

1992

The Retail Shop Leases Act 1984 (Qld): Does It Remedy A Mischief?

Colin Anderson

Follow this and additional works at: <http://epublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

The Retail Shop Leases Act 1984 (Qld): Does It Remedy A Mischief?

Abstract

The Retail Shop Leases Act 1984 (Qld) (RSLA) was assented to on March 12 1984. The Act grew from a report of the Committee of Inquiry into Shopping Complex Leasing Practices in November 1981 (the Cooper Report). This was then followed by joint Parliamentary Committee report in January 1983. The Act was amended in 1985 after the issue of a green paper. Further amendments were made in 1988, 1989 and 1990.

The Act thus has a substantial amount of material upon which it was based. This paper aims to examine the circumstances surrounding the passing of the legislation and in particular to compare and contrast the initial Cooper Report recommendations and other materials with the provisions of the Act as at the present. In so doing an evaluation is made of the extent to which the Act remedies the mischief it aims to correct.

Keywords

Retail Shop Leases Act, Cooper report, Acts Interpretation Act

THE RETAIL SHOP LEASES ACT 1984 (QLD): DOES IT REMEDY A MISCHIEF?



by
Colin Anderson
Lecturer
Queensland University of Technology
Faculty of Business
School of Accounting and
Legal Studies

Introduction

The *Retail Shop Leases Act 1984 (Qld) (RSLA)* was assented to on March 12 1984.¹ The Act grew from a report of the Committee of Inquiry into Shopping Complex Leasing Practices² in November 1981 (the Cooper Report). This was then followed by joint Parliamentary Committee report in January 1983.³ The Act was amended in 1985 after the issue of a green paper.⁴ Further amendments were made in 1988⁵, 1989⁶ and 1990.⁷

The Act thus has a substantial amount of material upon which it was based. This paper aims to examine the circumstances surrounding the

The *Retail Shop Leases Act 1984 (Qld)* is an important piece of legislation governing certain types of commercial leases in Queensland. However there is virtually no case law to assist in the interpretation of this statute. In the light of recent amendments to the *Acts Interpretation Act (Qld)* which allow for extrinsic material to be used to assist in interpretation, this paper examines the original report (the Cooper Report) upon which the legislation was based and the extent to which the legislation overcomes those problems first raised in the Report. In undertaking this task, some indication of the meaning of some of the more difficult sections to interpret, is extracted.

'I would point out that this is pioneering legislation. This Government is the first State Government in Australia to grasp the nettle. I do not expect that the legislation will satisfy everybody. However, a major effort has been made to come to grips with the major causes of concern in present retail shop leases'

The Minister for Industry, Small Business and Technology on introducing the *Retail Shop Leases Bill* in 1984

- 1 Some provisions viz Parts IV and V commenced in July 1984.
- 2 See *Report of Committee of Inquiry into Shopping Complex Leasing*, Qld Government Printer Brisbane. 1981.
- 3 See *Public Discussion Paper - Retail Shop Leases Qld* Government Printer Brisbane: 1983.
- 4 See no 33 of 1985.
- 5 See no 43 of 1988.
- 6 See no 117 of 1989.
- 7 See no 7 of 1990.

passing of the legislation and in particular to compare and contrast the initial Cooper Report recommendations and other materials with the provisions of the Act as at the present. In so doing an evaluation is made of the extent to which the Act remedies the mischief it aims to correct.

This is undertaken in the light of recent amendments to the *Acts Interpretation Act* (Qld)⁸ which enables the courts to take into account material extrinsic to the Act in certain circumstances and requires the courts to promote the meaning of legislation which best suits its object or purpose. This extrinsic material could be examined to establish if it assists in interpretation of those provisions of the Act which are unclear.

New Developments in Statutory Interpretation

Prior to examining the provisions of the *RSLA* and other material the recent amendments to the *Acts Interpretation Act* will be outlined. Under the Amendment Act section 11(12), section 14A and 14B were inserted into the principal Act. Section 14A provides as follows:

'Interpretation best achieving Act's purpose

14A (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

(2) Subsection (1) applies whether or not the purpose is expressly stated in the act.'

