Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001
Tel +61 7 3842 5904 Fax +61 7 3221 9329
president@qls.com.au
ABN 33 423 389 441

Office of the President

Your Ref:

Quote in reply: Property Law and Development & Franchising lLaw Committees: 21000345/113 13 February 2012

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

By email: [redacted]

Dear Attorney

RETAIL SHOP LEASES ACT REVIEW

Thank you for the opportunity to provide comments to the review of the *Retail Shop Leases Act 1994* (the Act) and for agreeing to a short extension for the Queensland Law Society to provide its submission.

The issues associated with the review have been considered by the Property and Development Law Committee and Franchising Law Committee of the Queensland Law Society and those committees have contributed to this response.

Interpretation / Coverage of the Act

Retail Shopping Centre - Currently, the Act covers offices for commercial purposes or services. The retail leasing market has however reached a state where multi- purpose complexes are becoming commonplace and dedicated precincts – usually the above ground floors or the whole of an office tower, are being set aside for those uses. It is submitted that the definition of 'Retail Shopping Centre' should exclude any buildings or floors of buildings dedicated or nominated by the landlord as at commencement of a retail shop lease as exclusively for premises not carrying on retail businesses, and operated as such by the landlord.

Sections 14 and 15 of the Act regulate the application of the legislation to leases that 'become' or 'cease to be' retail shop leases in various circumstances. The clarity of those sections may be contrasted with sections 13 and 129 of the Act, which produces a minefield for landlords, tenants and their advisors in getting an understanding, in a timely way, of the status of a retail shop lease and which version or provision of the Act applies to it. The table of endnotes to the Act lists not less than 18 amending acts since 1994 alone. Anecdotally even specialist leasing practitioners must keep libraries of different versions of the Act to enable them in any given case to ensure they are giving advice on the correct version of the provisions. It is submitted by the Society that this perpetuates a climate of uncertainty which enlarges legal costs and slows reasoned decision making over legal issues, especially on older leases, and one of several things should occur:

(a) A chronological table be inserted in the endnotes showing as at given benchmark dates, provisions 'opted in and opted out' for leases before or after those dates; or
(b) The department publish a brochure containing that information; or
(c) Individual sections of the Act affected by intervening amendments should be noted appropriately, e.g. 'section ….. does not apply to leases entered into prior to ……., or to any renewal of those leases by exercise of an option to renew'.

Preliminary disclosures about leases

Disclosure Period

Currently the Act provides that there are a number of disclosure obligations which a landlord has to meet at least 7 days prior to the formation or assignment of a lease. This fixed period often causes practical issues as it cannot be waived, especially for an existing tenant and their incoming assignee who must wait for the landlord to comply with their obligations.

The Society suggests that consideration is given to a mechanism to shorten or waive the 7 day period to permit real shop leases to be more flexible in their commencement. It is understood that one effect of the provision is to create discord between the actual taking of possession and the day a lease commences. This is an undesirable result.

The principal benefit of the current 'mandatory' seven day period under the Act, viz. an opportunity for the tenant to take financial and legal advice prior to being bound under a lease with potentially onerous responsibilities, could be addressed by making it a pre- requisite to waiver that the tenant must tender both a legal advice certificate and financial advice certificate to the landlord. The content and purport of both these certificates currently in use under the legislation, is well known to the property industry in Queensland, and 100% of their content is prescribed. Once a tenant has received both types of advice it cannot reasonably be said they have not been given clear guidance as to potential pitfalls of a lease. This system is not without precedent in this state. It has been embraced in the residential conveyancing area in Queensland for some years. In fact, no express written or other waiver by a buyer is necessary, the furnishing of a buyer's lawyer's certificate waiving or shortening a 5 day post-contract cooling off period, has that effect (sections 369A and 369B *Property Agents and Motor Dealers Act 2000*; www.fairtrading.qld.gov.au/property-forms).

As to any conflict between the date of possession and the date a lease agreement becomes legally binding on a tenant, it is submitted that:

(a) Such a conflict can be resolved if waiver is permissible under the Act only prior to possession for any purpose being given; and
(b) 'Possession' should exclude any period of mere access to the premises without the undertaking of fit-out works or storage of goods or materials by or on behalf of the tenant. This would place the onus of controlling the terms of access upon the landlord.

The Society is of the view that at the very least an assignee to a lease should have the right to waive the landlord disclosure as there is already an obligation on the tenant to give the proposed assignee certain information.

