

LEGISLATIVE REGULATION OF LEASES OF BUSINESS PREMISES

with particular reference to the Queensland Retail Shop Leases Act 1984

A.A. Preece*

Background to the Recent Queensland Legislation

Problems associated with leases of retail shops, particularly those in large shopping centres, have been around in a number of jurisdictions for several years. In fact, they have followed by a few years the development in importance of large shopping centres in each jurisdiction where that phenomenon has occurred, except those jurisdictions, such as England and Wales, where comprehensive legislation relating specifically to business leases predated such developments.¹

The problems appear to be the imposition of onerous and unreasonable terms upon tenants in leases of retail shops, particularly those in large retail shopping centres. These terms include those reserving a rent based on turnover, coupled with wide requirements for disclosure by the tenant of intimate details of his business, and arbitrary behaviour by landlords with regard to the renewal of leases.

The *Retail Shop Leases Act 1984* (Qld) is particularly interesting in that it represents the first legislative attempt to resolve these problems in an Australian jurisdiction. However, the legislation is not the first attempt by the Queensland Government to tackle this problem as it has been sufficiently concerned with the problem as to have been directly involved in attempts at resolution for the last few years.²

The Government's involvement began with attempts to persuade the representative bodies of the parties concerned, the Building Owners and Managers (BOMA) in the case of the landlords, and various small business organisations in the case of the tenants, to agree on a code of practice in the industry as a means of dealing with the serious problems which were arising. These attempts failed, ultimately because BOMA appeared not to possess the necessary combination of will and authority over its members.

With a justifiable reluctance to be seen as interfering in the free market, the Queensland Government demonstrated great patience with BOMA and its members during 1982, despite increasingly strident calls for legislation from many quarters which gained wide media coverage. However, by early 1983 the Government's patience with BOMA appeared to become exhausted and a discussion paper was circulated to interested parties with the clear implication that legislation could not be avoided.

Before outlining the provisions of the legislation it is appropriate to define and examine in general terms some of the problems to which it is addressed.

* M.A., LL.B.(Cantab.) Solicitor (England and Wales), Barrister and Solicitor (A.C.T.), Lecturer in Law, Queensland Institute of Technology.

1. Landlord & Tenant Act 1954, Part II, as amended.

2. For a detailed account of this matter, together with some perceptive analysis of the social and economic background, see H. Tarlo, 'The Great Shopping Centre Lease Controversy', 1983 *U.Q.L.J.*

Problems Associated With Business Leases

Landlords are able to impose oppressive terms on business tenants as part of the leases of their business premises, in two situations:

1. On the original grant of a lease;
2. On renewal of the original, or any succeeding, lease.

It is important to realise that the reasons the landlord is in such a strong bargaining position differ in each case.

1. Problems on the grant of the initial lease.

It is suggested that the reason that the landlord is able to impose a hard bargain on the tenant 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. Indeed, many would argue that the whole controversy is a fight between landlords and tenants of such premises for the monopoly profit resulting from the zoning restrictions.

This is why the most acute problems are currently found in the large shopping centres, where the landlord's monopoly position is most nearly absolute. Problems are found to a lesser degree, although there is evidence that they are still present, in the smaller shopping centres, strip centres, and individual business premises.

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 among prospective tenants for leases is artificially increased. To put it bluntly, so much of the consumer's dollar is spent in shopping centres that too many retailers will do virtually anything to obtain a lease of premises there.³ All too often one has heard of tenants signing leases in such centres in the face of clear and unequivocal legal advice not to do so.

Furthermore, it is understood to be a widely held view among retailers that if a new shopping centre opens, they must, at all costs, obtain a shop there to 'protect their existing business', presumably from competition. That means that the existence of a monopoly in shopping centres has given rise to monopolistic aspirations on the part of many retailers.

There is the additional factor that the existence of a widespread belief in the community that running any shop in a shopping centre will be highly profitable has resulted in an influx of a number of tenants not possessing sufficient business acumen or sufficiently realistic expectations to succeed in the retailing business. The willingness of such persons to sign leases on virtually any terms has compounded the problem.

2. Problems on renewal.

On renewal, a landlord's position is stronger than on the initial grant of the lease because of the disturbance and loss of goodwill which the tenant will suffer if he relocates to other premises. This enables the landlord to secure a rent above fair market value from the existing tenant, and has led to increasingly onerous terms being imposed on tenants. In short, there is not a free market situation since the tenant has no choice of alternative accommodation; it is only by remaining in the same premises that he can avoid the losses arising inevitably from a move. This effectively places the landlord in a monopoly bargaining position.

In the author's view it is this factor which is the root cause of the problems which have been experienced in Queensland and elsewhere in relation to shopping centre and other retail leases. It may be that this is a fundamental problem which is only soluble by comprehensive legislation conferring upon the tenant of business premises the right of renewal of the lease subject to exceptions on defined grounds; such as, e.g., where the

3. See Halper *Shopping Center and Store Leases* (1982), at 3 for a pertinent discussion in a North American context.

landlord has a legitimate reason for refusing to renew, or offers suitable alternative accommodation.

Such legislation could include provision that when a tenant is required to leave for reasons other than his own default, he should be compensated for any improvements which he has made to the premises other than under the terms of the lease or any previous lease, and for loss of goodwill.

Since Australia has no legislation of this nature it would be most unwise to advocate such an apparently radical approach without examining the experience of other jurisdictions which may have tried legislation along these lines.

It so happens that legislation in these terms has operated successfully for many years in the United Kingdom. Accordingly, an analysis of the effects of this legislation and its provisions follows.

Details of United Kingdom Business Leases Legislation

The relevant legislation is comprised in Part I of the Landlord & Tenant Act 1927 and Part II of the Landlord and Tenant Act 1954.

