[793]

The purpose of the uniform disclosure statement was to reduce the regulatory burden on multi-jurisdictional lessors and to improve information flow to lessees.[794]

Lease regulation, the leasing process and the typical retail lease itself are still too complex for a normal lessee to understand without assistance. Such assistance currently includes the supply of disclosure statements[795] and the requirement that a lessee obtain professional advice evidenced by certificates[796] Although detailed disclosure requirements may reduce the information asymmetry between lessors and lessees the extent of such information disclosure or the size of the disclosure statement is currently too

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791 Ibid, xxxi.

792 Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18th March 2015, 36.

793 Such as attaching any plans of the premises, providing details of incentives the lessor is providing to the lessee, setting out the lessor's requirements on the quality and standard of the lessee's fitout, listing any alteration works required to the premises or to be made to the building or the centre, including to the surrounding roads, providing details of the shopping centre's annual estimated turnover and the annual estimated turnover by the specialty retail shops on a per square metre basis, providing details of the anchor lessees, providing assurance to the lessee that the current tenancy mix in this shopping centre will not be altered by the introduction of direct competitors to the lessee, disclosing current legal proceedings, warning lessees that they have some remedies if the information provided in the disclosure statement is misleading or false or materially incomplete. See Newton G, "Update On Retail Leasing, Cases, Disclosure Statement and Legislation" (Paper presented at Australian Institute of Conveyancers NSW Regional Day, Coffs Harbour, Saturday 18 June 2011) 9.

794 G Newton, "Update On Retail Leasing, Cases, Disclosure Statement and Legislation" (Paper presented at Australian Institute of Conveyancers NSW Regional Day, Coffs Harbour, Saturday 18 June 2011) 8.

795 *Retail Leases Act 2003* (Vic) s 17(1)(a); *Retail Shop Leases Act 1994* (Qld) s 22; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 12; *Retail & Commercial Leases Act 1995* (SA) s 12; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 6; *Retail Leases Act 1994* (NSW) s 11; *Leases (Commercial and Retail) Act 2001* (ACT) s 30; *Business Tenancies (Fair Dealings) Act 2003* (NT) s 19.

796 *Retail Shop Leases Act 1994* (Qld) s 22D (1).

great for the lessee to absorb such that legal advice is virtually essential.[797] The effect of such disclosure is that the lessee, in attempting to understand the disclosure statement, incurs costs in receiving such advice

Instead of legal advice, the lessees understanding of documents (both leases and disclosure statements) may be improved by lessee education. Education of prospective lessees has also been considered by various committees of enquiry. However, this desire, while laudatory, also has pitfalls.

The ACT Working Party received numerous submissions to the effect that the problems of the retail leasing industry could be solved by increased lessee education.[798] In fact, the ACT Working Party, although acknowledging that lease documents are complex,[799] believed that disclosure statements were not necessary because the same result could be achieved by lessee education.[800] Education programs for lessees are provided in all jurisdictions by state and territory governments and federally, by the ACCC[801] Increased education would, logically, increase the understanding by the lessees of the lease transaction and the actions of the lessor thereby leading to lesser disputes.[802] However, prospective lessees cannot be forced to access these services and cannot be sanctioned if they do not. Community education is often seen as a panacea for the problems of modern governments.

797 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 157.
798 ACT Report 1984, 3.
799 Ibid, 20
800 Ibid, 20.
801 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 60.
802 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 184.

Avoidance of complexity is identified as a common goal in the discussions of the various committees of enquiry[803] as a method of protecting the interests of the lessee and to reduce costs. The main beneficiaries of any simplified retail leasing legislation throughout Australia are national lessors and lessees whose situation is simplified leading to definite cost reduction.

Conclusion

Both lessees and lessors can be subjected to additional cost burdens arising out delay, lack of certainty or the costs of resolution of disputes. In addition, transactional costs are increased because of complexity of different and constantly changing retail lease legislation, lease documentation, or the leasing process. Such costs can be minimised by the drafting of simple regulation, the use of standardised lease terms and procedures, ensuring that legislation provides certainty to all parties, reducing delay and eliminating procedures that increase costs but provide minimal benefit to the parties. It is understood that this objective would require an unusual degree of co-operation between all jurisdictions.

2.3 Delay

Justice delayed is justice denied.[804] In particular, where the parties to a dispute differ greatly in the availability of resources, such denial of justice is magnified. Most commonly in a retail tenancy dispute, there is a vast

803 Reid Report 1997, 64; Arnold Report 1984, 26; Clarke Report 1984, 30; ACT Report 1984, 20.
804 Sir Garfield Barwick, 'The Australian Judicial System: The Proposed New Federal Superior Court [1964] *Federal Law Review* 1, 20. See also Jaygo v District Court of New South Wales [1989] HCA 46, [20], *Townsville City Council and Anor v Department of Main Roads* [2006] 1 Qd R 77. See also Martin Luther King, "*Letter from Bermingham Jail*" 6. <http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf.>

difference in the financial resources of the lessor and the lessee. Delay is often a tactic adopted by the wealthier party because they can afford the expense involved that such delaying tactics will incur.[805] Delay is a useful tool to a lessor as the lessee has only a limited period under the lease to enjoy occupation of the leased premises and late into a lease term a disgruntled lessee would be unlikely to take action against a lessor because of that reason.[806] Where a lessee has a lease term of only three (3) years, a delay of even six (6) months in obtaining resolution of a problem, can cause irreparable damage to both the lessee's business and to the relationship between the lessee and the lessor.

Delay by a lessor could include delaying consent to an assignment,[807] delay in effecting repairs,[808] or a delay in providing information to a lessee regarding rent review[809] or delay caused by instituting tribunal proceedings to seek a remedy.[810] Delay has been identified as a tool used by lessors to limit the availability of lease information by the refusal to return executed lease documents.[811] Lessors can also delay responding to a request for lease renewal until the last minute, thereby increasing pressure upon the lessee to accept the lessor's proposal.[812]

Retail lease legislation that allows either party to benefit from delay is ineffective and self-defeating. Delay alone may result in a party losing their

805 Small Business Development Corporation (WA) Submission No DR 240 to Productivity Commission, *Access to Justice Arrangements*, Report No 72, 5 September 2014, 12.
806 *ACCC v Dukemaster* [2009] ATPR 42-290.
807 Cooper Report 1981, 4.
808 Arnold Report 1984, 43.
809 *ACCC v LeeLee* (2000) ATPR 41-742. See also Hill Report 1983.
810 *Worlds Best Holding Ltd v Sarker* [2010] 14 BPR 27,549.
811 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 204.
812 Clarke Report 1984, 25.

rights merely by passage of time. For example, delay by a lessor in responding to a request to assign a lease may cause an impatient buyer to elect not to proceed with the purchase of the lessee's business.[813]

One of the key factors reducing the effectiveness of dispute resolution procedures is the delay inherent in getting before a tribunal or awaiting the resolution of an appeal to the Court.[814] Dispute resolution procedures can be frustrated by delaying tactics adopted by lessors[815] because the lack of limitation of the right to appeal from decisions of low cost tribunals resulting in lessors often appealing an unsuccessful result to a higher court causing further delay.[816] The Reid Committee received evidence of one particular matter which was determined in a tribunal in favour of the lessee and then immediately appealed to the District Court and later the Supreme Court.[817]

In *Worlds Best Holding Ltd v Sarker*[818] the lessor was found to have behaved unconscionably in that its actions were not undertaken in good faith and were calculated to wear down the lessee by delaying the resumption of trading and exhausting resources by forcing the lessee to defend unmeritorious litigation.[819] The lessor attempted to use delay as a weapon against the lessee knowing that the lessee had limited financial resources

813 Reid Report 1997, 40.
814 Ibid, 27.
815 Ibid, 28.
816 Evidence to the Reid Enquiry, Perth, 11 November 1996, 406 (Len Rathmann of Western Australian Council of Retail Associations).

> It becomes a situation where lawyers can joust and be expensive in their whole approach such that the smaller retailer has no way whatsoever of being able to sustain the financial pressures that are imposed on them. The owners and the centre managers know this only too well – they are only too happy to admit it to people like me – so that this is exactly the way in which they will conduct proceedings because they can last longer than those tenants can.

817 Reid Report 1997, 35.
818 [2010] 14 BPR 27,549.
819 Ibid, [91].

and that, by protracting the litigation, those resources were further diminished.

Delay is not just the tool of the lessor. In the right circumstances, a lessee can use delay to its advantage by making unreasonable demands and using obstructive methods to hinder a lessor. For example, a lessor on the point of sale of premises may find it advantageous to have proper leases in place prior to such sale and to have all disputes with lessees resolved. In such circumstances, the lessees may delay dealing with the increasingly desperate lessor so as to secure the best terms for themselves.[820]

Most lessees and many lessors are unwilling to start court proceedings due to the cost of legal representation and the time delays in determining cases and uncertainty of result.[821] Litigation naturally causes all disputes to become protracted[822] and time consuming.[823] Mandatory dispute resolution provisions of the retail lease legislation through compulsory first stage mediation attempts to resolve disputes in a timely fashion which theoretically allows the parties to return to a proper working relationship.[824] As part of its 2008 inquiry, however, the Productivity Commission received submissions to the effect that although acknowledging the ability to refer complaints to a dispute resolution process through the Small Business Commissioner was generally useful, such process was too slow in that the complainant lessee

820 *Bond University v Limgold* [1997] QSC 227.
821 Arnold Report 1984, 2.
822 Arnold Report 1984, 14.
823 Ibid, 28.
824 P Prindable, 'Is Mediation an Alternative in Commercial Lease Dispute Resolution' (1994) 5 *Australian Dispute Resolution Journal* 99, 102.

required the early intervention of the Commissioner so that the lessor became aware of independent third party intervention.[825]

Conclusion

Delay is an effective tool of the lessor to achieve its objective, whether such an objective is to wear the other party down in litigation, or to limit the availability of lease information or to frustrate a lessee's desire to assign its lease. Any retail lease legislation must include provisions limiting the ability of either party, but particularly the lessor, to cause delay by, for example, restricting the parties right to appeal to certain time limits and grounds.

In circumstances where the issue of delay is so prevalent in each of the various enquiries, it is submitted that the reduction of delay is an appropriate benchmark to be used in assessing the effectiveness of retail leasing legislation.

2.4 Redundancy

Particularly detailed legislative requirements in a commercial transaction can cause a significant burden upon both parties but particularly upon small businesses not equipped to deal with red tape or with complicated procedures.

Where other legislation outside retail leases deals with the same problem more simply than retail lease legislation, the latter must impose another pointless layer of compliance leading to delay and increased costs.

807 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 185. (Evidence provided by NewsXpress Pty Ltd, Transcripts, 498.)

For example, section 22 of the now repealed *Retail Tenancies Reform Act 1998* (Vic) provided that the lessor must not unreasonably withhold consent to an assignment and if the lessee does unreasonably withhold consent the assignment may proceed without consent. This is simply a re-statement of the common law and is unnecessary.[826] Another example relates to assignments. In 1988, a new section 13(3) was added into the *Retail Shop Leases Act (Qld) 1984* which governed the situation where a lessee had no option to renew. The section put in place the following procedure: -

(a) Not less than 4 months prior to lease termination the lessee could request the lessor to renew the Lease;

(b) Not less than 3 months prior to lease termination the lessor must advise whether a new term would be granted and the lease conditions;

(c) Not less than 2 months before lease termination, if the lessor confirms that a new lease term will be available, the lessee must give notice of acceptance to the lessor;

(d) If the lessor fails to respond in the appropriate time frame, then the lessee becomes automatically entitled to a three month extension on its lease.

Putting aside any consideration as to whether a lessor would have sufficient time to consider its position and later prepare the necessary lease terms within one month, it would seem that this provision only formalises a

826 *Massart v Blight* (1951)82 CLR 423, 440; *Dufaur v Keneally* (1908)28 NZLR 269.

procedure that a reasonably diligent lessee and lessor would adopt in any event.[827]

Furthermore, the imposition of a three month extension to the lease does not appear to be of any significant benefit to the lessee. It would seem that the imposition of this extension is to give the lessee time to make other leasing arrangements.[828]

A three month extension does not, however, seem to be of sufficient detriment to cause a lessor to alter its' conduct. Although the procedure may make a tardy lessor act more swiftly, it is more likely to cause a lessor to adopt the path of least resistance and simply state under step (b) above that no new lease term will be granted. Having disposed of its statutory obligation under Section 13(3) the lessor could then, in its own time, approach the lessee and advise that a new lease term may be available provided the lessee meets the lessor's terms.[829] This could even prove more counter-productive to the lessee in future negotiations with the lessor.

The equivalent provision to section 13(3) under the *Retail Shop Leases Act (Qld) 1994* is Section 46AA. That section alters the timeframes somewhat from section 13(3) however the basic premise remains which is that if the

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827 W D Duncan, 'The Retail Shop Leases Act Amendment Act 1988 - A Sledgehammer to Crack a Nut' (1988) *Queensland Law Society Journal* 385, 389.

> One would have thought that this subsection is hardly necessary. If the existing tenant who must be aware that he does not have an option to renew, desires to take a new lease, then he could approach the landlord some months before the expiration of the lease and seek advice as to whether or not a new lease would be offered to him and upon what terms. What the subsection does in relation to those leases to which it applies, is to put the onus upon the landlord after receiving notice from the tenant to make up his mind whether or not he will offer the tenant the option to take a new lease and upon what terms.

828 *White v Downes* [2012] QCAT450.

829 Colin Anderson, (1992) 'The Retail Shop Leases Act 1984 (Qld): Does It Remedy a Mischief?' (1992) 4 (1) *Bond Law Review* 73, 87-88.

> It is difficult to see any significant advantage to a tenant in gaining a mere three months in such circumstances. Also no justification for imposing such a duty on a landlord is apparent given that the lease contains no option to renew and therefore it would seem open to the landlord to refuse to grant such a renewal.

lessee gives notice to the lessor prior to the end of the lease, the lessor must respond within a certain timeframe (which is different depending on the term of the lease) otherwise the lessee may be granted six month extension to the lease term which may be ended by the lessee upon giving one months' notice.

The effect of both section 13(3) and section 46AA, therefore, is to provide to a lessee almost exactly the same rights as the lessee would have at common law.[830] It is only if the lessor ignores the initial notice from the lessee that the lessee gains a small advantage by way of an extra period added to the lease term. It also presumes that the lessee benefits from not seeking to regularise its own position by initiating action before the end of the lease term which would evidence poor business practice.

Redundancies arise not only where the legislation grants rights already available at common law but also where rights are already available pursuant to other legislation.[831] Such overlap should not occur unless there is a benefit to the parties.[832]

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830 The writer has located no cases that deal with s13(3) *Retail Shop Leases Act 1984* (Qld) and only two cases that deal with s46AA of the *Retail Shop Leases Act 1994* (Qld). In *White v Downes* [2012] QCAT 450 the tribunal found that the lessee was entitled to a six-month extension pursuant to s46AA while in *Topbeach Pty Ltd v Seafarers Investments Pty Ltd* [2010] QSC 459 the court found that s46AA did not apply as the lessee had not requested an extension of the lease prior to the lease expiring as required by s46AA(4A).

831Westfield, Submission no. 85 to Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 16.

> … there is, uniquely within Australia, excessive regulation of the retail tenancy lease market through the operation of State and Territory retail tenancy laws which are, in the main, designed to protect retail tenants as a class. Those laws regulate all aspects of the landlord and tenant relationship. In addition, they are supplemented by Commonwealth law principally in the form of the TPA … State and Territory Retail Tenancy and associated legislation, such as Fair Trading Laws, also provide remedies for unconscionable conduct and misleading and deceptive conduct. It is apparent that the existence of this regulatory framework embeds a significant level of cost within the market for retail tenancies. This cost includes not only the cost of compliance,

For example, Section 121(1) (a) (i) of the *Property Law Act (Qld) 1974* provides that a lessor may not unreasonably withhold consent to an assignment of lease. A delay by the lessor in providing such consent would amount to a "refusal" for the purposes of the section. Despite this section 11(1) of the Retail Shop Leases Act (Qld) 1984 provided that where a lessee requests an assignment and provides adequate particulars, the failure of the lessor to answer in thirty days created a dispute referrable to a mediator. Similarly, under Section 50(1) of the *Retail Shop Leases Act (Qld) 1994* a retail tenancy dispute was deemed to exist if the lessor had not provided its answer within one month. Any "retail tenancy dispute" may be referred to mediation pursuant to section 55 of the Retail Shop Leases Act (Qld) 1994. Neither the 1984 nor the 1994 provision significantly increased the rights of the parties over and above what was already available under Section 121(1)(a)(1) of the *Property Law Act (Qld) 1974*. A dispute under Section 121(1) (a) (1) would be sufficient to amount to a "retail tenancy dispute" [833] for the purposes of referral to mediation under the *Retail Shop Leases Act 1994* (Qld)[834] or determination by tribunal.[835] A re-statement of the law within the *Retail Shop Leases Act 1994* (Qld) would only be necessary where such re-statement was required to give jurisdiction to the tribunal, however, the definition of "retail tenancy dispute" is sufficiently wide enough to allow the

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principally borne by landlords, but also the cost to the taxpayer of the bureaucracy and administrative infrastructure required to oversee and administer these laws.

832 Ibid, 96.

833 The Dictionary to the *Retail Shop Leases Act 1994* (Qld) provides: -

'retail tenancy dispute means any dispute under or about a retail shop lease, or about the use or occupation of a leased shop under a retail shop lease, regardless of when the lease was entered into.'

834 *Retail Shop Leases Act 1994* (Qld) s55.

835 Ibid, s64.

tribunal to hear a dispute arising from the application of other legislation provided the dispute is about a retail shop lease.

Similarly, any breach of the common law right of quiet possession would amount to a "retail tenancy dispute" for the purposes of the dispute provisions of the Retail Shop Leases Act 1994 (Qld) and, as such, provisions within the Act[836] giving the lessee the right to make a claim for compensation for disturbance are unnecessary. If nothing is added to the rights of either party except complexity it seems unnecessary for the legislation to be enacted.[837]

Finally, it must be remembered that the *Retail Shop Lease Act 1984* (Qld) came into being in Queensland over thirty years ago. Since that time, there have been significant amendments to the *Australian Consumer Law* which have enhanced the protection afforded to parties like lessees. Retail lease legislation may be redundant not because of any particular section of the legislation but because the result sought to be achieved by passing the legislation has now been achieved through the amendments to the another Act covering the field.[838]

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836 Ibid, Part 6, Division 7.

837 WD Duncan, "The Regulation of Commercial Tenancies – Heading for the Sunset?" (1990) 2 *Bond Law Review 28*, 33 referring to Section 11 of the Retail Shop Leases Act (Qld) 1984

> It is submitted that this provision in all jurisdictions adds little to the law as it stood, which provided, by statute, that in all leases containing a covenant against assigning or subletting without licence or consent, that particular covenant shall be deemed to be subject to a provision that the licence or consent is not to be unreasonably withheld.
> … The provisions of the retail tenancies legislation merely, and somewhat unnecessarily, provide an overlay to the already existing provisions of the statutes which were adequate to meet the particular contingencies to which this legislation was directed.

838 Colin Anderson, 'The Retail Shop Leases Act 1984 (Qld): Does It Remedy a Mischief?' (1992) 4(1) *Bond Law Review* 73, 93.

Redundancy is an appropriate benchmark in assessing the efficacy of existing legislation and should be particularly avoided where it impacts in any way upon the conduct of small business.

2.5 Balanced Protection

Retail Leasing legislation throughout the country is undeniably of a "consumer protection"[839] nature enacted to mainly protect the interests of the small business at the expense of large business i.e. lessors [840] as it appears to be accepted that where the lessor has the superior bargaining position the lessee requires similar statutory protection as that given to a consumer. [841] Retail leasing legislation was first introduced in Queensland in 1984 because of the complaints received by the government from lessees concerning overbearing conduct of lessors. According to Duncan: -

> 'At the foundation of these complaints was the fact that the lessees effectively had no bargaining power in relation to terms and conditions of their leases and were entirely at the mercy of the complex owners.'[842]

It was the perception of the lessors as all powerful and the lessees as powerless that led to various governments initially passing retail leasing

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> …the Trade Practices Act is now supplemented by the Fair Trading Act (Qld) 1989. It can therefore be suggested that the Act ought to be reviewed. Serious consideration needs to be given to the proposition that other legislation may adequately cover the problems raised in the Cooper Report. Many of the more extreme provisions require greater justification for their continued existence. In the present economic climate, the reduction of unnecessary regulation and the encouragement of investment would seem preferable goals if tenants could be adequately protected by other legislation.

839 Queensland, Parliamentary *Debates*, 30 March 1990, 1085 (Retail Shop Lease Amendment Bill Second Reading by Mr Connor).

840 *Vesco Nominees Pty Ltd v Stefan Hair Fashions Pty Ltd* [2002] ANZ Conv R 23, [55].

