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**Abstract**
The report of the Committee of Inquiry into Shopping Complex Leasing Practices (the 'Cooper Committee') presented to the Queensland Government on 19 November 1981 was the first salvo in a volley of shots that impacted around the nation. The Queensland Report led to the enactment of the Retail Shop Leases Act 1984 and similar legislation has followed in three other States, Victoria2, South Australia and Western Australia. The motivation for the Queensland Government to set up a committee of inquiry initially came from complaints made by large shopping centre lessees to the Queensland Small Business Development Corporation who had, in 1981, made two submissions to the State Government on a range of issues concerning deteriorating relationships between owners of large shopping complexes and their small trader lessees. At the foundation of these complaints was the fact that the lessees effectively had no bargaining power in relation to terms and conditions of their leases and were entirely at the mercy of the complex owners.

In this article, it is proposed to examine how these initial complaints have been dealt with in the legislation generally, whether the legislation travels beyond the initial aspirations of the aggrieved lessees andwhether or not some provisions were necessary in any case in the light of existing landlord and tenant law.

**Keywords**
commercial tenancies, shopping complex leasing, retail shop leases

# THE REGULATION OF COMMERCIAL TENANCIES—HEADING FOR THE SUNSET?

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## Introduction

The report of the Committee of Inquiry into Shopping Complex Leasing Practices (the 'Cooper Committee') presented to the Queensland Government on 19 November 1981 was the first salvo in a volley of shots that impacted around the nation.[1] The Queensland Report led to the enactment of the *Retail Shop Leases Act* 1984 and similar legislation has followed in three other States, Victoria[2], South Australia[3] and Western Australia.[4] The motivation for the Queensland Government to set up a committee of inquiry initially came from complaints made by large shopping centre lessees to the Queensland Small Business Development Corporation who had, in 1981, made two submissions to the State Government on a range of issues concerning deteriorating relationships between owners of large shopping complexes and their small trader lessees. At the foundation of these complaints was the fact that the lessees effectively had no bargaining power in relation to terms and conditions of their leases and were entirely at the mercy of the complex owners. However, the Cooper Committee made specific investigation into the following areas:

(i) the incidence of percentage rents;

(ii) the provision of monthly turnover figures to centre management;

(iii) the quantum, composition and method of assessing centre outgoing charges;

(iv) lease periods and options;

(v) assignment of leases;

(vi) the sharing of goodwill with the lessor and the ratios demanded;

1 See, for example, Report of the Retail Tenancies Advisory Committee—Victoria, Melbourne, 1984 and the reports of the Working Party on shopping centre leases, Adelaide, 1981 and 1983.

2 *Retail Tenancies Act* 1986

3 *Statutes Amendment (Commercial Tenancies) Act* 1985

4 *Commercial Tenancy (Retail Shops) Agreements Act* 1985

(vii) general leasing procedures.[5]

The Committee also examined other matters but it is clear that the particular issues above gave the initial spark to legislative intervention.[6] From an examination of the legislation in States other than Queensland, it is apparent that the Queensland legislation formed the blueprint. In this article, it is proposed to examine how these initial complaints have been dealt with in the legislation generally, whether the legislation travels beyond the initial aspirations of the aggrieved lessees andwhether or not some provisions were necessary in any case in the light of existing landlord and tenant law. As a matter of note the Queensland *Retail Shop Leases Act* 1984 came into operation on 12 March, 1984 and has been substantially amended on three occasions since then.[7] There is no doubt that the reason for such substantial amendment over a relatively short period has been the unease with which the legislation has generally been accepted by the marketplace, both lessors and lessees. It should also be appreciated that all this legislative activity was occurring in the atmosphere of the more frequent application of sections 52 and 53A of the *Trade Practices Act* 1974 to leasing practices.