Part I of the Landlord and Tenant Act 1927 confers a right upon business tenants to compensation for improvements. It is submitted that such a provision is neither unjust nor undesirable government intervention in the market place since it can be excluded by restricting the tenants right under the lease to improve; in addition, the landlord has rights of objection pursuant to s.3. Reasonable compensation provisions for improvements go a long way towards removing the ill feeling which arises between landlords and small business tenants when the tenant is refused a renewal.

Part II of the Landlord and Tenant Act 1954 confers upon business tenants security of tenure, through the machinery of enabling the tenant to apply for a new lease at the expiry of the original. This right is conferred by s.29. Sections 23-28 define the tenancies to which these provisions apply and provide the necessary machinery to govern the exercise of the tenant's right and such matters as interim rent while the application is being processed.

There is complete freedom to negotiate the terms of the original lease. This means that these provisions would not in themselves deal with the problem of oppressive terms being imposed on the grant of the original lease.

If the parties cannot agree on the terms of the new lease, these are settled by the Court, having regard to the terms of the current tenancy and all relevant circumstances (s.35). The rent is a market rent (s.34) excluding the influence of the goodwill generated by the tenant's business. Thus there is no attempt to hold down rent, which probably is the main reason that the legislation has been a great success. Contrast the dismal record of rent control legislation wherever it has been implemented.

One very beneficial effect of this rent assessment formula is that it means that any restrictive term as to user of the premises or otherwise which is imposed on the tenant has its price from the landlord's point of view since it will reduce the rent payable. This means that market forces tend to prevent the landlord from even seeking to have oppressive terms included in the lease on renewal.

The landlord may successfully oppose the grant of a new tenancy on specified grounds (s.30). These conditions appear to deal with all reasonable grounds for requiring possession, given that the landlord's legitimate interests are the enjoyment of a fair market return and the protection of his property.

Although this procedure may sound very cumbersome and may seem to be an interference with the free market it works well in practice and so enhances rather than restricts the operation of the free market. It is submitted that this legislation falls more into the category of legislation setting the framework within which transactions are carried out,

(as, e.g., the *Property Law Act* (Qld)), rather than being within the category of interventionist legislation.

As explained above there is a need to protect the small business tenant by conferring some kind of right of renewal because the landlord is otherwise able to exploit the loss of goodwill and disturbance which the tenant would otherwise suffer by relocating, so as to secure the payment by the tenant of a rent above open market value.

Legislation of the form of the U.K. provisions accommodates the reasonable aspirations of landlords, who are not in any way prevented from securing a fair market rate of return, and of tenants, who are protected against unfair exploitation on renewal.

In practice the U.K. courts tend to grant renewals of leases on the same terms as the original unless one party can come up with a strong argument for change. Since it is only the matters in dispute which the court decides, the parties are free to agree on changes and submit only the areas of disagreement to court decision. However, the guarantee of the right to renewal does enable the tenant to adopt a more robust negotiating stance on renewal, which appears to be the time when landlords are otherwise able to force tenants to accept oppressive terms.

The best evidence of the success of this legislation has been the fact that it has stood the test of time remarkably well. Despite the all too frequent amendment of the Rent Acts relating to residential lettings, including major changes, there have been only minor amendments of these business tenancy provisions since their enactment.⁴ Furthermore, the situation in relation to business tenancies was so smooth that contracting out was introduced in 1969, without any major effects.⁵

North America

Some indications of the relevant law in the United States may be gleaned from the literature.⁶ It seems that there is little legislative intervention, but many lease clauses may offend against the general anti-trust legislation.⁷

Scrutiny of Contemporary Problems in Comparison With United Kingdom Practice

It is instructive to examine how problems equivalent to those which have arisen in Queensland have been resolved under the U.K. legislation.

For example, attempts by a landlord, on renewal, to impose a 'clear' lease, that is one where virtually all the costs associated with the upkeep of the premises are charged to the tenant in return for a correspondingly lower rent, failed in *O'May v. City of London Real Property Co. Ltd.*⁸ While it was recognised that the tenant would, to some extent, be compensated by a lower rent, it was regarded as inappropriate for a tenant for a comparatively small number of years to be required to assume the financial risks inherent in the maintenance of the structure of an office block. This was particularly so since they were not in the business of property management and property dealing. The Court recognised that a 'clear' lease transfers such risks from the landlord to the tenant; and also noted the 'weak negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity'.

This kind of recognition by the courts of the economic facts of life in business demonstrates that they are capable of administering legislation of this nature in a way which

4. The insertion of s.34(3) by the Law of Property Act 1969, s.2.

5. By the Law of Property Act, 1969.

6. See particularly Halper, *supra* n.3.

7. *Ibid.* at 9.07 pp304-304.76.

8. [1982] 3 W.L.R. 407.

assists the operation of the economic system even when confronted with novel problems. Another good example of this ability is the acceptance of rent review clauses. The courts have allowed such clauses to be included on the renewal of leases not originally containing such clauses, on the basis of evidence that such clauses were invariably included in freely negotiated leases once inflation accelerated in the 1960's. A statutory power to include such clauses was granted in 1969.⁹

Justification for Legislation

It is the belief of the author that, as a general principle, 'few laws make free men', and accordingly that every new legislative incursion needs a strict justification.

Although many would argue that a free enterprise philosophy demands that government intervention in the market place should be kept to an absolute minimum, legislation to regulate the relationships of landlords and business tenants on the original grant of leases is justified on two grounds.

1. The existence of a truly free market has been destroyed by the existence of stringent zoning and town planning requirements, and further legislation is needed to correct the market distortions which have arisen as a consequence of such initial intervention in the market.
2. A distinction must be drawn between government intervention in the market through detailed regulatory legislation, and the mere setting of a legal framework, which there must be of necessity, within which the free market system can operate to advantage. Where such legislation assists rather than hinders the operation of the free market, it is supportive of rather than detrimental to free enterprise.

