The Great Shop Lease Controversy

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The revolution in retail shopping over the last fifteen years has been deep-rooted and widespread throughout the developed countries of the world. The ubiquitous automobile has clogged down-town centres which were built in a pre-automobile era. The growth of cities with a high proportion of population living in faraway suburbs, the difficulty of finding parking space in city centres, the pressure of rushing around perhaps widely-dispersed shopping areas in all weathers and the inconvenience of carrying purchases back to the car (or, worse, back home in the scarce public transport) have combined to produce regional shopping centres. These centres have large carparks and contain, usually under one air-conditioned roof, a wide variety of stores both large, medium-sized and small, and often as well offices for professional services. The overwhelming convenience of them for the consuming public is such that they set the pattern of shopping for the foreseeable future—at least, until the computer finally takes over our lives and people become almost totally sedentary (and bug-eyed) in front of their video screens, selecting their purchases with a touch on the keyboard.

The trend to large regional shopping centres has resulted in changes in the lifestyle of consumers—mainly for the better, it is suggested, though others may have a different opinion. It has also caused considerable changes in retailing and in the arrangements under which retailers operate, with consequences which probably were not envisaged when the centres first made their appearance. One result has been the controversies raging for some years past over shopping centre leases, more particularly in the case of leases to small tenants, and the relationships between the developers, owners or managers of the centres and those who run businesses therein. The problems have not been confined to Queensland; they have been nationwide. But the battle seems to have been fought especially fiercely in recent years in Queensland, where there are about sixty large integrated shopping complexes, the great majority of them built since 1975. Pressures, propaganda and lobbying by associations of owners and managers on one side and shopkeepers on the other have been constantly used and exercised against each other and against the State Government with a view to promoting their respective interests.

The issue has largely developed into a clash of philosophies: governmental regulation (desired by the small tenants) versus the "market place" or freedom from controls (the goal of the owners and managers, who talk of "industry-led self-regulation"). The Government, in such circumstances, becomes the proverbial meat in the sandwich. However, despite the traditionally different policies and outlooks of the major political groupings, opinions have cut across party lines. The Liberal Party and the National Party have had divided loyalties, being torn between their big

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business and small traders supporters. However, the lawyer members of the Liberal Party in the Queensland Parliament have been prominent in working in favour of some form of State control, which is also espoused, but to a greater degree, by the Australian Labour Party. Now, it has become increasingly fashionable to plead the case of small business and even the two conservative parties seem set on the path of bringing to bear on the problem the full apparatus of the State.

What is special about a shopping centre lease?

At the heart of the matter is the phenomenon of the shopping revolution and perhaps the failure of the law to appreciate the extent of that revolution. Shopping centre leases differ from ordinary commercial leases; they are in a class of their own and contain novel and sophisticated concepts, largely stemming from the special features of the centres themselves, such as the common areas and facilities. The differentiation of shopping centre leases from other commercial leases has been identified as mainly with regard to provisions which relate to:

(a) "percentage rent";
(b) common areas and facilities; and
(c) the relationship of the parties to the project (i.e. not only the relationship between the landlord and the tenant but also the relationship among the various tenants).[1]

Around these features there revolves a whole series of complex clauses which give shopping centre leases their particular flavour.

It is therefore not surprising that the developers or owners of shopping centres usually have printed forms of lease prepared. Of course, a printed form always appears to have a "take it or leave it" attitude about it, especially if it favours the landlord rather than the tenant. One has to distinguish here between major tenants and other tenants. The success of a shopping centre will depend on the mix of tenants and the positioning of them within the complex. It must have major traders, such as department stores and supermarkets, positioned in strategic locations in the complex. It is these stores which attract large numbers of customers with a resulting flow-on for the benefit of the smaller traders.[2] Thus a major tenant has a great deal of clout and may be able to insist on alterations in the standard lease. For this reason, attention has been focused on the relatively inferior situation of small traders and it is naturally from them that the unrest which has caused so many enquiries and reports has emanated. Their point of view has been expressed thus—

1. H. Wolfson, *Distinctive Features of a Shopping Centre Lease*, in *Shopping Centre Leases* (ed. H.M. Haber), Ontario, 1976, 4.
2. For an example of the loss of the major tenant (a supermarket) causing the collapse of a centre, see *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.* (1971) 17 D.L.R. (3d) 710. This case illustrates how essential it is for landlords to bind their tenants to carry on their businesses continuously throughout the terms of their leases; landlords may then be in a position to claim damages for prospective loss resulting from a breach of this obligation.

> "Without legislation the small tenant will always be at tremendous disadvantage in dealing with [big] corporations ...
>
> Read any of their leases and see how many of the 50 to 70 pages go to safeguarding the interest of the tenant.
>
> By and large, it is a landlord's document which has evolved over a period of time to reduce the standing of tenants to that of a vassal or serf who is dependent on his master's goodwill."[3]

The reference in the above quotation to the length of the lease is significant. Ordinary commercial leases are lengthy enough, as the parties endeavour to cover all possible eventualities and have a great deal of discretion in doing so. They are free to act in this way because of the comparatively small amount of control over them exercised by such general legislation as the *Property Law Act* 1974-1982 (Qld). Thus a commercial lease may extend from ten to twenty closely-typed or printed foolscap pages, whereas the more closely controlled residential tenancy may be enshrined in a standard form agreement consisting of four small pages.[4] In the case however of a shopping centre lease, there are far more matters to be regulated by the parties than in the case of an ordinary commercial lease. For example, the car park and other common areas, the promotion of the centre as a whole, including its operating expenses, the integral nature of the centre and the closeness of relationship between landlord and tenant, as well as between tenant and tenant, combine to produce a document of extraordinary complexity, extending to more than double the average length of other commercial leases. The drafts of shopping centre leases in use in Australia seem to be modelled to a large extent on those in use in the U.S.A. and Canada where large integrated shopping complexes have been in use for a much longer period. But complaints have been made there against the length of such leases and their unnecessary prolixity, factors which necessarily have a bearing on the charges of landlords' and tenants' lawyers.[5]

Background to the situation in Queensland

In 1981 the Small Business Development Corporation reported (in the form of two submissions) to the Government on a number of areas of apparent disagreement between shopping complex owners or managers and their small trader tenants. The most common complaint was that tenants were being required to accept forms of leases which contained provisions, conditions and obligations beyond those accepted as normal in traditional landlord and tenant relationships. The submissions set out a number of problem areas alleged to cause hardship to small tenants and recommended legislative action.