This provision is in slightly different terms to the corresponding provision in the *Commonwealth Acts Interpretation Act* (See section 15AA). It states

15AA(1) In the interpretation of a provision of an Act a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

In terms of the Commonwealth provision it has been said that

'The precise effect of section 15AA(1) and similar provisions are yet to be authoritatively determined. However it has been considered in a number of cases. There is however no case... in which section 15AA(1) or similar provisions has led to a result that is different from the result that would have been obtained from the development of pre-existing rules'.⁹

8 See no 30 of 1991.

9 McAdam, AI & Smith TM *Statutes* (2nd ed) Butterworth Sydney 1989. See also *Chugg v Pacific Dunlop Ltd* 64 ALJR 599 at 604.

However the new Queensland provision could have a greater impact. It refers to the preference for a best interpretation in terms of the particular acts' object or purpose whereas the Commonwealth provision merely concerns a situation where the preference is between one interpretation which promotes the object and one that does not. It seems that in many situations (if not most) the choice is between interpretations both of which perhaps help promote the purpose or object in some way.

If section 14A does affect the rules of interpretation to a greater extent than the Commonwealth section then it would seem that the purposive or mischief rule will become a dominant interpretative force. If this is the case, the implication for the RSLA would seem to be that the provisions of the Act will be given generally a wider meaning. The Act is clearly designed to promote the rights of small tenants in retail shopping centres.

'This Bill [the RSLA] proposes to regulate certain practices adopted by landlords that have placed an unfair burden on the small retail tenant'.¹⁰

Thus interpretations which promote this object should be favoured in so far as the words allow. It must always be remembered that the basis of the courts interpretation will be the words of the act itself and that the provision is unlikely to promote extreme or unreasonable interpretations, nevertheless the words in the RSLA are often capable of wider meanings and it would seem consistent with section 14A if such were to prevail in the case of ambiguity. So for example considering section 15(1)(a) of the RSLA which provides in part:

'In every retail shop lease (other than a periodic tenancy or a tenancy at will) there shall be implied the following provisions: -

- a) The landlord is liable to pay the tenant reasonable compensation for injury suffered by the tenant if the landlord, or a person acting under his authority ...'

A question may arise as to the interpretation of the words 'injury suffered by the tenant'. It is clearly meant to cover damages but what if the actual injury is suffered by a third party and as a result the tenant becomes liable for damages (eg through occupiers liability as a result of defects in the building or a breakdown of plant or equipment) [see section 15(1)(a)(v)]. Can it be said that the section will cover this? It would seem a purposive approach would extend the section to provide the tenant with a remedy against the landlord for such damage. Another situation where section 14A of the Acts Interpretation Act may assist in interpretation is in section 15(3). Wallace¹¹ has raised the issue as follows:

10 Legislative Assembly Parliamentary Debates 1983 1015 2nd reading speech of the Minister.

11 Wallace A E, *For better, for Worse - More changes to the Retail Shop Leases Act 1984* QLSJ February 1990 62.

'section 15(3), expressly allows an amount to be specified in the lease for compensation for injury caused wether by relocation of the business of the tenant [s.15(1)(a)(i)] or by requiring the tenant to vacate before expiry of the current term for the purpose of extending, refurbishing or demolishing the building or shopping centre [section 15(1)(a)(vii)]. The amount specified is deemed to be reasonable compensation.

This last provision apparently enables a landlord to specify in the lease that the tenant agrees to accept compensation of one dollar for injury caused by the events specified. However, it is arguable that because section 15(3) expressly provides for the amount specified to be reasonable compensation in relation to the events mentioned in section 15(1)(a)(i) and (vii), the implication is that amounts specified as reasonable compensation for the other events included in section 15(1) should not be regarded as necessarily quantifying reasonable compensation.'

It would seem that the interpretation which best achieves the purposes of the Act is that by specifying that the amount provided for is reasonable compensation for events as named in section 15(1)(a)(i) and (vii), the amounts specified as compensation for other events in section 15(1) should not be regarded as quantifying reasonable compensation.