841 A Bradbrook, The New Era of Tenancy Protection, (1987) 61 *Australian Law Journal* 593, 614.

842 WD Duncan, "The Regulation of Commercial Tenancies – Heading for the Sunset?" (1990) 2 *Bond Law Review* 28, 28.

legislation.[843] The need to favour the interests of lessees over the interests of lessors arises because of the nature of the leasing market.[844] In turn, this allows the lessors to specifically exert power over individual lessees by insisting that lessees enter into leases that favour lessors on a "take it or leave it" basis.[845] There is little new here as most lessors contract substantially on these terms except with large public companies.
The imbalance of bargaining power between lessor and lessee[846] recognised in the Reid Report,[847] led to the enactment of s51AC of the *Trade Practices Act* [848] in an attempt to restore the balance between the parties.[849]

A lessee's power increases or decreases depending upon circumstances. A lessee offering to lease premises where demand for space is high has less bargaining power then when demand is low. This position is exacerbated where the lessee is attempting to renew its lease at the conclusion of a lease term where there are no options to renew which is usually the case.[850] Although at a disadvantage a lessee in such a position is not suffering from a special disadvantage and the remedies for unconscionable conduct are not

843 L Davies, "Final Report on Consultancy Study of Common National Commercial and Retail Tenancy Issues, 1991, *Report for the Department of Primary Industry, Technology and Commerce, Australian Governmen*t, Canberra, 3.
844 Reid Report 1997 [2.27].
845 P Prindable, 'Is Mediation an Alternative in Commercial Lease Dispute Resolution' (1994) 5 *Australian Dispute Resolution Journal* 99, 102.
846 Minister for Workplace Relations and Small Business, Trade Practices Amendment (Fair Trading) Bill 1997, Second Reading Speech, House of Representatives, 30 September 1997.
847 Reid Report 1997, 17.
848 Now replaced by Competition and Consumer Act Schedule 2, s22.
849 I Villiers and E Webb, 'Using Relational Contract Principles to Construe the Landlord-Tenant Relationship: Some Preliminary Observations' (2011) 1 *Property Law Review* 21, 25.
850 Ibid, 36.

available to them.[851] The conduct of the lessor, in using the lessee's lack of security of tenure to extract concessions, may be viewed as unfair, however acting "unfairly" is not acting unconscionably.[852]

According to the Beddall Report, the bargaining power held by lessors could lead to abuse of that power. To prevent this, it recommends an "industry wide standard" setting out the rights of the lessor and lessee.[853]

Putting aside any "industry wide standard" it is clear that the Beddall Report emphasised the need to protect the rights of both the lessors and lessee. However, it was the need to protect the interests of the lessee as small business owners that led to the enactment of retail leasing legislation in the first place.[854]

The purpose of retail lease legislation is theoretically to balance the rights of the lessor and the lessee[855] by providing a regulatory framework which is fair to both lessor and lessee.[856] Attempting to find the perfect position for the legislation such that it will balance the position of both the lessor and the lessee is one factor that causes retail leasing legislation to be in a constant state of flux. For example, soon after the Productivity Commission issued its draft report on leasing law in Australia in 2007,[857] the NSW Government

851 *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, [15].
852 ACCC v Samton Holdings Pty Ltd (2002) 189 ALR 76, [50].
853 Beddall Report 1990, 104.
854 W D Duncan WD, Commercial and Retail Leases in Australia, (Thomsen Reuters, 7th edition, 2012 [Qld 3.20].
855 *Epworth Group Holdings Pty Ltd v Permanent Custodians Ltd* [2011] SASFC32, [43].
856 South Australia, *Parliamentary Debates*, Legislative Council, 30 November 2011, 1010-1011 (Second Reading Speech of Attorney General for Retail and Commercial Leases Act 1995).
857 Productivity Commission, *The Market for Retail Tenancy Leases in Australia Draft Report*, (2007).

announced yet another review into retail leasing law and released a discussion paper in April 2008.[858]

The various government committees set up over the years all acknowledge that the law should be altered to provide greater power to lessees and thereby balanced bargaining positions, but not so as to put the lessee in a more advantageous position than the lessor.[859]

The lessee must be able to maximise the full potential of its business but not at the expense of the lessor.[860] The lessor must still be able to realise the full value of their investments without violating the rights of the lessee.[861]

Enacting retail lease legislation is, therefore, for the purpose of: -

(a) adjusting the legal position of a party such that its bargaining position is more balanced;

(b) ensuring that once the legal position of the lessee is modified that the positions of the lessor and lessee are balanced or fair.

It is submitted that any retail leasing legislation must follow this pattern. It is appropriate to assess the various State and Territory retail lease legislation to determine whether the protection provided to both parties in their new bargaining positions is balanced.

858 Department of State and Regional Development (NSW*), Issues Affecting the Retail Leasing Industry in NSW*, (2008).

859 Department of Justice and Industrial Relations Consumer Affairs and Fair Trading (TAS*), Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998 Issues Paper,* (1999), 11; Productivity Commission, *The Market For Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008),, xxi; Reid Report 1997, 41; Hill Report 1983 (referred to in the ACT Report 1984, 46); Cooper Report 1981, 30; Arnold Report 1984, 32; Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), xxi.

860 ACCC Commissioner John Martin, "The ACCC and the Property Sector" Speech to Property Council of Australia Western Australian Division, 25 October 2005, Perth, 8.

861 Ibid.

2.6 Protection of the Retail Leasing Market

The retail leasing market can be defined as a market that

> 'exists to provide space for the provision of all manner of final goods and services in a retail format to the general public, including individual household and business customers.'[862]

Any legislation must be drafted such that the retail leasing marketplace itself is not adversely affected. Legislation or regulation of the leasing market can only be justified where such intervention results in a net benefit to the community and that it does not adversely affect competition in the market place.[863] Regulation cannot help but affect the retail leasing market as it requires both the lessor and lessee to act in a way that is not necessarily in the best interests of either one. For example, the lessors' disclosure statement under the *Retail Shop Leases Act 1994* (Qld) is mainly a summary of the terms of the proposed lease. However, it additionally requires the lessor to disclose its future plans regarding the centre.[864] Information imbalances between lessor and lessee can result in impaired market efficiency as the effective decision making ability of the lessee is reduced because of lack of information. Additionally, the lessee will incur extra costs

862 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 11.
863 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 7.
864 Paragraph 17 of the Lessor Disclosure Statement.

and delay in obtaining information from outside sources[865] which may or may not be available or accurate.

Power, including market power, is finite. For lessees to gain additional power because of retail leasing legislation means that lessors must have their power restrained.[866]

Any change to the law involving a market place will affect the key players in that marketplace. Not only may it affect the returns that the parties could expect to receive on their investments but it may affect the conduct of the parties within the market place. Any regulatory interference by Government in the affairs of private parties viz., retail lessors and lessees, may have widespread effects over the whole range of commercial and industrial leasing activities.[867] Poorly designed legislation can result in modification in the behaviour of the parties and thereby cause perverse economic outcome.[868]

A good example of such effect is in relation to lease assignments. Legislation in some jurisdictions of Australia[869] provides that where a lease states that any assignment of the lease must be with the lessor's consent, any consent to assignment of a lease shall not be "unreasonably withheld". To ensure control of the lessee, a lessor could choose to simply state in the

865 A Terry and Y Zhang, The Power and Information imbalance in Franchising: The Role of Prior Disclosure under the Franchising Code of Conduct, 39 *Australian Business Law Review* 245, 248.
866 "The enactment of laws almost invariably circumscribes the rights of individuals. The legislation under review limits the freedom to contract." K Gibbings, "From the Cooper Report to Retail Shop Leases Act 1994: Prescription or Placebo?" (1996) 26(5) *Queensland Law Society Journal* 1996, 409.
867 Cooper Report 1981, 3.
868 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 86.
869 *Property Law Act 1974* (Qld) s 121(1)(a)(i); *Property Law Act 1958* (Vic) s144(1); *Property Law Act 1969 (*WA) s80(1) and *Conveyancing Act 1919* (NSW) s133B.

lease that assignment of the lease is strictly forbidden, thereby precluding such provisions from operating.

The intention of the legislature was to ensure that lessors could not unreasonably withhold consent to an assignment of the lease which without the provision they could have done. The effect of the legislation is, however, quite different i.e. lessors alter how they conduct their business by removing any right to assign at all except subject to conditions not consent. Such alteration of conduct is not to meet the organic demands of the marketplace but simply to circumvent the legislation. Without the existence of the legislation the lessor is likely to have allowed the lessee to assign the lease upon more favourable terms. Now, because of the legislation that right is often lost.

Another example of such effect is in relation to extensions of lease term. The practice of having rent determined before a lessee decides to exercise its option to renew resulted in lessors rarely granting options to renew in retail leases.[870]

Regulation may not only affect the conduct of the parties directly involved in the market but also related parties. Most lessors are corporations or investment/superannuation trusts who must answer to their shareholders or unit holders.[871]

870 Department of Justice and Industrial Relations Consumer Affairs (TAS), '*Review of the Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998 Final Report'* March 2002, 46.
871 W D Duncan and S Christensen, "Section 51AC of the Trade Practices Act 1974: An Exocet in Retail Shop Leasing", (1999) 27(4), *Australian Business Law Review*, 282.

A perceived empowerment of lessees may make investing in retail lease premises such as shopping centres, in their view, a less attractive option because of the possibility of less investment return. For example, a submission by Lend Lease to the Reid Committee regarding the possibility of rent being assessed purely on a turnover basis, without any base rent, stated that unless the investor could obtain surety of income (and this should include base rent) investment would not occur.[872]

Regulation, when required, must ensure that it does only what is necessary to ensure fairness without damaging the market. The parties are still entitled to pursue their legitimate self-interests provided they act within the boundaries of "fairness" as determined by the legislature. According to Martin: -

> 'While the ACCC and other regulators have an important role in ensuring "the rules of the game are followed fairly", they must take care to avoid impeding reasonable commercial practice, or hindering 'robust competitive behaviour'.[873]

The difficult task is, as always, to define the "boundaries of fairness" beyond which the result is only unnecessary interference with the rights of the parties and subsequent damage to the market place.[874]

It is appropriate therefore to consider to what extent legislation to date achieves this result and whether legislation can adopt a version of legislation already employed in different jurisdictions.

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872 House of Representatives Standing Committee on Industry, Science and Resources, Parliament of Australia, *Finding a Balance: Towards Fair Trading in Australia*, May 1997; Evidence to Reid Enquiry, Canberra ACT, 24 Feb 1997, 807 (Lend Lease).

873 ACCC Commissioner John Martin, 'Unconscionable Conduct in Retail Leasing - How to Identify and Avoid it', Speech to the Property Council of Australia, 7 October 2003, 1.

874 Queensland, *Parliamentary Debates*, House of Representatives, 30 March 1990, 1085 (Retail Shop Lease Amendment Bill Second Reading by Mr Connor).

3. Enactment of Other Harmonised Legislation in Australia.

3.1 Introduction.

In considering a national approach to retail leasing law, it is appropriate to consider the principles driving the need for transactional simplicity in other areas of commercial law that have been the subject of reform or proposed reform. Such drivers assist in the development of benchmarks to assess the efficacy of differential retail lease legislation in the various jurisdictions.

It is proposed to consider three areas of commercial law. Two of which (Personal Property Securities and Consumer Law) have been substantially reformed and are the subject on national legislation. The third area is the reform of Work Health and Safety law which has stalled somewhat with the Victorian Government deciding not to implement such reforms.[875]

3.2 The State of Legislation Prior to Reform

Prior to the enactment of the *Personal Property Securities Act 2009* (Cth) ("PPSA") there were numerous statutes dealing with the registration of security over personal property in both Federal and State jurisdictions, covering many different types of property.[876] For example, the registration of

875 Website of Worksafe Victoria as at 23 November 2012. http://www.worksafe.vic.gov.au/laws-and-regulations/occupational-health-and-safety/national-work-health-and-safety-reform

876 Australian Attorney Generals Department "*Review of the Law on Personal Property Securities Option Paper"*, (11 April 2006), [5].

personal property security in Queensland was controlled by ten (10) different pieces of legislation.[877] Similar multiple legislation appeared in other State, Territory and Federal jurisdictions.[878]

There were substantial differences in registration arrangements for securities in each jurisdiction.[879] Securities would have to be registered in more than one jurisdiction which caused difficulty where the secured property moved between jurisdictions.[880]

Buyers of goods and lenders would be required to make enquiries in multiple jurisdictions regarding secured property.[881] Multiple registries increased the need for businesses and consumers to deal with different registration rules for different kinds of property.[882] Lenders were unable to precisely assess borrowers for suitability.[883]

> The present law of personal property securities is characterised by more than 70 Acts under which registration and search vary according to jurisdiction, the nature of the collateral, the kind of security interest or whether the debtor is a natural person or a company. Some interests are required to be registered on more than one register to gain protection whilst for others there is no available register at all.

877 *Bills of Sale and Other Instruments Act 1995*, *Consumer Credit Code* - Part 5*, Cooperatives Act 1997* s262; *Credit (Real Finance) Act 1996*, *Factors Act 1892, Financial Intermediaries Act 1996, Goods Act 1896, Hire Purchase Act 1959, Liens on Crops of Sugarcane Act 1931 and Motor Vehicles and Boats Securities Act 1986.*

878 *Corporations Act 2001, Designs Act 2003, Patents Act 1990, Plant Breeders' Rights Act 1994, Shipping Registration Act 1981* and *Trade Marks Act 1995*. See also Australian Attorney Generals Department "*Review of the Law on Personal Property Securities Option Paper*", (11 April 2006), Schedule D.

879 Australian Attorney Generals Department "*Review of the Law on Personal Property Securities Option Paper"*, (11 April 2006), [57].

880 Ibid, [58].

881 Ibid, Schedule E, E3.

882 Standing Committee of Attorneys-General, '*Review of the Law on Personal Property Securities – Discussion Paper No. 1 Registration and Search Issues'* (November 2006), [53] – [54].

883 NSW Law Reform Commission, [1992] NSWLRCDP 28, [2.34].

It was only possible to register security over some but not all classes of property.[884] The registration system was outdated requiring lodgement of paper documents rather than electronic lodgement. In addition registration was outdated in terms of type of forms and amount of information required.[885] In summary, the law for registration of securities was outdated and differed greatly between jurisdictions and did not allow security to be granted over all assets.

The PPSA came into effect on 30 January 2012 with the underlying purpose of streamlining the law and making it more accessible.[886]

The Australian Consumer Law which appears as Schedule 2 to the Competition and Consumer Act 2010 (Cth) is, substantially, the re-branded Trade Practices Act 1974 (Cth) ("TPA") as it copies many of the provisions of the TPA. The consumer provisions of the TPA had been added to over the years and those provisions had been copied into the various state-based Fair Trading Acts. This has resulted in the TPA and its state-based analogues being a mish-mash of legislation compiled by different governments with different policy objectives.

The development and application of consumer policy was shared between federal and state governments.[887] Legislation was, therefore, complex which

884 David E. Allan, "Uniform Personal Property Security Legislation for Australia", [2002] *Bond Law Review* 1, [4].
885 Access Economics Pty Limited, *The Costs and Benefits of Personal Property Securities (PPS) Reform – A Report for the Australian Attorneys-General's Department* (6 July 2006), 9.
886 Website of the Personal Property Securities Register as at 30 May 2012. http://www.ppsr.gov.au/AbouttheRegister/AboutPPSreform/Pages/default.aspx

led to complex contracts.[888] Mandatory disclosure requirements resulted in confusing more than informing consumers.[889]

Remedies available to consumers were also complex and redundant. For example there were over 100 consumer regulators across Australia with more than 20 consumer ombudsman offices.[890]

Work Health and Safety Law throughout Australia consisted of different legislation in each jurisdiction and suffered from over-regulation resulting in inefficient focus on detailed controls,[891] uncertain legal rights[892] and unnecessary duplication of legislation resulting in too many specialised statutes where the principle Work Health and Safety legislation was capable of regulating all hazards.[893] Complexity undermined consistency and eroded protection to employees[894] which was contributed to by the divergence between state and territory jurisdictions regarding the approach to be taken to ensure occupational health and safety.[895] In addition, the objects of the

887 Productivity Commission, *'Review of Australia's Consumer Policy Framework*' Report No. 45 (30th April 2008), 49.
888 F Zumbo, 'Are Australia's Consumer Laws Fit for Purpose' (2007)15 *Trade Practices Law Journal* 227, 227.
889 Senate Standing Committee for Economics, Parliament of Australia, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009* (2009), [1.19].
890 Senate Standing Committee for Economics, Parliament of Australia, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009* (2009), [2.3].
891 For example, Regulation 7 of the *Occupational Health and Safety (First Aid) Regulations 1987* (Vic) prescribed every item to be placed into every first aid kit including the size of the bags to be used to contain amputated body parts.
892 Industry Commission Inquiry Report, *An Inquiry into Occupational Health and Safety*, Report No 47, 42 – 44 (1995) http://www.pc.gov.au/__data/assets/pdf_file/0010/6994/47workhev1.pdf as at 12 November 2012, 41-42.
893 Ibid, 47.
894 Ibid, 66.
895 Australian Government "*National Review and to Model Occupational Health & Safety Laws Issues Paper*" May 2008 [1.1].

various occupational health and safety legislation in each state and territory varied considerably.[896]

Within each jurisdiction there was a fragmentation of laws with such laws being enforced by various agencies within that jurisdiction.[897] For example New South Wales had a general occupational health and safety act covering all industries including mining but separate acts applying to coal mining. Queensland and Western Australia had industry specific laws covering the mining industry which were exempt from the general occupational health and safety law.

Occupational health and safety legalisation applied only to the traditional employment relationship and did not cover contractors, franchisors and labour hire companies nor did it recognise the growth in casual jobs and part time jobs, outsourcing, job-sharing, labour hire, migrant workers and home works.[898]

3.3 Drivers for Reform

In each area of reform similar concerns arose resulting in the need for fresh legislation. Complex, defective or redundant legislation resulted in compliance being difficult or the rights of the parties being uncertain thereby causing greater costs, delay and imbalance in the rights of relevant parties concerned to the ultimate detriment to the market as a whole.

3.3.1 Costs

896 Ibid, [1.2].
897 Ibid, [2.1].
898 Ibid, [2.3].

(a) Costs arising from Complex, Redundant or Defective Legislation

The previous legislation was unnecessarily complex and was not cost effective in that the cost of compliance outweighed the benefit to society that the legislation was supposed to deliver.

Compliance with different legislation across multiple jurisdictions imposed additional costs[899] on all parties to a transaction.[900]

Such complexity also added unnecessary legal costs in that the parties would have to be legally advised separately in each jurisdiction regarding the legislation not only in relation to the transaction but also where the party's documentation met the requirement of that particular jurisdictions' legislation.[901]

Additional costs were also incurred by multi-jurisdictional parties in complying because of the inability to centralise functions[902] e.g. the need to maintain regional offices or to retain different lawyers in each State or Territory where local knowledge of leasing practices and the application of the local statute might be essential because of the complexity of the legislation.

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899 Australian Attorney Generals Department "*Review of the Law on Personal Property Securities Option Paper*", (11 April 2006), [57].

900 For example, the need to register a security in more than one jurisdiction imposed additional and unnecessary costs particularly where the borrower's property moved between jurisdictions Significant differences in occupational health and safety requirements placed considerable compliance burden and cost on multi-state employers. In addition, mobile workers were affected as they were required to be familiar with multiple occupational health and safety regimes. See Productivity Commission Report*, National Workers Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Australian Government Canberra 2004, XXII.; Access Economics Pty Limited, *The Costs and Benefits of Personal Property Securities (PPS) Reform – A Report for the Australian Attorneys-General's Department* (6 July 2006), 9.

901 Ibid, 228.

902 Productivity Commission, '*Review of Australia's Consumer Policy Framework'*, Report No. 45 (30th April 2008), 17.

Deficient regulation or over-regulation resulted in inconsistent application of such legislation. For example, deficiencies in the mandatory disclosure of information pursuant to the repealed *Trade Practices Act 1974* (Cth) [903] had resulted in such disclosure confusing rather than informing consumers with the result that the consumer would either abandon the transaction (at a cost to the supplier) or not make good use of the information in the disclosure document.[904]

The extra transaction and compliance costs incurred by businesses, arising because of the complexity and uncertainty of the previous legislation, were passed on to consumers.[905]

(b) Costs arising because of unnecessary duplication of materials.

Being required to prepare different documents for different jurisdictions for exactly the same circumstances and then to process such documents in different ways caused additional costs. A multi-jurisdictional lessor and lessee would prefer to have standardised documents and processes where the lessor, particularly where electronic registration is available, can conduct all business from one central point. For example, delays between executing a security document and registration of that document in all jurisdictions in Australia may, under the previous system, have caused loss of priority in some jurisdictions thereby increasing costs to lenders in perfecting their

903 S65D. Now ss134-136 *Australian Consumer Law*. In Australia, mandatory disclosure requirements apply in areas such as financial services; consumer credit; food; therapeutic goods; and motor vehicles.