## General Application

The application of the respective Acts in all jurisdictions largely depends upon the definition of the expression 'retail shop' or 'retail premises'. These are largely defined as premises used wholly or predominantly for carrying on business involving the sale of goods by retail or the retail provision of services excluding a retail shop with a floor area greater than 1,000 square metres or one held by a public company.[8] The only variation of this general definition appears in the South Australian provision which more broadly defines 'commercial tenancy agreement' by defining it as an agreement under which a person grants to another for valuable consideration the right to occupy, whether exclusively or otherwise, premises for the purposes of carrying on a business.[9] Notably, in South Australia, but not elsewhere, a licence to occupy falling short of a lease would be caught.[10]

The thrust of all the legislation is to protect the small trader as opposed to the larger retail chain outlet which because of its financial strength has considerably more bargaining power. In all cases, the emphasis is upon the expression "retail" which requires some element of the provision

5 Cooper Report, 6.2.

6 For a commentary on the Report, see: Tarlo, 'The Great Shop Lease Controversy', 13 U.Q.L.J. 7-27.

7 *Retail Shop Leases Act Amendment Act* 1985, No. 33; *Retail Shop Leases Act Amendment Act* 1988, No. 43; *Retail Shop Leases Act Amendment Act* 1989, No. 117.

8 Section 4 (1), Qld; s. 3 (1), Vic.; s. 3 (1), W.A.

9 Section 54, S.A.

10 There are further limitations under ss 55 (1) and (2) SA which provide for the prescription of certain premises and exemptions.

of goods or services for public consumption.[11] However, in a divergence from the original intention of the Act,the retail shops to which all Acts refer need not be situated in a retail shopping centre.[12] Stand alone retail shops or retail shops in small strips of less than five shops would be caught by the legislation. It is submitted that the ambit of each Act goes far beyond that which was originally proposed, particularly if one takes into account that the clamour for regulation came solely from small traders in large retail shopping complexes. It is also submitted that a stand alone retail shop or a retail shop in a small strip of shops was probably suffering very few of the same perceived disadvantages as the counterpart in a large centre.

To gauge some of the effects of the legislation it is proposed to examine a number of sections that each of Queensland, Victoria and Western Australia share in common. There are some divergencies in approach in these States but the approaches to the perceived problems are substantially similar. South Australia's *Statutes Amendment (Commercial Tenancies) Act* 1985 does not follow the other models and for comparative purposes has been omitted from the commentary.

## Rental Determination

Under the general law parties are free to negotiate the rent in any manner they chose. One of the initial contentious matters raised by the small trader was the manner in which the rent was set by the shopping centre owner. The Cooper Committee[13] found that many small traders had to pay percentage rents based on turnover and that this was not a desirable practice as it required the disclosure of monthly turnover figures to the centre management. Not only was this an intrusion into the lessee's right of privacy but also it led to anomalies between the major and minor lessees, the former of whom because of their ability to negotiate paid a lower percentage of their gross receipts than the small trader. Ironically, if turnover increased, the rent naturally increased and additional profit created by the improvement of business was partially absorbed by the increased rent.

The relevant sections have two major objectives. Firstly, in Queensland and Western Australia a retail shop lease cannot contain a provision to

11 *Plummer & Adams v. Needham* (1954) WALR 1 at 15; Cf *Wright v Edwards* (1961) SASR 267 at 282; in Queensland the Act applies to a retail shop lease of service station premises so far as the dispute in question arises out of or pertains to rights or obligations of the lessor and lessee other than nights or obligations that concern the manner in which the business is conducted. Section 5A Qld; By s 3 (1) WA premises involving the retail sale of petroleum products for use in road vehicles are exempted. In any case, any State Act inconsistent with the *Petroleum Retail Marketing Franchise Act* 1980 passed by the Commonwealth would be invalid to the extent of that inconsistency.