The other provision of the *Acts Interpretation Act* which may now impact on the interpretation of the *RSLA* (particularly in the light of the number of reports into the Act and the circumstances leading to its enactment), is section 14B. This section provides in part:

'Use of extrinsic material in interpretation

- (1) Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation.
 - (a) if the provision is ambiguous or obscure - to provide an interpretation of it; or
 - (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable - to provide an interpretation that avoids such a result; or
 - (c) in any other case - to confirm the interpretation conveyed by the ordinary meaning of the provision.
- (2) In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be had to -
 - (a) the desirability of a provision being interpreted as having its ordinary meaning; and
 - (b) the undesirability of prolonging proceedings without compensating advantage; and
 - (c) other relevant matters.

The section goes on to define ordinary meaning as the 'meaning conveyed by a provision having regard to its context in the Act and to the purpose of the Act'¹² and also lists examples of extrinsic material which may be taken into account. It includes inter alia:

- (b) a Report of a Royal Commission, Law Reform Commission, commission or committee of inquiry, or a similar body, that was laid before the Legislative Assembly before the provision concerned was enacted; and
- (c) a Report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted;

It is clear however, that the courts are not obliged to take extrinsic material into account and that the use of the word 'may' is likely to be directory rather than mandatory.¹³ Further the interpretation of similar provisions in the Federal Act has indicated that the courts can only use the material where the three conditions specified are fulfilled¹⁴ and that even where the court does take into account the material, the decision as to what weight should be given to it is entirely up to the court and that other factors may be such that the extrinsic material will not be determinative¹⁵ so that it would be possible to argue that resort could be had to extrinsic material. The extent to which particular material may assist in the interpretation of particular provisions will be examined in relation to each area raised in the Cooper Report.

The Cooper Report

By Cabinet Decision no 35970 of 7th September 1981, it was decided to establish a committee to:

- a) examine the reports of the Small Business Development Corporation in relation to retail shops leasing in shopping complexes;
- b) undertake any further inquiries as necessary; and
- c) report to the minister on shopping complex leases with recommendations on policies and whether legislation self regulation or other means of achieving these policies is desirable.

The committee had a relatively short life as the report was required by October 30 but it managed to identify seven major areas of concern to the tenants in major shopping centres. These were as follows:

- (i) the incidence of percentage rents
- (ii) the provision of monthly turnover figures to centre management

12 Section 14B(3).

13 MacAdam & Smith op cit 283 in relation to similar Commonwealth provisions.

14 *Ex parte Billing* (1986) 68 ALR 416 at 417-420.

15 *R V Bolton; ex parte Beane* (1987) 162 CLR 514.

- (iii) the quantum, composition and method of assessing centre outgoing charges
- (iv) the lease periods and options
- (v) assignment of leases
- (vi) sharing of goodwill with the landlord and the ratios demanded
- (vii) general leasing procedures - this included such matters as the policy of presenting leases for immediate execution with no possibility of tenants examining them. Other matters raised included the failure of plant, disruption during major renovation, parking, key money and bonds and general communication.

Prior to looking at each of these in turn along with the subsequent legislative developments, one final general point should be made.

The fundamental recommendation of the committee was that legislation only be considered as a last resort. It was clear that the committee favoured a system of self regulation. The Committee recommendations included.¹⁶

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 shaping complexes.

That the Government should fix desirable and yet achievable time limits in which these matters are to be resolved ...

That the Government reconsider the position after 30 June 1982. In the event that no resolution to the question appears likely at that stage, then the committee suggests that the problems are of sufficient importance and concern to warrant the Government taking positive action to resolve the matters than at issue by legislative means¹

The subsequent Joint Parliamentary Committee report took the view however that 'it is not practicable nor feasible to expect that landlords and tenants can always harmoniously regulate their own affairs'.¹⁷

Percentage Rates

Here the Cooper Report¹⁸ took exception to the practice of changing a base rent plus a percentage of the turnover. The Report found that the base unit tended to be equivalent to the market rent and the percentage of turnover was 'a device by which the owner can share in the profits of a business'.¹⁹ There was opposition amongst tenants to the practice (not surprisingly!) but the procedure was adopted to attract major tenants whose base rent was set at a

¹⁶ Ibid 4.

¹⁷ Ibid 3.

¹⁸ Ibid 23.