904 Productivity Commission, '*Review of Australia's Consumer Policy Framework'* Report No. 45 (30th April 2008), 11, 47.

905 Standing Committee of Attorneys-General, '*Review of the Law on Personal Property Securities – Discussion Paper No. 1 Registration and Search Issues'* (November 2006), [11].

interests by registration. The complexity of the law thereby slowed down business transactions.[906]

3.3.2 Certainty

Certainty of commercial advice could also be adversely affected because different legislation in different jurisdictions caused like transactions not to be treated alike[907] or for outcomes to be variable.[908] Parties may be required to obtain data from multiple jurisdictions to protect themselves[909] and data from such multiple registries may not necessarily be the same resulting in greater uncertainty in dealing with other parties.[910] Uncertainty arises where different legislation is applied to the same factual situation causing different results in each jurisdiction. Many of the differences in legislation are, in some cases, minor from the point of view of the transaction but still necessary for compliance purposes in the jurisdiction of the retail shop. For example, most jurisdictions require that disclosure statements must be provided 7 days[911] before the parties enter into a lease whereas in the Australian Capital

906 "Access Economics Pty Limited, *The Costs and Benefits of Personal Property Securities (PPS) Reform – A Report for the Australian Attorneys-General's Department* (6 July 2006) 9. See also James Popple, "Personal Property Securities Reform and Security Interests in Ships'', [2008] *Australian and New Zealand Maritime Law Journal* 16, 20.

907 Access Economics Pty Limited, *The Costs and Benefits of Personal Property Securities (PPS) Reform – A Report for the Australian Attorneys-General's Department* (6 July 2006) 9. For example, different jurisdictions had legislation dealing with crop, wool and stock liens but the legislation had different registration requirements and different effects were achieved by registration. See James Popple, "Personal Property Securities Reform and Security Interests in Ships'', [2008] *Australian and New Zealand Maritime Law Journa*l 16, 16.

908 Productivity Commission, '*Review of Australia's Consumer Policy Framework'* Report No. 45 (30th April 2008),17.

909 Australian Attorney Generals Department "*Review of the Law on Personal Property Securities Option Paper"*, (11 April 2006), Schedule E, [E3].

910 NSW Law Reform Commission, [1992] NSWLRCDP 28, [2.34].

911 *Retail Leases Act 1994* (NSW) s11; *Retail Shop Leases Act 1994* (Qld) s22; *Retail Leases Act 2003* (Vic) s17; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s6; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s6; *Business Tenancies (Fair Dealings) Act 2003* (NT) s19.

Territory such period is 14 days.[912] This anomaly may be said to be arbitrary where there is no obvious procedural necessity for the additional disclosure period.

With respect to disclosure itself, lack of certainty also meant that parties would err on the side of caution and disclose too much information resulting in overly long disclosure documents.[913]

A divergence between State and Territory jurisdictions regarding the approach to be taken to ensure effectiveness resulted in a fragmentation of laws. For example, in the retail leasing context, all Australian jurisdictions require the lessor to give a sitting tenant (who has no option to renew) notice as to whether the lessor intends to renew the lease or not. In most jurisdictions,[914] the obligation to give such notice is imposed upon the lessor. In Western Australia[915] and the Australian Capital Territory[916] however, the obligation only arises where the lessee requests such a notice from the lessor. In those jurisdictions where the obligation is placed upon the lessor the notice is to be given in the period between six and twelve months before the expiry of the lease[917] however in Tasmania the notice must be given only three months before expiry of the lease.[918]

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912 *Leases (Commercial and Retail) Act 2001*(ACT) s30.

913 Productivity Commission, '*Review of Australia's Consumer Policy Framework'* Report No. 45 (30th April 2008), 9.

914 *Retail Leases Act 2003* (Vic) s64(4,5); *Retail Shop Leases Act 1994* (Qld) s 46AA; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 29(6,7); *Retail & Commercial Leases Act 1995 (SA) s 20J; Retail Leases Act 1994* (NSW) s44(1); *Business Tenancies (Fair Dealings) Act 2003* (NT) s60.

915 *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 13B (1).

916 *Leases (Commercial and Retail) Act 2001* (ACT) s 107.

917 *Retail Leases Act 2003* (Vic) s 64(4,5*); Retail Shop Leases Act 1994* (Qld) s 46AA; *Retail and Commercial Leases Act 1995* (SA) s 20J; *Retail Leases Act 1994* (NSW) s44(1); *Business Tenancies (Fair Dealings) Act 2003* (NT) s60.

918 *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 29(6,7).

3.3.3 Bargaining Power

Bargaining power of a large institutional lessor may be increased by the lack of understanding of lessees of the nature of the leasing transaction and by the complexity of the lease document and process. Additionally, bargaining power in the hands of lessors exists naturally because of the limited number of shopping centres as compared to the high demand for shopping centre space.

In 2008, there were around 1360 shopping centres in Australia contributing nearly 40 per cent of total retail space, with around 60 000 retail tenancy leases located in such shopping centres.[919] Bargaining power was concentrated in the hands of a limited number of large shopping centre owners.[920] Zoning regulations also placed an artificial restriction on the supply of retail places preventing the construction of another shopping centre in close proximity because of environmental and traffic issues.[921] Retail lessees feel that they must operate within the shopping centre for their business to succeed.[922] As a result, demand for the supply of shopping centre space is constant, that of itself, preserving the lessors bargaining power. The lessor is able to drive a hard bargain, not only at time of lease

919 Productivity Commission, '*Review of Australia's Consumer Policy Framework'* Report No. 45 (30th April 2008), xix.
920 S Murdoch, P Rowland and N Crosby, "Looking after Small Business Tenants with Voluntary Codes or Statutory Intervention: A Comparison of Australian and UK Experiences" (Paper presented at the 7th Pacific Rim Real Estate Society Conference, Adelaide Australia, 21 – 24 January 20011) 25.
921 Productivity Commission, "*A Market For Retail Tenancy Leases in Australia*" Report No.43 (31st March 2008), xx.
922 A Preece, "Property: The Retail Shop leases Act 1984" 1984 April, *Queensland Law Society Journal*, April, 25.

renewal but at the initial grant of the lease [923] resulting in a "take it or leave it" attitude on the part of the lessor.[924]

Complex legislation, often in flux because of amendment and regular review, led to complex contracts that could not be understood by a consumer but were signed anyway because the contract was presented as a "standard form" contract;[925] Such complexity provided a disincentive to challenge a lessor or to self-enforce their rights,[926] in effect, shifting the balance of power and giving rise to an imbalance in the rights of supplier and consumer.[927]

Different but similar legislation in each jurisdiction meant that parties to a transaction in one jurisdiction may have lesser statutory protections than a similar party involved in a similar transaction in a different jurisdiction. The transaction, as agreed in one jurisdiction, may not be possible in another in major areas like rent review.

For example, prior to the *Personal Property Securities Act 2009* (Cth) it was not possible to register security over some classes of property[928] and that inability placed businesses whose capital is invested in such unregisterable property at a disadvantage thereby causing such businesses to face higher

923 Ibid.

924 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), xxi.

925 F Zumbo, 'Are Australia's Consumer Laws Fit for Purpose' (2007)15 *Trade Practices Law Journal* 227, 227.

926 Ibid, 228.

927 Ibid, 232.

928 David E. Allan, "Uniform Personal Property Security Legislation for Australia", [2002] *Bond Law Review* 1, [4]. For example, under the old system book debts were not registrable in any state or territory except Queensland. See James Popple, "Personal Property Securities Reform and Security Interests in Ships'' [2008] *Australian and New Zealand Maritime Law Journal* 16, 17.

cost of capital because they could not provide any security to lenders.[929] In addition, lenders under one piece of legislation obtained better security than lenders advancing to retailers under another piece of legislation.[930]

A further example in the retail leasing context would be that lessees in most Australian jurisdictions have a right to a minimum five year lease term[931] whereas there is no such minimum lease term in Queensland.[932] As a result a lessee in Queensland would appear to have a weaker bargaining position than a lessee elsewhere because of the inability to rely upon such right. Conversely, the existence of minimum lease term legislation can lead to the five year lease term being the only lease term offered by lessors[933] with the result that a lessee in minimum lease terms jurisdictions is, in fact, worse off because of such rigidity by lessors whereas lessees in Queensland are able to obtain more flexible lease terms, shorter or longer than 5 years,[934] however, this too may cause other problems. For instance, it often takes more than five years to amortise establishment costs.

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929 D McGill, 'Surviving the Personal Property Securities Act 2009 (Cth) (A speech to the 4th Annual North Queensland Symposium, 18-19 November2011, Hilton Cairns Hotel, Cairns, QLD), http://eprints.qut.edu.au/46917/. At 31 May 2012.

930 *Australian Central Credit Union v Commonwealth Bank of Australia* [1991] SASC 2724.

931 *Retail Tenancies Act 1986* (Vic) s21; *Retail Leases Act 1994* (NSW) s16; *Retail and Commercial Leases Act 1995* (SA) ss20B,20K; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s13; *Leases (Commercial and Retail) Act 2001* (ACT) s1; *Fair Trading (Code of Practice for Retail Tenancies) Regulation 2008* (Tas) s10 (3) and 10(4); *Business Tenancies (Fair Dealings) Act 2003* (NT) s26.

932 Five year minimum terms were included in the *Retail Shop Leases Act 1984* (Qld) but were removed when the *Retail Shop Leases Act 1994* (Qld) was enacted because of submissions by lessees that the minimum five year term was too restrictive. See Productivity Commission, *'Review of Australia's Consumer Policy Framework*' Report No. 45 (30th April 2008), 49.

933 S Murdoch, P Rowland and N Crosby 'Looking after Small Business Tenants with Voluntary Codes or Statutory Intervention; A Comparison of Australian and UK Experiences' (Paper presented at 7th Pacific Rim Real Estate Society Conference, January 2001, Adelaide).

934 Productivity Commission, '*Review of Australia's Consumer Policy Framework'* Report No. 45 (30th April 2008), 49.

Retail leasing legislation in each jurisdiction grants different rights to lessee in similar positions. For example, lessees in South Australia[935] and the Australian Capital Territory[936] have preferential rights of lease renewal whereas this is not the case in the rest of the country. As a result of lessees having different rights granted by legislation, the bargaining power of such lessees in areas of high importance would differ in each jurisdiction.

3.3.4 Protection of Market

Increased transactional complexity arises because legislation differs from jurisdiction to jurisdiction[937] in its application and interpretation. Interaction of other legislation, even in the same jurisdiction, could create unpredictable outcomes.[938] Such unpredictability increases economic barriers to entry into the market, thereby decreasing competition[939] and impeding economic development[940] resulting in increased costs. It is axiomatic that those who invest in business require as much certainty as possible.

935 *Retail and Commercial Leases Act 1995* (SA) Part 4A, Division 3.
936 *Leases (Commercial and Retail) Act 2001* (ACT) s108.
937 For example, interests in boats were not recorded in all jurisdictions. See Australian Attorney Generals Department "*Review of the Law on Personal Property Securities Option Paper*", (11 April 2006), Schedule E, [E3].
938 *Australian Central Credit Union v Commonwealth Bank of Australia* [1991] SASC 2724. In that case a company granted a registered Bill of Sale over a motor vehicle to the Credit Union. Shortly thereafter the same company gave to the Commonwealth Bank a registered floating charge over all of the assets of the company. The company fell into default and the Commonwealth Bank took possession of the company's assets. The Credit Union was unsuccessful in its action for a declaration that the vehicle was its property. It was unsuccessful because the Goods Securities Act 1986 (SA) did not give it any priority and did not contain a provision providing that registration provided notice to the world at large. Therefore, registration did not give notice to the Commonwealth Bank.
939 Standing Committee of Attorneys-General, '*Review of the Law on Personal Property Securities – Discussion Paper No. 1 Registration and Search Issues'* (November 2006), [10].
940 COAG *Communique* 14 July 2006, 7-8.

The problems arising from a multi-jurisdictional regime in regard to objectives, policy, interpretation and remedies results in the market itself suffering because: -

(i) Such problems make it difficult to respond to rapidly changing markets (meaning that the associated costs for consumers would grow).[941] There is an inability to respond quickly to provide appropriate policy for emerging needs in rapidly changing commercial settings. For example, the inter-jurisdictional nature of the Uniform Consumer Credit Code meant that any amendments to it took too long as they had to be effected in every jurisdiction.[942]

(ii) Gaps and inconsistencies in legislation results in differential remedies.[943] For example, the remedies available under the Australian Competition and Consumer Commission to assist consumers were more limited than the remedies available to some of the State Fair Trading Authorities.[944]

Such problems prevent the development of nationally competitive markets and stunt productivity and innovation.[945] For example, under the previous personal security legislation, newly created classes of property could not have security interests registered over them. Often, it was businesses that

941 Ibid, 2.
942 Productivity Commission, '*Review of Australia's Consumer Policy Framework'* Report No. 45 (30th April 2008),27.
943 Ibid,10.
944 Ibid, 43.
945 Ibid, 2.

were involved with newly created property that were seeking capital to expand their business.[946]

In the retail leasing context, similar problems occur in that: -

(a) Inconsistencies in retail lease legislation could result in different adjudicated outcomes in each jurisdiction even though the factual matrix and the lease provisions may be the same. As a result, a multi-jurisdictional lessor must use different lease documents and for certain purposes, for example dispute resolution, retain different lawyers in each jurisdiction;

(b) Retail lease legislation in Australia is enacted in seven jurisdictions and evolves in a piece meal fashion, one jurisdiction after another, with each such evolution adopting innovation from the previous review of legislation in another jurisdiction. For example, the ACT Working Party in compiling its report,[947] considered reports from several other jurisdictions.[948]

(c) Complexities of leases result in additional costs for legal advice creating additional barriers to entry into the market. Such complexity and the need for ongoing compliance in one jurisdiction may result in a lessee deciding to take their business to another.[949]

946 For example, there were no registration arrangements for internet domain names or satellite transmission capacity. See Australian Attorney Generals Department "*Review of the Law on Personal Property Securities Option Paper*", (11 April 2006), [52] – [55].
947 ACT Report 1984.
948 Clarke Report 1984, Hill Report 1983 and Arnold Report 1984.
949 Productivity Commission, '*Review of Australia's Consumer Policy Framework'* Report No. 45 (30th April 2008), 91.

3.4 Common Elements in Legislation Other Than Retail Leasing Legislation.

Drivers for reform of non-retail lease legislation can also be drivers for reform of retail leasing legislation.

In this chapter, we have considered other legislation such as the Australian Consumer Law, Personal Properties Securities legislation and the proposed reform of Work Health and Safety law.

Each of these enactments has the following elements in common with the retail leasing legislation:

a) all have as a relevant issue the question of an increase in expenses in establishing and operating a business. All of the reviews[950] regarding such legislation emphasised the cost to small business in complying with the terms of the legislation.

b) all four areas of legislation have an effect upon how small business deals with consumers. The government is, therefore, interested in its role as consumer watchdog to protect the interests of consumers and small business that employs most workers is equated to consumers.

c) all four areas of legislation have a similar heritage in that the relationship (of lessor and lessee) existed at common law and then was substantially modified by the legislation to provide greater protection to

950 For Personal Property Security see Australian Attorney Generals Department "*Review of the Law on Personal Property Securities Option Paper"*, (11 April 2006) and Standing Committee of Attorneys-General, '*Review of the Law on Personal Property Securities – Discussion Paper No. 1 Registration and Search Issues'* (November 2006). For Work Health and Safety see Australian Government "*National Review and to Model Occupational Health & Safety Laws Issues Paper*" May 2008 [1.1]. For Consumer Law see Productivity Commission, '*Review of Australia's Consumer Policy Framework'* Report No. 45 (30th April 2008).

consumers. All four areas of law have the potential, if they are too complex or prescriptive,, to interfere with a seamless national economy.

d) All four areas of legislation have relevance when dealing with international partners. The consequence of this becomes more important as Australia moves from being seven State or Territory based shops in an Australian village to being considered more as an Australian shop in a global village. This is a result of the digital economy and the increased interest of foreign persons in purchasing Australian assets and corporations.

The similarities of the four different areas of legislation mentioned indicate that a driver for reform of one area of legislation would be to each. Therefore, it is appropriate to consider the drivers for reform leading to other commercial legislation when considering the benchmarks to be used for assessment of the desirability of retail lease legislation.

4. Drivers of Reform of Leasing Regulation in England and Wales.

4.1 Introduction

It is instructive to consider the retail leasing statutory regime in the United Kingdom (UK) in comparison to the Australian situation as trading conditions in Australia and the UK are similar and many of the issues concerning small business lessees are shared between both countries.[951]

There are obviously some differences. For example, Australia has retail lease legislation in all jurisdictions whereas the UK still has a voluntary code. Leasing processes also differ. The pre-lease process in the UK is for a

951 Neil Crosby, "Australian and UK Small Business Tenants- What Can We Learn from Each Other" (2007) 14 *Australian Property Law Journal* 297, 299.

lessee to be given details about rent and other terms by negotiation. A short heads of agreement is entered into before a solicitor is instructed to prepare a retail lease. The result is that a lessee does not normally obtain legal advice until negotiations are completed. The UK government hoped that the lessors would distribute copies of the voluntary code to potential lessees to provide greater information to lessees but unfortunately this very rarely occurred.[952] In contrast, a potential Australian lessee is, prior to entering into a lease given a draft lease and a disclosure statement to examine during a seven or fourteen day cooling off period.

Although the processes may differ the intention of the government is the same, that is, to better inform the small business lessee so that that lessee may make better and informed decisions. The UK policy issue of ensuring that small businesses are aware of the effects of signing a lease[953] is similar to the issue identified by the Productivity Commission as one of the principles for assessing the effectiveness of regulation, that is, to ensure that all lease conditions are clear and transparent to lessees and that lease and property rights are clearly defined.[954]

In England and Wales, commercial leases are controlled by both a mandatory and voluntary method. The mandatory regulation is provided by the *Landlord and Tenant Act 1954 (UK)* which, most importantly, provides a right to a lessee to insist upon a renewal of a lease. Additional benefits are

952 Ibid, 308.
953 Ibid, 303.
954 Productivity Commission, *'Review of Australia's Consumer Policy Framework'* Report No. 45 (30th April 2008), 96.

provided by the *Landlords and Tenants (Covenants) Act 1995 (UK)*[955]and the *Landlord and Tenants Act 1988 (UK).*[956] The voluntary regulation is provided by the 2007 Code for Leasing Business Premises in England and Wales[957] ("UK Lease Code 2007" hereafter).

4.2 Landlord and Tenant Act 1954 (UK)

Lessees in England and Wales have the benefit of the *Landlord and Tenant Act 1954 (UK)* ("LTA") which provides certain rights to business lessees[958] to automatically renew their Lease subject to the lessors right to object to such renewal on a small number of stated grounds.[959] The procedure for a new lease term starts with a notice from the lessee to the lessor requiring a new term. The lessor has two months[960] in which to object, and if the lessor does object the matter is determined by the court.[961]

The purpose of these provisions was to remedy a perceived power imbalance between the lessor and lessee and to ensure that the lessee could always receive some benefit at the conclusion of its lease. At the time of passing of legislation, the UK had recently endured a world war and there was a shortage of commercial buildings. Lessors, therefore, had significant

955 *Landlord and Tenant (Covenants) Act 1995* (UK), s5 releases a lessee from ongoing liability under the lease upon assignment.
956 *Landlord and Tenant Act 1998* (UK), s1 requires the lessor not to unreasonably withhold consent to an assignment and to reply to a request for assignment within a reasonable time.
957 The Joint Working Group on Commercial Leases, '*The Code for Leasing Business Premises in England and Wales*' (2007).
958 *Landlord and Tenant Act 1954* (UK), s23.
959 Ibid, s30. For example, because the lessee has been late in paying rent, failing to repair or other substantial breaches of the lease. Other grounds include where the lessor can find suitable alternative premises for the lessee or where the lessor intends to demolish.
960 Ibid, s26.
961 Ibid, s29.

power because of the shortage of supply of suitable commercial premises.[962] The LTA was an attempt to remedy that imbalance and has operated successfully from 1954.

Consideration of the LTA is relevant in the Australian context as the LTA was a method used to correct a power imbalance in favour of lessors arising from an economic cause (the negative effects of the Second World War) in the same way that minimum lease terms and preferential rights of renewal in Australian jurisdictions seek to reduce lessor bargaining power arising from another economic anomaly (i.e. the concentration of power in the hands of a limited number of lessors as a result of planning and zoning restrictions.).

