Review of Queensland's Retail Leasing Legislation

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The Queensland Department of Justice and Attorney-General has released a Discussion Paper, designed to "form the basis of the consultation process for the review" of the Retail Shop Leases Act 1994.

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The need for the review stems from section 122 of the Act which provides that every seven years:

> *"The Minister must carry out reviews of the operation of this Act to decide whether its provisions remain appropriate"*

Like so much of the retail leasing legislation in Australia, this enactment is ambiguous.

On one view, the section calls for a line by line analysis of the existing provisions, so as to decide upon the 'appropriateness' of each provision. This approach drives the 1968 Torana into the garage, strips down the engine, puts it back together again with the oil leaks sealed and a new fuel injector, and drives it back out, into the traffic.

On the other view, the section calls for the Minister to consider whether the Act as a whole remains appropriate. It requires the Minister to consider the purposes of the entire bundle of provisions, and whether those provisions remain effective and appropriate in the current retail environment. This approach drives the Torana into the garage, looks at the car, looks at the traffic outside, looks at what the driver needs, and then sends the driver back out in a hybrid.

It should be apparent that section 122 is concerned with the second type of review. The Act can be tweaked at any time during each seven year cycle in order to address perceived problems. This was recently demonstrated when the Act was amended, to prohibit rent ratchets.

Section 36 was the provision designed to prohibit rent ratchet clauses. Embarrassingly, the provision did not actually prohibit rent ratchets. It was amended in 2011 (by the introduction of section 36A), so as to achieve the intended effect.

Accordingly, section 122 obliges the Minister to step back and have a good hard look at the legislation, and to decide whether or not the provisions are actually effective in promoting the interests of retail shop tenants, when balanced against the cost and complexity of managing the legislated system. The Minister is required to review the operation of the Act, and then decide if the provisions remain appropriate. It is almost too obvious to need stating that the appropriateness of the operation of the Act can only be gauged by reference to how the Act works. And this directs the review to the industry, not to the intricate detail of the Act.

This is the sort of review we have been crying out for since the Productivity Commission released its report into the market for Retail Tenancy Leases in Australia in 2008. No State or Territory has asked the hard questions necessarily flowing from the Productivity Commission's Report. The Discussion Paper actually provides a crisp summary of the findings of the Productivity Commission (at pp 6-7):

> *"The Commission found that the State and Territory Retail Tenancy legislation is overly prescriptive and that significant differences between jurisdictions persist despite attempts at harmonisation. The Commission also found that the legislative differences across jurisdictions and aspects of the legislative framework that focus on prescribing lease terms and conditions have constrained the market, lowered productivity and added to compliance and administrative costs for business.*
>
> *The Commission made recommendations for improving the operational efficiency of the retail tenancy market and reducing the regulatory burden on business, including that States and Territories should remove unnecessarily prescriptive elements of the retail tenancy legislation that provide no improvement in operation efficiency compared with the broader market for commercial tenancies and… seek to establish a nationally consistent retail lease framework."*

These findings could easily form the framework for the Minister's review. This would then require the Minister to ask difficult questions and undertake difficult analysis. But the product would be a worthwhile review. It is easier (but far less satisfactory) to quibble about the intricate detail of the Act, and to pretend that this is a review.

Sadly, this appears to be where we are headed. For instance, the Discussion Paper invites us to consider whether the office tower exemption, available in New South Wales, should be adopted in Queensland. Does anybody really care about these idiotic details? And if they do, how are these details to be reconciled with the recommendations of the Productivity Commission that the overly prescriptive elements of the legislation should be unwound, so as to improve the performance of the retail industry?

Unfortunately, there is nothing in the tenor or format of the Discussion Paper to suggest that the Minister's review will be anything more than an exercise in polishing the turd.

The format of the Discussion Paper includes a summary of each section of the Act, and then poses the question:

> "*Are the current provisions for [whatever] adequate or appropriate?*"

The focus of the response then comes down to an analysis of the 'appropriateness' of each individual section.

Detailed, line-by-line questions will receive details, line-by-line responses, which will inevitably leave the existing legislation in place, plus or minus a few bells and whistles.

This sort of review is not what is called for by the Act, and leased the retail industry short-changed, yet again. The opportunity to actually do something to adapt the legislation to current retail conditions will be neatly sidestepped.

It is a shame that the Discussion Paper does not kick off with brave questions like:

1. Does the retail industry need the retail tenancy legislation in 2012?

2. If we do, what, exactly, needs to be regulated?

3. How do we best regulate those things we have identified as requiring regulation?

4. How do we regulate those things in a way consistent with other jurisdictions?

It may be that a chainsaw was needed 20 years ago to cut down the forest. But now that the trees are all gone, we can probably keep the forest in check with a pair of secateurs.

You review the operation of the Act by looking at the forest, not the chainsaw.

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