Retail legislation
The gift that keeps on giving

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So many things have annoyed me about the retail legislation since Christmas that it is hard to know where to start.

Let me give an example of how the legislation can be manipulated to achieve outcomes for which I hope it was never intended.

Relocation

In NSW, I have been assisting the owner of an office tower with ground floor retail. The development is a single complex, but it is possible to manage the office and retail components separately. The owner needed to refresh the retail podium. This required substantial work. There was not enough space into which to relocate tenants, and so the landlord invoked the demolition entitlement in the lease.

The exercise of the demolition right was subject to section 35 of the *Retail Leases Act 1994* (NSW). Section 35(1)(a) provides that the demolition right cannot be effected unless the lessor has a genuine proposal to demolish "the building of which the retail shop forms part."

In this case, a tenant argued that "the building of which the retail shop forms part" was the whole development, including both the retail podium and the office tower. Because the landlord only intended to demolish the retail podium (which formed only a small part of the overall development), the tenant claimed that "the building" was not being demolished and that, therefore, the lease could not be terminated on the ground of the proposed demolition.

This argument carried about as much weight as an Italian greyhound with anorexia, but the mere existence of the argument dragged the landlord into mediation, with consequential delay to the project.

The matter was subsequently resolved by negotiation.

The infuriating aspect to all of this is the cavalier way in which the legislation addresses the demolition process. Demolition and redevelopment of shopping centres and mixed use developments are complicated processes. Landlords are required to navigate the planning, development, financing and leasing issues in the context of legislation that appears to have been thrown together by people who have never actually been involved in development.

Section 35 occupies less than a page of the Act. By way of contrast, Part 2A (which deals with cash security bonds) (does anyone bother with cash bonds any more?) runs to 14 eye-glazing pages.

If you are going to regulate complex issues, at least do it well.

All levels of government say they are on a rampage against red tape in business. I guess government just does not think the retail industry is a business.

Queensland review

The Queensland retail legislation has been subject to a long running review process which has entailed a large number of written submissions and consultation with industry.

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The *Retail Shop Leases Amendment Bill* was introduced into parliament on 25 November 2014 by the red-tape-eliminating National/Liberal government, before it was wiped out.

After the review process, we were hoping for a chainsaw, or at least to have the hedge trimmed. Instead, we seem to have got another hectare of jungle.

It is frustrating when a rare opportunity for genuine reform arrives, and it is squandered.

So what does the Bill achieve?

It tweaks definitions and procedural provisions. It sort of aligns the concept of when a lease is entered into with other jurisdictions.

We introduce a new provision about pre-lease disclosure with a special section about disclosure by franchisors. (Isn't there a franchising code somewhere which might talk about this?). The lessor has to give a certified copy of the signed lease to the lessee within 30 days of it being signed by the lessor. (Thank God. I am not sure how tenants have survived for so long without this marvellous innovation).

Here we go again, going through the motions, and pretending that something has been achieved. Hundreds of hours of productive effort to produce a few pointless tweaks.

On and on it goes, and all I see is guff, guff and more guff. The only good thing that can be said about the Bill is that it has resisted the temptation to include the minimum 5 year term lunacy which pervades the other jurisdictions.

Hopefully, the Bill will wallow somewhere forever, while Queensland tries to find out if it has a government. (When you look at the Bill, it makes you think that we would all achieve more if maybe there wasn't a government).

Minimum 5 year term

Which brings me to one of my favourite grievances about the retail legislation: the compulsory minimum 5 year term.

Can the person who ever thought this was a good idea please stand up and fire a cannon.

I think the concept had its genesis with the thought that some tenants in some circumstances invest substantial capital in fitting out their shops. If a substantial investment is made, it is reasonable that the tenant be assured of a decent term in order to have the time to recoup the investment.

I have previously commented that a cucumber could grasp this concept without the need for legislation. You would expect tenants to be able to negotiate to conserve their interests in this regard, without the need to impose a minimum 5 year term on the entire industry.

This is certainly the informed view in Queensland.

But if the issue does not matter in Queensland, why do we have the ludicrous opposite legislated position in Western Australia that the landlord and tenant might agree to a 2 year term, but the tenant is entitled to exercise a statutory option to extend the term to 5 years. The landlord can avoid this risk, but only if it can convince a tribunal that special circumstances exist.

In between, we have the incomprehensible South Australian enactment in which the draftsperson does not seem to understand basic property law concepts such as the term of a lease and holding over.

And in the other eastern States, the parties can avoid the compulsory 5 year lease if the tenant obtains a release certificate signed off by a lawyer. This leaves the risk that the parties to an intentionally short lease might be inadvertently lumbered with a minimum 5 year term by mere oversight.

Either the issue is important or it is not. The retailing process is the same, State to State. So why is the minimum term critical in one State, and irrelevant in the next?

Makes you wonder if the legislators have even thought hard about the issue, despite the countless reviews.

It just confirms what a mess the States have made of the legislation, and how the review process is never intended to be more than irrelevant window-dressing.