The Society sees that the 7 day period in relation to the assignor disclosure statement in section 22B (which contains details of lease payments and seller's sales figures),which runs 7 days before the lessor's consent to assignment is sought, does not reflect the commercial reality of these types of transactions. It is customary for prospective assignees to enter into contracts to purchase the business

run upon the premises, or otherwise agree to enter into an assignment of the lease without purchase of goodwill, well prior to the 7 day period commencing. The statement, intended to inform the assignee prior to binding itself is really only of benefit if it is given whilst the prospective tenant has an option not to go ahead with the transaction if it is not satisfied with the disclosure content. The Society also takes note of the fact that, like many real estate transactions, business contracts are often negotiated in some haste and only involve solicitors after their execution, but usually contain provisions amounting to conditions subsequent for the buyer/assignee's protection. The Society submits that an amendment to section 22B that requires assignor disclosure at least 7 days prior to the assignee being *unconditionally bound to accept an assignment of a retail shop lease* would better achieve the statutory objective.

Furthermore the Society is of the view that there is no need for disclosure in the instance of a renewal of an existing lease to a sitting tenant.

Disclosure Form

The new form for disclosure under the Act which is common to the jurisdictions of New South Wales, Victoria and Queensland gives rise to a number of practical issues:

- Our members report that it is practically impossible to comply with the provisions relating to the disclosure of outgoings in the current form as it does not often fit the factual circumstances;
- In the circumstance of an agreement for lease where there is no set commencement date many aspects of the form can not be meaningfully completed;
- The meaning of 'core trading hours *relevant to the lessee*' is unclear; and
- Disclosure of numbers of car parks can be impossible in some smaller shopping centres where parking bays are not marked.

Furthermore the Society is of the view that the length and complexity of the form does little to inform tenants of the salient information they need to know when entering a retail shop lease. For example, items 13.4 and 14.5 appear to require the same information. We suggest that the form should be revised to be simpler and more appropriate to leasing practice in this jurisdiction.

Minimum Lease Standards

Tenant's Obligations to make Particular Payments

Sections 24 and 24A prescribe the payments that may be imposed on a retail tenant.

The Society is concerned that whilst the Act and Disclosure Statements stipulate the particularising of charges that may be imposed upon Tenants, Landlords frequently reserve to themselves the right to impose car parking charges which can impact on the attractiveness of the Centre or Building as a destination.

It is submitted that the Lessor Disclosure Statement should contain an item:

'Car Parking Charges	The Lease clause ___ reserves the right for the Landlord to charge visitors to the Centre /Building for car parking'.

Termination for failure to reach Turnover Rent Targets

The Society submits that if provisions are inserted in a lease allowing termination of the lease due to inadequate turnover, then:

(a) In line with market conditions and usual inequality of bargaining power, the ability to terminate should lie with the tenant only, and
(b) For the landlord's protection, the lease must record the amount of turnover, and the time periods, against which it is benchmarked, prior to the tenant being able to exercise the right of termination.

Release of Outgoing tenant and Guarantors at time of assignment tenant

Currently at the time of an assignment of a lease, an outgoing tenant can be released from future liability provided that certain obligations are met. While this benefits tenants that are individuals it does not assist guarantors of outgoing tenants – most typically in practice the beneficial owners, shareholders or directors of tenants that are proprietary limited companies - where landlords have required the giving of personal guarantees in support of the tenant's covenants under the lease. Given the prevalence of ownership structures through companies used by businesses large and small for asset protection and fiscal reasons, the Act should reflect that practice.

If an outgoing tenant is being released when an assignment of lease takes place then we submit that it makes sense for the outgoing tenant's guarantors to be released as well.

Implied Provisions for Compensation – the Physicality element

The Society considers that given the exclusivity of jurisdiction for QCAT to determine compensation, the grounds on which compensation may be claimed should be widened. Currently the law tends to read provisions being triggered by things done by the landlord as being in the case where some tangible physical interference is involved: ***Fernandes v Yat (1998) 13 SR (WA) 148*** but anecdotal evidence from Society members indicates that non-physical interference by the landlord in the dynamics of tenancy mix for example, may have just as great an impact and have the effects in sections 43 (1)(b) and (1)(c) in particular. The criteria should be actions 'physical or otherwise'.