3. D. Black, *Why We Must Have Effective Legislation, The Retailer of Queensland*, April, 1983, 9.
4. The control in Queensland is exercised by the *Residential Tenancies Act* 1975, but is much lighter than in some of the other States, e.g. Victoria.
5. See R.C. Dick, *Drafting a Shopping Centre Lease*, in *Shopping Centre Leases, supra*, n.1, 39.

The report did not apparently completely satisfy the Government and has not been published, though summaries have appeared in other reports. Possibly it was thought to be too biased in favour of small tenants. In any event, the Government appointed a small high-powered committee to re-examine the whole question with particular regard to some of the wider ramifications. The Report of the *Committee of Inquiry into Shopping Complex Leasing Practices* ("Cooper Report") appeared towards the end of 1981. Its findings were markedly favourable to small traders who, it felt, were being burdened with conditions out of proportion to their individual and relative contributions to the viability of the complexes. It found that the general conditions of leases were almost totally in favour of the owner. Perhaps a little inconsistently it noted that the majority of tenants, whilst unhappy about specific issues, were generally reasonably prosperous and consequently quite satisfied to trade in shopping complexes, and that many dissatisfied tenants had little or no experience in or knowledge of business practices in general, and more particularly of retailing. It wanted more education and guidance for small business people.[6]

In addition to six broad findings, the Cooper Report made six major and fourteen subsidiary recommendations, but having regard to the complexities of the issues its main thrust consisted in its major recommendation that the Government should give every practicable encouragement and support for an industry-led, managed and regulated solution to the problems of small tenants in shopping complexes and that the recommendation by the Small Business Development Corporation for legislation should be deferred for the time being. However, in the event that no resolution to the question appeared likely by the end of 1982, it suggested that the problems were of sufficient importance and concern to warrant the Government taking positive action to resolve the matters then at issue by legislative means.[7]

It is noteworthy, and a serious criticism considering the nature of its inquiry, that the Cooper Committee did not contain a lawyer among its membership of three. If it had, it would have been more cognisant of landlord and tenant law and would not have fallen into such errors as failing to comprehend the doctrines of and the distinction between privity of contract and privity of estate.[8] The lack of a lawyer-member may also have some connection with its comments on leasing procedures not being calculated to bring much comfort to the legal profession, about which it declared that it appeared that there was an almost unanimous opinion that the profession was entirely to blame for not reacting quickly to the needs of shopping complexes. It thought that the time taken to produce lease documents and the cost of leases should be of concern to the legal profession "and it may require the initiative of Government to request the profession to engage in some self-examination in this regard."[9]

6. Cooper Report, 5.
7. *Ibid.*, 6, 7.
8. *Ibid.*, 31 (re assignment of leases).
9. *Ibid.*, 33.

The Cooper Report was given wide publicity, and many points of view were put forward. A major formal response to the report was given to the Government in April, 1982, by the Building Owners and Managers Association (BOMA), the principal organisation of developers, owners and managers of shopping centres. The vehemence with which the contest raged may be gauged from the almost daily references to the subject in the newspapers. Allegation and denial followed each other swiftly, and every possible interest group, including politicians, tried to influence the Government, either to legislate to secure the rights of tenants, or to accept the BOMA view that the industry should and could regulate itself (as recommended also by the Cooper Report), or merely to do nothing and let normal market forces resolve the issue over time. The Government resolved this quandary by calling for yet another report, referring the matter to a Joint Parliamentary Committee comprising committees of the Minister for Commerce and Industry and the Minister for Justice and Attorney-General ("Joint Committee").

The major task of the Joint Committee was to review in practical terms the implications of the Cooper Report, the BOMA submission and the many representations received by the Government from individuals and organisations representing tenants, particularly small tenants. There resulted from the work of the Joint Committee a *Discussion Paper on Retail Shop Leases*, which appeared in January 1983. The title is not without significance. The previous reports had been on shopping complex leases, and the Cooper Report went out of its way to emphasise that it did "not have any direct relevance to tenancies of general commercial and industrial premises or to tenancies of strip shopping developments and the like."[10] But the Joint Committee considered it evident that many of the same problems occurred in arcades, strip shops and single shops. It accepted that with the emergence of major shopping complexes, there had been a major shift in the traditional roles of landlords and tenants, viz. (according to the Joint Committee) the role of the landlord was to provide the premises and it was the tenant's major obligation to pay rent for the peaceful enjoyment of the tenancy.[11]

The extension of the inquiry to cover all shop leases is of particular interest having regard to the issue by the Minister for Commerce and Industry in July, 1982, of a booklet entitled *Shop Leases—What the Tenant Should Know*, which professed to be advice to tenants of both large and small shopping complexes. It was based on a similar publication published four months earlier by the Minister for Industrial Development and Commerce of Western Australia, though it has been alleged that the Queensland version is a watered-down one which omits some of the more critical points made in the Western Australian publication. However, as one comment had it, the Queensland publication had two major effects in that it not only alerted prospective tenants as to what practices

10. *Ibid.*, 12.
11. *Discussion Paper*, 3.

they should be wary of, but it also "provided a do-it-yourself kit for strip shop landlords who were able to adopt practices of which they were unaware."[12] At least it appears to be reasonably accurate on landlord and tenant law.