An example of such 'framework' legislation would be the *Property Law Act 1974* (Qld).

However, the fact that the world scene is littered with the results of failures to regulate landlord and tenant relationships — the U.K. Rent Acts, and legislation in the southern States of Australia imposing rent controls and security of tenure being prominent examples — means that great care is necessary in framing any legislation of this nature. Indeed, to the author's knowledge, the only comprehensive legislation in any major common law jurisdiction regulating the rights of a particular class of landlords and tenants which has a good record of success is the U.K. Landlord and Tenant Act 1954 which seems to have largely satisfied the legitimate aspirations of both landlords and tenants of business premises for the last 30 years.

Provisions of the Queensland Legislation

The sections of the Act will be considered in numerical order, except where it is necessary or useful to make cross references to other provisions. All references to sections are to sections of the *Retail Shop Leases Act 1984*.

Application of the Act

The application of the Act to particular premises and leases is largely achieved through the employment of the phrase 'retail shop lease' in many of the sections of the Act. This phrase is itself defined in the interpretation section, 2.4, as:

- a lease that provides for the tenancy of a retail shop other than a lease that —
- (a) provides for the tenancy of a retail shop with a floor area that exceeds 1000 square metres; and
 - (b) is held by a corporation within the meaning of the Companies (Queensland) Code which would not be eligible to be incorporated in Queensland as a proprietary company or that is held by a subsidiary of such a corporation.

9. Law of Property Act 1969, s.4, amending Landlord and Tenant Act 1954 by inserting a new subs.38(4).

This definition is designed to exclude large shops and those operated by large companies. The basis for this exclusion is that the tenants of such premises are able to look after themselves in their dealings with landlords and do not require special protection. It also refers to the term 'retail shop' which is itself defined as:

premises —

- (a) which are used wholly or predominantly for the carrying on of one or more of the businesses specified in the First Schedule to this Act; or
- (b) situated in a retail shopping centre, that are used wholly or predominantly for the provision of one or more of the services specified in the Second Schedule to this Act.

The First Schedule attempts an exhaustive list of the different types of retail shop, while the Second Schedule comprises a list of businesses supplying the types of services commonly found in retail shopping centres. Both these Schedules may be supplemented by Regulations made under s.61.

The result of this definition is that a retail shop within the First Schedule is always covered by the Act whereas the other businesses in the Second Schedule are only covered if they form part of a 'retail shopping centre'.

'Retail shopping centres' are also defined as:

a cluster of premises in respect of which

- (a) five or more are used wholly or predominantly for the carrying on of one or more of the businesses specified in the First Schedule to this Act; and
- (b) one and the same person is or would be (when the premises are leased) the head lessor:

the term does not include a multi-level building except in relation to each floor of the building on which is situated a cluster of premises in respect of which provisions (a) and (b) apply.

This definition will include small shopping centres and the so-called 'strip' shopping centres. The first part of the definition was inserted during the passage of the legislation through parliament in order to prevent a whole multi-storey building being brought within the scope of the Act merely by virtue of the required five shops being present at ground floor level.

It should also be borne in mind that 'lease' is defined as 'any lease or agreement, whether in writing or not, that provides for a tenancy of premises whether for a term or for a periodic tenancy or at will'.

This means that all the recognised leasehold estates are included but that the Act will have no operation in respect of licence arrangements. However, the ability of would-be landlords to avoid the effect of the Act by resorting to licence arrangements is restricted by the approach of the High Court to such arrangements in *Radaich v. Smith*.¹⁰

The principal provisions of the Act apply only to leases which are the product of arrangements entered into wholly after the commencement of the Act. Leases entered into before the commencement date, or entered into pursuant to contracts finalised or options conferred by lease prior to that date, are excluded from the effect of the major provisions of the Act by s.5(1). Apart from the general provisions contained in Parts I, VI, and VII, only the mediation provisions in Part IV apply to such arrangements, and in the case of Part VI also, references to the Tribunal do not apply.

The Act came into force on 12 March 1984, this being the date it received Royal Assent. Section 5(2) ensures that no amendment of the Schedules by regulation can have any effect on any lease existing at that time. Accordingly, the Act has no retrospective effect.

10. (1959) 101 C.L.R. 209.

Section 5(4) ensures that the provisions of the Act cannot be avoided by executing a lease outside Queensland or by providing that the law of any other jurisdiction is to apply in relation to a lease.

There are four main groups of substantive provisions in the Act. These are the provisions in Part II relating to rents based on turnover and certain premium payments, those in Part III imposing other restrictions upon and requirements in relation to the contents of leases, the provisions relating to mediation in Part IV and, finally, those relating to the Tribunal in Part V. These will be considered in turn.

Rents based on turnover and premiums

Section 6 prohibits the inclusion in retail shop leases of provisions reserving rent wholly or partly based on turnover of a business carried on at the premises unless the tenant has elected for the rent to be computed in that manner. A form is prescribed for a tenant's election in these terms.¹¹

The provision, like many others in the Act, is framed as a prohibition for the breach of which a monetary penalty is prescribed in the section, as in this case, or by virtue of s.56. However, any provision offending against this or any other section of the Act is also rendered void by s.16.

There are two main reasons for the enactment of this provision. Firstly, to meet the complaints of tenants that they were being forced, by virtue of the immensely superior bargaining power of landlords, into agreeing to clauses providing for rents which were such a high proportion of turnover that an unduly large share of the benefits of any increase in trading accrued to the landlord. Secondly, to prevent the bargaining position of the tenant being totally destroyed by a complete disclosure to the landlord of the most intimate details of the business.