Exclusion of Claims for prior warned occurrences

The Society considers that there is some benefit in clauses that prevent or limit claims for a specific occurrence if that occurrence was specifically drawn to the tenant's attention in writing prior to the lease being entered into, however:

(a) The onus of showing that the occurrence has been drawn to the attention of the tenant should expressly lie on the landlord;
(b) The tenant must be given full particulars of the likely occurrence including reasonable details as to the extent of works required, time of the occurrence, scheduled duration of it, steps to be taken by the landlord to mitigate any losses or disruption that the tenant might suffer and reasonable particulars of the nature and severity of disruption to the tenant as a result of the occurrence and the changes if any that it makes on the building or retail shopping centre and the anticipated impact on the tenant of those changes;
(c) The terms of the lease must provide for reasonable abatement or rent or other moneys due under the lease for the duration of the occurrence and any reasonable period following it when its effects might continue to impact upon the tenant; or the rent otherwise be structured so as to substantially ameliorate that impact (e.g. a discounted rent provided for over the term); and
(d) The tenant is entitled to abatement from payment of moneys otherwise due and payable under the retail shop lease if:

a. The occurrence is of substantially greater impact or duration than might reasonably be inferred from the particulars provided by the landlord; or
b. The amounts provided for under paragraph (c) are not reasonable, in the circumstances of the occurrence.

Exemption for Response to Emergencies

The Society concurs that steps taken by the landlord to deal with a reasonable response to an emergency should be exempt from section 43. Tenant's business interruption insurance should deal with any losses flowing to tenants from such actions.

Shopping Centre Practices

The Society does not consider that shopping centre practices should form part of the deliberations of QCAT in determining compensation as historically such practices are geared to favouring landlord interests or the profitability of the Centre as an investment and often antagonistic to the interests of individual tenants. Likewise, the question of 'reasonableness' should probably be left out of this deliberation and the material questions being more properly:

(a) Whether the interference etc. was 'material'; and
(b) Whether the interference was due to causes beyond the reasonable control of the landlord.

Implied Provisions for Damaged Premises

There is an attractiveness in uniformity and harmonisation, but the Society has some concern about the model provisions in NSW and Victoria, as a landlord may simply refuse to reinstate as 'undesirable' for a wide variety of reasons. Commercially, landlords may see this is as an opportunity to renegotiate the lease.

A more palatable alternative would be that the landlord 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.'

Relocation of a tenant's business and Demolition of a building

The relocation and demolition provisions under the *Retail Shop Leases Act* do not adequately provide for franchisees and other licensees who have a licence to occupy the premises.

The definition of lease under the *Retail Shop Leases Act* is very wide and covers any agreement under which a person gives or agrees to give to someone else for valuable consideration a right to occupy premises whether or not the right is:

> "(a) an exclusive right to occupy the premises; or
> (b) for a term or by way of a periodic tenancy or tenancy at will."

Therefore under these provisions the relationship is extended from that of a simple landlord/lessor and tenant/lessee to:

- Landlord / Lessor
    - Lessee / Franchisor

- Occupier / Franchisee / Licensee where the right to occupy is often granted by way of a licence agreement for valuable consideration but is not an exclusive right

An example of this type of situation would be where a franchisor leases premises and then grants a licence to occupy to the franchisee who actually occupies the premises.

In some circumstances the lessee subleases the premises to a sublessee who then licences the premises (for example):

- Landlord / (Head) Lessor
    - Lessee / Sub Lessor
        - Sub lessee / Franchisor
            - Occupier / Franchisee / Licensee

An example of this type of situation would be where premises are leased for say a bookshop. The Franchisor takes a licence of occupy over part of the premises to install a coffee kiosk in the book shop. The franchisor then grants a sub licence to occupy to the franchisee who actually occupies the premises.

However under subdivision 1 of Division 9 (Relocating lessee's business) and subdivision 2 of Division 9 (Demolishing building where lessee's business is situated), it is only the lessee who is required to be given notice for relocating, refurbishment or demolition, notwithstanding it is the franchisee or licensee who is occupying the premises.

Under section 46G, the lessor is required to pay the lessee's reasonable costs of relocation. However in the above examples, whilst it is the franchisor (or an entity associated with the franchisor) who is the lessee, the franchisor has not installed the fixtures, fittings and equipment into the premises and does not own those items. The franchisor in those circumstances as franchisor/lessee will incur very little cost for relocation. Instead, it is the franchisee/licensee as the occupier and owner of the business who will incur these costs.

It should be mentioned here that there are also circumstances where the franchisee's associate is the owner of the fixtures and fittings because of requirements of some franchisors.

Whilst the franchisee/licensee may make a claim for compensation under s43(1)(f),[1] this is compensation only in relation to the vacation of the premises because of the extension, refurbishment or demolition of the retail shopping centre or leased building containing the shop. It is not compensation for the relocation of the business. These are two completely different scenarios.