12 'Retail shopping centre' means a cluster of premises in respect of which—(a) five or more are used wholly or predominantly for the carrying on of a retail business or a specified business and all of which have a common head lessor except the term does not include a building with more than one storey except in relation to each storey of the building upon which is situated a cluster of premises as above s 4 (1) Qld; s 3 (1) Vic; s 3 (1) WA

13 Cooper Report, 6.2.1.

the effect that rent is to be determined by reference to turnover unless the lessee has elected in writing to agree to this.[14] Secondly, the lease shall be void unless it specifies, as part of its provisions, the formula by which the amount of rent is to be calculated.[15] Thirdly, the lessee must for the duration of the lease furnish to the lessor on a monthly and yearly basis, as the case may be, a statement of turnover to enable the rent to be properly charged and adjusted.[16] None of the Acts prohibit the charging of rent on the basis of turnover; nor do they prohibit a lessor gaining knowledge of an important aspect of the financial viability of the lessee's business. The only safeguard is really that the tenant has an election in Queensland and Western Australia to reject that method of calculation of rent. However, only the Victorian Act has limited provision for non disclosure of information[17] probably as a trade off for not giving the lessee an election. Certainly, if the rent is to be determined by reference to volume of turnover, the legislation limits the number of items of income receipt which may be taken into the calculation. Apart from these considerations, the situation remains the same as before. If the lessee objects to a turnover based calculation, no doubt the lessor would take that into account when setting rent on another basis from a commercial point of view. The small traders' desideratum of absolutely prohibiting 'turnover' rental charging has not been realised.

## Provision for Rent Review

This aspect of retail shop leases was not taken up directly in the Cooper Report, nor did it form part of the recommendations. However, having said that, the Report acknowledged that the major thrust of the complaints relating to rental dealt with the charging of 'percentage rent'.[18] In Queensland and Western Australia respectively,[19] provision is made for the determination of market rent in the absence of agreement by a licensed valuer.[20] In Queensland, this person is designated as a 'specialist retail valuer' and must be registered as such.[21] Market rent is also defined for this purpose to be rent that will be obtained for the premises on a free and open market if the premises were unoccupied and offered for rental for the use for which they are then permitted or will be permitted under the lease.[22] The expression 'market rent' or variations of that expression have previously been well defined by the courts.[23] The object of defining the expression 'market rent' may have been to deny a valuer

14 Section 6 (Qld); s 7 (1) WA.
15 Section 9 (1) (a) Qld; s 11 (1) Vic; s 7 (2) WA.
16 Section 9 (1) (b) Qld; s 11 (2) Vic; s 7 (2) WA.; elaborate provisions define 'turnover' for the purposes of this section: s 9 (2) Qld; s 11 (4) Vic; s 7 (4) WA.
17 Sections 12 (3) and (4)
18 Cooper Report, 6.2.1.
19 Section 10A (1) Qld; s 11 (3) WA.
20 Section 10 (2) (b) Qld; s 11 (3) WA.
21 Section 10B Qld.
22 Section 10 (2) (a) Qld; s 11 (2) WA.
23 *A Hudson Pty Ltd v Legal and General Life of Australia Ltd* [1984] 1 NSWLR 1; *Edmund Barton Chambers (Level 44) Co-operative Ltd v Mutual Life and Citizens Assurance Co Ltd* (1986) 6 NSWLR 322; *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* (1987) 8 NSWLR 642.

an opportunity to take into account rent holidays, and other lessee incentives such as free fitout of fixtures, fittings and cash payments. It is submitted that the restrictions posed upon the valuers in relation to the determination of market rent are unwarranted in the circumstances, given the complex nature of the market and the many and varied enticements used to attract tenants. In this respect, why should retail shop leases differ from any other commercial or industrial lettings?

## Assessment of Outgoings

The quantum, composition and method of assessing outgoings was the subject of specific mention by the Cooper Report.[24] There is some truth in the assertion that shopping centre owners were endeavouring to cover as many of the standard outgoings as possible plus additional charges which were effectively included the amortization of capital works for the construction of the centre. Again,there was very little uniformity in the leases and whilst some charges, for example, security, lighting, cleaning and rubbish removal were acceptable, some lessees complained that the inclusion of a share of local rates, charges and such items as land tax, were unreasonable. Some leases even incorporated the cost of the actual centre manager, and additional items like structural repairs and major renovations. Most of the States now provide that the lease must clearly specify the outgoings that are to be regarded as operating expenses, how they are determined and apportioned to the lessee and how they are to be recovered by the lessor.[25]