In relation to the destruction of the tenant's bargaining position through disclosure of his full trading and profit figures, it is interesting to note the recent restrictive approach of the English Court of Appeal to disclosure of such figures in a case involving the assessment of open market rental in, *W.J.Barton Ltd. v. Long Acre Securities Ltd.*¹² The Court rejected the contention that 'evidence of trading was relevant and admissible to consider and show what the open market value is', in circumstances where there were plenty of comparable premises in the vicinity.

In a passage of particular relevance to the Queensland situation, the judgment stated that:

No doubt evidence of the tenant's trading would indicate whether the business had been successful and unsuccessful and so might be a pointer to the rent which this particular tenant might pay in order to spare himself the disruption of moving to other similar premises in the area, but that has nothing to do with the open market rent which the Court is directed by the Act to ascertain. That it is for this purpose that the discovery is sought is, we think, tolerably clear from the statement of the landlord's valuer submitted by Mr. Belben which contains a frank avowal that if these tenants, in the light of their turnover . . . [would] have been prepared to pay a particular rent there, the disclosure of that turnover and of the turnover of the business in the premises in suit will be an indication of the sort of rent which it might be prepared to agree to for these premises.

The English judiciary are clearly alert to the effects of such disclosure on the tenant's bargaining position. Indeed, the whole tenor of the judgment indicates how aware the Court was of the link between goodwill in the business and the ability of the landlord to extract more rent from the existing tenant than on an open market letting and the difficulty of

11. Form S1, Retail Shop Leases Regulations 1984, Second Schedule.

12. [1982] 1 W.L.R. 399.

excluding that possibility once trading figures were allowed some bearing on the rent fixing process.

The tenant is protected against disclosure by the combined effect of ss.6 and 7, for s.7 prohibits the inclusion in any retail shop lease of any provision requiring disclosure of trading figures, or enabling the landlord to collect them, save in cases where the tenant has elected for a rent based on turnover.

These provisions appear to be the minimum necessary to redress the severe inequality of bargaining power which has previously existed in these circumstances, while at the same time enabling those tenants who desire rent to be based on turnover to continue to enjoy the freedom to negotiate the same.

However, the provisions may be capable of avoidance by the landlord simply refusing to enter into a lease until and unless the tenant elects for a turnover rent. It may be the Government's intention to frame regulations to prevent such avoidance. This may be possible since s.6 provides that a turnover rent is only possible if: 'the tenant or prospective tenant has elected, by notice in writing in or to the effect of the prescribed form to the landlord, that method as the method by which the rent payable under the lease shall be determined'. The regulations might be drafted in such a way as to require the notice to be given after the lease had been entered into by the parties. Any suggestion that such a regulation would not be a valid exercise of the regulation-making power contained in s.61 would appear to be precluded by the reference to a 'tenant' giving notice, which seems to imply that notice could be required to be given after the lease comes into existence.

Section 8 is aimed essentially at capital payments or premiums demanded by landlords on assignment of shopping centre leases, and attempts to compel the tenant to pay all or part of the goodwill of a business to the landlord as a condition of assignment. It goes considerably further than this through the prohibition of any payment of 'key-money' or any other payment in connexion with the granting, renewal, extension or assignment of the lease. 'Key-money' is defined very widely to mean:

any money that is to be paid to or at the direction of a landlord or his agent, by way of a premium, non-repayable bond or otherwise, or any benefit that is to be conferred on or at the direction of a landlord or his agent in connexion with the granting, renewal or assignment of a lease.

Despite this very wide definition, it is to be expected that the Courts will not construe it as affecting the normal incidents of a lease, and in particular, the rent reserved thereby. It is intriguing to speculate whether the ban on premiums may be partially avoided by providing for payment of rent in advance.

The landlord is also precluded by s.8(1)(b) from receiving any payment in respect of goodwill attaching to any business carried on at the premises. However, there is an exemption in s.8(2)(c) to cover the case of a person who sells a business and, as part of the transaction, grants a lease of the business premises to the purchaser. There are also exemptions in s.8(2)(a) and (b) for landlords costs reasonably incurred in investigating any proposed assignee of a lease and in relation to lease documentation and any required consents in connection with a lease or assignment. Any amount paid in breach of this section will be recoverable as a civil debt by virtue of s.8(4).

This section could have some undesirable effects. For example, where the lessee is a company the giving of a director's personal guarantee could be held to be prohibited.

Implied Conditions

Part III of the Act attempts to deal with the main problems which have been claimed to exist in relation to retail shop leases.

Where the rent is based on turnover

Section 9 relates to rents based on turnover, and so will only be applicable in those cases where a tenant has elected for such a rent pursuant to s.6.

Section 9(1)(a) requires the lease to specify the formula by which the amount of rent is to be calculated. This adds little if anything to the general requirements of the common law, since a lease will be void for uncertainty if it does not contain provisions enabling the rent to be fixed with certainty.

Section 9(1)(b) has the effect of limiting the tenants obligations to supply figures to a monthly 'gross sales certificate' stating with reasonable accuracy the turnover, supplemented by an annual audited statement. The parties may decrease the frequency of the submission of the 'gross sales certificate' or vary the period in respect of which audited certificates need to be produced.

Section 9(2) excludes from turnover, for the purposes of the section, a list of items which are not part of the receipts of a business on which normal profits are earned — for example, discounts and refunds, and receipts on certain tickets sold for third parties where the business only earns commission. The reason for, and justice of, these exclusions is clear.¹³ However, the manner in which this object is sought to be achieved in the legislation is suspect, since these items are excluded from the meaning of turnover 'for the purposes of this section' only. On a strict legal interpretation, s.9(2) would, accordingly, not prevent a landlord from providing for a rent based on turnover including some or all of the excluded items, since the exclusion would not apply to the meaning of 'turnover' as defined in the lease. It seems to the author that the opening words of s.9(2) should instead provide that where rent is based on turnover, none of these items should be included in the computation of that turnover.