The Joint Committee reached the view that it was neither practicable nor feasible to expect that landlords and tenants could always harmoniously regulate their own affairs. At the same time, it was not possible for any agency, whether inside or outside of Government, to resolve every question of dispute between landlords and tenants. It reached the view that relationships and dealings between landlords and tenants could be influenced and improved by legislation, which would include provision for mediation in certain disputes between landlords and tenants, a ban on certain practices in retail shop leases and the inclusion of certain implied terms in such leases, combined with the adoption and promotion of a model retail shop lease endorsed by the Government.[13]

The legislation proposed by the Joint Committee would (as it had hinted in its opening remarks) refer specifically to retail shop leases, whether the shop was located in a shopping complex or not, though it was not to be in conflict with any existing legislation such as the *Property Law Act* 1974-1982 (Qld). While the aim of the legislation would be to redress the balance between the landlord and the tenant, the Joint Committee thought that the legislation should only apply to retail shop leases coming into effect after the promulgation of the legislation. Thus it would not have the retrospective effect of certain provisions in the *Property Law Act* relating to landlord and tenant, such as section 121 (covenant not to assign, etc., without licence or consent).

Major Areas of Contention

1. Rental alternatives.

All official inquiries have concentrated a considerable part of their attention on how rentals are assessed and adjusted,and in particular on "percentage rent". This is one of those contentious issues arising particularly from the distinctive nature of a shopping centre lease. Generally commercial rents are negotiated on the basis of market value, with periodic adjustments tied to the Consumer Price Index (All Groups) or (less commonly) fixed annual increases, in either case with periodic revaluations to allow for the updating of market values on the exercise of options for further lease terms. But most retail shop leases in shopping centres use percentage rentals, with provision for escalation according to turnover.

In the case of a percentage rent, there is an annual minimum (or "base") rent, negotiated between the parties and presumably related to market value, with provision for updating in one form or another. While the size of the demised premises should be a

12. D. Black, *supra*, n.3.
13. *Discussion Paper*, 3.

relevant consideration in determining the minimum rent, it is a fact of life that the major retailers, being the major attractions of the shopping centre, would most likely pay less per square metre than the small specialist shops, whether in the form of a fixed rent (index adjusted) or as the base rent component of a percentage rent clause. But percentage rent does not stop at an annual fixed sum, for in its most common form it requires the tenant to pay as additional rent (sometimes called "overage rent") the difference between the minimum rent for a particular year and the agreed percentage of the tenant's gross receipts for that year. But there are many variations, one of which may be the agreed reduction of the percentage as turnover reaches a certain level. Leases contain various definitions of "gross receipts", but without fail the definition is bound to be a very elaborate one.

Here again, the leverage exercised by the major tenants, reinforced by their comparatively huge turnover, ensures that they will pay a lower percentage of gross receipts than the smaller tenants. Whereas most tenants will be liable for a payment of average rental based on a percentage of turnover of between 4 and 10, depending on the particular type of store and its location in the complex, a large supermarket or department store will be assessed on the basis of a percentage of 1 to 3 only.[14]

Shopping complex owners claim that the concept of a base rent, with a percentage provision coming into effect once a certain predetermined turnover is reached by the trader, has been applied throughout the Australian shopping centre industry for over twenty years, during which time the appropriate percentages for various kinds of businesses have been established and accepted. They assert that under such a system the landlord has a strong incentive to promote the centre and thus increase the landlord's income. But the Small Business Development Corporation took the view that rent based on a percentage of turnover should be prohibited. It wanted rent to be quoted and based entirely on a fixed amount per unit area, so that business people would be aware of their annual commitments.[15]

The Cooper Committee was certain that the base rent for small traders in many complexes had all the appearance and substance of market rent for the space rented. It found a remarkable uniformity between the rents levied as base rents in the various complexes and it appeared as if there were more direct correlations between rental levels and floor areas than rental levels and the types of business and turnovers involved, at least in the case of small tenants. In such circumstances, it could be argued, according to the Committee, that the percentage rent sought in excess of the base rent was not in essence a rent at all, but a device by which the owner could share in the profits of the business. However, the industry would not dispute that it is a profit maximizing method, but a legitimate and equitable one in the circumstances, and no prospective tenant is

14. These figures are supplied by BOMA; *cf.* the table of shopping centre percentage rents in Metropolitan Toronto as of February, 1976, in *Shopping Centre Leases, supra,* n.1, 240-242.
15. Cooper Report, 23.

compelled to enter into a lease. Further, the Cooper Committee seemed to be stretching the point by its view that by sharing in the profits of the business the owner became a partner in the business.[16] As indicated earlier, the lack of a lawyer-member led the Committee into several traps, and this was one of them. It could not normally be shown that the landlord and the tenants are carrying on business in common with a view to profit, within the terms of the common definition of a partnership. But in any event it is expressly declared by statute that the sharing of gross returns does not of itself create a partnership.[17] Further, emphasis may be given to the denial of a partnership relationship by an appropriate lease clause. It may be added that rentals based on turnover are found also in other industries, e.g. petrol service stations and licensed hotels, without the formation of partnerships.

Paradoxically, the Cooper Committee found that only relatively few small tenants were paying rent in excess of the base rent, yet there was almost universal opposition among them to the levying of percentage rents. Small traders felt strongly that they would be penalised for their initiative and also that their increase in turnover would be the basis for lifting the base rent. They feared too that the increased rent would absorb the additional net profit created by them, for increases of rent based on turnover took no account of the effect of such increases on either gross or net profit. The Cooper Committee found that the tenants' fears were genuine, and also came to the conclusion that the application of percentage rents to small traders extended the historic principle of percentage rents into an area of business which was never really intended. It appeared to the Committee that percentage rents were used to attract major tenants into shopping complexes. As an inducement, base rents were set at a low figure; so that the landlord might eventually achieve a satisfactory return on his investment, a percentage on turnover rent system was devised whereby the major retailer would progressively increase his rental payments to the landlord as his turnover expanded.

