Another retail lease review

Just what we need – more money down the drain

SPEIRSRYAN

Concerned readers will be relieved to learn that the Federal Senate Economics References Committee has handed down its report on the need for a national approach to retail leasing arrangements. (The Report was tabled in March 2015).

We need another report on retail lease legislation like we need a dose of genital herpes.

Not surprisingly, the Federal Committee thought that a national approach to retail leasing would be a good idea.

This was despite robust submissions by The Law Society of South Australia that a national approach was "unnecessary". The South Australian lawyers expressed concern that a national approach would limit "the ability of South Australia to determine its own policies and laws suitable for South Australian business."

As if selling a shirt in South Australia is a sacred ritual, not to be sullied by the grubby methods employed in the other States.

These guys would no doubt argue that the Australian Consumer Law and the Family Law Act should not apply in South Australia, because they are "not suitable". I guess they just don't want those damn Yankees telling the good ol' Confederates how to roll.

And when you remember that South Australia's main contribution to the national fabric has been the pie floater, you can understand the sentiment.

Fortunately, the Committee was not seduced by the suggestion that the retail industry is best served by a mish mash of ill-conceived and contradictory State laws. But not much more can be said for the Report.

The Committee gave the terms of reference the once over lightly, and then rolled out a list of bland findings that would offend no-one (apart from me… and the South Australian lawyers), and which could then be safely shelved in the graveyard for retail lease reports.

The Committee delivered the breathtaking insight that "harmonisation of retail leasing would be of great benefit to both landlords and lessees but appreciates that this is a matter for the States and Territories."

In other words, we need a single, national law, but it is up to the South Australians to deliver it!

This is exactly the sort of leadership we have come to expect from our parliamentarians.

Before the Committee sat, everybody knew that harmonisation would be handy. The hard part is implementation. So why not use the Committee's time to examine the options for achieving harmonisation, and make a recommendation. Start a conversation that might actually achieve something.

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Or even review the fundamental question that no one seems to ask. Do we actually need this idiotic legislation?

Of course the Committee could hide behind the terms of reference, which did not go to these issues.

As for the "issues" addressed by the Committee, they hardly call for comment.

Ten witnesses were called. Six were retailers (or representatives of retail organisations), two were small business bureaucrats, and two were representatives of the SCCA. Given the terms of reference and the provenance of witnesses, there was never any doubt about where the bus was headed. Two of the 10 witnesses (ie 20% of the witnesses) were directors of the Jewellers Association of Australia. Maybe the Committee wanted to produce a gold-plated Report.

Senator Xenaphon produced a "dissenting" Report.

He tabled a list of proposed "reforms" which would effectively increase the level of regulation. Those "reforms" included:

- that an effective dispute resolution code be implemented;
- that ratchet clauses be excluded from retail leases, unless expressly agreed to by the tenant; and
- conferring greater rights of renewal on tenants.

Pausing here, it may be that Senator Xenaphon was asleep when the Committee ran the pencil over the current regulatory shambles. Had he been paying attention, he might have noticed that the dispute resolution process is already one of the few success stories of the legislation.

He might have also noticed that all jurisdictions already impose a blanket prohibition on ratchet clauses, even if they are expressly agreed to by the tenant.

Which makes the Senator's recommendation truly puzzling. He seems to be suggesting that tenants should be accorded greater protection from the risk of ratchets, by removing the current blanket prohibition on ratchets.

One of the features of the retail legislation is that its provisions operate "despite the provisions of the lease". So that even if a tenant expressly agrees to a ratchet, the legislation will override that agreement, therefore making the ratchet ineffective.

I suppose I should not be so hard on the Senator. After all, it is easy to miss provisions such as these in the thicket of regulation he wants to add to.

And as for conferring greater rights of renewal on tenants, I think we need to be careful about regulating a multi-billion dollar industry off the back of a couple of anecdotes.

As a South Australian, Senator Xenaphon is no doubt aware of the embarrassing "guaranteed tenure" provisions of the South Australian legislation. (In case you are not aware, the guaranteed tenure provisions in South Australia introduce a mountain of procedural rigmarole that fails to provide guaranteed tenure). (No doubt the Law Society of South Australia is satisfied that this is a suitable process for regulation of South Australian business).

Guaranteed tenure comes from the Mills and Boon book of retail leasing.

In the real literature, landlords need to be able to continually improve and update their centres. In case the incurable romantics hadn't noticed, the pace of change is increasing. Centres have to be reinvented and remodelled to stay relevant and competitive. Guaranteed rights of tenure have the potential to check that process.

Do you want a row of tired old jewellery shops, or do you want a Sydney Central Plaza?

And so what has the report of the Committee achieved?

Nothing.

Yet another Committee has lived the dream.

More time, effort and money poured down the drain, that could have been better spent on something productive.

Maybe next time a committee is established to review the legislation, the industry participants should look at a boycott.

It is a tempting thought. But it could produce a really scary ride. The Law Society of South Australia might just turn up.