Geoff Bowyer

25 August 2014

Senate Standing Committees on Economics
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Dear Sir/Madam

Preliminary Submission to Senate Standing Committee on Economics – National Approach to Retail Leasing Arrangements

The Law Institute of Victoria (**LIV**) welcomes the opportunity to make a submission in response to the published Terms of Reference. However, in the absence of an issues paper as background to the itemised topics, this submission must, of necessity, be preliminary in its scope, and the LIV would hope to have the opportunity to make a more detailed submission when an options paper becomes available.

The LIV's members include some practitioners with a largely landlord client base, some with a largely tenant base, and others who act for landlords on some occasions and for tenants on others. Consequently, the LIV's policy in relation to making submissions for legislative review and reform in this area is to address the relevant topic on an even-handed basis so that neither side of the landlord-tenant relationship is preferred or disadvantaged.

We note that the Productivity Commission published a report entitled *The Market for Retail Tenancy Leases in Australia* dated 31 March 2008 which addressed a number of the topics listed in the Terms of Reference.

a. The first right of refusal for tenants to renew their lease

The issue of whether sitting tenants should have a statutory first right of refusal to renew their lease was addressed by the Productivity Commission in its report (at page 122) but the Commission concluded that regulation was likely to be ineffective. The LIV is neither in favour of, nor opposed to, the creation of a statutory right to renew. It is noted that the *Retail and Commercial Leases Act* 1995 of South Australia, which gives shopping centre tenants a statutory first right of refusal, also allows for the parties to exclude the right where the lease contains a 'certified exclusionary clause'. Where there is an ability to exclude the statutory right, it seems likely that many landlords would wish to do so. The difficulty in drafting a clause giving effect to the statutory right is to ensure that the right does not operate unfairly against the landlord's fundamental right to determine the use to which its property is put.

The LIV also notes that the granting of a statutory right of first refusal may result in a requirement to pay duty on leases in Victoria pursuant to s 7(1)(b)(v) of the *Duties Act* 2000 (Vic).

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b. Affordable, effective and timely dispute resolution processes

The *Retail Leases Act* 2003 (Vic) (Victorian Act) provides for disputes to be the subject of alternative dispute resolution through the Office of the Small Business Commissioner before the issue of a proceeding, and this process is considered in Victoria to be a very efficient and cost-effective approach to early dispute resolution (see: Part 10 of the Victorian Act and in particular ss 86 and 87). The LIV submits that the Victorian provisions for dispute resolution should be considered as a model for any national regulation.

c. A fair form of rent adjustment

In our view Part 5 of the Victorian Act provides a fair form of rent adjustment. Section 35 prescribes the bases that may be adopted for rent review/adjustment under a retail lease; provisions providing for any other bases are void (see: ss 35 and 94). A provision in a retail premises lease that prevents or limits a reduction in the rent is also void (see: s 35(3)). Part 5 also provides for the Small Business Commissioner to appoint a determining valuer where the parties are unable to agree on one, and also sets out the matters that must be taken into account, or excluded, by a determining valuer. If a lease only provides for a landlord to initiate a market review the tenant may initiate the review, if the landlord declines to do so (see: s 35(5)).

d. Implications of statutory rent thresholds

We assume that this point refers to a statutory monetary or other limit to determine whether a lease is subject to statutory regulation. In Victoria, under the *Retail Tenancies Act* 1986 (Vic) and the *Retail Tenancies Reform Act* 1998 (Vic), premises that exceeded 1,000 square metres in 'floor area' were not regulated; that test proved difficult to apply and interpret and gave rise to a significant amount of litigation. The current Victorian Act limits its application to retail premises with an annual rent not exceeding $1 million (exclusive of GST) (see: s 4(2) of the Victorian Act and its regulations). This ceiling has not created difficulties or confusion in its application and is generally regarded as infinitely preferable to the floor area limit that applied under the earlier legislation.

e. Bank guarantees

In our view it is fair that tenants be required to provide a bank guarantee or other security to ensure that rent is paid to the end of the lease and that the tenant complies with its 'make good' obligations at the end of the lease. Bank guarantees in Victoria are generally equivalent to three months' rent.