There is also provision in all Acts for the lessor to make an annual estimate of expenses and furnish that to the lessee prior to seeking reimbursement for those expenses.[26] The Queensland Act goes further and provides that a lessor under a retail shop lease is not entitled to payment by a lessee into a sinking fund (or otherwise) for the amortization of costs and expenses of or incidental to a major improvement of a structural nature in the building containing the retail shop or other building in the centre or an improvement to an area used in association with some building.[27] In Queensland, an individual item of expenditure as shown in the statement should not exceed, in fact, five per cent of the total amount claimed by the lessor except in relation to State taxes or one specific item of a large nature.[28]

Victoria has the most stringent provision in relation to operating expenses in that a lessor may not accept payment from a lessee for any particular item of expense of more than the greater of the actual amount or the total estimated amount of that item of expense. Secondly, if a lessee has paid the lessor more than the actual amount of those expenses

24 Cooper Report, 6.2.3.

25 Section 12 (1) (a) Qld; s 15 (1) (a) Vic; s 12 (A) WA.

26 Section 12 (1) (b) (c) Qld; s 15 (1) (b) (c) Vic; s 12 (b) WA.

27 Section 8 (2A) Qld; such a benefit is recoverable either if paid under the lease or paid in connection with the granting, renewal, extension or assignment of the lease; ss 8 (3) and (4).

28 Section 12 (2) Qld; see also s 12 (5)

as stated, the lessee is entitled to a refund of the overpayment when the lessor gives a lessee the annual statement dealing with those expenses.[29]

The Queensland Act seeks to limit recovery for operating expenses by providing that the annual statement of expenditure which must be furnished by the lessor to the lessee within three months after the termination of an accounting period and be itemised so that the amount allocated to each item shall not exceed five per cent of the total expenses shown in the statement except in relation to any tax, impost or charge levied by the State or any one component that cannot be dissected so as to comply with the limiting provisions.[30] The Queensland provision appears unnecessarily complex in comparison to its Victorian counterpart. The object of the provision is sound but there seems no reason why a lessor cannot accurately estimate expenses within a fixed variation in advance (even Government charges) and present these to a lessee at the beginning of a period.

The Queensland provision gives rise, in my view, to a great deal of unnecessary dispute and argument in relation as to what might constitute 'an outgoing consisting of one component that cannot be dissected so as to comply with the limiting provisions of the section'. Again, it must be said that the legislation does not limit the range of expenses significantly which is probably what the lessees most desired.

## Consent to Assignment of Lease

The Cooper Committee[31] identified the concern of lessees who were experiencing constant delay in seeking to obtain the lessor's consent to an assignment of a lease or a sublease. Particularly acute was the difficulty experienced by lessees who had their lease under contract as part of the sale of their business and who had limited time to obtain the consent of the lessor. The failure of the lessor to give an indication one way or the other as to the consent often meant the loss of the sale of that business.

Now, if a lessor is provided with 'adequate particulars' of the proposed assignee, the lessor has thirty days in Queensland and forty-two days in Victoria and Western Australia respectively to respond to the lessee's request for an assignment.[32] In the past, it is suggested that the fault in the delay may have rested either with the lessee in not providing adequate particulars[33] or the fault of the lessor in failing to consider the matter within a reasonable time frame. In any case, a lessor should be given reasonable time to consider the matter[34] and should be provided with sufficient information to make an informed assessment.[35]

29 Sections 15 (3) and (4) Vic.

30 Section 12 (2) Qld; s 12 (5) provides that land tax or other charge on the land which is an outgoing shall not exceed the amount of liability for the lessor which it might if the lessor's only freehold land was the shopping centre.

31 Cooper Report, 6.2.5.

32 Section 11 Qld; s 16 (1) Vic.; s 10 WA.

33 Section 4 (1) Qld 'adequate particulars' means sufficient particulars to make a sound commercial decision in respect of the matter.

34 *Wilson v Fynn* [1948] 2 All ER 40 at 42

35 *Fuller's Theatre and Vaudeville Co, Ltd v Rofe* [1923] AC 435 at 442.