The right of renewal contained in Part II of the LTA continues to the present day although there have been some amendments. Originally, it was not possible to contract out of Part II of the Act, however, the *Law of Property Act 1969* (UK) amended the LTA to provide that parties could contract out of the LTA if there was a joint application to the court for approval.[963] The purpose of requiring a court application was to ensure that the parties had reached a genuine agreement and the lessee understood the value of what they were giving away.[964] The court was not required to determine whether the lessee was getting a "good deal"[965] merely to determine that consent by the lessee was genuine and freely given.[966]

962 Sarah Hill-Wheeler '*Commercial Leases Code – Tenant's Tool or Landlord's Token?*' (University of Northumbria, August 2009), 21.
963 *Law of Property Act 1969* (UK), s5. This section altered s38 of the LTA 1954.
964 United Kingdom, *Parliamentary Debates*, House of Commons, 1968-1969, 500.
965 *Metropolitan Police Commissioner v Palacegate* [2000] 3WLR 519.
966 House of Lords Select Committee on Delegated Powers and Regulatory Reform, '*Fourth Report*' (2002-2003), [17].

As a result, the court applications were often successful but provided only modest protection to the lessee[967] as the courts did not enquire into the substance of the transaction.[968] It was doubtful that the court applications were an effective filter to prevent abuse of the lessor's dominant position[969] as the involvement of lawyers in preparing the court application did not necessarily ensure that advice was given about the waiver of rights.[970]

The requirement of court approval was, itself, abolished by regulation in 2004[971] to be replaced by a requirement only that the lessor give to the lessee a warning statement at least 14 days prior to the start of the lease, alerting the lessee to the consequences of giving up their rights to renew.[972]

Both the 1969 amendment and the 2004 amendment were put in place not because of a government swing back in favour of lessors, but to allow business to be carried out more effectively, with minimal cost and delay, while still retaining the balance between lessor and lessee.[973]

The LTA was not a wide-ranging piece of legislation. Although it covered all businesses, and not only retail leases, its provisions primarily dealt with security of tenure. In addition, lease periods were viewed differently in the UK than in Australia in that long lease terms are considered more

967 Memorandum by the Office of Deputy Prime Minister to House of Lords Select Committee on Delegated Powers and Regulatory Reform, 24 October 2002, [15].
968 *Hagee (London) v Erikson (AB) and Larson* [1976] QB 209.
969 *Business Tenancies (Report)* 1992] EWLC 208 [2.16 (c)].
970 Memorandum by the Office of Deputy Prime Minister to House of Lords Select Committee on Delegated Powers and Regulatory Reform, 24 October 2002, [15].
971 *Regulatory Reform (Business Tenancies) Order 2003* (England and Wales) SI 2003 No 3096, [3].
972 The reforms were based on an earlier Law Commission report being *Business Tenancies (Report)* [1992] EWLC 208[2.59]
973 For the 1969 reforms see Law Reform Commission (UK), '*Landlord and Tenant: Report on the Landlord and Tenant Act 1954 Part II'* Law Com No 17, (1969) [33]. For the 2004 amendments see *Business Tenancies (Report)* [1992] EWLC 208[2.57].

appropriate there to ensure continued income-stream.[974] Long lease terms were the norm and lease terms of 20 years were not uncommon.[975] Long term leases, with upward only rent reviews, continued original lessee liability, strong repair covenants and clauses shifting the burden of all outgoings to the lessee became the "Institutional" UK lease over several decades.[976] Such leases were sustainable by the lessee provided markets stayed buoyant such that the upward only rent reviews stayed at parity with the growth of the markets.[977]

With the recession in the UK in the 1990's, lessees started to see their income steadily decreasing while their rents continued to increase in circumstances where they were locked into long term leases. Many lessees with no civil remedy available to them and suspicious of lessors hiding behind confidentiality clauses, complained to their local members. The government subsequently indicated that unless a voluntary remedy could be determined they intended to legislate.[978] This threat led to the creation of the first voluntary code for commercial leasing in 1995. At this time the main expressed concerns of the government were the effect of upward only rent reviews, confidentiality clauses and dispute resolution.

The lack of a statutory right to renew in Australia and the risk that goodwill generated by a lessee will evaporate at lease end continues to be one of the

974 Neil Crosby, "Australian and UK Small Business Tenants- What Can We Learn from Each Other" (2007) 14 *Australian Property Law Journal* 297, 297.
975 N Crosby and S Murdoch, '*Cutting Edge 2000, Monitoring the UK Commercial Leases Code of Practice: Code, What Code?*' (London RICS 2000), 2.
976 Sarah Hill-Wheeler '*Commercial Leases Code – Tenant's Tool or Landlord's Token?*' (University of Northumbria, August 2009), 18.
977 Crosby N. and Murdoch S., '*Cutting Edge 2000, Monitoring the UK Commercial Leases Code of Practice: Code, What Code?*' (London RICS 2000), 1.
978 Neil Crosby, "Australian and UK Small Business Tenants- What Can We Learn from Each Other" (2007) 14 *Australian Property Law Journal* 297, 298.

many (if not the major) issues between lessors and lessees. Australian lessors are generally opposed to an automatic right to renew, as the lessor loses the ability to effectively manage a shopping centre while lessees believe that an automatic right to renew will stop lessors abusing their power at lease expiry.[979]

The lessons for Australia appear to be that automatic rights of renewal can work subject to the parties being able to avoid such provisions whether by court approval or by a warning statement. The continued existence of the LTA since 1954 seems to suggest that lessors are able to effectively manage their leasehold even though their leases contain an automatic right to renew. Conversely, it would appear that avoiding the automatic renewal provisions in the UK has been going on for some time and the longevity of the legislation may be a testament to how easily it could be avoided rather than to its effectiveness. The statutory right to renew applies in England and Wales but not in Scotland and Scottish lessors do not appear to be abusing the privilege.[980]

4.3 Can Australia Learn Anything from the United Kingdom Voluntary Codes for Commercial Leasing?

The UK does not have retail lease legislation to the same level as Australia. Rather than adopting extensive legislation, the UK has attempted to manage the lessor-lessee relationship through the use of voluntary codes and the application of the Common Law.

979 Ibid 310.
980 Ibid.

In all, there have been three voluntary codes for commercial leasing. The first code was introduced in 1995.[981] It was generally regarded as a failure. [982] The second code was introduced in 2002[983] and the third code was introduced in 2007 ("UK Lease Code 2007" hereafter).[984]

Consideration of the code is relevant to the Australian situation because many of the problems that the voluntary codes seek to address are similar problems that occur in Australia. For example, the introduction to the UK Lease Code 2007 provides that the objectives of the Code are to create a document which is clear and concise which will help promote "efficiency and fairness in landlord and tenant relationships".[985] Issues regarding fairness of lessor and lessee relationship have echoed through numerous Australian inquiries in particular the 1997 Reid Inquiry which concluded that unfair conduct by big business had been a matter of grave concern for years. [986] The subsequent Joint Select Committee Report that followed two years later also considered issues regarding unfair business conduct.[987]

Identified issues that led to the drafting of the first code shared points of interest with complaints made by Australian lessees. These issues were:

a) upward only rent reviews;

b) the dominance of 20 to 25 year institutional leases;

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981 The Commercial Leases Working Group, '*A Code of Practice for Commercial Leases in England and Wales'* (1995).

982 Faculty of Urban and Regional Studies, University of Reading, '*Monitoring the Code of Practice for Commercial Leases* '(April 2000).

983 The Commercial Leases Working Group, *'A Code of Practice for Commercial Leases in England and Wales' (2nd ed, 2002)*. An archived copy appears here <http://www.sutherlandsurveyors.co.uk/wp-content/uploads/downloads/2012/12/Code_of_practice_for_commercial_leases.pdf>

984 The Joint Working Group on Commercial Leases, '*The Code for Leasing Business Premises in England and Wales*' (2007).

985 *UK Leasing Code 2007*, Introduction.

986 Reid Report 1997, v (Foreword).

987 Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure, A Review of Australia's Retailing Sector,* August 1999, 103.

c) the defective system of dispute resolution; and

d) confidentiality clauses in leases.[988]

The upward only rent reviews meant that even when the economy had suffered a downturn the rent would still increase in circumstances where customer spending would be severely diminished. The long term institutional leases meant that lessees were unable to escape unjustified rents in areas that had become unpopular because of newer shopping centres or business parks. In Australia, similar concerns were raised in relation to "ratchet clauses" that resulted in an increase in rent at every rent review.

The UK issues regarding dispute resolution provisions were that leases commonly provided that when a lessee disputed the rent review, the matter could be appealed to an arbitrator. To resolve that dispute the arbitrator would seek evidence of the rental levels in comparable property.

Comparable evidence of rental value could only be obtained from other properties which also had high rent, as rather than there being new lettings with which to compare rent there were only empty shops. If there was a new letting, any information from that new letting would remain secret through the use of confidentiality clause. The result was that there was no way for the arbitrator to obtain a proper assessment of the market.[989] Similar concerns were raised (and are still raised) in Australia about the lack of information available to valuers in order to carry out a market valuation.[990] Although

988 United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1992, Volume 213, 851 - 852.

989 Ibid. In *Re Dickinson* [1992] 2 NZLR 43 a lessee was successful in using subpoenas to obtain details from lessors of comparable premises of side deals. Any such attempt must balance the requirement for valuations to be based on correct rent paid and the right of the lessor to confidentiality.

990 W D Duncan et al, *Commercial and Retail Leases in Australia*, (Thomsen Reuters, 7th edition, 2012 [50.2100].

leases are registered in several jurisdictions such registration does not provide information regarding side agreements between lessors and lessees. Lack of such information can distort the rent valuations.[991] So far, no Australian jurisdiction has legislated for a separate property databank where all details of a lease including side deals would be recorded and they are not likely to do so.

The small business sector was seen as one of the most important engines for economic growth[992] in the UK. However, the lack of free-flow of information and the antiquated[993] and medieval[994] leasehold system prevented the market from operating effectively.[995] As we have seen, archaic regulation was one of the reasons for the far reaching amendment to the personal property securities law in Australia specifically its effect on the market efficiency.

It was submitted to the UK Government that it should intervene to free up the market and safeguard small business.[996] The Government responded that long term leases, upward only rent reviews and arbitration clauses were all within the power of the parties to negotiate when they entered into the lease[997] and that if the government began to interfere in the freedom of contract, then distortions in the market would arise.[998]

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991 See, for example, *Ropart Pty Ltd V Kern Corp Ltd* [1992] ANZ ConvR 103; *Re McCafferty* [1994] 2 Qd R 538; *State of New South Wales v SAS Trustee Corp* [1998] ANZ ConvR 163; *Eureka Funds Management Ltd v Freehills Services Pty Ltd* (2007) ANZ ConvR 223.

992 United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1992, Volume 213, 851 - 852., Column 851.

993 Ibid.

994 Ibid, 853.

995 Ibid, Column 852-853.

996 Ibid, Column 854.

997 Ibid, Column 855.

998 Ibid, Column 855.

The “freedom of contract” argument adopted by the UK government is the same argument adopted by Australian lessors in opposing any changes to legislation to favour lessees i.e. interference with long held contractual principles regarding freedom of contract would result in a significant and unpredictable aberrations in the market thereby causing shopping centres to no longer be a favoured form of investment for developers or investment funds. The decline in shopping centres would then result in job losses, closure of businesses, a loss of investment income by those who invested in shopping centres and overall a dip in the economy. It was these fears that resulted in various governments inserting mandatory review of legislation clauses into their retail lease legislation

In reality, UK lessees were unable to negotiate lease terms or fully appreciate the implications of such lease terms as an upwards only rent review.[999] Additionally, the confidentiality clauses inserted into the leases made it more difficult to understand such clauses as the lessees could not compare notes.[1000]

In 1993, the UK Department of Environment issued a consultation paper as to whether legislation controlling upward only rent reviews would be appropriate. It considered that there were arguments for and against the regulating of upward only rent reviews as follows:

a) upward only rent reviews had become the market norm and that therefore adopting them and thereby adopting established market practice,

999 Ibid.

1000 N Crosby and S Murdoch, ‘*Cutting Edge 2000, Monitoring the UK Commercial Leases Code of Practice: Code, What Code?*’ (London RICS 2000), 1.

meant that the market could operate more efficiently and with more certainty.[1001]

b) conversely, upward only rent reviews made it harder to assign leases in areas where rents were falling and thereby inhibited free market choice and created market imperfections.[1002]

The Department of Environment Consultation Paper only took into account the effect upon the economy[1003] and issues of fairness were not considered although it was conceded that the 'limitation of risk to the investor achieved by an upward only rent review clause unhealthily diverts resources away from other sectors of the economy'.[1004] The UK Government proposed legislating in relation to these matters[1005] however, after receiving industry responses, the UK Government decided not to legislate and instead to rely upon the industry to self-regulate.[1006]

It was at this moment that the UK leasing scene became the "other side of the coin" to the Australian retail leasing scene. In 1981 the Cooper Committee recommended that there should be no legislation and that the industry should self-regulate. That recommendation was not adopted by the subsequent Joint Committee in 1983 who recommended legislation thereby leading to the *Retail Shop Leases Act 1984* (Qld). Consideration of the UK experience is therefore valuable as it shows what the Australian retail

1001 Department of Environment, *Commercial Property Leases Consultation Paper* (London, HMSO 27 May 1993), [2].
1002 Ibid, [1.6].
1003 Sarah Hill-Wheeler '*Commercial Leases Code – Tenant's Tool or Landlord's Token?*' (University of Northumbria, August 2009), 18.
1004 Department of Environment, *Commercial Property Leases Consultation Paper* (London, HMSO 27 May 1993), [1.9].
1005 C Hughes, "The Role of Industry Bodies in Changing Market Practices Through Self-Regulation: Commercial Property Leasing in the UK (PhD Thesis University of Reading School of Real Estate and Planning October 2015), 84.
1006 Ibid, 88.

leasing scene could have been and illustrates the inefficacy of a system involving a voluntary code.[1007]

The first voluntary Leasing Code of Practice was issued a short time after the UK Department of Environment Consultation Paper in 1995 ("UK Lease Code 1995"). In 2000, after an analysis of the effectiveness of the UK Leasing Code 1995, the English Property Advisory Group, reported that the Code had had little impact and that lessees were not sufficiently aware of property matters with the result that upward only rent reviews remained the norm.[1008]

The Property Advisory Group was of the view that the essential need was to empower lessees by providing them information that they needed to operate effectively in the market.[1009] In relation to upward only rent reviews the Group found that lessors were unwilling to abandon the use of upward only rent reviews because:

a) they found alternative pricing difficult;

b) they were fearful of a downward impact upon their year-end valuations;

c) overseas investors were attracted by upward only provisions; and

d) lessors did not wish to carry out the management required to instate turnover leases.[1010]

Lessees were not willing to challenge upward only clauses because:

a) there was strong competition for space;

1007 The New South Wales *Retail Tenancy Leases Code of Practice* was adopted in 1992 but only lasted 2 years.

1008 Property Advisory Group Annual Report (2000) http://www.communities.gov.uk/documents/regeneration/pdf/155871.pdf as at 12/11/2012.

1009 Ibid.

1010 Ibid

b) lessees were required to pay a premium for a non-upward only rent review;

c) lessees who wanted flexibility or where uncertain about their future, were more likely to request a break clause than an alternate rent review clause; and

d) upward only rent review clauses were an "off the shelf" product. The simplicity of such a product meant that lower legal fees could be charged.[1011]

A further enquiry into the impact of the UK Lease Code1995 found that: -

(a) lenders and investors were reluctant to adopt any alteration to the institutional lease norm of an upward only rent review because existing valuation methods were unable to adequately price different lease terms.[1012] Accordingly, upward only rent review clauses were still the dominant form of rent, however, lease terms had reduced and more break clauses had been inserted into leases;[1013]

(b) the LTA with its statutory right of renewal perpetuated existing lease provisions[1014] but there was no increasing trend to contract out of the statutory right of renewal provisions[1015]

(c) alternative rent review provisions such as turnover rents or indexation were rare and five (5) years continued to be the most prevalent period for rent reviews;[1016]

(d) the use of confidentiality clauses was low;[1017]

1011 Ibid.
1012 N Crosby and S Murdoch, '*Cutting Edge 2000, Monitoring the UK Commercial Leases Code of Practice: Code, What Code?*' (London RICS 2000), 4.
1013 Ibid, 7.
1014 Ibid, 4.
1015 Ibid, 7.
1016 Ibid, 7.
1017 Ibid, 7.

(e) that most lessees (and in particular those who were unrepresented) took their leases based on the first offer made to them and sought to negotiate nothing more than the initial rent.[1018] Although lessees were aware of the upward only rent review provisions, most of them did not understand the process by which any dispute over the reviewed rent would be determined.[1019]

Although the UK Government had partially achieved its objectives (which were shorter leases, greater flexibility in rent reviews and greater transparency), such results were achieved because of the change in the economy and not because of the effective penetration of the UK Lease Code 1995.[1020] As a result, the 1995 edition of the Code was abandoned and a second edition of the Code was produced in 2002.

An Inquiry in 2005 found that the second Code was better disseminated than the previous Code but did not directly influence leasing negotiations or practice.[1021] A third Code was introduced in 2007 but unfortunately the dissemination of the third Code was no better than that of the second Code.[1022]

The Government was understandably disappointed about the ineffectiveness of the Code and that it had not become a primary tool for negotiation of new

1018 Ibid. This was still the position when research was carried out in regards to the 2002 Code. See N Crosby, S Murdoch and C Hughes, 'M*onitoring the 2002 Code of Practice for Commercial Leases*' (Reading University, March 2005).
1019 N Crosby and S Murdoch, '*Cutting Edge 2000, Monitoring the UK Commercial Leases Code of Practice: Code, What Code?*' (London RICS 2000), 7.
1020 Ibid, 8.
1021 N Crosby, S Murdoch and C Hughes, '*Monitoring the 2002 Code of Practice for Commercial Leases'* (Reading University, March 2005).
1022 N Crosby and C Hughes, '*Monitoring the 2007 Code for Leasing Business Premises*, (University of Reading, July 2009).

leases except in the hand of larger lessees. The Government was also concerned that small business lessees were not properly informed about the leasing choices that they were making.[1023]

The UK Lease Code 2007 sought to improve the position of the lessee by urging the lessor to provide concessions to the lessee. The Code consists of a one-page list of items to be inserted into a lease, a three page occupier's guide with hints and tips and a two page Model Heads of Terms (which is similar to an item schedule in a lease, in that it contains, for example, details of the premises, the parties, lease duration, rent, rent review and outgoings.

An analysis of the UK Lease Code 2007 reveals the various shortfalls in lease documentation and inequities in the lessor-lessee relationship that the Code seeks to remedy. Such shortfalls mirror problems that have arisen in the Australian retail leasing context. For example, issues in relation to complexity and certainty can be seen in the introduction of the Code which states that its' objective is: -

(a) to create a document which is clear, concise and authoritative;

(b) to be used as a checklist for negotiations for new leases and renewals; and

(c) to provide easy access to information explained in plain English.

Limitation of delay is emphasised in Clause 10 of the Code regarding "Ongoing Management" which provides time limits on the lessor regarding decisions about alterations, requests for additional information and provision of a schedule of dilapidations.

1023 I Austin, *Ministerial Statement by the Parliamentary Undersecretary of State for Communities and Local Government*, (July 2009), 3.

Protection of the bargaining position of the lessee is reinforced by the encouragement in Clause 1 of the Code for lessors to provide lessees with flexible lease terms. In Clause 4 lessors are expected to provide alternate rent review clauses to the standard upward only rent review clause and to provide reasons if they cannot provide such alternatives. Further protection is provided by clause 5 of the Code which provides that a lease should contain a clause allowing lessees to assign the lease with the lessors consent not to be unreasonably withheld or delayed.[1024]

Since the first edition of the Code was introduced in 1995, the focus of the government has altered from being solely in relation to economic efficiency and now such focus is on the small business lessee and their awareness and use of the Code.[1025]

4.4 Conclusions Regarding Commercial Leasing Law in England and Wales – Lessons for Australia

The UK Lease Code 2007 sets out standards of conduct for the lessor and lessee. As a voluntary code it is only a "wish list" and contains no sanctions for not following the Code. It does, however, illustrate the areas of the leasing transaction which are of concern and where improvement in the conduct of the parties, but primarily lessors, is required. In summary, the issues in relation to the reform of commercial leasing law in England and Wales are as follows:

1024 Although such a clause appears to be redundant as such a provision appears in the *Landlord and Tenant Act 1988* (UK), s1.

1025 C Hughes and N Crosby, 'The Challenge of Self-Regulation in Commercial Property Leasing: A Study of Lease Codes in the UK' (2012) 4 *International Journal of Law for Built Environment* 1, 25.

(a) Transactional costs – Costs are increased by out-dated practice or legislation. According to the UK Government the leasing regime in the United Kingdom was "medieval" and required updating.[1026] For example, reduction of costs was achieved by the removal of the need to obtain Court approval for the parties to contract out of the statutory right of renewal.