Rent Review

Section 10 deals with rent review, and similar comments apply in relation to s.10(1) as were made above in relation to s.9(1)(a). Section 10(2) provides that where a rent review clause in the lease provides for a review based on 'market rent' then:

that market rent shall be determinable by reference to the rent that would be paid for the retail shop if it was unoccupied and offered for rental for the use for which the premises are presently permitted or will be permitted under the lease, and having regard to the terms of the lease, on a free and open market.

The main significance of this provision is that it requires the rent to be based on the assumption that the premises are unoccupied. This excludes the effect, explained above, of the existing tenant being prepared to pay over the odds in order to avoid the loss of goodwill and disruption which a move would cause. Accordingly, this provision is one of the most important in the Act in that it tackles one of the key problems in this area.

The section further provides 'for submission to arbitration of the question of what rent could be so expected if there be no agreement between the landlord and tenant upon that question'.

Requests to Assign

Section 11 deals with the problems tenants have sometimes experienced in obtaining consent to assign a retail shop lease. Where the landlord fails to respond to a request for consent to assign within forty-two days, the matter may be referred to the mediator (see below). Also, where the lease provides for the tenant to pay the costs incurred by the landlord in investigating a proposed assignee, the costs which may be recovered are limited to those reasonably incurred. If the parties fail to reach agreement on the amount payable a provision for arbitration is implied.

13. See Halper, *supra* n.3 5.05(b)(xiii), for a discussion of a similar problem in the North American context.

Quaere whether the landlord could escape the effect of this provision by stipulating for payment of costs as a condition of granting consent. However, he would then be subject to s.121(1)(a) of the *Property Law Act*, (Qld) which also limits such costs to a reasonable amount, although it does not provide for arbitration.

Where tenant pays part of operating expenses

Section 12 deals with lease provisions providing for the tenant to pay all or part of the operating expenses of the building of which the premises form part. Paragraph (a) requires any such provisions to be spelt out in detail as to:

- (i) those items of expense which are to be included as operating expenses;
- (ii) how those operating expenses will be determined and apportioned to the tenant; and
- (iii) how those operating expenses may be recovered by the landlord from the tenant;

Paragraphs (b) and (c) respectively provide that annual estimates of each of those expenses shall be furnished by the landlord to the tenant at least one month before the commencement of the period to which the estimate relates and that annual statements of expenditure incurred on each of those expenses audited by a public accountant shall be furnished by the landlord to each tenant within three months after the termination of the annual period to which the expenditure is referable.

Minimum tenure for first leases

Section 13 is an important provision in that it effectively gives the tenant security of tenure for the first five years during which a retail shop is let. It is submitted that the reference to 'the first such lease' in s.13(1)(a) is to the first lease of the premises in question which complies with the definition of a 'retail shop lease' contained in s.4(1), irrespective of whether the lease is granted before or after the commencement of the Act. Section 13 will, of course, have no application to a lease made or contracted for or resulting from the exercise of an option contained in a lease made prior to the commencement of the Act, by virtue of s.5.

It has been suggested¹⁴ that this section is ambiguous in that s.13(1)(a) is open to the alternative constructions that it applies in the case of particular premises to the first lease between a particular landlord and a particular tenant or that it applies to the first lease after the commencement of the Act. It is submitted that there is no serious ambiguity in the provision in that a court can be reasonably expected to give the provision the primary meaning suggested above. The first alternative appears to be ruled out by the inclusion of the concluding phrase of s.13(1)(a), and in any case there seems to be no real justification for construing the word 'such' as anything other than a reference to the preceding phrase 'retail shop lease'. The second alternative appears to be untenable in the light of s.5(2) which makes it clear that the definition of 'retail shop lease' in s.4 is applicable to pre-Act leases even though such leases are not subjected to the substantive provisions of s.13.

It is not suggested that explanatory notes published by the Government contemporaneously with the passage of a Bill in the Queensland Parliament have any legal status in relation to the interpretation of legislation. However, it is perhaps worth noting as a matter of general interest that the explanatory notes published with the final version of the Bill clearly indicate the Government's intention for this provision only to apply on the first occasion that the premises are leased. It is argued that later tenants will have the benefit of past trading figures at the premises and so will be in a better position to calculate the lease term that they require to sufficiently amortise their investments.

The machinery by which the objective of security of tenure is attained is that a tenant is entitled to an extension of any initial term of less than five years for the balance of that five

14. See W.A. Pretty (1984) 14 Q.L.S.J.

years by serving notice in the prescribed form not less than 90 days before the expiry of the initial lease. The option must be exercised in the prescribed form.¹⁵

Suggestions have also been made that ss.13(1)(c) and (e) are also ambiguous.

It is claimed¹⁶ that these provisions do not make it sufficiently clear whether, in cases where the lease itself contains an option to renew, but is within the provision because the length of the original term plus any extension to which the tenant is entitled by reason of the option is less than five years, the right to extend under the section is exercisable until 90 days before the end of the extended term or is exercisable only up to 90 days before the expiry of the original term.

Section 13(1)(c) provides that notice may be served 'not less than 90 days prior to the date on which the existing tenancy expires'. It is submitted that the most natural construction of this phrase is that notice can be served until 90 days before the expiry of any extension of the original term since the extension may be regarded as part of the existing lease. Admittedly, the selection of the expression 'initial term' in s.13(1)(e) may be unfortunate in not being as appropriate as a phrase such as 'original lease', and the situation could be clarified by the addition of the words 'including any extension pursuant to an option contained in the lease' after 'initial term'.