¹⁹ Ibid 24.

relatively low figure. The Committee conceded that the method may be appropriate in certain instances but recommended that 'the percentage be reduced as turnover increases'²⁰ if the system were not dropped. The Report then stated that failing that 'the government should give consideration to reviewing arbitration procedures in this state to allow for arbitration to provide for the adjudication of fair and equitable rents for tenants in shopping complexes'.²¹ Such a suggestion however, was never taken up in the legislation.²² The subsequent joint Parliamentary Committee report suggested that the legislation should require that:

The tenant be offered at least two alternative rent methods, one of which shall be 'a rent stated as a cost per square metre of leased area'. The tenant shall have the right to elect the alternative desired'.²³

Again this suggestion was not adopted in the legislation as it was drafted. The legislation introduced s6, which only prohibits such a practice if the tenant has not elected to have the rent to be computed in this manner. It is quite clear however that such a provision is of limited use in overcoming the problem as stated by the Cooper Report. In referring to s6 and s7 (see below) Preece has said

These provisions appear to be the minimum necessary to redress the severe inequality of bargaining power which has previously existed in these circumstances while at the same time enabling those tenants who desire rent to be leased on turnover to continue to enjoy the freedom to negotiate the same. However, the provisions may be capable of avoidance by the landlord simply refusing to enter into the lease until and unless the tenant elects for a turnover rent'.²⁴

Thus, the legislation in no way assists the tenant if they wish to avoid the practice of turnover rents. At best its effect is only to draw the existence of such a method of calculation, to the tenants attention. The question must then be asked as to whether the problems raised in the earlier reports are worthy of legislative correction. If they are not, then it may be argued that s6 ought to be reviewed as at no stage was the problem identified as being that tenants were unaware of the percentage rent requirement.

Further issues may arise on the interpretation of the effect of s6. If a landlord includes a prohibited provision on a lease what effect other than the penalty is that to have? From the tenants point of view, it would seem that the landlord would be unable to enforce such a provision. However what if payments had previously been made, is it possible for the tenant to recover these?

20 Ibid 24.

21 Ibid 26.

22 The issue is dealt with somewhat ineffectively in s6 of the Act.

23 Ibid 4.

24 Preece AA *The Retail Shop Leases Act 1984* QLSJ April 1984 28.

Section 16(1) provides:

Where a provision of this act prescribes a duty or an entitlement of a landlord or tenant under a retail shop lease in relation to which this Act applies that duty or entitlement shall be deemed to be provided for by every such retail shop lease

This section does not seem to be of any assistance as it appears to simply imply the requirements of Part III into leases where they are otherwise not in the lease.

There appears to be nothing else in the Act which will assist the tenant to recover such amounts, however the overall purpose of the Act should be sufficient to indicate that such a provision be rendered void and the effect must be governed by the Parliamentary intention.

The effect of a contract rendered void by statute, but not illegal, is determined, however, not only by the principles of the general law applied by the courts, but to a large extent by the interpretation of the invalidating statute concerned'.²⁵

The mere fact that the legislation is intended to protect tenants rights does not automatically entitle the tenant to recover. See for example *Valentinei v Canoli*²⁶ where it was held that the *Infants Relief 1874* was intended to protect infants not sanction injustice and thus where there was no total failure of consideration, no money could be recovered. It would seem a relatively simple solution to redraft the section to provide specifically that any amount paid by way of percentage rent where the election has not been completed, be recoverable by the tenant. This would seem to increase the effect of the section and also give more certainty where the section has not been complied with.

The other section which is relevant in relation to percentage rents is section 9. That section implies certain conditions into a lease where a tenant has agreed to rent to be calculated as a percentage of turnover. This is again inconsistent with the Cooper Report recommendations that owners cease the practice of percentage rents.²⁷ It is however consistent with the Joint Parliamentary Report²⁸ which suggested that the legislation contain a requirement that 'the basis and/or the formula for calculating rent reviews shall be stated in the lease'²⁹ and also

If the tenant elects to accept a percentage rent, the Retail Shop Lease shall contain a clear formula on how it is derived.

25 Starke Seddon & Ellinghaus *Cheshire & Fifoots Law of Contract* (5th Ed) Butterworths Sydney 1988 343.

26 (1889) 24 Q B D 166.