In Victoria, a landlord of retail premises cannot unreasonably refuse to accept a security deposit in the form of a bank guarantee. That provision is well-accepted since most landlords would prefer a bank guarantee to another form of security deposit in any event as bank guarantees do not pose risks for landlords in the case of tenant insolvency, nor are they caught by the *Personal Property Securities Act* 2009 (Cth).

An issue seems to have arisen in recent times concerning the response of some banks to requests for payment under bank guarantees. Bank guarantees are worded so as to require the issuing bank to pay the amount requested on demand by the favouree and, in the past, that has generally occurred. However, some of our members have been informed by issuing banks recently that payment cannot be made on demand but will be made within a specified period after demand. This approach runs completely counter to the concept of a bank guarantee as a form of security enabling the holder to obtain payment on demand.

f. A need for a national lease register

In our view the consequences of mandatory registration will be increased regulation and compliance costs with little benefit to landlords or tenants.

The system of unregistered leases in Victoria has worked well for many years due to the protection given to the interests of tenants in possession by s 42(2)(e) of the *Transfer of Land Act* 1958 (Vic) which does not have any interstate equivalent.

While it is not necessary to register leases in Victoria, leases can be registered. However, the Victorian experience with registration has not been a happy one – our experience has been delays in reviewing leases and the stopping or rejection of leases that fail to meet the technical requirements of the Land Titles Office.

In our view mandatory registration of leases will not achieve the result hoped for by its proponents, notably valuers, because the information relating to 'real' (as opposed to 'effective') rent, rent holidays, landlord incentives and the like, will not be contained in the registered instrument but will be contained in a collateral document. Landlords do not like disclosing this information. Also the information about rent contained in a lease is current only for a short period of time; it is soon out of date. In particular, following a rent review it is not possible to discern the rent being paid.

We are not aware of any evidence supporting the proposition that tenants in jurisdictions with mandatory lease registration are better protected, or have greater bargaining power, than jurisdictions such as in Victoria that do not have mandatory registration. Tenants in Victoria certainly have the benefit of lower costs and less regulation. It is not clear to us why a national system of registration would produce a different and better outcome than the existing state systems of registration.

It is interesting to note that until 2012, the Victorian Act contained a provision that required the landlord to provide prescribed information to the Small Business Commissioner. Section 25 was repealed because it increased compliance costs without serving any purpose as the Act did not specify the purpose or purposes to which the information might be put.

g. Full disclosure of incentives

As between the granting landlord and the tenant receiving the benefit of incentives there will always be full disclosure, and so it seems likely that this heading is directed towards ensuring full disclosure to assignees of the original tenant and to valuers called upon to undertake rent reviews and determinations.

As indicated under the preceding heading, many landlords prefer to make the grant of incentives the subject of a document separate from the lease itself, and so any regulation requiring full disclosure of incentives could not achieve its purpose effectively unless incentives are required to be contained in the lease itself.

h. Provision of sales results

In our view a retail tenant should not have to disclose details of its turnover unless the lease calls for the whole or a part of the annual rent to be determined by reference to turnover.

i. Contractual obligations relating to store fit-outs and refits

The Victorian Act contains a number of useful provisions relating to fit-outs.

Where a landlord has not completed its fit-out by the rent commencement date, the tenant is not liable for any rent or other amounts under the lease (such as outgoings) until the landlord's fit-out has been completed (see: s 31).

The landlord may charge a special rent to recoup the costs incurred by it in fitting out premises (see: s 32).

The Victorian Act also provides that a provision in a retail premises lease requiring the tenant to refurbish or refit the premises is void unless it indicates the nature, extent and timing of the refurbishment or refit (see: s 58).

The forms of disclosure statement prescribed by the *Retail Leases Regulations* 2013 (Vic) require that the disclosure statement contain a significant amount of detail in relation to the landlord's fit-out, the date of handover, any contribution by the tenant, the tenant's fit-out, whether the landlord is required to contribute, and the standard of fit-out required.

j. Any related matters

There are no other matters upon which the LIV wishes to comment at this point.

If you would like to discuss any of the matters raised in the original letter please do not hesitate to contact myself or Karen Cheng, LIV Property and Environmental Law Section Lawyer

Yours sincerely

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President
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