It was contended that landlords should share in an increase in business to which they had themselves contributed by their promotional and managerial efforts, but the Cooper Committee reached the view that the system was not really satisfactory in its existing form for small tenants, and even where percentage rents were appropriate, the percentage should reduce as turnover increased, for an increase in turnover was not necessarily a true measure of an increase in the capacity to pay, and percentage rentals were "in some ways akin to a tax on initiative and hard work."[18]

The Cooper Committee therefore recommended that owners of shopping complexes, of their own volition, should drop the practice of percentage rents when dealing with small traders, or alternatively (and more vaguely) a more equitable system of percentage rents should be evolved. Failing the implementation of

16. *Ibid.*, 24.
17. In Queensland, by the *Partnership Act* 1891, s. 6(2).
18. Cooper Report, 25.

either of these alternatives, it wanted the Government to consider providing a system of arbitration "for the adjudication of fair and equitable rents" for tenants in shopping complexes.[19]

The relatively moderate approach of the Cooper Committee is belied by the latter recommendation. An imposed system of arbitration for the fixing of initial rents for new leases, however "fair and equitable", would be a most radical measure of interference with the market and the rights of both sides in negotiating terms of agreement, and one which would hardly be appropriate for commercial leases. Even in the case of residential tenancies, any remaining semblances of rent control in Queensland were abandoned many years ago, and no suggestions about returning to such a system have been heard recently.

The Joint Committee is to be commended for not repeating this *canard*. Its solution was that legislation should require that the tenant (in the case of *all* retail shop leases) be offered at least two alternative rent methods, one of which should be "a rent stated as a cost per square metre of lease area", the tenant to have the right to elect the alternative desired. As part of the self-regulation of the industry, BOMA had already announced in its response (in April, 1982) to the Cooper Report the concession that, in shopping centres where the percentage rental system was in use, the owner would offer to small shopkeepers the alternative of a consumer price index method of rental adjustment. This undertaking is now embodied in the *Code of Good Practice* and *Model Lease* issues (in April, 1983) by BOMA and its offshoot, the Australian Council of Shopping Centres. But while BOMA has among its members virtually all the owners of major shopping complexes in Queensland, it cannot control its members; it can only try persuasion. Further, a great deal would depend on the way the option is offered. Thus an owner could offer the choice between a percentage rent and a highly inflated indexed rent, which would make the supposed freedom of choice meaningless. Nevertheless, the Joint Committee's proposal may well find its way into legislation, notwithstanding that small traders' associations seem to be a little distrustful, for it seems to have found favour with politicians.

2. *Disclosure of turnover*

A concomitant of a percentage rent is the obligation of a tenant to provide turnover figures to the landlord. The Cooper Committee thought that this was an intrusion into a small tenant's right of privacy in his business dealings, whereas the Joint Committee took the view that, if the tenant accepted a percentage rent, then he had an obligation to provide turnover figures for the landlord, though he should not be obliged to do so if he elected to pay rent on a basis other than a percentage one. The BOMA view is that information about turnover has other uses in the promotion and management of a shopping centre, for which the owner is responsible, as it is the only method by which the effectiveness of promotional activities can be gauged, and that it can also be valuable for the tenant to

19. *Ibid.*, 26.

enable him to evaluate his relative performance. BOMA's *Model Lease* requires the tenant to furnish monthly trading figures, subject to the landlord's keeping such information confidential. Interestingly, according to BOMA, some landlords do not use the percentage rental system for small tenants because those landlords consider that some small tenants cannot be relied on to report their turnover figures accurately.

3. Lease Premiums

Complaints have been made by small traders' associations that shopping centre owners frequently demand substantial premiums as "Key money" or non-returnable bonds for the granting of leases. The Small Business Development Corporation considered that the practice of demanding key money or bond money should be banned, but, as its report has not been published, one cannot tell upon what evidence this view was founded. Similarly, the Joint Committee wanted all such payments prohibited by statute, again without any published discussion. The only hard facts available are that the Cooper Committee stated that no evidence was presented to it to indicate that owners of shopping complexes had demanded key money from prospective tenants, though it was generally accepted that tenants should lodge a bond of at least one month's rent in advance prior to the tenancy being taken up and the Committee considered this practice to be reasonable.[20] The matter is not referred to in the BOMA response to the Cooper Report or in its *Code of Good Practice.*

4. Lease periods and renewals

Short lease terms and the lack of options for their renewal were identified by the Small Business Development Corporation as main problem areas of landlord and small tenant relations in shopping complexes. The Corporation took a rigorous pro-tenant line by recommending that it should be made compulsory for every lease to give a minimum initial term in addition to two minimum option periods, though it is not known what periods the Corporation contemplated. Concern was expressed too by the Cooper Committee that the trend for shorter lease terms for small tenants placed an extremely effective bargaining tool in the hands of landlords and managers and evidence suggested that this practice had been abused by some owners and managers. It acknowledged that in a free enterprise system there was no compulsion upon prospective tenants to accept proffered leases from owners. Owners had pointed out that lease terms were negotiable and that full regard was given to the proposed investment by a prospective tenant in fittings and fixtures and the need for leases to allow sufficient time for these capital outlays to be recovered. On the other hand, owners claimed that it was necessary for the well-being of a centre to have a tenant mix which was judged to be the most suitable at any particular time. Shorter leases provided flexibility in this regard, whereas longer term leases or those providing for

20. *Ibid.*, 37.

options had an inhibiting effect on optimum management.

The Cooper Committee detected a preference on the part of owners for three year leases without options, but even where there were options, normally the extent of any increase in rent was dependent on negotiations between landlord and tenants, as it was also frequently in the case of periodic rent reviews during the currency of a lease. Tenants complained that, since the only alternative to rental adjustments was the forfeiture of their businesses, they were in a very weak position and had no defence against excessive increases.