A refusal outright must be distinguished from a deferral of consent where this occurs.[36] It issubmitted that this provision in all jurisdictions adds little to the law as it stood, which provided, by statute, that in all leases containing a covenant against assigning or subletting without licence or consent, that particular covenant shall be deemed to be subject to a provision that the licence or consent is not to be unreasonably withheld.[37] Second, under the general law, a lessor would be prevented from imposing unreasonable terms or conditions as prerequisites to an assignment or sublease. The courts would look at such conditions which it considered extraneous to relevant considerations such as the assignee's financial and business standing.[38]

The provisions of the retail tenancies legislation merely, and somewhat unnecessarily, provides an overlay to the already existing provisions of the statutes which were adequate to meet the particular contingencies to which this legislation was directed.

## Key Money and Bonds

In the Cooper Report,[39] the Committee found that there was no evidence to indicate that the owners of shopping complexes were demanding 'key money' from prospective lessees. However, there was a tendency to ask for rent in advance, a practice which the Committee did not find unreasonable. Nevertheless, when the ultimate legislation took shape, there were provisions which made it quite clear that 'key money' in connection with the granting, renewal or extension or assignment of the lease or payment of any amount for goodwill of the business or any other benefit to a lessor in connection with the granting, renewal, extension or assignment of a lease was outlawed.[40]

The provisions do not prevent a lessor from recovering reasonable costs of investigating a proposed assignee, the costs of the documentation for the assignment or consent to assignment of the lease or from receiving the payment of rent in advance.[41]

Under the general law, it is not illegal to demand a fine if the lease expressly provides for that contingency.[42] If a fine were demanded without the authority of the lease, the lessee would be entitled to disregard it and assign without consent.[43] However, if a lessee made payment of a

36 *Daventry Holdings Pty Ltd v Bacalakis Hotels Pty Ltd* [1986] 1 QdR 406 at 411-412.

37 Section 121 (1) (a) (i), *Property Law Act* 1974 (Qld); s 144 (1), *Property Law Act* 1958 (Vic); s 80 (1), *Property Law Act* 1969 (WA). (Note that the Victorian section does not apply to retail shop leases, s 16 (2) and (6), Vic).

38 See, for example, *Re Gibbs and Houlder Bros & Co Ltd's Lease* [1925] Ch 575 at 585; *Bromley Park Garden Estate Ltd v Moss* [1982] 1 WLR 1019 (collateral considerations outside the lease imposed).

39 Para 6.3.4.

40 Section 8 (1) Qld; s 9 (1) Vic; s 9 (1) WA.

41 Section 8 (2) Qld; s 9 (2) Vic; s 9 (2) WA.

42 Section 121 (1) (b), *Property Law Act* 1974 (Qld), s 144 (1), *Property Law Act* 1958 Vic; s 80 (1), *Property Law Act* 1969 WA.

43 *Andrew v Bridgman* [1908] 1 KB 596 at 599.

fine or premium without the authority of the lease, it is arguable that the sum would not be recoverable if it had been voluntarily paid.[44]

If the Cooper Committee did not identify the payment of fines or premiums for the granting or assignment of leases in shopping centre complexes as a particular problem, and legislation already existed concerning this practice, one wonders why it was necessary to include it as part of the retail tenancy legislation. All that may have been necessary would be to provide that any provision obliging the lessee to pay a premium or a fine for the grant or assignment of the lease would be void.

## Options to Renew

In its initial investigations, the Cooper Committee detected a preference, which may have become the norm for lessors, to prefer three year leases without options.[45] Lessees complained that a three year term, without options, barely gave enough time to recoup the capital cost of fitout. Those lessees urged the Committee to consider security of tenure for a period of at least five years.