Complexity increases legal costs incurred by the parties in obtaining legal advice regarding their position. Most lessees in England and Wales took leases based upon the first offer made to them and sought to negotiate nothing more than the initial rent. They were generally not aware of the upward only rent review provisions nor were they aware of the process by which any rent review dispute would be determined.[1027] Upward only rent review clauses would often be drafted in complicated language and commercial leases themselves would often be over 100 pages in length. [1028] Similar problems in relation to legal costs have arisen in the Australian retail leasing context. For example, complex leases and procedures would require that a lessee obtain legal advice. Retail lease legislation would allow a lessor to demand that the lessee obtain such legal advice and evidence that this had occurred.

(b) Delay – The UK Lease Code 2007 attempts to limit delay by setting time limits upon lessors to provide responses to certain queries by lessees. Similar time limits are imposed only upon lessors in Australian retail leasing legislation in relation to responses to a request for assignment of lease.

1026 United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1992, Volume 213, 853.

1027 Neil Crosby, "Australian and UK Small Business Tenants- What Can We Learn from Each Other" (2007) 14 *Australian Property Law Journal* 297, 308.

1028 Sarah Hill-Wheeler *'Commercial Leases Code – Tenant's Tool or Landlord's Token?*' (University of Northumbria, August 2009), 18.

(c) Balance of Power – The obvious focus of the UK government is to give greater power to lessees in relation to negotiation of lease terms and operation of leases. This is shown by their continued condemnation of the upward only rent review clauses and their requirement that lessors be more flexible in relation to the length of lease terms and rent review clauses. In Australia, the issue of upward only rent review (ratchet clauses) has been resolved by the banning of such clauses, a remedy that has not been adopted by the UK Government.

However, the problem of the "sitting tenant" not being preferred for a further term has been ameliorated in the UK by the guaranteed right of renewal provided by the *Landlord and Tenant Act 1954* (UK). The "sitting tenant" problem remains unresolved in Australia.

In common with Australian governments, the UK Government also seeks to empower lessees by educating them and providing them with explanatory information. UK lessees are under no obligation to take advantage of such education or to receive such information. Similarly, UK lessors are under no statutory obligation to provide information to the lessee.

The UK Government hoped that lessors would provide a copy of the voluntary code to lessees so that the lessee would be better informed. This, unfortunately, has rarely happened.[1029] In contrast, Australian retail leasing legislation requires that the lessor provide a disclosure statement to the lessee before the lessee enters into the lease. It is submitted that the Australian method, which mandates a particular process to protect the lessee, is a more effective solution to the problem of lessees' lack of

1029 Neil Crosby, "Australian and UK Small Business Tenants- What Can We Learn from Each Other" (2007) 14 *Australian Property Law Journal* 297, 308.

awareness and shortage of information than the UK method of relying upon the voluntary code.

(d) Protection of Market – The UK government is aware that small business is a significant sector of the economy requiring its protection. however, they have so far adopted a “light touch” preferring self-regulation over legislation. In contrast, all Australian State and Territory governments have elected to legislate in relation to retail leasing in order to protect that market.

Lessons that can be learned from the UK experience with voluntary codes are that: -

(a) Voluntary Codes are not effective. In the UK the government made it quite clear that unless suitable self-regulation was put in place that they would legislate. Despite such threats, three versions of a voluntary lease code have been attempted and failed. This experience is similar to the experience in New South Wales where a voluntary Code was also attempted and failed. One of the problems of drafting a voluntary Code is that the parties responsible for preparing the Code do not represent the whole market and, in addition, have no power over their own members to force them to accept it. In the UK, the existence of the voluntary code (in whatever version) was simply to have the government focus on other issues and not to regulate transactions.

(b) “Protection of the Market” and “Standard Market Procedure” are often seen as the same thing. In the UK, the Department of Environment determined that upward only rent reviews were the established market practice and, therefore, their continued existence would mean the market

could operate with more certainty.[1030] Both lessees and lessors were reluctant to abandon upward only rent review clauses as leases containing such clauses were "off the shelf" and therefore easier to produce and less expensive for the lessee. In addition, existing valuation methods were unable to adequately price different lease terms.[1031] The point is that a market may still be protected even though there has been a substantial change to standard market procedure. Protection of a standard market procedure should be only a minor consideration in determining the effectiveness of regulation;

(c) Giving mandatory rights of renewal to a lessee will not necessarily result in damage to the market as such rights have been in operation in the UK since the *Landlord and Tenant Act 1954 (UK).* This legislation operates, however, in the context of longer leasing terms than in Australia.

5. Conclusions

This chapter has involved an examination of the nature of the leasing transaction to establish criteria to evaluate current retail lease legislation. Such examination reveals uncertainties existing within the lease itself, inequity between the parties to the lease and distortions in the retail lease market. These anomalies are features of a lease arising from the long term relational nature of a lease. These manifest themselves as opportunities that become available to the lessor because of the inability of the parties to predict future plans regarding the use of the shopping centre. Other matters

1030 Department of Environment, *Commercial Property Leases Consultation Paper* (London, HMSO 27 May 1993), [2].

1031 N Crosby and S Murdoch, '*Cutting Edge 2000, Monitoring the UK Commercial Leases Code of Practice: Code, What Code?*' (London RICS 2000), 4.

like changes to tenant mix and the construction of competing centres are also impossible to predict.

Additionally, although the parties may begin their relationship as neutral parties interested only in maximising their business opportunities and requiring the co-operation of the other party to do so, by the time the lease has run its course, the parties may have distinct feelings of ill-will towards each other to the extreme extent that they are prepared to damage their own business to inflict economic harm upon the other party.[1032]

Unconscionability provisions within the *Australian Consumer Law* and the various State and Territory retail leasing legislation attempt to provide a remedy to a lessee but the lessee will incur legal costs enforcing such remedies. The existence of such unconscionability provisions has not, in any event, prevented such conduct from occurring[1033] although its frequency has reduced as a complaint against lessors.

As the lessee is often one who initiates action regarding the lease (with the lessor often simply being required to grant or refuse consent to the lessee's proposals), in cases where a discretion is afforded to a lessor unfettered by terms requiring the lessor to act reasonably, the lessor has a degree of control over the future of the lessee subject to regulations regarding unconscionable conduct and

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> 'The idea there is a 'war' going on in shopping centres around Australia, between retail tenants and property owners and managers, conveys accurately the tenor of evidence given to the Fair Trading inquiry on retail tenancy issues.'

House of Representatives Standing Committee on Industry, Science and Resources, Parliament of Australia, Finding a Balance: Towards Fair Trading in Australia, May 1997, 15.

1033 N Crosby, S Murdoch, E Webb, 'Landlord and Tenants Behaving Badly? The Application of Unconscionable and Unfair Conduct to Commercial Leases in Australia and the United Kingdom'' (2007) 33 *UWAL Rev* 207, 208.

any implied obligation of good faith.[1034] Such good faith obligation may require the lessor to take into account the reasonable expectations of the lessee.[1035]

The nature of the lease favours the lessor (particularly in regard to shopping centre leases) as an imbalance of power arises between the experienced professional lessor and the novice amateur lessee who, unlike the lessor, has no access to data regarding similar leased premises.

The broader leasing market also favours the lessor in that zoning restrictions provide the shopping centre lessor with a monopoly of retail space. Constant revision of retail leasing legislation burdens both parties, but its effects are felt more by a lessee who can, commonly, only afford basic legal advice and who does not have the experience of the lessor in dealing with change.

A review of retail leasing law may be effected on a normative or non-normative basis. Non-normative review is based on the premise that simplification alone will achieve the primary goal of financial and economic gains. Normative review seeks a standard of regulation that is better than the current standard or, at least, the best of the current standard so as to ensure economic efficiency.[1036]

1034 Section 22(1)(l) of the Australian Consumer Law requires the court to consider the extent to which the parties have acted in good faith.

1035 N Crosby, S Murdoch and E Webb, 'Landlord and Tenants Behaving Badly? The Application of Unconscionable and Unfair Conduct to Commercial Leases in Australia and the United Kingdom'' (2007) 33 *UWAL Rev 207*, 219.

1036. Roger A Shiner "Law and its Normativity" in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd, 2010) 417, 421.

Normative simplification, although still primarily concerned with economic considerations, is additionally based on notions of justice and fair play. It is proposed that consideration of any revised retail leasing statutory regime should proceed on a normative basis such that change will not only provide financial and economic benefits but also limit the power imbalance between the parties and so correct any market inefficiencies which may benefit either party but which may, in addition, damage the retail leasing market.

It is this over-riding search for parity between the parties that has led to the numerous tribunals and inquiries which, in turn, has led to the constant review of retail leasing regulation throughout Australia with the added burden of the provisions of the Australian Consumer Law.

It is essential, in order to draft such retail lease legislation, to determine major subjects of dispute that have arisen between lessors and lessees over the years and to consider the effectiveness of remedies to such disputes adopted in each state and territory. Such subjects may then be used as benchmarks to allow a comparison of retail leasing legislation in each State and Territory in Australia to determine whether any legislation in any jurisdiction is more effective than another or whether all must be abandoned to be replaced by new legislation or an amalgam of existing legislation.

In this chapter these benchmarks have been determined by:

a) identifying topics that have been identified over the years in Australia as being of value or meaning to both lessor and lessee.

b) identifying drivers for reform of other commercial legislation specifically the Australian Consumer Law, the Personal Properties Securities Act and the reform of the Work Health and Safety Law.

c) examining the drivers for reform of the leasing landscape in England and Wales specifically in relation to the *Landlord and Tenant Act 1954 (UK)* and the voluntary lease codes.

The purpose of examining the history of retail leasing reform in Australia is to identify historical benchmarks against which proposed future legislation may be assessed. Examination of the retail leasing landscape in England and Wales allows one to compare drivers for reform in England and Wales with the drivers for reform for retail leasing in Australia. Other areas of Australian commercial law are also relevant to consider as such areas, being similar to retail leasing in that they are commercial in nature, allow identification of further drivers for reform which may not have been considered in any retail leasing reform recommendation previously.

Drivers for reform of any law often can be of a similar nature. For example, the issue of costs was relevant in all areas, whether retail leasing in Australian, leasing in England and Wales or reform of Work Health and Safety Law, Australian Consumer Law or Personal Properties Securities Law.

This is unsurprising, taking into account that all of the above areas of law are commercial in nature, as the issue of costs of implementation is a primary consideration for business. Although normative simplification may be based on the grounds of justice, both normative and non-normative simplifications are ultimately grounded primarily in economic considerations.[1037]

1037 Roger A Shiner "Law and its Normativity" in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd, 2010) 417, 421.

In the leasing field the question of costs applies not only to the lessor and lessee but also applies to costs incurred by government in providing services to facilitate the retail leasing legislation (i.e. tribunals, mandatory mediation, and production of standard documentation such as disclosure statements).

From the point of view of protection of the retail leasing market the government is also concerned about any additional costs that may be imposed upon consumers arising from the legislation or passed on to them because of additional compliance required of the lessor or lessee. Any additional compliance costs may discourage any new entrants in the market thereby decreasing competition in the retail leasing marketplace and reducing economic efficiency.

Costs play a similar role in the leasing market in England and Wales. For example, under the *Landlord and Tenant Act 1954 (UK)*, a lessee had a statutory right for an extension of lease term which could only be waived with the consent of the lessee and with the approval of the Court.

In 1995, the *Landlords and Tenants Act 1954* (UK) was amended to provide that the approval of the Court was no longer required provided there was an appropriate warning statement attached to the lease. One of the Government's motivations for taking this step was to reduce the costs for both lessor and lessee in having to make an application to the Court. The abolition of the need for court approval would, at first blush, appear to deprive the lessee with an important protection. In circumstances where such applications were often "rubber stamped", the level of protection is minimal as compared with the cost of having to bring a court application. Thus, the level of protection afforded by regulation must be balanced with

the cost of obtaining such protection. A similar consideration arises in relation to the requirement that a lessor at no cost to the lessee provide a disclosure statement to a lessee before a lease is entered into. The lessee may incur extra cost in having the disclosure statement explained however, it is submitted that the benefit to the lessee far outweighs such cost to either party.

Costs were an issue in relation to the *Australian Consumer Law* and personal property security reform in that the complexity of the prior legislation resulted in greater costs for suppliers in complying with such regime and greater costs for business for legal or accountancy advice. Work Health and Safety Law differed in each State and Territory which resulted not only in increased costs but also increased safety risks for workers.

Costs are increased where there is a lack of certainty regarding interpretation or application of legislation. The enactment of retail shop lease legislation in Australia has provided greater certainty for both lessor and lessee in that the legislation provides direction to both lessor and lessee as to how they should conduct their business with regard to items such as disclosure, conduct at end of lease term, dispute resolution, rent review etc.

As a result of reform to the Australian Consumer Law and the Personal Properties Securities Law there is now one law rather than multiple laws spread out over each State and Territory in Australia. The abolition of multiple securities registries to be replaced by a single Personal Properties Securities register provides greater ease of access to information to lenders, borrowers and purchasers of personal property.

In the event that any new law is adopted throughout Australia, the reform provides greater certainty by reducing the cost of interpreting laws in multiple legislations in each State and Territory.

Costs can be increased as a result of out-of-date systems, procedures or legislation and modernisation of these items can involve modernisation of terminology, process or approach particularly with advances in technology. For example: -

(a) Prior to the commencement of the retail leasing codes in the United Kingdom, the government believed that the leasing regime in that country was medieval and in need of an overhaul.

(b) Reforms of any law modernise terminology, provide more efficient processes by use of the internet and more modern processes to record transactions easily available to search.

Besides costs, delay was another area common in all areas of enquiry. Delay can be caused by either the lessor or the lessee and may be caused innocently or for ulterior motives. A lessor may delay consent to an assignment or granting an extension of lease because they may have an alternate lessee available to them who they find more acceptable.

Moreover, delay may arise in relation to the availability of remedies. For example, prior to the enactment of the Australian Consumer Law applying consumer law was difficult because of delays involved regarding the availability of regulatory remedies and dispute resolution. Delay was also a problem with the leasing regime in England and Wales in that the system of dispute resolution was defective making it costly and cumbersome. In

addition, the process whereby application was made to the Court to allow the lessor and lessee to contract out of the mandatory lease extension provisions of Part 2 of the Landlords and Tenants Act 1954 (UK) was something that delayed the execution of the lease.

Issues of redundancy are also relevant. For example, retail lease legislation in Australia may contain redundant provisions either because they re-enact law which is pre-existing in a more complex way.

Bargaining power was a significant topic in all areas examined. Attempts to provide greater bargaining power to a lessee is plain in the UK Lease Code 2007 in that lessors are required to be flexible in relation to lease terms and to provide alternative rent review to the standard upward only rent review clauses. If no alternative can be provided, then reasons for that should be provided by the lessor.

In Australia, the retail leasing legislation has been characterised as being consumer protection in nature to prevent the abuse by the lessor of its greater bargaining position. The *Australian Consumer Law* is obviously consumer protection legislation in nature and as such its primary aim is to empower the consumer in its dealings with the supplier. Removing the requirements for a prospective lessee to pay for the cost of preparation of a lease[1038] allows small businesses with limited budgets greater ability to negotiate with larger businesses with deeper pockets.

Both the Australian and British governments recognised the need to protect the retail leasing market. In 1992 it was the concern of the British

1038 *Retail Leases Act 2003* (Vic) s 51; *Retail Shop Leases Act 1994* (Qld) s 48; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 8(2); *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 14B; *Retail Leases Act 1994* (NSW) s 14; *Leases (Commercial and Retail) Act 2001* (ACT) s 23;

government that the lack of free-flow of information prevented the leasing market from operating efficiently and that the government should consider legislating to free the market and safe-guard small business.

Similarly, in Australia It was generally considered that the more consistent the law, particularly commercial law, the more efficient is the operation of the market. Small businesses can now compete on a more level playing field. This is particularly the case for entities trading in a similar way in all parts of the federation and across State and Territory borders.

Protection of the market place was also important in the reform of Australian retail leasing in that it was a consideration of government as to what extent retail legislation should impose itself upon the retail leasing market beyond which the marketplace is itself damaged or can no longer operate efficiently.

In summary, it is proposed that the following areas of law are relevant in relation to reform of retail leasing:

a) Costs;

b) Redundancy;

c) Delay;

d) Balance of Power;

e) Protection of Market;

It is proposed to adopt these subjects as benchmarks in the assessment of retail leasing legislation in each State and Territory in Australia in relation to the areas of security of tenure, disclosure, assignment, dispute resolution and rent review.

These benchmarks will allow the effectiveness of such legislation to be ascertained. Once such legislation has been graded according to effectiveness it will then be possible to determine whether:- legislation from one jurisdiction is superior to all others and should be adopted; or

(a) all of the current legislation is ineffective and should be abandoned and completely new legislation drafted;

(b) the current legislation is partially effective and effectiveness may be achieved by some amendment or amalgam of the existing legislation.

CHAPTER 5

SUMMARY AND CONCLUSIONS

1. The Problem with Retail Lease Legislation in Australia

Problems regarding retail leasing first occurred in numerous Australian jurisdictions in the early 1980's resulting in government Inquiries in Queensland, Victoria, South Australia, Australian Capital Territory and Western Australia.[1039] Each of these Inquiries, with the exception of the Cooper Inquiry, recommended that there should be retail lease legislation introduced.[1040] The recommendations of the Cooper Enquiry were subsequently reversed by the subsequent Queensland Joint Committee in 1983 which recommended that retail lease legislation be enacted in Queensland.[1041]

Retail lease legislation first appeared in Queensland in 1984.[1042] Since then legislation has been adopted in every Australian jurisdiction.[1043] In addition, Federal legislation has been enacted which impacts upon the retail leasing arena, particularly in relation to the area of unconscionable conduct in

1039 The Committee of Enquiry into Shopping Complex Leasing Practices ("Cooper Inquiry") was formed in Queensland in 1981. In 1983 the Victorian Retail Tenancies Advisory Committee ("Arnold Inquiry") was formed. The Western Australian Inquiry into Commercial Tenancy Agreements ("Clarke Inquiry") and the ACT Working Party on Business leases ("ACT Working Party") were formed in 1984. The South Australian Working Party on Shopping Centre Leases ("Hill Inquiry") was formed originally in 1981 and then again in 1983.

1040 *Report of the Retail Tenancies Advisory Committee*, Victoria, (February 1984) ("Arnold Report 1984"); *Report of the Inquiry into Shopping Centre Leases*, South Australia, (1983) ("Hill Report 1983"); *Report of the Inquiry into Commercial Tenancy Agreements*, Western Australia, (February 1984) ("Clarke Report 1984"); *Report of the ACT Working Party on Busine*ss *Leases Review Legislation*, ACT (1984) ("ACT Report 1984").

1041 *Queensland Joint Committee Report 1983,* 5.

1042 *Retail Shop Leases Act 1984* (Qld).

1043 *Retail Lease Act 1994* (NSW); *Retail Leases Act 2003* (Vic); *Retail and Commercial Leases Act 1995* (SA); L*eases (Commercial and Retail) Act 2001* (ACT)*; Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas)*; Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA)*; Business Tenancies (Fair Dealings) Act 2004* (NT).

business transactions.[1044] The concept of the implication of a contractual duty of good faith into commercial contracts has also been accepted by the Courts.[1045]

The legislation in each Australian jurisdiction varies in relation to the solution that the legislation provides to the problems as identified by the original enquiries and the numerous State, Territory and Federal enquiries that have followed since. Each piece of legislation amounts to a significant reduction in the freedom of contract[1046] between the parties specifically with a view to reducing the power of the lessor in the leasing transaction. However, by way of balance their market power as owners of the property is reinforced by town planning regulation which restricts nearby competition.[1047] The monopoly granted to the lessor reduces market efficiency and decreases benefits to the community[1048]

The traditional characteristics of the parties themselves also reinforce the strength of the lessor's bargaining power in that the lessor is normally more experienced than the lessee and is used to carrying out leasing negotiations on a daily basis whereas the lessee has little interest in the lease itself and sees the lease as only a stepping stone to achieve the lessee's real objective which is to operate a successful business. In addition, the lessors

1044 *Australian Consumer Law*, s21.
1045 *Renard Constructions (ME) Pty Ltd –v- Minister for Public Works* (1992) 26 NSWLR 234; *Alcatel Australia Ltd –v- Scarcella* (1998) 44 NSWLR 349; *Burger King –v- Hungry Jacks Pty Ltd* [2001] NSWCA 187; Esso *Australia Resources Pty Ltd –v- Southern Pacific Petroleum NL* [2005] VSCA 228; *Alstom Ltd –v- Yokogawa Australia Pty Ltd (No. 7)* [2012] SASC 49; *Trans Petroleum (Australia) Pty Ltd –v- White Gum Petroleum Pty Ltd* [2012] WASCA 165.
1046 Beatson, *Ansons Law of Contract* (30th Edition Oxford University Press 2016) 4. See also JW Carter, Elisabeth Peden and G J Tolhurst , *Contract Law of* Australia (5th Edition, Australia, 2007) 8.
1047 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 259-260.
1048 G Dawson "The Market and Efficient Resource Allocation" (1989) 9(5) *Economic Affairs*, 40.

of shopping centres are normally well resourced[1049] and able to employ persons with retail leasing experience, afford more sophisticated legal advice[1050] and assistance. Additionally, through the use of turnover clauses, lessors have access to information regarding the viability of the businesses of other lessees within the same shopping centre complex.[1051] This is valuable information not commonly available to commercial lessors of other forms of property.