The Cooper Committee was inclined against regulation in these matters, though it considered that in general a five year initial term would be reasonable. But it was a matter of market judgment for the tenant whether he signed the lease or not, the important aspect being the total period for which the tenant had security of tenure, there being no difference in the Committee's view whether this period was expressed as one term or a term with options. Where an option existed it was the view of the Committee that the inclusion of a clause providing for independent arbitration of disputes was reasonable, and similarly in the case of periodic reviews of rent during the currency of a lease, if no automatic formula was provided.

However, where there was no option, it believed that the tenant should rely on normal commercial negotiations with the landlord. The Committee took a far more cautious line than it had on the matter of percentage rents in new leases (*supra*) in stating that it could not recommend arbitration on the renewal of expired leases in shopping complexes without establishing a precedent with widespread ramifications throughout the commercial world which might also affect the relationship between landlord and tenant in areas such as domestic housing.[21] In fact, there would appear to be a much stronger case for interference here than in the new lease area.

However, BOMA was naturally not inclined to argue with a viewpoint so favourable to it, and contented itself with affirming that landlords and tenants were free to enter into leases for such periods as they agreed between themselves and could include or omit options or rights of first refusal as they saw fit. But, unless options were involved, BOMA did not consider it appropriate that experts should be engaged to fix rentals for new leases or for the renewal of expired leases.[22] The use of the word "experts" indicates a matter on which BOMA took issue with the Cooper Committee, as BOMA believed that a valuer or other qualified expert, acting as an expert and not as an arbitrator, could give quicker decisions at lower cost than an arbitrator. This practice is followed in many commercial leases.

The Joint Committee followed the Cooper Committee's arbitration line (if no agreement) both for rent reviews on the basis of market rent and in the case of the exercise of options. But the Joint Committee went much further by its proposal that there

21. *Ibid.*, 29-30.
22. These points are now part of the *Code of Good Practice.*

should be implied in every retail shop lease an option for the tenant to extend the lease by a period equal to the initial term, the total not to exceed five years. It also wanted its proposed legislation to prohibit any demand by a landlord for any special payment or the granting of any benefit in return for the renewal or the extension of a lease (apparently irrespective of an option).[23]

5. Assignment of leases

Some small tenants have complained of unreasonable delays in granting permission to assign their leases. The Small Business Development Corporation recommended that a tenant should have the freedom to sell his business without fear of permission for assignment of the lease being capriciously withheld. This recommendation obviously takes no account of section 121(1) of the *Property Law Act*, which, having regard to the restriction on assignment without consent contained in most shopping centre leases, would prohibit such consent being unreasonably withheld, even if the latter qualification were not present in the lease. Both the Cooper Committee and BOMA agreed that applications for consent to assignments should be handled promptly, BOMA adding the rider that this depended on the prompt submission of the required credentials of the proposed assignee, as the landlord must have sufficient time to investigate the latter. This was particularly important in the community of a shopping centre where considerable care has to be exercised in the selection of tenants.[24] Thus a change of user which would upset the tenant mix could be a relevant consideration, and most leases reserve for the absolute discretion of the landlord the power to grant or refuse consent to a change of user.

In relation to assignments, the Cooper Committee appeared to be unaware of the well-established common law principle of privity of contract when it recommended that leases should no longer bind the original tenant to remain responsible for the future performance by the assignee of the terms of the lease. The Committee found that most tenants believed that all connection with their landlords was severed after assignment and that the practice of continuing tenant liability was unreasonable.[25] Perhaps it is not being too over-confident to surmise that no such fundamental change in the existing law is likely to occur, and BOMA evidently so believes in making the blunt statement in its *Code of Good Practice*: "By common law, an assignor remains liable for the performance of his lease covenants whether so stated in the lease or not."

Section 121 of the *Property Law Act* also provides for the right of the landlord to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to consenting to an assignment. The Cooper Committee, apparently

23. *Discussion Paper*, 5.
24. As to the withholding of consent in the interests of good estate management, see *Bromley Park Garden Estates Ltd. v. Moss* [1982] 2 All E.R. 890; [1982] 1 W.L.R. 1019. (C.A.).
25. Cooper Report, 31.

unaware of this provision, saw no objection to the practice "provided the lease makes provision for this".[26]

6. *Goodwill*

A distinctive (and contentious) feature of large shopping complex leases has been the insistence of landlords of a share of the price obtained for goodwill upon the sale of a business and the associated assignment of the lease. The owners of the centres claimed that goodwill accrues to a business as a result of joint efforts by landlord and tenant and that consequently there must be some method for sharing the goodwill between landlord and tenant. They submitted to the Cooper Committee that in order to discourage speculative trading in leases in the early days of a shopping complex, the proportion of goodwill demanded should be as high as 50%, reducing over time to perhaps 20% or even 10%. In other cases owners have claimed the equivalent of 3 months' rent before an assignment of a lease was agreed to.[27]

The Small Business Development Corporation recommended that landlords should be prohibited from demanding a percentage of goodwill or an amount associated with the sale of a business. However the Cooper Committee was prepared to accept the principle of some mechanism for the sharing of goodwill between landlord and tenant, but it was concerned regarding the actual percentages or ratios shared between the respective parties. It suggested that the percentage should reduce to no more than 10% after three years or one month's rent in cases where a rent equivalent was required. They further considered that the practice of apportioning goodwill on the sale of a renewed lease on the same basis as for a new lease should cease, as this practice directly contradicted the rationale submitted by owners for the high share of goodwill in the initial period of a lease.[28]

The Cooper Committee's views were accepted by BOMA, though with some reservations. It asserted that in many cases goodwill was little more than key money for the lease, payable to the tenant instead of to the landlord, an observation which seems rather unfair to tenants. It noted that the *Property Law Act* expressly permitted the payment of a premium for consenting to an assignment, if the obligation to pay it was expressly stated in the lease,[29] and drew comfort from a sentence in a Trade Practices Commission circular to the effect that customers often primarily go to a shopping centre complex and only secondarily to an individual business in such centre.[30] Accordingly, its 1982 *Code of Good Practice* stated that a landlord of a shopping centre was entitled to a share of the goodwill payment on the sale of a tenant's

26. *Ibid.*; see also *Discussion Paper*, 6.
27. Cooper Report, 32.
28. *Ibid.*
29. S.121(1).
30. The circular considers the sharing of goodwill not to be a restraint on competition: Trade Practices Commission *Information Circular* No. 7 (12 May, 1975), pp. 7-8, 17.

business, but the lease should specify the method of assessment, which should be fair.

