Submission to the Senate Economics Committee Inquiry into the need for a national approach to retail leasing arrangements.

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This submission represents my personal views and is not to be taken as the view of Victoria University.

Introduction

The intention is to create a fairer system and reduce the burden on small to medium businesses with associated benefits to landlords, with particular reference to:

a. the first right of refusal for tenants to renew their lease;
b. affordable, effective and timely dispute resolution processes;
c. a fair form of rent adjustment;
d. implications of statutory rent thresholds;
e. bank guarantees;
f. a need for a national lease register;
g. full disclosure of incentives;
h. provision of sales results;
i. contractual obligations relating to store fit-outs and refits; and
j. any related matters.

Submission

I was approached earlier this year by Mr Bob Heller who (via his family company Apriaden P/L) was evicted from his small business premises in 1998 and subsequently engaged in litigation, one result of which was the amendment of s146 the Property Law Act 1958 (Vic) to ensure that tenants are given notice before eviction even when they are found to have repudiated their lease at common law. Despite the area being extensively regulated by statute, Apriaden was held to have repudiated the lease at common law and

thus to have forfeited it, even though no notice to quit was ever received. The law has now been changed to require a notice before eviction in all circumstances, but that is of little comfort to Mr Heller and Apriaden.

Apriaden's application for leave to appeal to the High Court was refused with the suggestion by Gummow J that it should have pursued a remedy in equity. Apriaden's experience of the dispute resolution process in retail tenancies was the opposite of affordable, effective and timely – ruinously expensive, ineffective and protracted. Having lost its tenancy, compensation was its only possible remedy. Unable to obtain agreement to this from its former landlord through alternative dispute resolution, litigation was the only option. Given that the law was actually changed to prevent landlords doing what Apriaden's landlord did, Apriaden was entitled to hope that the High Court would give it justice, but the High Court refused leave to appeal.

It is possible that if a dispute resolution system such as the one now operating in Victoria had been in operation when Apriaden fell into dispute with its landlord, this dispute could have been resolved before the disastrous consequences of eviction, but the Apriaden case did go to arbitration before litigation and the courts' endorsement of Apriaden's eviction without notice was ample demonstration that the law is stacked in landlords' favour.

I am primarily a constitutional lawyer and Mr Heller initially approached me in the hope of a constitutional remedy. I do not think that he has such a remedy, but he is entitled to feel let down by the Victorian justice system and the High Court. He has obtained several pieces of legal advice suggesting application for an ex gratia payment, and I am proposing to add to that collection, though the response of State and Commonwealth to date has not been encouraging.

There is a constitutional objection to the national regulation of retail tenancies: where is the constitutional authority for the Commonwealth to do this? Property law is a State matter. Sure the Commonwealth can regulate corporations, but there would seem to be a problem with it regulating retail leases which are matters of real property and contract.

I would respectfully suggest that the Committee recommends a co-ordinated approach between the States in this area, based on the Victorian model, and with the assistance of the Commonwealth, rather than trying to graft a Commonwealth scheme on top of the State systems.

I would be happy to elaborate on this submission if the Committee wishes.

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