The lessee, although they may receive legal advice, leasing consultant advice and the assistance of a tenant's group may only be a novice in relation to lease negotiations[1052] and ill equipped to understand the complexity of the transaction. The emphasis of a professional lessor is to obtain the best commercial deal possible where as often the emphasis of a lessee is to obtain the fastest lease possible so that the lessee can get on with running their business.

Lessees also often view the relationship with the lessor as one of a partnership or joint venture in that the lessee believes that the success of the lessee's business will also result in greater success for the lessor especially where a turnover clause exists. Lessors can, however, act opportunistically to obtain advantages for themselves[1053] or allow a lessee to suffer for the benefit of the centre as a whole. The relational nature of the leasing contract and the inherent difficulty in predicting future events that may affect the

1049 Eileen Webb, "Unconscionable conduct in Australian Competition and Consumer Commission v Dukemaster Pty Ltd — A Recognition of 'Acoustic Segregation' in Retail Leasing Transactions?" (2010) 18 *Australian Property Law Journal,* 48.
1050 *Hasler Transport Co Pty Ltd v. Avelian Pty Ltd and Pied Properties Pty Ltd [*2009] QRSLT 7.
1051 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 165.
1052 *ACCC v Dukemaster* [2009] ATPR 42-290.
1053 *Opera House Investments Pty Ltd v Devon Buildings Pty Ltd* [1936] 55 CLR 110.

viability of a centre effectively means that the lessor shifts some future risk to the lessees.[1054]

Chapter 1 is an introduction to the thesis. It provides a general background of retail leasing and an analysis of leases generally which includes a discussion of the principle of freedom of contract and the relational nature of contracts. It also discussed the retail leasing market and the nature of lessors and lessees.

Chapter 1 concluded that the traditional freedom of contract principles would not be effective as the bargaining power of the lessor is so great that the marketplace is distorted. The power of the lessor comes not only because town planning restrictions provide the lessor with a monopoly but also because the lessor is experienced in the field and has access to information, resources and advice while the lessee has only limited access to such things. In addition, the long term relational nature of leases allows the lessor to act opportunistically at the expense of the lessee.

Chapter 2 of this Thesis identified the drivers for reform that led to retail leasing regulation and five main areas of focus by considering the reports and recommendations of early inquiries. These five main areas were: -

- Security of Tenure;
- Assignment of Lease;
- Disclosure;
- Dispute Resolution; and

1054 *Bobux Marketing Limited –v- Raynor Marketing Limited* [2002] 1 NZ L R 506, 516 (Thomas J.).

- Rent Review.

Chapter 2 then discussed how these areas of focus were considered by later inquiries and concluded that these issues had never been properly resolved.

Chapter 3 traced the performance of retail leasing legislation since its inception in 1984 to the present time by considering reports of various inquiries since the commencement of retail lease legislation and considered to what extent the solutions adopted have achieved the initial purpose as set out in the early inquiries. The chapter concludes that despite retail lease legislation being imposed in the 1980s the situation became worse such that by 1997 lessors and lessees are described as being at war.[1055]

A subsequent Inquiry by the Productivity Commission in 2008[1056] found that the retail leasing market was working well but that problems still existed with dispute resolution, disclosure and transparency. Despite such findings the problem of the sitting tenant remains as does the ability of the lessor to delay or frustrate assignment of leases or to affect the market review or rent by concealing rental information through confidentiality clauses in leases.

Chapter 4 discussed the current retail leasing environment before comparing legislation in each jurisdiction using benchmarks identified by analysing case law, inquiry reports and journal articles in Australia and the United Kingdom. The voluntary leasing codes of the United Kingdom as well as other areas of uniform legislation such as the *Personal Property Securities Act 2009* (Cth) and the *Australian Consumer Law* and the proposed Work Health and Safety

1055 Reid Report 1997, [2.1} – [2.2].
1056 PC Report 2008.

Law were considered to identify common factors leading to such voluntary codes or uniform legislation. These common factors were used to identify the benchmarks for evaluation of the current retail lease legislation to determine whether such legislation was effective or required amendment or repeal.

In this Chapter it is intended that each of the five areas of concern will be considered and current retail lease legislation will be assessed using the criteria developed in Chapter 4 to determine the effectiveness of such legislation.

Finally, if reform is indicated then this chapter will provide recommendations for such reform.

2. Regulation –v- Voluntary Codes

Voluntary codes can be more flexible[1057] than regulation however they can also be highly ineffective.[1058] Three voluntary codes that have been promulgated in United Kingdom have all failed. In addition, the voluntary Code briefly used in New South Wales in 1991 was also a failure[1059] and legislation in New South Wales quickly followed.

Broadly, the voluntary codes generally failed for the following reasons: -

(a) The New South Wales voluntary Code had the benefit of bi-partisan

1057 Nicola Howell, "Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards?" [2015] *UNSWLawJl* 19, 20.
1058 Ibid, 19.
1059 S Murdoch, P Rowland and N Crosby, *Looking after Small Business Tenants with Voluntary Codes or Statutory Intervention: A Comparison of Australian and UK Experiences*, (PPRES Conference, January 2001) 19.

support in that the Code was supported both by lessors and lessee organisations. The difficulty was that the supporting organisations were themselves voluntary organisations which did not represent between them 100% of the retail leasing landscape. In addition, the supporting organisations were not able to force the use of the Code upon their members.

(b) Similar problems arose in relation to the UK voluntary codes. An attempt was made to have the codes adopted by lessors on the basis that the code made it more likely that lessees would be willing to deal with a lessor who had agreed to be bound by a code. Such an attempt, however, failed to take into account the fact that most lessees had no real understanding about the terms of their leases, nor any understanding about the benefits to them of a voluntary code. Generally, it was found that UK lessees accepted the first offer made to them by the lessor and there was no reliance upon voluntary codes by the lessees and, as a result, no regard was given to the codes by the lessors.[1060]

(c) These voluntary codes can be compared to the Australian Casual Mall Licencing Code of Practice which is a code of practice promoted by the Shopping Centre Council of Australia which also has support of retail lessee organisations. That Code of Practice is based upon the Casual Mall Licencing Code enacted by the South Australian Government in 2002.

1060 Cathy Hughes and Neil Crosby, The Challenge of Self-Regulation in Commercial Property Leasing: a Study of Lease Codes in the UK, *IJLBE* (2012) 4(1) 23, 24.

> Like the codes mentioned above the Casual Mall Licencing Code of Practice is a voluntary code, but unlike the UK code or the New South Wales Code, compliance with the Casual Mall Licencing Code of Practice has been authorised by the Australian Competition and Consumer Commission. Authorisation provides statutory protection from Court action for conduct that might otherwise be a breach of the competition provisions of the Competition and Consumer Act 2010. [1061]
>
> The Casual Mall Licencing Code of Practice therefore is a hybrid voluntary code in that adopting the code is completely voluntary. However, the statutory protection from court action arising out of a breach of competition provisions provides a real incentive to the parties to adopt and observe the terms of the Casual Mall Licencing Code of Practice.
>
> Such a hybrid voluntary code may be effective in regulating the retail leasing relationships as the code has the same characteristics as the UK codes and New South Wales codes (that is, developed by members of the industry with bi-partisan support) but in addition has the added benefit of statutory protection from court action.

Irrespective of the success of the Casual Mall Licencing Code, however, it is unlikely that lessees in the retail leasing market would need to adopt an entirely voluntary code now as retail leasing legislation has existed in one form or another for over 30 years since 1984 with the result that most

1061 Media Release of the Australian Competition and Consumer Commission 6th February 2013 "ACCC Authorises Casual Mall Licencing Code of Practice" <https://www.accc.gov.au/media-release/accc-authorises-casual-mall-licensing-code-of-practice-0.>

lessees have accepted the conduct of their business under the umbrella of legislation. Reverting from legislation to a voluntary code would be seen as a significant loss of power by the lessees. The Productivity Commission has recommended the removal of prescriptive legislation and the use of voluntary codes regarding certain issues such as transparency, lease lodgement, information provision and dispute resolution.[1062] However, there does not appear to be any appetite to institute this change in any jurisdiction with retail leasing legislation.

3. Broad Considerations of Control of Market Power

Retail lessors have more bargaining power than retail lessees. Such bargaining power arises from the usual characteristics of the parties themselves, the nature of the leasing transaction and the context of the transaction in the leasing market place. There is little doubt that lessees have accepted that the best place to earn money from their business is inside a large shopping centre as opposed to a strip shopping centre or individual premises.[1063] The lessors' position is also reinforced by town planning regulations which restrict construction of neighbouring shopping

1062 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Report No. 43 (31 March 2008), 257.
1063 A Preece, "Property: The Retail Shop Leases Act 1984" 1984 April, *Queensland Law Society Journal*, April, 25.

centres thereby ensuring that there is no competition for shopping centre space in the near proximity.[1064]

The solution of Australian jurisdictions to this bargaining power disparity has been to enact legislation to interfere with the negotiations between lessors and lessees, the terms of the lease contract itself, the conduct and obligations of the parties during the lease term affecting the parties even after the relationship has ended. Such legislation attempts to balance the consumer protection of the lessees against the lessors' traditional property rights and the rights of the parties to freely negotiate their own agreements.[1065]

In the United Kingdom there has been only a small degree of legislative prescription in relation to commercial leases. Principally, the *Landlord and Tenants Act 1954* (UK) interferes with the freedom of contract rights of both lessors and lessees to a limited extent. For example, it provides for automatic extension of any lease term. In Australia, regulation is seen as a method to achieve that objective because the leasing market is economically important and thought to require protection in that the continued failure of businesses results in undesirable market outcomes.[1066]

It is submitted that the use of legislation to limit the bargaining power of lessors is a clumsy method to achieve that objective. Limits placed upon the party's conduct reduce commercial options for both parties.[1067] Once legislation is enacted the parties immediately start attempting to legally

1064 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 235.
1065 P S Atiyah, *Essays on Contract* (Clarendon, Oxford 1990) 359.
1066 '*New Deal: Fair Deal - The Federal Government's Fair Trading Statement - Giving Small Business a Fair Go'*, Ministerial Statement, House of Representatives, September 1997, 4. (Peter Reith, Minister for Workplace Relations and Small Business.)
1067 G Dawson "The Market and Efficient Resource Allocation" (1989) 9(5) *Economic Affairs*, 91.

circumvent it for their benefit. For example, provisions that provide for a minimum lease term of five (5) years often resulted in a five (5) year lease being the only term that a lessee could obtain. Prescribing that, where an option to extend the lease existed, and the lessee asking for a market assessment of the new rental to be paid prior to exercising the option, resulted in such options no longer being granted by lessors. [1068]

Legislation, therefore, often leads to more complex legislation. Issues that were not considered or even imagined by the legislature originally nor canvassed by the various Inquiries prior to the enactment of the initial legislation are often introduced as each party endeavours at every reiteration of the legislation to better their respective positions In addition, changes in the market place and consumer preferences also bring amendments to legislation.[1069] As a result legislation is often developed in a "leap frog" fashion such that legislation enacted in one particular jurisdiction is adopted in another jurisdiction with embellishments.

Furthermore, Governments ignore principles based legislation and instead pass legislation that accommodates very small variations in circumstances often to meet a noisy minority. The legislation also tends to be overly prescriptive in that it is very detailed and often not amenable to judicial interpretation because it is mainly considered by tribunals on a case by case basis. In the operation of a business it can prove inflexible[1070] and confusing

1068 Department of Justice and Industrial Relations Consumer Affairs (Tas), *'Review of the Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998 Final Report*' March 2002, 46.
1069 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), xxvi.
1070 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), 90.

to the parties, especially the lessee.[1071] Complexity and over prescription in legislation can discourage investment and thereby damage the retail leasing market. Costs of compliance are passed onto lessees and customers thus causing market inefficiencies.[1072]

A better course would be to reduce or roll back the current retail lease legislation to focus on the areas of operation where it has proved to have been effective such as disclosure requirements, education programs and low cost and accessible dispute resolution alternatives.[1073] More restrictive elements of retail tenancy legislation should be removed and lessors and lessees should move towards greater self-regulation.[1074] In this regard, the development of the unconscionable conduct provisions of the Australian Consumer Law may be developed to further particularise conduct which amounts to unconscionable conduct in a retail leasing context.

It is unlikely that such self-regulation would be successful by use of a voluntary code unless such voluntary code either had a “carrot” or a “stick” attached to it which would make the adoption of the voluntary code by lessors attractive.

Reduction in the lessors bargaining power can be achieved without interference in the parties’ contractual rights by the relaxation of prescriptive town planning regulation that restrict the supply of retail space.[1075] Such relaxation will result in greater competition between lessors which may result in their offering more generous lease terms. The construction of more

1071 *D & D Ventures Pty Ltd v Evans* [2000] NSWADT, 30.
1072 Shopping Centre Council of Australia, Submission No 83 to the Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, August 2008, 17.
1073 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43* (31st March 2008), xxiv.
1074 Ibid, xxvi.
1075Ibid, 259-260.

shopping centres will, however, result in greater traffic flow, parking problems and environmental concerns.

A better course would appear to be to allow shopping centres to be constructed as community title properties (with common areas such as carparks, amenities and food courts) such that different parts of the shopping centre are owned by different lessors with the result that the lessors will compete amongst themselves for lessees. High levels of competition are achieved without the need to construct shopping centres in close proximity to each other.

4. Security of Tenure

The problem of granting security of tenure to a sitting lessee has not been solved despite the various attempts to do so. An existing lessee has a lease for a finite term. The finite term is a problem for a lessee in that: -

(a) The lessee may not be able to amortise the costs incurred in setting up the business including fit out costs;[1076]

(b) There may be insufficient time left in the lease term to make the lease and the business attractive to any buyer;[1077]

(c) The initial years of any business are often the hardest years and it is only when the lease is coming to an end that the lessee has been able to develop its business sufficiently to provide a good return on such investment of money and time;[1078] and

1076 ACT Report 1984, 47; Productivity Commission, *The Market For Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 100.
1077 ACT Report 1984, 46.
1078 Western Australia, *Parliamentary Debates*, Legislative Assembly, 5th March 1985, 503 (Court).

(d) The fact that the lessee has invested such time, energy and money into the business means that at the end of the lease the lessee is at the lessor's mercy in relation to negotiation of a new lease.[1079]

Proposals to solve the above problems were: -

(a) Leases to have a minimum term of five years.[1080]

(b) Lessees to have first right of refusal to a lease extension.[1081]

(c) Automatic right of renewal. In the United Kingdom, lessees have the automatic right to extend the term of their lease subject to certain exceptions.[1082] The lessees can contract out of this right.[1083]

Current legislation in Australia does not satisfactorily address all of the above issues.

(a) Minimum lease term

In many jurisdictions the legislation provides for a minimum lease term of five (5) years.[1084] Although such a minimum lease term may allow a lessee to amortise its initial set up and fitout costs, it does not solve any of the other problems referred to above. In addition, the prescription of a five (5) year minimum lease term has resulted in Australia in the five (5) year lease term

1079 Arnold Report 1984, 32; Preece A, Legislative Regulation of Leases of Business Premises (1985) 1 *QIT Law Journal*, 140.
1080 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2; Reid Report 1997,[2.6]; Cooper Report 1981, 30.
1081 Clarke Report 1984, 25; South Australia, *Parliamentary* Debates, Legislative Council, 28 November 1996, 611 (Levy).
1082 *Landlord and Tenants Act 1954* (UK), Part 2.
1083 *Regulatory Reform (Business Tenancies) Order 2003* (England and Wales) SI 2003 No 3096, [3].
1084 *Retail Tenancies Act 1986* (Vic) s21; *Retail Leases Act 1994* (NSW) s16; *Retail and Commercial Leases Act 199*5 (SA) ss20B, 20K; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s13; *Leases (Commercial and Retail) Act 2001* (ACT) s1; *Fair Trading (Code of Practice for Retail Tenancies) Regulation 2008* (Tas) s10 (3) and 10(4); *Business Tenancies (Fair Dealings) Act 2003* (NT) s26.

becoming the norm, whereas prior to legislation lease terms of longer duration were often negotiable.[1085]

The prescription of a minimum lease term has therefore resulted in less flexibility to a lessee than the situation prior to the existence of the legislation.

The market place is also affected generally in that the bargaining position of the lessee has, once they have entered into a lease, been diminished further in that prior to entering into a lease they had nothing to lose whereas at the end of a five (5) year lease term when they have established a substantial business, they are unable to afford the risk of losing that business and therefore will more readily agree to demands made by the lessor in the negotiation of a further term. The lessor's bargaining position is therefore enhanced at the conclusion of a lease term whether it is a prescribed minimum lease term of five (5) years or otherwise.

Extension of the five (5) year lease term to either seven (7) or ten (10) years will not solve this problem. Queensland abandoned the lessee's right to a minimum five year term and left this aspect of the transaction negotiable. There has been little clamour to have it return.

Nor will it solve the problem where the lessee wishes to sell their business with a sufficient period left in their lease term to make the business attractive to a buyer or the problem where the lessee has developed the business to a stage where it is profitable and the lessee wishes to continue in the business.

1085 Reid Report 1997, 19; Productivity Commission, *The Market For Retail Tenancy Leases in Australia – Report No.43* (31st March 2008), 100.

The only attempts to solve these problems arise out of the automatic right of renewal contained in the *Landlord and Tenant Act 1954* (UK) and the purported preferential rights of renewal referred to in the South Australian and Australian Capital Territory Legislation.

(b) Automatic right of renewal

No Australian jurisdiction provides for a true automatic right of renewal of lease. Such a provision only appears in the *Landlord and Tenant Act 1954* (UK) which gives the lessee a right to renew their lease unless the lessor is able to establish some reason to not renew the lease. The provisions of the *Landlord and Tenant Act 1954* (UK) initially could not be contracted out of, however, the provisions have subsequently been watered down such that the parties could contract out of the provisions provided they had court approval. The provisions were further watered down to provide that the parties could agree that the provisions of the Act did not apply provided that the lessee was given a warning statement.

The position in the United Kingdom was however different to that in Australia, in that in the United Kingdom long term leases of twenty-five (25) years or more were the norm as lessors and investors saw that a long term lease meant a long term return on investment.

In Australia, short leases were preferred to allow lessors to control tenant mix and changes in retail patterns which can occur over shorter periods than ever before. It also allows lessors, in consequence, to extract the greatest rental possible from either the sitting lessee or any new lessee[1086] and

1086 Cooper Report 1981, 4.

allows maximum advantage for refurbishment and redevelopment. The risk of lack of demand for shopping centres based in Australia is less than the United Kingdom because the Australian town planning regulations limit competition by restricting the number of shopping centres which could be built nearby.

As the UK legislation can be contracted out of both lessors and lessees will incur additional costs in taking steps to contract out of those provisions. In addition, an automatic right of renewal can reduce certainty in a lease,[1087] significantly reduce the lessor's ability to control tenant mix[1088] and allows a poor performing lessee to remain in occupation.[1089]

(c) Preferential Rights of Renewal

The preferential rights of renewal contained in the South Australian[1090] and Australian Capital Territory legislation[1091] provide significant avenues for a lessor to contract out of those provisions.[1092] Accordingly, those provisions are ineffective in resolving the sitting tenant problem. In addition, both lessor and lessee will incur costs in contracting out of the provisions as it is likely that a retail lessor would simply provide that he would not enter into a lease unless a lessee agreed to contract out of the provision. Even if preferential

1087 ACT Report 1984, 214.
1088 Ibid, 216.
1089 Ibid.
1090 *Retail and Commercial Leases Act 1995* (SA), Part 4A Division 3.
1091 *Leases (Commercial and Retail) Act 2001* (ACT) s108.
1092 Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18 March 2015, 18.

rights to renew were mandatory government intervention reduces the parties' scope to negotiate a mutually beneficial result.[1093]

Accordingly, the provisions are both ineffective and costly and should be discarded.