It must therefore have come as a blow to BOMA when in January, 1983, the Joint Committee recommended that legislation should provide that no part of goodwill payable to a tenant on assignment of a lease should be payable to a landlord. BOMA then did a quick about-turn and announced shortly afterwards that a landlord's sharing in the goodwill payment received by a tenant on the assignment of a lease in a shopping centre was no longer BOMA policy. It recommended that such clauses be eliminated from new leases and that rights to goodwill payments arising under existing leases be waived. This concession was an attempt to remove the need for legislation, which BOMA saw looming dangerously before it and which it strongly opposed. This then was an example of the industry self-regulation in which BOMA continued to believe.

But the renunciation of a share of goodwill was not without its compensation, for BOMA's new *Code of Good Practice* of April, 1983, stated that, to discourage speculative trading in leases, a "disincentive payment" might be provided for in a lease, but only during the first three years of a new centre, the amount thereof to be not more than six months' rent during the first two years of the lease and three months' rent in the third year of the lease. Such payments were not to extend beyond the third year and should be waived in cases of established hardship, such as an unexpected disability. As in the case of a share of goodwill, a disincentive payment cannot be claimed unless it is expressly so provided in the lease.[31]

7. Outgoings

Liability for outgoings is another problem area, complaints by tenants ranging over the method of assessing charges, the composition of the charges, the quantum to be borne by tenants and the processing of the amounts charged. The Cooper Committee found little uniformity to the industry as to the composition of outgoings. The inclusion of such items as charges for cleaning, lighting, security and refuse removal was considered to be equitable to all parties, but the inclusion of local authority rates and charges and land tax in outgoings was regarded by some tenants as unreasonable. But in the Committee's view, these were costs which in shopping complexes it was reasonable for the landlord to recover by the inclusion of a component in either the base rent or outgoings. However, centre outgoings should not include the costs of centre management, structural repairs, major renovations and the like, and management should adopt a more accountable approach to the charging of outgoings to each tenant. There was also criticism of some owners profiting from the retailing to individual tenants of electricity purchased in bulk by the owners.[32] The Joint Committee made quite specific recommendations concerning provisions about outgoings in its

31. *Ibid.*
32. Cooper Report, 27-29.

proposed legislation, including exactly what items could be included in operating expenses charged to a tenant.[33]

The problem about such proposals is that they ignore the inescapable fact that all the costs of operating and maintaining a shopping centre must be paid by someone—and that must be either the owner or the tenants, rentals being set accordingly. BOMA has drawn attention[34] to the great change in lease procedures world-wide since the end of World War II. In most kinds of commercial and industrial leasing it has become a common practice for tenants to pay a base rental, which covers the owner's financing costs, his off-site management costs and his profit. In addition, the tenant reimburses *all* the onsite costs, but there are many variations where the landlord absorbs some of these costs, and charges a correspondingly higher base rent. The fairest methods for apportioning the cost of outgoings among tenants is usually to apportion the costs in proportion to floor areas occupied.

BOMA's *Code of Good Practice* advises that outgoings to be recouped from tenants should be expressed clearly in the lease and detailed statements of actual outgoings should be provided promptly to tenants. It also provides that in the apportionment of costs the landlord should meet the outgoings for vacant shops.

8. Alterations and maintenance

The Small Business Development Corporation listed various other issues which were contentious and, according to the Corporation, caused hardship to small tenants. One of these was in relation to alterations and additions to the shopping complex which caused inconvenience to existing businesses. The Corporation recommended that the tenant should be entitled to compensation for the loss of revenue caused by such alterations and additions. Similarly, the Cooper Committee was of the opinion that just and equitable compensation should be offered to tenants if their normal trading results were distorted by the acts of the owners or their agents, such as major renovations.[35] The Joint Committee made no reference to these matters. These situations may of course be covered by provisions in the lease or there may possibly be a breach of the landlord's implied obligation not to derogate from his grant,[36] or even perhaps in some circumstances a breach of the covenant for quiet enjoyment, though the latter is more doubtful.

BOMA's attitude on trade disruptions, as evidenced by its *Code of Good Practice*, is that if a landlord causes such a disruption, as, for example, by undertaking major structural alterations, compensation *may* be payable to the affected tenants, but that compensation is not payable in respect of occurrences beyond the landlord's reasonable control.

In addition, in some centres, maintenance and repairs are alleged to be not effected promptly, and the Small Business

33. *Discussion Paper*, 5.
34. In a *Practice Note* issued to its members in February, 1983.
35. Cooper Report, 36.
36. See, for example, *Newman v. Real Estate Debenture Corporation Ltd.* [1940] 1 All E.R. 131.

Development Corporation recommended that, in a case where lack of maintenance or failure to effect repairs promptly were to the detriment of the tenant, he should be entitled to compensation in the form of either a rent-free period or perhaps a partial relief from rent. The Cooper Committee took the view that some provision should be made for the burden of such occurrences as failure of plant and equipment to be shared by tenants and landlord and it saw scope in such circumstances for arbitration.