Accordingly, various provisions in the respective legislation[46] provide a right in the lessee to at least five years of secure tenancy, subject to certain conditions as the lessee not being in default, the lease not already granting a term (with options) of five years or over and the lease being the first retail shop lease of the premises. It is certainly not difficult to appreciate the objections that a small trader might have to simply taking a lease for a limited term of three years, no doubt with the intention of remaining for a longer period but having the renegotiation of all the terms of the lease to undertake at the end of that term. It is submitted that these provisions are not unreasonable but, unfortunately, the mechanical provisions for exercise of the option have become somewhat complex.[47]

The Queensland experience has been that most commercial leases in shopping centres would be granted for a minimum period of three years with an option for a further similar term or a period of five years or more without any options. The inclusion of such a provision is only reasonable whilst the lessor has such a powerful negotiating position. If it became difficult to tenant shopping centres through economic conditions, this provision may work against the lessor. Where the lease provides for an option to renew taking it beyond the five year period, the section does not become operational.[48]

In Victoria, where the retail shop lease contains an option exercisable by the lessee to renew for a further term there is a procedure which the lessor and lessee must follow in the giving and acceptance of notice.[49] If

44 *Waite v Jennings* [1906] 2 KB 11 at 16.
45 Cooper Report, 6.2.4.
46 Section 13 Qld; s 13 Vic; s 13 WA.
47 Section 13 (3) Qld; s 13 (3) WA.
48 Qld s 13 (3).
49 Section 14.

there were an option in a lease as it stood, then one would have considered that the mechanism of exercising the option would be spelt out in the lease and the courts could give adequate effect to that mechanism.[50]

## Leasing Procedures

There was a significant complaint made by lessees to the Cooper Committee which related partly to the lack of the early provision of documentation by the solicitors for lessors to prospective lessees and partly to the cost of preparation of formal leases, their stamping and registration. There was a further problem addressed in that information in letters of intent, or heads of agreement, was not sufficiently detailed to provide the prospective lessee with a clear picture of obligations required.[51]

The Cooper Committee came to the view that there should be a mechanism whereby a person negotiating to take up a lease is fully apprised of all salient terms and conditions as soon as possible and well before the time for execution of any formal instrument. It was in the light of these grievances that the Committee recommended that a draft or pro forma copy of the shopping centre lease be shown as soon as possible to the prospective lessee. What emerged in the legislation was an obligation upon the lessor to provide that person with a copy of the lease or sufficient particulars, within a certain period after the terms were agreed, or prior to the lessee becoming bound by the formal agreement.[52]

The legislation also provides for termination by the lessee within a specified period where the formal lease entered into does not answer the earlier description of subject matter as disclosed by the lessor or where there is no disclosure.[53] It is conceded that a standard letter of intent to be enforceable need only set out basic provisions.[54] Certainly, a prospective lessee would want to know more than what are termed 'usual covenants'.[55] Some sensitivity was revealed by lessees who indicated that they were compelled to use the services of the lessor's solicitor. This led, in Queensland alone, to a provision of the Act[56] to the effect that the prospective lessee negotiating with the lessor should not be compelled to use the services of the lessor's solicitor, and a lessee, so compelled, shall not be required to pay the solicitor any fees. This provision merely encourages good practice. It is difficult to see how a solicitor for a lessor could properly discharge his duty to a lessee in relation to explanations required of unusual and non standard clauses.[57] If the lessee elects not

50 See, for example, *Gollin & Co. Ltd v Karenlee Nominees Pty Ltd* (1983) 57 ALJR 711 at 715; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 56 ALJR 825 at 826-827.

51 Cooper Report, 6.2.7.

52 Section 15A (1) Qld; s 8 (1) Vic; s 6 (1) WA.

53 Section 15A (2) Qld; s 7 (1) Vic; ss 6 (1) and (2) WA.

54 *Marshall v Berridge* (1881) 19 ChD 233 at 244-245; *Harvey v Pratt* [1965] 1 WLR 1025 at 1026.

