Queensland Law Society

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Your Ref:

Our Ref: Property and Development Law Committee: 21000345/113

30 April 2012

Department of Justice and Attorney-General
Retail Shop Leases Act Review
Strategic Policy
GPO Box 149
BRISBANE QLD 4001

By email: [redacted]

Dear Ms Flower

RETAIL SHOP LEASES ACT REVIEW – FURTHER SUBMISSIONS

Thank you for your email of 5 April 2012 inviting the Queensland Law Society to make further submissions on the *Retail Shop Leases Act Review.*

This letter was written with the assistance of the Property and Development Law Committee and the Franchising Law Committee of the Queensland Law Society.

Definition 'retail shopping centre' (s.8):

Greater context and specificity in relation to the QLS proposal. For example:

- ***does the Society's proposed definition intend that the RSLA should not cover leases for commercial purposes or services at all (irrespective of where in the centre the premises are situated - i.e., on ground floor, on an above ground floor or in an office tower and whether or not there are one or more retail businesses situated on the same floor level)?;***
- ***please clarify Mr Raven's reference at the meeting to the former definition of "retail shopping centre" in the RSLA;***
- ***does the Society have a view in relation to the application of comparative provisions in other Australian jurisdictions - for example, the new definition of "retail shopping centre" in the Commercial Tenancy (Retail Shops) Agreements Amendments Act 2011 (s.5)?***

The former definition of retail shopping centre Mr Raven was referring to is as follows (in particular in reference to paragraph (2)):

8 Meaning of "retail shopping centre"

(1) *A* ***"retail shopping centre"*** *is a cluster of premises—*

(a) 5 or more of which are used wholly or predominantly for carrying on retail businesses; and

(b) for which 1 person is, or would be if the premises were leased, the head lessor.

(2) *However, a building with more than 1 storey is not a* ***"retail shopping centre"*** *except to the extent that a storey of the building contains, or adjoining storeys of the building each contain, a group of premises complying with subsection (1)(a) and (b).*

Examples of subsection (2)—

1. In a multistorey building owned by 1 person, the ground floor contains 5 retail businesses. All other floors of the building are used solely for commercial purposes, eg. premises used by legal or accounting firms or financial advisory services. Only the ground floor of the building is a retail shopping centre.

2. In a multistorey building owned by 1 person, the ground and first floors each contain 5 retail businesses. All other floors of the building are used solely for commercial purposes. The ground and first floors of the building collectively are a retail shopping centre.

3. Each floor of a 5 storey building owned by 1 person contains 5 or more retail businesses. The building is a retail shopping centre.

(3) *To remove any doubt, if a retail business is conducted in premises situated in a building separated from a retail shopping centre only by the centre's common areas, the* ***"retail shopping centre"*** *includes the premises.*

Example of subsection (3)—

A fast food shop is conducted from a building in a retail shopping centre's car park. The shop is part of the retail shopping centre.

The above is substantially the same definition as s 5, *Commercial Tenancy (Retail Shops) Agreements Amendments Act 2011* referred to below.

To clarify, the Society was not advocating a return to that definition or excluding non-retail uses within a shopping centre. Although this does have some attraction for its simplicity, it is out of step with other jurisdictions. The point was that non-retail tenancies within identifiable "commercial" parts of land containing a retail shopping centre should be excluded from the operation of the Act.

Disclosure on renewal of existing lease to sitting tenant:

At the meeting the Society indicated that, while its Committee members had differing views in relation to the issue of disclosure on renewal, there are some elements of disclosure (i.e.. proposed refurbishment of centre) that would be material to a sitting tenant's decision to enter into a new lease for the premises and of which the tenant may not otherwise be aware by virtue of its sitting status. This is to be distinguished from the situation were an existing tenant exercises an option to renew (in which case s.21(1)(b) of the RSLA applies and there is no requirement for landlord disclosure).

Please confirm that this accords with the Society's view, or otherwise clarify.

That is correct. Our submission was that disclosure seemed unnecessary for a sitting tenant being granted a new lease (not pursuant to exercise of an option which is excluded), as it is impossible to give a Disclosure Statement to a lessee seven days before the lessee enters into possession when the lessee is already in possession.

In the course of discussions we conceded a few of the matters in the statement were potentially relevant, eg. proposed redevelopment. However, if the landlord is issuing disclosure statements to new tenants

advising of a proposed redevelopment, it may be that sitting tenants will know about it). The Committee had differing views on this issue, some preferring a limited form of disclosure within a timeframe which is appropriate as the lessee is already in possession of the premises but the majority concluded that the cost of having to prepare a disclosure statement outweighs the benefit so there is no need for disclosure in the instance of a renewal of an existing lease to a sitting tenant.

Termination on basis of inadequate turnover:

It is our understanding that the Society agrees that there should be a prohibition in Qld in line with other jurisdictions – ie. that a provision be inserted into the RSLA expressly prohibiting a provision in a lease that enables termination by the landlord on ground that tenant failed to achieve specified sales/turnover.

Please confirm that this accords with the Society's view, or otherwise clarify.

The majority of the Committee agrees with this view, however there are some dissenting views that there may be circumstances where it would be appropriate for a Landlord and Tenant to reach a commercial agreement that the Landlord should have this right.

Implied provisions for compensation (physicality element):

Please provide examples of non-physical interference for which the Society considers that compensation is appropriate, including in the context of the District Court of Western Australia's unreported decision in Fernandes v Yat.

The Society is not presently in a position to provide these examples and does not intend to pursue this issue.

Implied provisions for damaged provisions:

It is our understanding from the submission and the brief discussion at the meeting that the Society supports in principle the inclusion of implied provisions for damaged premises in the event of damage not caused by the tenant along the lines of sections 36 of the Retail Leases Act 2003 (Vic) and s.57 of the Retail Leases Act 1994 (NSW), except that it is concerned that for where a landlord seeks to terminate the lease on the basis that repair or reinstatement is ' impractical or undesirable', the onus should be on the landlord to provide the tenant at the time of termination with 'details sufficient to demonstrate that the landlord, acting reasonably, had resolved not to restore the premises within a reasonably practicable time following the date of damage or destruction'.

Please confirm that this accords with the Society's view, or otherwise clarify.

The Society agrees with this position.

Relocation and demolition provisions:

Please give examples of where a franchisee's associate is the owner of fixtures/fittings because of franchisor requirements.

One example is where an international franchisor requires the franchise agreement be entered into with the personal name of the franchisee. (This appears to be a worldwide trend). Generally the franchisee's accountant suggests that the fixtures, fittings and other items etc be owned by a company and that same company be appointed as manager of the business on behalf of the franchisee. That is allowed by the franchisor.

Retention of s.43(1)(f):

Please give examples of circumstances in which compensation may be payable other than under ss. 46C or 46H.

It is unclear from the drafting whether s46C and 46H exclude other types of relocation and demolition clauses. As presently worded s46C only applies where the landlord cannot practically carry out the refurbishment by getting vacant possession of the shop. We have suggested the drafting needs to be clarified.

Exclusion of leases by a listed corporations/subsidiary:

Please advise the Society's view regarding the proposal to exclude such leases from the operation of the RSLA.

The Society does not have any objection to the proposal.

Please do not hesitate to contact either myself or have a member of your staff contact our Principal Policy Solicitor, Matt Dunn on [redacted] or our Policy Solicitor, Louise Pennisi on [redacted] if you wish to discuss these concepts further.

Yours faithfully

[redacted]

Dr John de Groot
President