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The Retail Industry Inquiry
Productivity Commission
GPO Box 1428
Canberra
ACT 2601

The economic structure and performance of the Australian Retail Industry
Legislation, regulation, failure to bring down decisions in equity

Further to my submission dated 12th May, I thought of another major area preventing equity and fairness, from being the cornerstone between landlords and tenants rights in the commercial property arena. Notwithstanding the fact that there is a lack of unbiased, strong legal rules i.e. laws in place as suggested in my 12th May submission (see Attachment A from QRTSA submission in 2008 that was prepared by me), but:

1. Courts and Tribunals, and I say this without reserve, favour landlords (see below);
2. That the major landlords, who control the malls, fight and appeal cases that may cause legal precedent; and (I know)
3. Actively put money into even obscure cases at a local level to prevent same eg. an outgoings matter that went to appeal in Western Australia.

At a local level, the legal fraternity call the Queensland Retail Shop Leases Tribunal a "landlord's tribunal".

In effect (other than one or two smart unbiased individuals), the Tribunal's behaviour and modus operandi is as follows (and I have either had first-hand experience or watched its operation having a reasonably inquiring and intuitive mind):

1. The make-up of most tribunal members is that they lack knowledge, skills, ability to understand disputes, and more importantly to follow even in Plain English quantification of loss;
2. The management and interlocutory process is not balanced; it favours the landlord (I believe this must be with an even hand);

3. No matter what quantification of loss (limit was $250,000, now some $700,000), the Queensland Tribunal has rarely if ever awarded reasonable compensation other than to cover an applicants legal costs i.e. $70,000; I ran a matter in the early 2000s and the client was awarded $80,000;
4. Chairmen and members personalise disputes (they are not independent, impartial, objective); it is partisan, establishment, do not "rock the boat";
5. The level of consistency depends on the prevailing wind (and how hard it is blowing);
6. To allow new material into evidence during a hearing;
7. Failing to manage their courts better than a Kangaroo Court, eg. to not afford experts an opportunity to be examined objectively on objective, articulated, accurate calculations and assumptions of loss;
8. To not give a party adequate hearing time to present and have their case heard;
9. The modus operandi is to seek to bash through settlements to:
    a. Avoid having to bring down decisions (or have to take responsibility for same);
    b. Avoid creating legal precedent;
    c. To castigate without knowledge, qualifications, expertise, experts who advise the court, who stand up against bias, partisanship, "establishment" behaviour and who are prepared to "keep the bastards honest" – quote Don Chipp;
    d. That legal members, who chair Conciliation Conferences and Expert's Conclaves, step inside the arena, to push forward (or into the arena) immaterial assumptions and or figures on loss <u>not based</u> on any figure associated with commercial loss, other than to "settle"; even if it means a subsidy from the landlord to the tenant and or more often than not, in Queensland, the other way round;
    e. To supplant in another experts mind, the same ridiculous argument that manifested itself through and into the hearing;
10. To then seek to bash someone for standing up against this behaviour. It is like a child being caught with its hands in the cookie jar. No better.

To illustrate just how far removed the Queensland Tribunal system is from reality, disputes where I am instructed to prepare an expert's report are/have (I currently am under instruction or have just prepared several reports to include matters such as allegations of failure to maintain, loss of derogation of grant, failure to manage and provide customer traffic, misrepresentation, unconscionable conduct, estimated losses say $220,000 to $2.5 to $3.0 million for a landlord to acquire a lease back from a tenant and or to compensate for reasonable loss):

1. Settled on the basis of one report – ref to my Webpage prepared for landlords and tenants;
2. Settled on a figure estimated at just less than double what was then the $250,000 jurisdictional limit;

3. Provide the court with an opinion, that is independent, impartial, objective, yet it has favoured someone whose report was an advocates report. That person was dragged kicking and screaming by me back up to the figures that had been my original calculations, whereas that person had used the data and sought to obfuscate my very calculations to the Tribunal. And the Tribunal members failed to pick it up.

Notwithstanding this behaviour, no miss-trial gets recorded or a retrial ordered, despite me having made representations to the Tribunal President.

In short, this behaviour has started creeping into the best system, the NSW Tribunal system (the ACT system is very good, followed by Victoria). But Queensland is hopeless.

Failure by legislators to legislate, regulators to regulate and legislators to send the right message to industry participants is detrimental to all including: landlords, tenants, investors, prospective investors, the consumer, the nation.

Over to you.

