The minimum 5 year term

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The minimum 5 year term was one of the pillars of the New South Wales Retail Leases Act when it was enacted in 1994.

It has now been repealed.

New South Wales is now aligned with Queensland in the belief that the term of a retail shop lease does not need regulation.

Which makes you wonder why a minimum 5 year term is necessary in the other States and Territories. It also makes you wonder what other pillars of the legislation are not really necessary.

The minimum 5 year term was never a good idea.

In terms of the eastern seaboard, its development was two steps forward, one step back.

It first surfaced in Queensland way back in 1984.

It was then enacted in Victoria in 1986.

When NSW introduced the minimum 5 year term in 1994, Qld repealed it. (This was a master-stroke in harmonisation of the retail legislation).

And 23 years later, NSW has now followed Qld in repealing the minimum 5 year term.

Assuming Qld does not re-enact it, Victoria is left with a difficult problem. If retailers in Queensland and New South Wales do not need the minimum 5 year term, why do the Victorians? Particularly when in many cases it is the same retailers, doing the same things, in pretty much the same centres.

The minimum 5 year term continues to contaminate all of the other States and Territories.

Victoria's system is complicated, but at least contains a reasonably convenient opt-out parachute.

It gets a little crazier, the further west you go.

South Australia more or less piggy-backs the old NSW section 16, so that a minimum term must be 5 years, unless the lease contains a "certified exclusionary clause", (which is a grandiose term for what was in NSW a section 16(3) certificate). That is, a solicitor is required to sign off that he or she explained to the tenant that the lease is for less than 5 years.

(As I have previously pointed out on many occasions, a retailer who is unable to grasp this concept without having it explained by a solicitor is in serious trouble, no matter what legislation is enacted).

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South Australia then muddies the water by bolting on “preferential right” provisions for sitting tenants, but commentary on this issue will have to wait for another day.

It is in Western Australia that the minimum 5 year term really comes into its own.

Section 13 of the Commercial Tenancy (Retail Shops) Agreements Act 1985 pre-dates the Victorian enactment. It is Australia’s most spectacular 5 year term legislation.

When I read it, I feel like Barnaby Joyce watching a haka.

It runs to 5 eye-glazing pages, (when combined with the related section 13A it is 7 ½ pages).

The upshot is that if the term of a lease is more than 6 months, but less than 5 years, the tenant has a statutory option to enlarge the term to 5 years.

This statutory option can only be avoided on application to the State Administrative Tribunal by the landlord, if the Tribunal is satisfied that the tenant was not pressured and the circumstances of the case warrant the granting of the application.

A fee of around $100.00 is payable on each application.

This idiotic legislative edifice is a pain in the neck for landlords. And given the elimination of the minimum 5 year term from New South Wales and Queensland, it must be of questionable benefit to tenants.

In WA, landlords are required to manage short term leases to ensure they do not enlarge into long term leases, which then attract the minimum 5 year term. This means that a tenant who would happily sit in premises on a continuing hold over has to get booted after 6 months (or go through the SAT rigmarole before the 6 months is up).

This outcome does not work for anybody.

And in cases when the parties simply want a fixed, 3 year term, it is necessary to run the gauntlet of the SAT process.

Tasmania gets to the same position as Western Australia, but does it in 3 lines (section 10 of the Fair Trading Code for Retail Tenancies).

Tasmania also does not fiddle around with the concept of a lease for less than 6 months being outside jurisdiction.

The Northern Territory mandates a 5 year term, along similar lines to the old section 16 in New South Wales and it also avoids the 6 month jurisdiction mambo.

So we continue to endure intrusive legislation, which disjunctively disrupts freedom of contract in the retail industry. We have two States who (correctly) regard the minimum 5 year term as an embarrassment. And we have the other States and Territories flapping their gums about unnecessary regulation, while twiddling their thumbs about obvious and necessary reform.

If ever there was a case for repeal of unnecessary and harmful legislation, it has to be the minimum 5 year term.