In most shopping centre leases (as in BOMA's *Model Lease*), the landlord undertakes to keep and maintain the centre in good order and repair and also to use his best endeavours to provide air-conditioning during normal trading hours. However the landlord disclaims liability to the tenants for any loss or damage suffered by the tenant for any malfunction or interruption of the air-conditioning or fire equipment or the water, gas or electricity services or for the blockage of any drains, etc., from any cause whatsoever. The tenant agrees to occupy and use the demised premises at his own risk, the landlord being liable only for loss or damage caused or contributed to by the landlord's negligence, but failure to repair is declared not to be negligence for this purpose.

9. Arbitration or mediation

A sweeping plan for an independent Board to arbitrate on all grievances at no charge was proposed by the Small Business Development Corporation. On a less grand scale, BOMA, in its pursuit of industry self-regulation, originally advocated the establishment of a Retail Tenancy Advisory Body, the role of which would be to investigate legitimate complaints from either tenants or landlords, such body to be conciliatory and not arbitrative. It was modelled on the lines of a projected voluntary tribunal to deal with some commercial lease disputes in the Australian Capital Territory. The Cooper Committee held the view that the creation of such a body would not of itself solve the problems currently affecting owner-tenant relationships, though it felt that such a body could well have a place as part of an overall package of measures which could be adopted to achieve industry self-regulation and administration.[37] BOMA, on further reflection, doubted the desirability of such a Board and thought there would be little scope for it, at least if BOMA guidelines as to what should be included in leases were accepted.

However, the Joint Committee came out firmly in favour of the statutory creation of the office of Mediator to provide a low cost forum where parties in dispute could air their differences and with the help of the Mediator reach some acceptable compromise solution. However, as there would be no compulsion to make parties attend mediation, the process would appear to have little chance of being an effective body. The only sanction would be that, if a party refused to attend or broke a mediation agreement, that party might be reported in the Mediator's report to Parliament and also might be referred to by name in a newspaper advertisement,

37. Cooper Report, 40.

presumably somewhat like the publication of cases decided in the Small Claims Tribunal.

It is not clear from the Joint Committee's *Discussion Paper* whether legal representation would be allowed in mediation proceedings, for while it is stated that the parties must make their own representations before the Mediator, yet they may be assisted by advisors. However the Joint Committee wished to make it clear that it did not want the mediation process to take away the rights of parties to approach the courts, which of course could not be the result of the creation of the office of Mediator. Furthermore, clauses in leases which were subject to arbitration would not be referred to mediation.

10. Model retail shop lease

The Joint Committee stated that a draft lease was being reviewed by an expert legal panel which was to report its views to the Committee, and that public comment would then be sought prior to seeking endorsement of the lease by the Government. What this endorsement was to consist of was not spelt out. The Committee thought that the adoption of a model lease could eliminate undesirable leasing practices. As mentioned previously, BOMA has also produced a *Model Lease* for shopping centres, which, being a landlord's document, presumably will attract much criticism from small traders' organisations. There is no doubt that a suitable model lease, acceptable to all parties, with various sets of alternative provisions, would be a progressive step for the industry.

11. Associations of traders

It is usual for a centre to have its own association of traders ("Merchants' Association"), the objects of which are to advance and to further the trading, promotion and the publicising of the shopping centre and to conduct, organise and set up promotional programmes, special events, cooperative advertising and other joint ventures in the general interest of the centre. The costs of these activities are shared between management and tenants.

Obviously the merchants' associations can play a very important role in the success or failure of a shopping centre. The Small Business Development Corporation was dissatisfied with the effectiveness of the associations and considered that they were biased towards larger traders. Indeed the most common complaint received by the Cooper Committee about the functioning of the associations was their alleged undemocratic structure. Most small tenants felt that the centre management and major tenants completely dominated the associations. An examination of the constitution of a typical association would seem to bear this out, and the Cooper Committee's findings supported this view, though it noted with approval the regulations of one owner which ensured an equality of voting power between the three major interests in shopping complexes, viz. the owner, the major tenants and the small traders. It suggested the arrangement as a model for other owners to follow.

A further complaint received by the Cooper Committee pointed to the very narrow field of responsibility and activity of most merchants' associations, which, in the main, concerned themselves solely with promotion, advertising and display activities for the complex as a whole. The Committee believed that the charter of the associations could be widened to include a management supervisory role with respect to the cost and efficiency of various services provided to each shopping complex. Furthermore, it would be helpful if associations could allow tenants to air their grievances and it was felt that better communication would result if this were the case. In fact, the Committee believed that the inability of management to communicate effectively with tenants was a basic weakness throughout the industry and was most likely a product of the recent proliferation of shopping complexes which had created a shortage of skilled and experienced centre managers.[38] No mention is made in the Joint Committee's *Discussion Paper* regarding merchants' associations.

In its response to the Cooper Report, it was admitted by BOMA that in practice the associations have rarely been effective mainly because of the tenants' lack of interest. But it did not believe that the widened function of associations proposed by the Cooper Committee was appropriate: the management of the centre was the landlord's function and not a joint function between landlord and tenants. However, if tenants wished to deal as a group with the centre management, there was no reason why they should not form a tenants' association for the purpose. That is exactly what has been happening, the small tenants in some shopping complexes forming their own associations in order to press collectively for changes in the lease arrangements in shopping centres and to give strength to their negotiations with the landlords on behalf of their members. One of the items for which they are pressing is equal representation and voting rights within the structure of the (official) merchants' associations.

While BOMA's *Model Lease* requires membership of the merchants' association, it is understood that such associations have not been formed in a number of the newer centres. Instead, tenants have been required to contribute to promotion funds administered by management.