The terms of the extension are the same as those of the original lease, except that, if there is no provision for review of rent, the new lease will be at a market rental determined in accordance with s.10.

The landlord cannot avoid this provision by rendering the lease determinable other than for default by the tenant (s.13(2)).

The tenant loses his right to extend while there exists any unremedied default on his part, and the extension cannot prolong the term of a sublease beyond the term of the headlease. This furnishes an easy means of avoidance in that the landlord might operate through a company which itself enjoys a lease of less than five years, relying on the exclusion of corporate tenants from the benefit of the section through the definition of 'retail shop lease' in s.4(1) which excludes leases in respect of which certain corporations are tenants. It would also appear to be possible to achieve this objective by employing the exclusion of leases of retail shops comprising floor areas greater than 1000 square metres from the definition by letting an area greater than 1000 square metres and subletting smaller portions.

It has been suggested that there may be some doubt as to whether the provision benefits assignees of the lease, and that the matter ought to have been rendered free of doubt by an express definition of 'tenant' to include assignees.¹⁷ While it is true that some of the best drafted legislation such as the *Property Law Act 1974* includes such a definition,¹⁸ much legislation proceeds, justifiably in the view of the author, on the basis that such inclusion is not necessary by way of definition since the natural meaning of a term such as 'tenant' includes 'assignees' anyway. It is true that the term 'landlord' is defined in s.4 as the person entitled to the rent, but this is an extremely tenuous basis on which to argue, by analogy with the '*expressio unius, exclusio alterius*' principle that the meaning of the term 'tenant' in the Act should exclude assignees.

One has to bear in mind the need to keep legislation as short and simple as possible, and the dangers of unduly restricting the meaning of what would otherwise be general words through the application of the '*eiusdem generis*' or '*expressio unius, exclusio alterius*' principles of interpretation. After all such monuments to legislative reform as the *Real Property Acts (Qld)* (though they are deficient in other ways) and the *Law of Property Act*

15. Form S2, Retail Shop Leases Regulations 1984, Second Schedule.

16. Pretty, *supra* n.14.

17. *Ibid.*

18. S. 4(1).

1925 of the United Kingdom operate successfully without such a definition. In any case, it is submitted that the Act clearly envisages that its provisions apply to assignees through the wording of such provisions as s.8 and s.11.

It is interesting to consider the interrelation of this provision with the principles of indefeasibility of title inherent in the Torrens system. There is no express provision conferring indefeasibility equivalent to s.53 of the Real Property Act 1861 so one must look to the case law for guidance.

Provided the lease is registered the option to renew would appear to be a right protected by the doctrine of indefeasibility according to the decision of the High Court in *Mercantile Credits Pty. Ltd. v. Shell Co. of Australia Ltd.*¹⁹ However, if the lease is not registered, the option to renew would appear not to be protected by the doctrine of indefeasibility, even though the lease itself would be so protected if it takes effect in possession for a term not exceeding three years (s.11 of the *Real Property Act 1877*). Accordingly, any such lease should be registered pursuant to s.18 of the *Real Property Act 1877*.

This reasoning assumes that the Retail Shop Leases Act is not held to have an overriding effect in relation to the option to renew. Such an effect could be arguable on the basis that the right to renew conferred by s.13 is a legal right and not the equitable interest which an option is normally held to be. However, such a finding would be unlikely in view of its lack of sympathy with the structure of the Torrens system.

Tenant's right to independent legal advice

Section 14 guarantees the tenant's right to independent legal advice.

Tenant's rights to compensation for adverse consequences of certain actions of landlord

Section 15 is a key provision. It furnishes the tenant with a right to reasonable compensation whenever the landlord causes him loss by specified acts. This right is implied into leases of retail shops in retail shopping centres only, and is enforceable only by recourse to the mediator appointed under the Act and thence to the Tribunal if the mediator cannot secure agreement.

It is made clear that the right to compensation exists whether or not the landlord is acting pursuant to authority contained in the lease. These rights of compensation arise where the landlord:

- (i) relocates the business of a tenant to alternative premises within the centre during the term or any renewal of the term of the lease of the tenant;
- (ii) inhibits the access of a tenant in the centre to his business in any substantial manner;
- (iii) takes any action that would substantially alter or inhibit the flow of customers to any retail shop or retail shops in the centre;
- (iv) causes or fails to make reasonable efforts to prevent or to remove any disruption to trading within the centre which disruption causes loss of profits to a tenant or tenants in the centre;
- (v) fails to have rectified as soon as practicable any breakdown of plant or equipment under his care and maintenance which breakdown causes loss of profits to a tenant or tenants in the centre; or
- (vi) neglects to adequately clean, maintain or repaint the building or buildings which constitute the centre including common areas, then the landlord may be made liable to pay reasonable compensation to the tenant or tenants affected thereby.

Of these rights, (i) is potentially the most far-reaching in that it may confer a right to compensation where the tenant is forced to move elsewhere in the shopping centre as a

19. (1976) 136 C.L.R. 326.

result of a refusal of the landlord to renew the lease. However, this provision may be a two-edged sword in that in order to avoid possible liability the landlord may deny the tenant alternative premises in the shopping centre. Complex problems then arise if, say, the tenant secures the lease of other premises in the centre by taking an assignment from an existing tenant.

The third provision is also of quite wide import in that it could give rise to liability where a landlord-inspired change in the mix of businesses in a shopping centre substantially inhibits the flow of customers to any part of the centre.

Prohibition on contracting-out

Section 16 has already been mentioned and it has the effect of implying all obligations and rights created by the Act into all retail shop leases and of rendering inoperative any attempts to exclude their operation.

Mediation provisions

Part IV (ss.17-27) provide for mediation. These provisions and those in Part V relating to the Tribunal did not come into force until 1 July 1984.