(d) Conclusions

(i) Roll Back Legislation

It is submitted that all legislation which prescribes the minimum lease terms or preferential rights of renewal should be repealed and the subject of lease term and options to renew should be left to negotiations between the parties. Lessors should, however, as the more well informed party be required to provide disclosure of information and even advice to the lessee where it is apparent to the lessor that such information or advice is required. For example, where a lessor, in attempting to maintain standards within a shopping centre, requires a high level of fit out, the lessor should have an obligation to provide credible information to the lessee as to the likelihood of the lessee being able to amortise such costs over the period of the lease term as far as the lessor's future proposals are concerned. Such information would include a calculation or estimate as to the amount of income that the lessee would be required to achieve in order to fully pay for the cost of the fit out as required by the lessor over the period of the lease term.

1093 Productivity Commission, *The Market For Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 124-125.

In relation to entering into a lease for a finite time warning statements should be provided by the lessor to the lessee about the fact that at the end of the lease term, the lessee may not necessarily be granted a new lease with the result that the substantial investment of time, money and effort into the lessee's business would be wasted and the possibility of selling the business, with only a small amount of time left on the lease term would be minimal.

The effect of the roll back of legislation would be to allow the lease duration to be of a period which the lessee would consider sufficient to allow them not only to amortise their expenses but also to achieve a return upon their investment either by way of the sale of the business or by financial returns from the business they have developed.

The market is also protected in that there is no automatic right of renewal or preferential right of renewal, such that new entrants into the market are not precluded.[1094]

(ii) Lessee to have statutory right to request lease renewal

In circumstances where the lease is about to end and the lessee has no option to renew the terms of the lease the lessee should be entitled to request the lessor to grant an extension of the lease. In the event that the lessor is willing to grant such an extension, the lessor should provide an offer to the lessee as to upon what terms the lessor is prepared to grant a lease.

In the event that the lessor is not willing to grant an extension of the lease then the lessor should be required by legislation to provide a reason for their

1094 Productivity Commission, *The Market For Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 124-125.

decision. Currently the lessor is not required to provide any reason for refusing to grant an extension of the lease.

The purpose of requiring the lessor to provide a reason for their refusal to grant an extension of the lease is for the lessee to provide some method of ensuring that the lessor's conduct in refusing to grant the extension is not unconscionable and also to allow the lessor's conduct to be examined for the purposes of Section 22(1)(f) of the Australian Consumer Law which, applied to this situation, provides that a court, in determining whether someone has acted unconscionably can consider the extent to which the lessor's conduct towards the lessee was consistent with the lessee's conduct in similar transactions between the lessor and other lessees. Where the premises are leased for retail purposes, and there appears no reason for the lease not to be renewed, the onus should be on the lessor to establish such a reason. If no valid reason can be given, the lessee should be entitled to a limited term extension.[1095] A valid reason would be, for example, redevelopment of the centre, a new lessee offering to pay rent greater than that paid by the existing lessee.

Additionally, if a lessee who has no option to extend the term of the lease requests an additional lease term from the lessor but the parties cannot reach agreement and the lessee has to vacate, the lessor shall not be entitled to lease the premises to a new lessee for substantially the same purpose for a period of three (3) months after the termination of the first lease. The purpose of this provision is to ensure that the lessor cannot take

1095 Clarke Report 1984, 27.

over the goodwill of the lessee's business by refusing to renew the lessee's lease and then permitting the opening up of a similar business immediately thereafter.[1096]

If the lessor wishes to lease the premises out for a similar purpose within the three (3) month period, the lessor may do so only with the consent of the lessee which may be granted by the lessee. However, the extent to which these mechanisms would protect reluctantly departing lessees is open to question. In stark terms, there can be very little a sitting lessee can ultimately do to protect and capitalise upon its good will except through sale of its business at a profit. This can only be realistically achieved where a reasonable term remains in the lease or where the lessor agrees to surrender the existing lease and grant a new lease for a longer period to the incoming buyer as a condition of the sale. Despite all the legislative attempts to give a sitting lessee preferential consideration upon a renewal of an existing lease, ultimately the lessor must have the final say without any recourse by the lessee. The problem has possibly been exacerbated by the propensity of retail lessors to offer only 3 to 5 year terms to some speciality traders which is often not sufficient time to amortise establishment costs and return a respectable profit. The lessor's knowledge of turnover figures of the lessee's business for the term of the lease may also be influential in the decision not to offer a new lease when there is the prospect of replacement of the lessee with a better trader.

1096Clarke Report 1984, 25; South Australia, *Parliamentary Debates*, 23 March 1995, p 2152 (Atkinson).

5. Dispute Resolution

Prior to retail lease legislation, problems with dispute resolution concerned: -

(a) Dispute resolution through traditional courts took too long[1097] and was too costly;[1098]

(b) The formal nature of the court proceeding suited the lessor more because of the lessor's financial ability to employ more experienced lawyers and stand the cost of litigation;

(c) Lengthy and costly court proceedings would damage the lessor and lessee relationship.[1099]

(d) Court proceedings often did not lead to a satisfactory result for either party

Proposed solutions to these problems were: -

(a) Establishment of low cost tribunals[1100] which could deal with matters in a timelier manner without recourse to the formalities of a superior court, for example, applying the rules of evidence. There was a suggestion that the tribunal system be to be split into two tiers with the higher tier dealing with more complicated matters;[1101]

(b) Mediation by specialist mediators familiar with the retail leasing business;[1102]

1097 N Mumford, The Retail Shop Leases Act 1984-1989- Does the Act Achieve the Purposes Identified in the Cooper Report 1981 (1992) *QLSJ*, 91, 106; Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 18.10.2000, 3170 (Chief Minister Humphries).
1098 Clarke Report 1984, 14; Professor H Tarlo, Pioneering in the Deep North: Tinkering with Shop Leases, (1987) 8 *Qld Lawyer* 67, 90.
1099 ACT Report 1984, 66; Clarke Report 1984, 33; Queensland Joint Committee Report 1983, 3.
1100 Arnold Report 1984, 30.
1101 Arnold Report 1984, 29.
1102 Queensland Joint Committee Report, 6; Hill Report 1983 (Referred to in ACT Report 1984, 64).

(c) Establishment of a Government entity to intervene in disputes, such as a retail tenancy advisory board or Small Business Commissioner; and

(d) Disputes about rent to be determined by the Valuer-General.

All Australian jurisdictions now provide for mediation.[1103] Low cost and timely dispute resolution through tribunals and mediation[1104] has been one of the successes of retail lease legislation. The creation of the office of a Small Business Commissioner has allowed early intervention into retail lease disputes.[1105]

Dispute resolution through Tribunals and the Small Business Commissioners result in a saving of costs for both lessors and lessees and reduction in delay. The ability to obtain timely and low cost dispute resolution provides greater power in a relationship to the lessee who can normally not afford to conduct litigation through the traditional courts.

The early resolution of disputes is a general benefit to the retail leasing market generally as, upon resolution, both parties can then get on with running their business.

Recommendations in relation to dispute resolution therefore are as follows: -

(a) Establish the role of Small Business Commissioner each jurisdiction.

(b) The Small Business Commissioner to be provided with powers of investigation which may be used when a dispute is referred to the Small Business Commissioner. This would also require the Small Business

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1103 *Retail Leases Act 1984* (NSW) s68; *Retail Leases Act 2003* (VIC), Part 10; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s25D; *Business Tenancies (Fair Dealings) Act 2003* (NT) Part 11; *Retail Shop Leases Act 1994* (QLD) s55; *Retail and Commercial Leases Act 1995* (SA) ss63-69; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) s39.

1104 Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18th March 2015, 28.

1105 Ibid.

Commissioner to have the power to demand information and documents from either lessors or lessees.

(c) At the conclusion of this investigation the Small Business Commissioner to release its opinion as to the solution to the dispute. Such solution may or may not be adopted by the parties.

(d) If the parties accept the Small Business Commissioner's opinion, then this is to be reduced to an agreement signed by the parties. If one or both of the parties do not accept the Small Business Commissioner's determination then, depending upon the nature of the dispute, the Commissioner may refer the matter to: -

(i) A Valuer appointed by the Commissioner from a panel of Valuers maintained by the Commission;

(ii) A Mediator appointed by the Commissioner from a panel of Mediators maintained by the Commission;

(iii) Case appraisal;

(iv) A hearing at a Tribunal; or

(v) Any combination of the above.

In deciding which method to adopt the Small Business Commissioner shall be entitled to receive submissions from the parties.

In relation to valuation, if the Commissioner believes that a matter can be wholly or partially resolved by valuation, the matter may be referred to a valuer whose determination will be binding upon the parties. The parties are entitled to provide submissions to the valuer and the valuer may demand information and documents from the parties including confidential documents such as side deals.

Similarly, in relation to mediation the Small Business Commissioner may refer the matter to mediation. The mediation will then proceed in the manner as determined by the Mediator. The Mediator is also entitled to demand information and documents from the parties.

In relation to Tribunal hearings such hearings should be divided into two separate tiers as follows: -

(i) First tier hearings – For matters where the amount in dispute is $50,000.00 or less that does not involve (in the opinion of the Commissioner) complicated matters of law or where time is of the essence. The first tier tribunal will commonly consist of one (1) non legal member. Appeals from the first tier tribunal shall be to the Appeal Panel of the tribunal only.

Lawyers would not be entitled to appear in the first tier tribunal without permission from the Tribunal, even where both parties agree on legal representation. Any costs incurred by the successful party (such as expert reports) are payable by the other party only where the Tribunal believes that the claim was vexatious or obviously had no chance of success.

(ii) Second tier hearing – For matters over $50,000.00 or where the Small Business Commissioner believes that the matter involves complicated areas of law then the matter shall proceed by way of a second tier hearing. Appeals from the second tier

hearing are to the Appeal Panel as of right or to the Court of Appeal by leave only on matters of law.

Within thirty (30) days after the determination by the Tribunal both parties must file a Notice as to whether they intend to appeal and if so whether they intend to appeal to the Appeal Panel or the Court of Appeal.

If one of the parties advise that they intend to appeal to the Court of Appeal, then any appeal to the Appeal Panel is not possible. If the Court of Appeal refuses leave then the matter may not be appealed to the Appeal Panel and the matter effectively ends.

Legal representation of the parties is allowed for a second tier hearing. The second tier hearing normally consists of a panel of three (3) members of which at least one (1) must be a legally qualified person.

(e) Case Appraisal – If the Small Business Commissioner believes that a matter qualifies for a first tier hearing but the speedy determination is required where the Tribunal list will not allow such an early hearing then the Commissioner may refer the matter to Case Appraisal. The Commission is to maintain a panel of suitably qualified persons (such as Barristers, Solicitors or ex-Judges) to carry out a case appraisal. The person appointed shall be entitled to ask for information or documents from both parties and after receiving information submitted by the parties shall hand down their

decision. The decision of the Case Appraiser is appealable in the same manner as a decision from a first tier hearing.

The benefit of the structure referred to above is that: -

(i) Costs incurred by the parties are kept to a minimum. Legal representation is generally not allowed unless the matter proceeds by way of second tier hearing. Rights of appeal are limited to ensure that a matter cannot be appealed and then appealed again.

(ii) Decisions achieved by a tribunal are likely to involve less delay than decisions obtained by a court hearing. In addition, the ability of the Small Business Commissioner to form an early opinion also eliminates delay as does the ability of the Small Business Commissioner to refer the matter to case appraisal where the Tribunal list is too long.

However, whether this process may be more effective than the current mediation and later tribunal hearing is moot. Many disputes, except those relating to the non-payment of rent or outgoings, caught at an early stage by the intervention of an independent third party in whom the parties have some confidence can be often speedily resolved.

6. Assignment

Prior to retail lease legislation, problems in relation to assignment of leases included the lessor delaying or frustrating the assignment, lessors refusing to consent to assignment on spurious grounds, attempts by the lessor to obtain additional benefits for itself as part of its consent and lack of disclosure of lease terms by lessees to potential assignees.

Proposed solutions to these problems were:-

(a) Legislation to provide that the lessors consent cannot be unreasonably withheld.

Current retail lease legislation provisions provide that the lessor may not unreasonably withhold consent to an assignment.[1106] Such provisions are redundant, however, where existing legislation[1107] in some jurisdictions already provides that the lessors consent to the assignment of a lease cannot be unreasonably withheld[1108] where the lease requires that the lessor's consent be obtained to an assignment. This is not invariably the case outside the retail leasing sphere. Such redundant legislation adds additional complexity to the leasing relationship which incurs additional costs. The reason for the redundancy is to bring the assignment dispute within the jurisdiction of the mediators or tribunal as the case may be. In non-retail instances these disputes may have to be heard in the respective Supreme Courts.

Where the lessor refuses to consent to an assignment the lessee can, pursuant to retail lease legislation, refer the matter to a tribunal for determination.[1109] Such a provision is useful as the resolution of disputes through tribunals is low cost and timely. Rather than re-enacting existing

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1106 *Retail Leases Act 2003* (Vic), s60; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), s10; *Leases (Commercial and Retail) Act 2001*(ACT), s100; *Business Tenancies (Fair Dealings) Act 2003* (NT), s53; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas), s28; *Retail Shop Leases Act 1994* (Qld), s50; *Retail and Commercial Leases Act 1995* (SA), s43; *Retail Leases Act 1994* (NSW), s39. A similar provision occurs in the United Kingdom being *Landlord and Tenants Act 1927* (UK), s19(1) .

1107 *Property Law Act 1974*(Qld) s121 (1); *Conveyancing Act 1919* (NSW) s133B; *Property Law Act 1958* (Vic) s144; *Property Law Act 1969* (WA) s80 (1).

1108 C Anderson, The Retail Shop Leases Act 1984 (Qld): Does it Remedy a Mischief?" (1992) 4(1) *Bond Law Review*, 89.

1109 *Retail Shop Leases Act 1994* (Qld) s50.

legislation however,[1110] retail lease legislation should simply provide that disputes relating to the refusal of consent to the assignment of a retail shop lease apply the general law but be heard in the manner of any retail lease dispute, that is through access to mediation and the respective tribunals.[1111] In all jurisdictions, the retail lease legislation has enhanced provisions relating to assignment which may smack of over regulation given the fact that the general law on this refusal of consent to lease assignment is relatively settled. However, it is conceded that some enhancements may be desirable in the particular instance of retail leasing assignment issues.

(b) Restrict lessors delay in assignment proceedings.

Retail leases are of a limited time only. A lessee may lose a purchaser because of the delay caused by the lessor in consenting to the assignment.[1112] Retail lease legislation currently requires lessors to respond to a request for an assignment in a set period of time.[1113] A similar provision occurs in the United Kingdom.[1114] Such provisions should be retained because they reduce the power of the lessor, as the party in the superior bargaining position, to frustrate the assignment of

1110 In this regard s144 of the *Property Law Act 1958* (Vic) is expressly excluded from applying to retail leases by s60 (2) *Retail Leases Act 2003* (Vic). The *Retail Leases Act 2003* (Vic) is therefore the only remedy available to retail lessees in Victoria in relation to unreasonable refusal to consent.
1111 For example, s50 (3) of the *Retail Shop Leases Act 1994* (Qld) provided that s50 does not limit the circumstances the way in which a retail shop lease dispute may exist.
1112 Reid Report 1997, 40; Professor H Tarlo, "The Great Shop Lease Controversy" (1983) *University of Queensland Law Journal* 13 (1), 18.
1113*Retail Leases Act 2003* (Vic) s 61; *Retail Shop Leases Act 1994* (Qld) s 50(1); *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 28(5); *Retail & Commercial Leases Act 1995* (SA) s 45; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 10(2); *Retail Leases Act 1994* (NSW) s 41; *Leases (Commercial and Retail) Act 2001* (ACT) s 99(2); *Business Tenancies (Fair Dealings) Act 2003* (NT) s 55.
1114 *Landlord and Tenant Act 1988* (UK), s1(3).

lease or to provide their consent only at the last minute when the lessee will agree to anything in order to make sure the sale proceeds.

The consequences of the lessor exceeding the required time limit to provide consent are not consistent in Australia. The lessors delay means either that the matter can be referred to a tribunal for determination[1115] or that the lessor is deemed to consent.[1116] In the United Kingdom, the failure by the lessor to give or communicate a decision within a reasonable time will be treated as equivalent to a refusal of consent without reasons which allows a lessee to take the lessor to court in a claim for damages for breach of statutory duty.[1117]

Access to the court, or to a tribunal, allows the parties to make submissions upon the reasons for the delay which is appropriate.

Deemed consent, however, seems to be unfair where the delay of the lessor might be reasonably explained. In addition, where consent is deemed to be granted there is no guidance upon the terms the assignment is granted and the lessee is uncertain as to such matters until the lessee applies to the courts or tribunal for a determination.[1118]

Additionally, there is no reference as to what documentation is required to be produced as a result of the lessors "deemed consent". Where an assignee is prepared to proceed with a purchase of the lessees'

1115 *Retail Shop Leases Act 1994* (Qld) s50.
1116 *Retail Leases Act 2003* (Vic) s61 (6); *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s10(2); *Leases (Commercial and Retail) Act 2001*(ACT) s99; *Business Tenancies (Fair Dealings) Act 2003* (NT) s55; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s28(5); *Retail and Commercial Leases Act 1995* (SA) s45; *Retail Leases Act 1994* (NSW) s41.
1117 *Go West Ltd. v Spigarolo & Anor* [2003] EWCA Civ 17 (31 January 2003) [24].
1118 Small Business Commissioner (SA), *Discussion Paper re the Retail and Commercial Leases Act 1995*, December 2014, [1.7].

business relying upon the “deemed consent”” provisions, the question arises as to how the assignee is, at a later date, able to prove to any subsequent potential purchaser that they have any rights under the lease when the lease documents are presumably still in the name of the original lessee and no formal written consent from the lessor is explicit. The Australian Capital Territory legislation requires the person who holds the lease to deliver a lease to the Registrar-General to allow endorsement of the assignment but this can only occur after an application to the Magistrates Court.[1119] As any deemed consent may result in the lessee being required to proceed to a hearing in any event, the better course would appear to be that the delay of the lessor may, on application by a lessee, be reviewed by a tribunal or official (such as a Small Business Commissioner) who may make orders that are relevant to the lessee’s situation after considering any submissions from either party. The Tribunal or Commissioner may then issue a document authorising the assignment. The application to the Tribunal or Commissioner will have little cost for the lessee. The assignment of the lease will be further delayed but the outcome for the lessee (an official document authorising the assignment) warrants such delay. The balance of power between the parties may be significantly affected in that the lessor may lose control of the assignment process. However, such loss of control only results from the lessor’s own conduct. The lessor has the additional benefit of being able to make submissions to the Tribunal or Commissioner regarding the lessors delay.

1119 *Leases (Commercial and Retail) Act 2001*(ACT) s99(5).

(c) Restrict lessors' reasons for refusal.

Some jurisdictions precisely state the reasons that the lessor can rely upon in refusing consent to an assignment.[1120] Such grounds for refusal include where there is a proposed change of use or where the proposed assignee has financial resources or retailing skills inferior to the lessee. Highly prescriptive regulation, however, means that other grounds for refusal are excluded even if such reasons are valid. The legislation is, therefore, not effective in that it favours the lessees' interests over the lessor and should be removed.

(d) Restrict lessors' ability to obtain additional benefits for itself as part of consent to assignment.

In Queensland, a lessor cannot, in granting consent to an assignment, impose on the assignee an obligation not imposed on the lessee, or seek to remove a right from the assignee conferred on the lessee.[1121] Such a provision appears to be unnecessary as under the common law courts may consider any conditions imposed by a lessor to determine whether such conditions are unreasonable.[1122] According to Duncan: -

> "The provisions of the retail tenancies legislation merely, and somewhat unnecessarily, provide an overlay to the already existing provisions of the statutes which were adequate to meet the particular contingencies to which this legislation was directed."[1123]

1120 *Retail Leases Act 2003* (Vic) s60; *Business Tenancies (Fair Dealings) Act 2003* (NT) s53; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s28; *Retail and Commercial Leases Act 1995* (SA) s43; *Retail Leases Act 1994* (NSW) s39; *Leases (Commercial and Retail) Act 2001*(ACT) s100.

1121 *Retail Shop Leases Act 1994* (Qld) s 50(2).

1122 W Duncan, "The Regulation of Commercial Tenancies – Heading for the Sunset", (1990) 2 *Bond Law Review*, 34.

1123 Ibid.

Redundant provisions only lead to greater cost for both parties in dealing with two sets of legislation. These provisions should be removed. Removal of these provisions will not alter the balance of power between the lessor and lessee as the underlying legislation will remain.

(e) Disclosure to be provided to potential assignee.

Disclosure statements between the lessee and the proposed assignee are valuable in that they prevent the assignee from having a misguided view of what they are purchasing. Such disclosure documents would be better coming from the lessor alone at the assignor's expense. In some jurisdictions, the assignee receives disclosure statements from the lessor and assignor which seems unnecessary duplication.

(f) Abolition of ongoing liability of original lessee.