The issue that arises is that under section 46C, it is the lessor that is to propose to refurbish, redevelop or extend the building.

In the case of a franchisee, the franchisee often occupies the premises under a Licence to Occupy from the franchisor. So when looking at a franchisee, the franchisor (or an associate of the franchisor) is their lessor. The franchisor/lessee is not the person who proposes to refurbish, redevelop or extend the building. It is the head lessor who proposes to do that.

[1] "The lessor is liable to pay to the lessee reasonable compensation for loss or damage suffered by the lessee because the lessor, or a person acting under the lessor's authority— (f) causes the lessee to vacate the leased shop before the end of the lease or renewal of it because of the extension, refurbishment or demolition of the retail shopping centre or leased building containing the shop."

Therefore the relocation notice to be issued under section 46D is issued to the franchisor as lessee of the premises. Under section 46G, it is the lessee's (or franchisor's) reasonable costs of relocation etc that are to be paid. However, the franchisor does not own the fixtures and fittings and equipment. They will have very little cost of relocation. The Franchisor will require that the franchisee bear the costs of relocating the fixture, fittings and equipment and therefore it is the franchisee that will have those costs.

However, the definition of lessee does not extend to include a sublessee or franchisee for the purposes of Division 9. It is limited to part 6, division 7.

It is the Society's view that a franchisee/sublessee should have the rights granted to a lessee under Division 9. It is possible under the current legislation for the franchisor to come to an agreement with the lessor without in any way involving a franchisee in the discussions.

Therefore, the Society recommends that the Act be amended so that:

- In addition to serving notices on the lessee, the lessor is required to give the refurbishment/relocation/demolition notices to either:
    - The franchisee/licensee (if the lessor has the service details of the franchisee/licensee); or alternatively;
    - To the business premises; and
- The franchisee/licensee is entitled to their reasonable costs of relocation; and
- Both the franchisor/lessee and the franchisee/licensee must agree to the amount of the compensation and the division of that compensation between them.

The same issue regarding notice being given to a franchisee/licensee arises under Subdivision 2 of Division 9 in regard to demolition of the building.

The Retention of Section 43(1)(f)

The Society considers that section 43(1)(f) should be retained, as it may apply in circumstances other than those triggering sections 46C or 46H.

Section 43(1)(f) should however be expressed to be subject to those sections.

Relocation

Presently there is some debate about whether section 46C limits a landlord's ability to require a tenant to relocate to the "genuine redevelopment proposal" scenario or whether it simply sets out a procedure to be followed where a lease contains such a clause. Arguably, if the lease does not contain the precise words in section 46C the clause does not apply which enables a lessor to include a provision allowing it to relocate tenants at will. Our section 46C is similar to section 34A of the NSW legislation but the NSW provision clearly applies to any lease with a relocation clause. We submit that section 46C would be clearer if it simply said:

> "A retail shop lease is taken to include sections 46D to 46G if the lease contains provision that enables the business of the lessee to be relocated during the term of the lease."

Section 46D would then need to say you can only give a relocation notice if (a) and (b) in the current section 46C were satisfied.

Retail shop lease trading hours

Core Trading Hours

The definition of core trading hours in section 51 is also a matter of some contention at present and may profit from legislative clarification.

In most cases (if there has not been a resolution of eligible lessees in a centre) it means "the hours the lessees of the centre are required to keep retail shops open for trading". This seems to assume all tenants will be required to trade at the same time which is rarely the case. For example, restaurants do not usually have to trade in the morning and real estate agents, banks, and other services do not usually have to trade after 5. The common view seems to be core trading hours are the hours most of the tenants are required to trade. The literal view is it means only the hours of required trading common to all tenants. This concept is important in determining how operating expenses are apportioned and could perhaps be clarified in the legislation with respect to the majority of tenants.

Legal representation

The Society is concerned that the trend in QCAT proceedings is to show an overwhelming disinclination to permit legal representation and that the pendulum may have swung too far in this regard.

The personal circumstances of a party, the complexity of the legal issues before QCAT and the whole of the circumstances should be taken into account.

It is submitted that QCAT must, when considering a request for legal representation, consider the whole of the circumstances surrounding the parties and the application, including:

(a) The physical and mental capacity of a party;
(b) Financial hardship; and
(c) The extent to which the issues before the Tribunal are legal rather than factual.

Thank you again for the opportunity to provide these comments.

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 [redacted] or our Policy Solicitor, Louise Pennisi on [redacted] or [redacted] if you wish to discuss these concepts further.

Yours faithfully

[redacted]

Dr John de Groot
President