Mediators are to be appointed by the Governor in Council for a specified term and may be similarly removed if they prove unfit or incapable (ss.17-19).

As well as hearing any disputes under retail shop leases, except those relating to rent, mediators are to report to the Minister annually on the discharge of their functions (ss.20, 23).

Hearings before the mediator are informal and no official records are to be kept except particulars of the dispute as submitted by the notifying party, a notation of the nature of the dispute as determined by the mediator and the result of the mediation (ss.22, 24). The result of the mediation must be recorded in the prescribed form.²⁰ These records are to be kept at the Registry in Brisbane (s.21).

Section 24 provides that parties are entitled to the assistance of the Registrar in completing the prescribed form of reference of a dispute,²¹ and have carriage of their own case unless the mediator approves the appearance of a legally qualified or other agent. In the case of a corporation the mediator must approve the representative.²² The hearing is private and the parties are not compellable. However, reasonable notice of the hearing must be given to all parties (s.25).²³

Where mediation reaches a solution in the form of an agreement there is provision (s.26) for the agreement to be put in writing, signed by the parties, and recorded by the mediator in the prescribed form.²⁴ Breach of the agreement or failure to perform it within the time specified or two months, in the absence of any such specification, results in the matter being referred to the Tribunal (s.26(2) and s.27(1)(c)).²⁵

Disputes are also referred to the Tribunal if a solution by way of mediation is not possible, or not possible within 90 days of notification to the Registry, or a party fails to attend a mediation hearing, provided, in all cases, the dispute is within the jurisdiction of the Tribunal. Otherwise, the matter is merely reported to the Minister.

The Tribunal

Part V (ss.28-50) relates to the establishment and operation of one or more Retail Shop Lease Tribunals.

20. Retail Shop Leases Regulations 1984, First Schedule, Form 10.

21. *Ibid.* Form 1.

22. *Ibid.* Forms 2,3.

23. *Ibid.* Form 6.

24. *Ibid.* Form 10.

25. *Ibid.* Form 11.

Establishment of Tribunals, and appointment and removal of members (apart from the Chairman who is a District Court Judge), is in the hands of the Governor in Council. Appointments are for fixed terms of three years (ss.28, 29). The other two members of the Tribunal are persons chosen by the Minister to be representative of landlords and tenants respectively. There is a retirement age of 70 years.

As well as hearing any dispute referred to it by a mediator (s.36(1)), making any necessary investigations and determining the dispute, the Tribunal must report annually to the Minister. The Minister must then prepare a consolidated report on the work of all Tribunals and table it in Parliament (s.32).

Determinations are by a majority except that questions of law are reserved to the Chairman (s.33).

The Tribunal has no jurisdiction in respect of rent, and the mediators may not refer to the Tribunal matters which may be referred to arbitration (s.36).

Hearings may proceed in the absence of a party who does not respond to a reasonable notification thereof (s.37)²⁶ and witnesses are compellable with no privilege against self incrimination (s.39).

The status of the Tribunal is that of a Commission of Inquiry within the meaning of *The Commissions of Inquiry Acts*, 1950-54, and the members of the Tribunal have the powers etc. of Commissioners under those Acts with the exception of those powers reserved to the Chairman of a Commission who is a Judge of the Supreme Court and certain powers to issue warrants (s.38).

The Tribunal is empowered to make orders to pay money or to perform or refrain from any action, to dismiss any dispute, or to give effect to any settlement between the parties (s.40).²⁷

Specific enforcement is by registration of the order of the Tribunal in the Supreme Court, and enforcement via normal court procedures (s.41). Orders for payment of money may be enforced through the ordinary courts (s.42).

Rights of appearance are similar to those before the mediator, except that the Minister may authorise any person to appear as may the Tribunal, and the proceedings are again to be private with each party bearing its own costs (ss.45, 46). There are powers to renew²⁸ and amend proceedings, and failure to attend, produce documents or comply with Tribunal orders are offences punishable by a maximum penalty of \$5,000 (ss.43, 44, 47, 48). There are similar provisions regarding representation of parties to those applying in the case of mediations.²⁹

The Tribunal's proceedings may not be appealed and may only be questioned on the grounds of excess of jurisdiction or denial of natural justice (ss.49, 50).

General provisions

The remainder of the Act comprises general and miscellaneous provisions. Of interest is s.55 which excludes other jurisdictions once a reference to a mediator or Tribunal is made, unless and until the dispute is withdrawn, struck out as outside jurisdiction or in exceptional cases, such as existing leases, where the mediator fails to resolve the matter and the Tribunal has no jurisdiction.

Section 53 provides for withdrawal of disputes from the mediation panel or from the Tribunal either before or after either body has entered upon the hearing of the dispute.³⁰

26. *Ibid.* Form 12.

27. *Ibid.* see Forms 9, 11, 13-15.

28. *Ibid.* Form 13.

29. *Ibid.* Form 14.

30. *Ibid.* Form 15.

Section 61 confers power on the Governor in Council to make regulations. This power has been exercised to make the Retail Shop Leases Regulations 1984³¹ which provide for the Registries established for both the mediation panel and tribunal, fees in connection therewith, and prescribe forms as required by the various provisions of the Act. Apart from the regulations relating to the panel and tribunal, which came into force on 1 July 1984, the regulations are operative from the date of gazettal which was 31 March 1984.

Since the fee for filing a notice of reference of a dispute³² is \$100³³ frivolous complaints are likely to be discouraged.

General Comments

The Act strikes a reasonable balance between the interests of landlords and tenants given the existing situation in relation to retail shop leases, and this is strikingly demonstrated by the fact that both BOMA and the principal small business organisations have expressed general satisfaction with its final form. It is in the nature of a highly commercial and complex area of this nature that the ultimate solution is unlikely to be achieved in one hit, so that some amendment of the legislation in the light of its operation in the market place is to be expected.