55 See, for example, *Chester v Buckingham Travel Ltd* [1981] 1 WLR 96 at 100.

56 Section 14 Qld.

57 *Sykes v Midland Bank Executor and Trustee Co. Ltd* [1971] 1 QB 113 at 124; *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co (a firm)* [1987] 1 WLR 916 at 921.

to employ a solicitor, the solicitor for the lessor does not owe a duty of care to the lessee.[58]

The provisions relating to disclosure again probably reflect good practice in any case, particularly given the length and complexity of many commercial leases and the usual situation where the prospective lessee requires the earliest possible possession. There is no present indication that the right to terminate is being used by unmeritorious lessees with second thoughts about the whole deal.

## Compensation by Lessor

Evidence was taken before the Cooper Committee that lessors' actions were causing considerable problems to individual lessees in consequence of such matters as failure of plant and equipment benefiting the tenancies and common property and other sources of disruption from such causes as renovation and remodelling.[59] All jurisdictions with retail tenancy legislation now have provision for the lessor to compensate the lessee where the lessor inhibits the access of the lessee, substantially inhibits or alters access by customers or causes significant disruption to trading for any reason. Liability will also flow where the lessor fails to rectify any breakdown of plant or defect in the building which is causing loss or damage to the lessee.[60] It is submitted that many of these matters would have attracted liability under the general law. In every commercial lease there is normally a covenant on the part of the lessor to give quiet possession and not to derogate from the grant.[61] Further, the failure to maintain services would constitute a breach of the covenant for quiet possession which, if not expressed, would certainly be implied against the lessor.[62] Secondly, if there were nothing expressed in the lease concerning the repair of machinery which affected the amenity and enjoyment of the common area, or requiring the lessor to clean, maintain and repair common areas, such a provision would certainly be implied in any case.[63] However, it could be argued that these provisions now implied in every retail shop lease[64] makes it unnecessary for the lessee to seek to imply clauses in agreements which are usually one-sided in favour of the lessor.

## Conclusion

The above comparison and commentary reveals considerable uniformity in Victoria and Western Australia with the earlier Queensland legislation. It also illustrates the source of a number of important provisions which

58 *Hardware Services Pty Ltd v Primac Association Ltd* [1988] 1 QdR 393 at 398.

59 Cooper Report, 6.3.1, 6.3.2, 6.3.3.

60 Section 15 (1) Qld; s 17 (1) Vic; s 14 WA.

61 *Owen v Gadd* [1956] 2 QB 99 at 106; *J.C. Berndt Pty Ltd v Walsh* [1969] SASR 34 at 37 (both cases concerned with inhibiting access and use due to repair and reconstruction).

62 *Lavender v Betts* [1942] 2 All ER 72 at 73.

63 *Liverpool City Council v Irwin* [1977] AC 239 at 257-258; *Karaggianis v Malltown Pty Ltd* (1979) 21 SASR 381.

64 Section 16 Qld; s 24 Vic; s 15 WA.

have been incorporated in all Acts. It is interesting to note that many of the lessees' grievances in Queensland were duplicated in other States.

Given the nature of the legislation and the fact that it redressed, in reality, only a very few of the complaints, one wonders whether it has been worth all the trouble. Several innovations such as disclosure provisions in relation to lease provisions and outgoings, the right to elect whether or not to have rental determined by gross turnover and the right to a lease for a period of at least five years may be considered to be advantageous to a lessee over and above that which the general law offered.

Yet, it is submitted that the power of the market still prevails. It would still be possible to draw a very strict lease against the lessee, even taking into account these implied prohibitions. There is nothing to dictate what a lessor should charge as initial rent, nor is there in reality anything to prevent a lessor forcing a lessee to share in most of the outgoings, although the quantum is subject to some limit.

Although the Act in Queensland has been in force, in various forms, for some six years, there is still an uneasy relationship between lessors and lessees. This is also despite mediation provisions.[65] It is perhaps too early to properly assess the success of the legislation and it is significant that each State has incorporated a sunset provision.[66] This fact may demonstrate that the respective legislatures themselves are not entirely convinced that retail tenancies should be regulated by statute and it will be of some interest to see what changes the respective reviews of those Acts brings forth after the sunset has passed.

65 Part IV Qld; Part III Vic; Part III WA.
66 Section 63 Qld; s 26 Vic; s 31 WA.