Prior to legislation retail lessees complained about their ongoing liability under the lease even after assignment. [1124] Retail lease legislation in some jurisdictions now provides that original lessee liability after assignment has now been abolished.[1125]

The abolition of original lessee liability results in damage to the market in that an outgoing assignor has no interest in the merits of the assignee and is concerned only with settlement of any business contract to which consent to assignment is subject.[1126] Although a lessor is entitled to carry out investigations and request information and documents from an assignee it is more likely that an assignee will be

1124 Cooper Report 1981, 31.

1125 *Retail Leases Act 2003* (Vic) s 62; *Retail Shop Leases Act 1994* (Qld) s 50A; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 9(1); *Retail & Commercial Leases Act 1995* (SA) s 28; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 10; *Retail Leases Act 1994* (NSW) s 41A; *Business Tenancies (Fair Dealings) Act 2003* (NT) s 58.

1126 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 234.

suitable to operate the leases where the assignee has been vetted both by the lessor and the outgoing lessee.

Original lessee liability, therefore, for both the outgoing lessee and its guarantors should be reinstated such that the outgoing lessee and its guarantors shall remain liable only for, for example, a period of twelve (12) months from the date of assignment or the balance of the lease term, whichever is the lesser.[1127]

(g) Lessor not to benefit from lessee's good will.

One of the complaints of lessees is that where the lessor refuses consent to an assignment of lease the lessor can then lease other premises within the same centre to the refused assignee or, where the lessee vacates the premises, lease the premises to that same assignee. The assignee receives the benefit of the lessee's good will for nothing which allows the lessor to demand greater rent from the assignee. Meanwhile, the original lessee has lost its lease and the goodwill of its business.

To avoid this result, regulation should provide that where the lessee locates through its own endeavours a purchaser for its business and the lessor refuses consent to assignment, the lessor is not entitled to subsequently lease premises within the same shopping centre to the refused purchaser for the same use without the consent of the lessee for a period of three months after the lessee vacates. This will ensure that the lessee keeps its goodwill in its business and prevents the lessor from benefiting from such goodwill. The purpose of this restriction is to ensure that the lessor does not sabotage the sale of the lessee's business

1127 In South Australia, the outgoing lessee remains liable for two years or for the balance of the lease. See *Retail & Commercial Leases Act 1995* (SA) s 28.

simply for the purposes of the lessor then approaching the proposed assignee and leasing to them other vacant premises within the same shopping centre to operate the same sort of business as the original lessee. If that was to occur, then the lessee would not only lose a potential sale of the business but it would immediately gain a competitor.

7. Rent Review

Problems in relation to rent review, prior to retail lease legislation, related to issues such as the cost of the review, arbitrariness of result,[1128] the lack of transparency,[1129] delays in rent reviews being finalised in consequence of which the lessee was unaware as to the new reviewed rent prior to exercising its option to renew.[1130] Ratchet clauses[1131] or upward only rent review[1132] clauses in leases allowed a lessor to nominate several different methods of rent review and select the method most profitable to the lessor.[1133] Such clauses also provided that the rent review could not result in the rent being less than the previous year's rent.

Delays in rent reviews resulted in the lessee being unable to afford to pay any retrospective amount when once the new rent had been finally determined.[1134]

Proposals regarding solutions to these problems were that: -

1128 ACT Report 1984, 25.
1129 Arnold Report 1984, 26; Clarke Report 1984, 13.
1130 Cooper Report 1981, 22.
1131 ACT Report 1984, 30.
1132 United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1992, Volume 13 Column 858, (T. Baldry, Parliamentary Secretary of State for the Environment); Neil Crosby, 'Commercial Lease Reform in the UK: Can we Learn Anything about the Awareness of Small Business Tenants?' in *Findings in Built and Rural Environment* (RICS, September 2006) 1.
1133 ACT Report 1984, 30.
1134 Clarke Report 1984, 18.

(a) All rents be regulated by the Government.

In addition to the costs to the Government involved in such a proposal, regulation of rent would result in inefficient markets[1135] and discourage investment in shopping centres.[1136] Such a proposal should never be adopted.

(b) That lessees have the right to have a new rent arbitrated by a tribunal.[1137]

Western Australia is the only jurisdiction that allows a rent review matter to be referred to a tribunal and then only after the failure of the review process.[1138] Arbitration of rent is a significant interference with the rights if the parties and should be avoided.[1139]

(c) That the rent to be paid after the exercise of an option to renew be determined prior to the lessee exercising such option.

Such a solution has now been enacted in Queensland and New South Wales.[1140] The purpose of such legislative provisions is to allow the lessee to know the amount of rent that they will be required to pay in the event that they did exercise their option to extend the lease. Traditionally, only after the lessee had exercised their option, would the parties negotiate the rent review.

The difficulty with the legislation in this regard is that by allowing the early determination of rent review prior to the lessee exercising its option results in lessors simply not granting options to renew a lease. Without

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1135 Productivity Commission, *The Market for Retail Tenancy Leases in Australia - Report No.43 (31st March 2008)*, 142-143, 151, 257.
1136 ACT Report 1984, 25.
1137 South Australia, *Parliamentary* Debates, Legislative Council, 28 November 1996, 612 (Levy).
1138 *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 11(5).
1139 Professor H Tarlo, "The Great Shop Lease Controversy" (1983) *University of Queensland Law Journal* 13 (1), 26.
1140 *Retail Shop Leases Act 1994* (Qld) s 27A (2); *Retail Leases Act 1994* (NSW) s 32.

an option the lessor can demand any rent that the lessor requires from the lessee and the lessee, who has no option to extend, is left to choose between either accepting such proposal or vacating the premises and perhaps losing their business.

Legislative provisions that provide for early determination of rent review prior to exercising an option to renew a lease should therefore be removed which would make lessors more likely to grant options within retail leases.

(d) Restrict methods of rent review.

Legislation has now been introduced which proscribes any lease provision that prevents rent from decreasing on review[1141] and also limiting the methods of rent review contained in the lease.[1142] Such methods commonly provide for rent review to be based only on the lessee's turnover, movements in an independent index such as the Consumer Price Index, a market review, a fixed percentage or dollar increase. Prescribing the methods of rent review appears to be too prescriptive and limits the freedom of the parties in negotiations and should be removed. Proscribing any lease clause which restricts rent from decreasing, however, is appropriate as it puts the lessee and lessor on a more equal footing. Rent review clauses that allow rent to be increased by a fixed amount or a fixed percentage are, in fact, clauses

1141 *Retail Leases Act 2003* (Vic) s 35(3); *Retail Shop Leases Act 1994* (Qld) s 36A; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 12(8); *Retail & Commercial Leases Act 1995* (SA) s 22; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 11(2)(c); *Retail Leases Act 1994* (NSW) s 18(4); *Leases (Commercial and Retail) Act 2001* (ACT) s 46; *Business Tenancies (Fair Dealings) Act 2003* (NT) s 28(3).

1142 *Retail Leases Act 2003* (Vic) s 35(2); *Retail Shop Leases Act 1994* (Qld) s 27(5); *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 12(2); *Business Tenancies (Fair Dealings) Act 2003* (NT) s 28(2).

that prevent rent from decreasing and should also be proscribed except where the lease provides for a market review every three years.

(e) Prohibit turnover rent clauses or limit the lessor's right to receive and use turnover information.

Lessees complained that often the turnover information sought by the lessor had nothing to do with ascertaining any turnover rent but was simply a method whereby the lessor could access the lessee's financial performance which the lessor could use against the lessee when the rent was due to be reviewed. A lessor is entitled to require that a lease contain a turnover rent provision and, although turnover information is protected by confidentiality provisions in retail leasing legislation,[1143] it is difficult to see how a lessor can be prevented from using that information in any subsequent rent reviews. In addition, however, lessors can use turnover information to ascertain whether or not a lessee is performing efficiently or whether the lessor should take steps to ensure the ongoing health of the shopping centre generally by either insisting the lessee relocate or requiring that the lessor vacate the premises pursuant to a performance clause in the lease. Such performance clauses are prohibited in most Australian jurisdictions.[1144] In Queensland however, it

1143 *Retail Leases Act 2003* (Vic) s 65; *Retail Shop Leases Act 1994* (Qld) s 26(2); *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 10(7); *Retail & Commercial Leases Act 1995* (SA) s 51; *Retail Leases Act 1994* (NSW) s 50; *Leases (Commercial and Retail) Act 2001* (ACT) s 129; *Business Tenancies (Fair Dealings) Act 2003* (NT) s 66.

1144 *Retail Leases Act 2003* (Vic) s 73; Fair *Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 36; *Retail & Commercial Leases Act 1995* (SA) s 58; *Retail Leases Act 1994* (NSW) s 58; *Leases (Commercial and Retail) Act 2001* (ACT) s 142; *Business Tenancies (Fair Dealings) Act 2003* (NT) s 73.

is legitimate purpose to collect turnover information to ascertain the performance of the centre[1145] as a whole.

It is submitted that the use of turnover information by the lessor to ascertain the health of the lessee's business is a legitimate use of the information to allow the lessor to ensure that the shopping centre generally is operating efficiently especially where the lessor is unable to limit the reduction of rent upon review.

It is recommended therefore that turnover rent clauses not be prohibited and that it be the subject of an agreement between the parties.

(f) Limiting the arbitrary nature of rent reviews by requiring that the method and timing of such reviews be set out in the lease.

Legislation now exists in this regard[1146] which limits the time period in having rent reviewed to market. Such legislation will prevent any large retrospective amounts being paid by the lessee. Such provisions should be retained.

(g) Require full disclosure by the lessor of all lease terms and side agreements.

One of the main difficulties with rent review is that there is no requirement upon lessors or lessees to disclose any side agreements that may exist between them. The only information available to a new lessee, valuer or a bank, is the actual lease itself which may or may not be registered. Registration of the lease would provide a limited benefit to potential

1145 *Retail Shop Leases Act 1994 (Qld)* s 26(4) (a).

1146 *Retail Leases Act 2003 (Vic)* s35; *Leases (Commercial and Retail) Act 2001*(ACT) s50; *Business Tenancies (Fair Dealings) Act 2003* (NT) s28 (1); *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas) s12; Retail Shop Leases Act 1994(Qld) s27.

lessees as the formal terms of the lease only become public record. Full disclosure of all lease arrangements will provide a major benefit to a potential lessee attempting to enter into the leasing market. Such disclosure would therefore be of benefit to the leasing market generally because new lessees would be fully informed.

On the other hand, side agreements come into operation because a lessee has requested a lower rent than that to which the lessor is willing to agree generally in the centre. Lessors, when faced with a request from a lessee to accept a rent less than what the lessor requires, will only consent to such rent where the lessee agrees to enter into a lease which specifies a higher rent with a side agreement between the lessor and the lessee where the lessor agrees to accept the lesser rent provided that the lessee complies with the terms of its lease.

The benefit to the lessor is that in subsequent negotiations with other lessees the lessor can point to the lease which contains a falsely inflated rent figure. This inflated figure can also be provided to the lessor's banks and the bank's valuers to justify the market capitalisation of the lessor's premises as an investment as this value is often determined through the total yield achievable.

There is also, however, a substantial benefit to a lessee who is a party to such a side agreement for such side agreements to remain confidential as, if the side agreements become readily available or known the result will be that lessors will cease making such side agreements to the ultimate detriment of the lessees. In addition, the parties are entitled to expect a degree of confidentiality in relation to their dealings.

There have been proposals to the effect that there be a separate lease registry which will contain a copy of the lease itself together with copies of any side agreements between the parties. The justification of this registry is to allow full disclosure to be made to other lessees, banks and valuers.

It is likely that any such separate lease registry would have to be funded by the government to the cost of the community generally. It is also likely that if such a registry has come into existence that side deals no longer be given to the ultimate detriment of lessees.

For these reasons, it is not recommended there be separate lease registry where the parties are required to disclosure side agreements. There should, however, be an obligation upon a lessee attempting to sell its business to provide copies of not only the lease but any other relevant side agreements to a proposed assignee subject to such information being provided on a confidential basis.

This would mean that information in relation to side agreements would be made available to the relevant parties but not to the world at large.

Leases should however be subject to mandatory registration. Mandatory registration will of course involve additional expense which would normally be paid for by the lessee; however, the benefit to persons such as banks seeking valuations of premises outweighs the small cost of registration.

Current disclosure requirements upon assignment where the lessee is obliged to provide a copy of the lease and disclosure document to an assignee which include details of any side agreements should be

retained. In addition, the obligation of the assignee to provide a disclosure statement to the lessee should also be maintained. In circumstances where a lessee is taking over a vacant shop then the lessor should also be required to provide a copy of a lease of the most recent lessee occupying the premises prior to the current potential lessee to allow the potential lessee to compare the lease proposal by the lessor to the prior lease. The lessor's disclosure statement should also provide details as to the circumstances arising in relation to the termination of the previous lessee's lease together with the contact details of the previous lessee. This would allow the lessee to make a better informed decision about whether or not to take up a lease with the lessor, in particular, after being informed as to why the previous lease ended and also having the benefit of speaking to the previous lessee as to the reason by the previous lessee vacated the premises.

8. Disclosure

Problems with disclosure prior to retail leasing legislation were that: -

(a) Information about the lessor's future intentions was not disclosed.[1147]

(b) Lessees over-relied upon oral representations by lessors' or their agents;[1148]

(c) Lessors would exaggerate the likely performance of the premises of the centre;[1149]

1147 Arnold Report 1984, 2.
1148 Cooper Report 1981, 5.
1149 Arnold Report 1984, 20.

(d) There was poor communication between lessees and lessors managing agents;[1150]

(e) Leases were not provided prior to occupancy;[1151] and

(f) Lease documents were too complex to understand.[1152]

Proposals to deal with such problems were as follows: -

(a) Greater education of lessees regarding their obligations under a lease.[1153]

Unfortunately, lessees cannot be forced to educate themselves and will suffer no sanction if they choose not to be better informed. Education programs are offered by both State and Federal organisations, however, education alone is unlikely to provide any benefit to lessees. Experience in a market is still the best teacher.

(b) Provision of disclosure statements by lessors to lessees with draft lease.

Despite legislation requiring disclosure by lessors[1154] the information asymmetry between lessors and lessees continues.[1155] Disclosure statements have become more detailed since first introduced and more

1150 Small Business Development Corporation (Qld), *Leases by Small Tenants in Shopping Centres* referred to in Cooper Report 1981, Appendix 2.
1151 Cooper Report 1981, 5.
1152 Arnold Report 1984, 20; Victoria, *Parliamentary Debates* (Second Reading Speech of Retail Lease Bill), Legislative Assembly, 8 May 1986, 1959-1960 (Fordham).
1153 ACT Report 1984, 65.
1154 *Retail Tenancies Act 1986* (Vic) s17; *Retail Shop Leases Act 1994*(Qld) s22; *Retail Leases Act 1994* (NSW) s11; *Retail and Commercial Leases Act 1995* (SA) s12; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s6; *Leases (Commercial and Retail) Act 2001* (ACT) s36; *Fair Trading (Code of Practice for Retail Tenancies) Regulation 2008* (Tas) s6; *Business Tenancies (Fair Dealings) Act 2003* (NT) s19.
1155 Productivity Commission, *The Market For Retail Tenancy Leases in Australia - Report No.43 (31st March 2008)*, [153].

complicated to the detriment of lessees.[1156] Disclosure statements generally, however, have been a significant increase to the bargaining power of lessees and should be retained. The creation of an industry standard lease[1157] has been suggested by several Inquiries[1158] however a complete lease document may be too complex[1159] to be relevant to all transactions. A standard lease document containing basic terms[1160] would allow for the reduction in the size of disclosure statements while still assisting in the lessees' understanding of the transaction and allow a body of case law to develop around such standard lease. The standard lease should not be mandatory but the extent which the lessor complies with the standard lease document should be one of the considerations in determining whether the lessor has acted in good faith if that becomes necessary.

Additional information should be provided within the lessor's disclosure statements being details about the fit-out required by the lessor and the lessor's estimate of the cost of that fitout and the costs to amortise that cost over the length of the lease term. This will provide some warning to the lessee about the consequence of taking a lease for too short a period

(c) Lessees to have the right to terminate the lease or seek compensation if the disclosure statement is misleading or is not given.

1156 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 157.
1157 Beddall Report 1990, 104.
1158 Arnold Report 1984,53; Cooper Report 1981,24.
1159 Clarke Report 1984, 29 -30.
1160 Such as those contained in the UK Lease Code 2007.

Termination of a lease for misleading information[1161] seems unfair when such misleading information may have arisen as a result of an error by the lessor. In order to force the delivery of disclosure statements, the obligation of the lessee to pay rent should abate until the disclosure statement is provided in the proper form. In the event that the disclosure statement contains misleading information, the lessee should have a right to claim compensation in the first instance.[1162] Termination of the lease should only be available where a tribunal considers that compensation alone is insufficient.

(d) Lessors to provide warning statements to lessees to obtain legal and financial advice or, alternatively, lessees be required to obtain certificates from legal and financial advisers.

Obtaining legal advice certificates and financial advice certificates[1163] is a costly process and causes delay while such certificates are obtained. The requirement for such certificates should be abolished and replaced by a warning statement[1164] provided as part of the disclosure statement that the lessee should obtain legal and financial advice before entering into the lease.

1161 *Retail Leases Act 2003* (Vic), s17; *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), s6; *Business Tenancies (Fair Dealings) Act 2003* (NT), s20; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas), s7; *Retail Shop Leases Act 1994* (Qld), s22; *Retail and Commercial Leases Act 1995* (SA), s12; *Retail Leases Act 1994* (NSW), s11.

1162 *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), s6; *Leases (Commercial and Retail) Act 2001*(ACT), s37; *Business Tenancies (Fair Dealings) Act 2003* (NT), s18; *Fair Trading (Code of Practice) Retail Tenancies Regulations 1998* (Tas), s5; *Retail Shop Leases Act 1994* (Qld), s43; *Retail and Commercial Leases Act 1995* (SA), s12; *Retail Leases Act 1994* (NSW), s10.

1163 *Retail Shop Leases Act 1994* (Qld) s 22D.

1164 Cooper Report 1981, 33; Arnold Report 1984, 20.

(e) Additional disclosure by lessors by requiring mandatory registration of leases or through the creation of a separate lease register.

Neither of these options has been adopted in any jurisdiction. Side agreements between lessors and lessees continue to remain hidden. Registration of leases is not mandatory so information contained within such leases also remains hidden. Registration of leases is, however, a simple matter as all Australian jurisdictions allow for such registration.[1165] Such registration will not reveal side agreements[1166] however the creation of a separate public registry to record side agreements is too expensive[1167] and the obligation to register side agreements too difficult to enforce.[1168] Forcing lessors to divulge any side agreements they have with lessees will result in the lessor not utilising side agreements to the detriment of lessees.[1169] The better course would be to require leases to be registered but not require a separate lease registry.

9. Conclusion.

This thesis has considered retail lease legislation in Australia, since its beginnings in the 1980's to the present time, through multiple Inquiries both regional and federal, in order to determine what form modified retail lease legislation might take in the five topics of concern being lack of security of tenure, ineffective disclosure, costly dispute resolution and unfair assignment

1165 Productivity Commission, *The Market for Retail Tenancy Leases in Australia* - Report No.43 (31st March 2008), 157.
1166 Ibid, 175.
1167 Ibid, 24.
1168 Law Society of New South Wales, Submission 9 to Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Report No. 43 (31 March 2008), 26.
1169 QUT Property Law and Research Centre, Submission No 12 to Senate Economics Reference Committee, Parliament of Australia, *Need for a National Approach to Retail Leasing Arrangements*, 18th March 2015, 12.

and rent review provisions. Such legislation is a significant encroachment into the contractual rights of both lessors and lessees. Retail lease legislation has only increased in size and complexity since first inception as the legislature continues to under estimate the ingenuity of lessors and their advisors in circumventing such legislation.

The Australian experience of nation-wide retail lease legislation has been compared to the experience in the United Kingdom where the Government applies only a “light touch” of regulation preferring instead to rely upon voluntary codes and market forces to achieve what the Government sees as desirable outcomes.

As retail lease legislation has now been part of the retail leasing scene for over three decades it is highly unlikely that such legislation will be repealed, however certain aspects of that legislation can be rolled back to allow the parties to negotiate a mutually beneficial arrangement, particularly provisions regarding lease duration. Certain inequities within the legislation should be remedied to provide a fairer solution. Voluntary codes are unlikely to be effective in Australia unless such codes contain some incentive for the parties to comply with them.

The difficulty with any major alteration to the current law is that often Governments will not have the courage to implement such alterations out of concern that market aberrations will occur. Such was the concern of the Queensland Government when retail lease legislation was first established. Nevertheless, unless Governments carry out a cost-benefit analysis of retail lease legislation and discard overly prescriptive regulation, retail lease

legislation will continue to grow in size and complexity to the ultimate detriment of both parties.

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