Yours sincerely

DE Gilbert

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Attachment A

Productivity Commission considerations – table from our original submission

Critical parts of law to address	**Reason**
Security of tenure	A business needs tenure to set-up, build up and close-down. Within a 5-year lease term, it is impossible, the business being most vulnerable at lease renewal with fixtures and fittings not yet written off. The broad principles should be: ▪ That for any new lease in a shopping centre, tenure should be granted to amortise set-up costs twice under the taxation legislation viz. 8 + 8 years;

	[maybe less, say 6 + 6 or 7 + 7 years] year terms may be split into terms within that, at the tenant's request, (say 3 + 5 = 8), and have at least one market review opportunity within each 8 year term and the commencement of the next 8 years; ▪ At the request of either party up to one year before the end of the final term, more 8 year terms can be requested; ▪ For strip shops, the above principles apply but it is not a controlled environment and only a single 8 year term must be offered (or period totalling 8 years), but with options if agreed; ▪ A requirement to do a refit will trigger a new 8 year term (to write it off); ▪ Fitout requirements generally should be in sufficient detail for full costings to be done to negotiate the lease terms with IAS 38 or AASB 138 zero based costing principles, to avoid opportunistic leverage at renewal because of fitout cannot be written off and avoid unconscionable conduct arising; ▪ At end of 8 + 8 years, to avoid a previous tenant's site goodwill being taken without being paid for and to prevent "gazumping", a landlord may not offer a subsequent tenant a lease under the same permitted use unless the parties have had the opportunity to sell the goodwill on the forward assumption of another 8 + 8 year lease, offered at market value; ▪ Less tenure can be requested by the tenant; ▪ Shorter tenure may be offered by a landlord if there is a genuine extension or redevelopment. It will force landlords to plan ahead; ▪ The Franchisee and the Tenant are the same person; they are the leasholder (they do not own/operate a business under licence and are removed from any dealings with the Landlord).
Disruption to trade, maintenance of centre, misrepresentation	Generally, the provisions and principles are already established and must simply be enforced. I understand that in Canada, if centres renovate, extend or upgrade, business owners are sent away on holiday and come back to their shops either having been relocated or able to trade. It is cheaper for all concerned.
End of lease & rent review principles	The ACT end of lease dispute resolution mechanisms must be mandatory and the market review principles embodied in the Queensland, NSW and Victorian Acts should apply, with the permitted use and reasonable rent principles embodied. The latter two principles are critical in the retail arena.
Fitout & pre-fitout works	To reduce or avoid significant cost burdens and third line forcing, requiring tenants to do fitouts with only one supplier (a related company belonging to the Landlord) should be outlawed.
Sales data; business closures and why	A commissioner should be appointed in every state: ▪ To collate sales data (excluding GST) for all centres from a Supermarket based centre upwards, perhaps on a quarterly basis in line with BASS (maybe off that data base);

	▪ To ensure sales turnover is presented and available on the Web for each centre on a "User Pays" basis; ▪ To ensure all Lessor Disclosure Documents (which have essential lease rent data vs whole leases) are "Registered", including incentives if any granted. This to include leases that do not proceed; ▪ To note all business closures over three years with the reasons why.
Outgoings Code of Conduct	Say no more, it is ready to go, simply attach it to the law as mandatory – simple rules just make it happen.
Enforcement	▪ State Tribunals are geared to retail. Compensation should be up to $500,000 **[compensation in equity, by far bigger and stronger resourced organisations, for damage claims which they could avoid through better business practice, forward planning etc]** and enforcement in equity to avoid one party subsidising the other's "business". If one plays by the rules, there will be no need for it. ▪ Tribunals may not depart from decisions of other jurisdictions or higher authorities. ▪ Tribunals should be able to hear any matter, including matters about rent. ▪ No party should have to pay the other's legal expenses unless there is a judgement awarded against them. ▪ In Tribunals, no costs may be awarded unless a claim is frivolous and vexatious.
When it comes into operation	New tenancy law can come into operation: ▪ at any time by mutual agreement; ▪ at the end of a lease or beginning of a new option period.
Guarantees	▪ Personal guarantees limited to three months gross rent; ▪ No business owner should have to disclose more about their personal assets than a simple letter from the bank, showing that the proprietor has sufficient equity to cover set-up costs including stock and that the business will cover the rent, provided it is paying current market rent; ▪ On sale of business (assignment of lease), that party has no further obligations under the lease including guarantees.