It is interesting to consider other possible measures which were rejected.

Model Lease

This suggestion has been made many times. However, it has the problem that, quite apart from its undesirability in restricting freedom of contract, it is not possible to prescribe a standard form of lease, since there must be scope for variations to meet individual circumstances. This means that any legislation imposing a model form of lease would have to allow for variations, and this would mean that it would either become impossibly complicated, or would fail to meet its objective by allowing freedom to contract out.

The only remaining option in this regard, and one which may meet the requirements of the proponents, is to prescribe a standard form to be used for all business leases, but allow free variation subject only to a requirement that such variations would have to be clearly stated as such on the lease itself. This would indicate clearly to the tenant where the lease differed from the model form, and would appear to be the only workable manner in which a model lease could be employed, beyond simply operating by way of moral pressure.

Tenant Purchase

It is understood that the manner of dealing with the problems arising in shopping centres in the USA is to apply anti-trust legislation to break up the concentration of ownership. Accordingly, a large shopping centre would be divided into two or more parts so far as ownership is concerned, so that the forces of competition would operate between the separate parts and thus reduce or eliminate monopoly power. This would be a solution firmly in line with free enterprise philosophy. A variation would be to confer on tenants rights to purchase their shops etc. at fair market value, so that a shopping centre could become a strata title complex to be managed by a body corporate as are units under the *Building Units and Group Titles Act 1980 (Qld)*.

It is suggested that the existence of at least some shopping centres where part or all of the shops were sold in this way would alleviate problems by breaking down monopolies. A requirement to sell off part of a shopping centre could be made a condition of the zoning approval.

31. Made 29th March 1984. Queensland Government Gazette 31 March 1984 pp 1323-1337.

32. Form 1.

33. Regulation 7(i).

Problem of General Reluctance to Pursue Legal Remedies that are Available

A problem which frequently exists in this area is that a legal remedy exists but the tenant is unwilling to employ it. In some cases this may be merely because the tenant wishes, quite naturally, to have the law amended further so as to reduce the uncertainties of litigation. In others it is suggested that fear of the consequences on his future relationship with his landlord is the reason. The existence of possible remedies under the *Trade Practices Act* 1974 (Clth) against corporate landlords never seems to have attracted the tenants of shopping centres.

A number of provisions in the *Retail Shop Lease Act* assist in dealing with this problem. Firstly, to the extent that the landlord's ability to commit abuses is removed by the Act, tenants will feel more secure in pursuing legal remedies. Secondly, a low cost legal remedy is provided, which will alleviate the worries of the small businessman embarking on a dispute with a large corporate landlord. The restriction on legal representation is undoubtedly a response to tenants' fears that generally, the landlords' greater financial power would enable them to gain an undue advantage by spending heavily on legal representation, particularly in test cases. This could rebound on tenants in that large corporate landlords will appear by a representative who will inevitably be able to gain greater expertise through regular appearance than may a tenant for whom an appearance will, hopefully, be a rarity.

Criticisms

There seems to be no real need for penalty provisions, which appear out of place in civil law of this nature. Surely, rendering offending clauses in a lease void would be adequate to defeat those who would try to avoid the provisions of the Act.

If the fundamental problem proves to be the tenant's weak position on renewal, it could be argued that the Act largely deals with the symptoms rather than the cause of the problem, and that the conferral of some kind of right of renewal on the tenant would have solved the problem much more simply and effectively. It remains to be seen whether this legislation will prove to be as successful in its field of operation as the United Kingdom Landlord and Tenant Act 1954. The legislation satisfies the necessary precondition for success by not interfering with rent levels. The main question will be whether the outlawing of certain oppressive practices will alone be enough to prevent others appearing in their place in the absence of any direct attack on the problem of renewal.

Criticism may be levelled at the drafting of the legislation, despite the tremendous improvement over the first version presented to Parliament in December 1983. For example, ss. 24(3)-(5) and 45(2)-(4) are identical save for the replacement of 'mediator' by 'Tribunal'. It would also have been possible to shorten the Act by replacing these provisions with a single provision in Part VI. However, the Queensland Government must be commended for being the first in Australia to tackle this thorny problem, and for its painstaking attempt to find a solution compatible with freedom of the market place and reasonable equity fair to all parties. A measure of its success in this is that both BOMA and the organisations representing tenants, between whom there had appeared to be an unbridgeable gulf, expressed themselves to be reasonably satisfied with the legislation.

Comparison With Other Legislation

The apparently successful United Kingdom legislation has already been discussed. The only other draft legislation relating to business tenancies in existence in Australia at present seems to be the draft A.C.T Business Leases Review Ordinance 1983.

The draft provides for review of rents on application to a Board which must take into account a number of factors. It is possible that this could lead to rents being fixed at lower than market value, which could lead to shortages of accommodation in time. There are also provisions for varying leases issued pursuant to options to renew if the terms are, *inter alia*,

'unfair, harsh or unconscionable',³⁴ enabling the tenant to secure compensation for improvements,³⁵ or for failure to renew,³⁶ there being a right to apply for renewal.³⁷ There is also provision for review of a landlord's refusal of consent to assign.³⁸ Thus it is broadly similar to the U.K. legislation the major differences being the formula for assessment of rent, and the open-ended nature of the right to compensation for non-renewal.³⁹

34. Draft Business Leases Review Ordinance 1983, (A.C.T.) Art. 41.

35. *Ibid.* Art. 46-52.

36. *Ibid.* Art. 55.

37. *Ibid.* Art. 63-66.

38. *Ibid.* Art. 68-69.

39. This is effectively limited in the U.K. to a fixed sum broadly equivalent to a maximum of two years rent.