The Prospect of Legislation

The above problems were not the only ones which came to light during the years of debate, inquiry and report. But they are the principal ones, and their considerable number is proof that all is not well in the shopping centre industry. The Cooper Committee held the view that "governments normally should not dictate the form commercial leasing contracts should take", while at the same time warning the industry of "the ground swell of resentment amongst tenants at the onesided nature of shopping centre leases". It referred to moves in other States to introduce consumer

38. *Ibid.*, 37-38.

protection type provisions for small traders, such as a "cooling off" period of at least seven days after entering into a lease agreement, and suggested to landlords that they should be very conscious of the more unpalatable alternative to reform on the lines indicated in the Cooper Report.[39]

The Joint Committee came down strongly in favour of legislation, which is even more strongly demanded by the small traders, who angrily dismiss arguments about free enterprise as being irrelevant to the many retailers who claim to be suffering from extortionist landlords and who fear the expiration of their leases. On the other hand, the representatives of shopping complex owners and managers claim that they have been putting their own house in order and that their new, improved and concessionary *Code of Good Practice* and *Model Lease* should satisfy the small retailers. The latter retort that industry regulation cannot work because no voluntary organisation can control its members, let alone its non-members. The intense interest in this matter is indicated by the ninety responses to the Joint Committee's *Discussion Paper.*

A counter-balance to the Queensland reports is the *Report of the South Australian Working Party on Shopping Centre Leases* (the "Hill Report"), issued in May, 1981, which recommended that the (South Australian) Government take no specific action on any of the problem areas which were brought to the attention of the Working Party, nor indeed on any other provisions of shopping centre leases and ancillary agreements. These included most of the significant areas which were considered by the various investigating bodies in Queensland. The Hill Report, which was a lengthy and thorough one, in the course of reaching its conclusion against statutory regulation, examined the situation elsewhere in Australia. It pointed out that the tenant unrest throughout Australia was a symptom of the changes in the status and independence of small retailers which occurred in recent times as a result of the spread of shopping centre complexes owned by large corporations and institutions. These changes had led to tenant frustration due to an apparent lack of bargaining power with landlords, exacerbated at present by difficulties experienced in earning a viable return relative to more prosperous times. The general opinion was that the problems of tenants were essentially private contractual ones in which it was not appropriate for governments to intervene. However no State seemed to be discounting the possibility that intervention might be necessary in the future if the problems persisted and could not be ameliorated through industry self-regulation.[40]

That point seems to have been reached in Queensland. While as recently as August, 1982, BOMA was reporting to its members that it had "the assurance of the Minister, supported by a Cabinet decision, that legislation is not contemplated", there is now (in mid-1983) a political momentum afoot in all parties which appears to foreshadow the inevitability of regulatory legislation. For

39. *Ibid.*, 34-35.
40. Hill Report, 37.

example, the Liberal Party (Qld) announced its policy on the matter in May, 1983, stating that the situation had been reached where the Party's fundamental philosophy of non-interference in the market place had to be changed in this case, and the maintenance of fair competition could be achieved only through legislation that gave landlords a reasonable return for their investment and guaranteed retailers a reasonable security of lease and equity in dealings with owners.[41] The National Party (Qld) has a similar policy, though the specific proposals in the policies of the two Government parties have already been dealt with, on a voluntary basis, by the industry itself, which was said to be "aghast" at the politicians' statements and warned that "Queensland's reputation as a free enterprise State could be destroyed if the State Government intervened in the area of shopping centre leases".[42]

So it must be accepted that legislation will eventuate, and there is certainly no overwhelming reason against Government regulation in view of the considerable number of precedents for interference in the market. Specifically, in the area of landlord and tenant, there are regulatory provisions in all jurisdictions, particularly in the case of residential tenancies. However, even in the case of commercial tenancies, all States have legislation dealing with such matters as, for instance, modifying the effect of certain covenants and imposing restrictions on and granting relief against forfeiture. In Queensland, fifty-one sections of the *Property Law Act* are devoted to general landlord and tenant law.[43] English legislation goes very much further in the protection of business tenants, particularly in protecting them from eviction when their leases expire,[44] and the same is true of some other jurisdictions.

Thus ample precedent for legislative control exists. Questions arise whether the legislation will apply to all commercial leases or be confined to shopping centre leases, and, if the latter, whether it will be protective not only of minor tenants, but also of major tenants, who seem to find existing practices quite acceptable. The Cooper Committee was "mindful that any regulatory interference by Government in the affairs of landlords and tenants within shopping complexes could have widespread effects over the whole range of commercial and industrial leasing activities throughout the State and indeed bear upon all forms of landlord/tenant relationships".[45] Indeed, the Committee went out of its way to emphasise that it had not given consideration to general commercial leasing.[46]

The Joint Committee proposed that its legislative recommendations should apply to all retail shop leases. If the eventual legislation seeks to protect small tenants only, whether in shopping complexes only or more generally, the problem of

41. *Courier-Mail*, 17 May, 1983.
42. *Courier-Mail*, 3 May, 1983.
43. Ss.102-152.
44. Part II of the *Landlord and Tenant Act*, 1954 (Eng.)
45. Cooper Report, 3.
46. *Ibid.*, 12.

defining small tenants may prove to be a difficult one, for where does one stop? The Cooper Committee received representations from medium-sized traders and noted the remarkable similarity of some of the major problems shared between small and medium-sized retailers, for example, objection to percentage rents and the cost of centre outgoings.[47] The Committee adopted for the purpose of its inquiry a highly selective definition of "small tenant",[48] criticised by BOMA which believed that it was unsuitable for use in legislation because it depended on the personal qualifications of the tenants concerned. BOMA suggested, as an alternative, the rather limited definition of "small shop" in the *Factories and Shops Act*, but omitting the reference to the type of goods sold.[49] Neither definition is satisfactory.

Whatever in due course eventuates, perhaps one may express the hope that moderation will prevail and that the emerging legislation will not be too Draconian, and cast its net too wide, in its efforts to placate tenants and eliminate the harsher practices of some landlords.

47. *Ibid.*, 16.
48. *Ibid.*
49. *Factories and Shops Act* 1960-1982 (Qld), s. 5(1).