27 Ibid 26.

28 Ibid 4.

29 Ibid.

If the tenant accepts a percentage rent then the tenant has an obligation to provide turnover figures to the landlord.³⁰

Disclosure of Turnover

This was obviously an area where small tenants voiced their objections strongly to the Cooper Committee and the Report commented as follows:

The Committee found that almost all small tenants interviewed opposed the requirement of their leases that they should provide the landlord with details of their monthly trading results. Most considered the practice an invasion of their privacy and their basic rights as tenants to conduct their own affairs in a appropriate manner and in the quiet enjoyment of their premises ...

The Committee holds the position that if percentage rents (in their present form) are not applicable to small tenants, then it follows that revealing trading results to landlords will become of no real significance to them.³¹

The Committee went on to say that 'in arriving at this position the Committee was mindful of the basic right of a tenant to be allowed the undisturbed occupancy of space in return for the payment of rent'.³² It is doubtful however that such a requirement would amount to a breach of the covenant of quiet enjoyment. Such conduct has been described as follows:

Conduct amounting to breach of a covenant for quiet enjoyment or possession may take many forms. Whilst the assertion by the lessor that the lessee's title and right to possession may be invalid, the mere making of that assertion, however wrong it is, does not amount to a breach of the covenant. Likewise, the threatening of, or taking proceedings for possession and damages would be similarly treated. The covenant is not an absolute covenant protecting a lessee against eviction or interference by anybody, it is a qualified covenant protecting the lessee against interference with the lessee's quiet and peaceful possession and enjoyment of the premises by the lessor or persons claiming under or through the lessor. The word 'enjoy' used in this connection refers to the exercise and use of the right to possession and having the full benefit of it rather than deriving pleasure.³³

The result in the legislation was a provision (section 7) with the effect that a landlord shall not include a requirement that either a landlord is entitled to or a tenant is obliged to furnish turnover figures in relation to the business carried on. Again this provision is largely consistent with the Joint Parliamentary Report.³⁴

30 Ibid 4 & 5.

31 Ibid 26.

32 Op act.

33 Duncan WD *Commercial Leases* Law Book Co Ltd Sydney 1989.

34 Ibid 5.

Much the same criticism associated with section 6 can also be levelled against section 7. If the problem is as the Cooper Report asserts, that the percentage rent should be prohibited and if as suggested above, that type of rent can be easily imposed despite section 6 then obviously section 7 could also be overcome.

Also the use of the words 'unless the rent of part of the rent payable under that lease is or may be determined' as a fraction of turnover in the section provides a landlord with great opportunity to overcome its effect provided he otherwise complies with section 6.

For example, a lease may provide that the rent is a fixed sum unless some contingency occurs, yet despite the fact that this contingent event may not occur or may not yet have occurred, the landlord could without breaching section 7 require the tenant to provide turnover figures immediately even though the rent at that stage is not being based on turnover. Also the criticism that the consequences (in terms of remedy for the tenant) if the provision is breached is not addressed so that as with section 6, a tenant who has suffered because of a breach of the section may not be compensated. Further, it may be questioned as to whether a fine of \$5000 is a significant deterrent for breaches of sections 6 and 7 given the value of commercial rents in some areas.

Centre Outgoings

This heading encompasses a wide range of operating expenses which a tenant may be required to pay a share of, under the conditions of the lease. The Cooper Committee found a large number of complaints across a number of areas. 'Tenants' complaints ranged widely from the method of assessing charges, the composition of the charges, the quantum to be borne by tenants and the processing of the amounts charged.³⁵

As a result of these concerns, the Report put forward the following:

There should be clear limitations placed on owners as to what comprises repairs and maintenance. In the Committee's view, structural repairs, renewals and major renovations should be at the cost of the owner solely. Day to day maintenance and periodic refurbishing are items which it is reasonable to expect would be shared by tenants as part of the annual outgoings.

The Committee is firmly of the opinion that centre management charges are the sole responsibility of the owner or property management company

The Committee holds the view that good business practices, e.g. by seeking tenders, should be used to secure the services of contractors to provide various services to complexes. The method of securing contractors should be fully

35 Ibid 28.

advised to tenants as well as the costs involved

The Committee believes that budgets for the year's outlays should be provided at the beginning of each year. Charges should be raised monthly and adjustments made at the end of the year when actual outlays are known. Statements of actual expenses should be audited and provided promptly to tenants with audit certificates.³⁶

When the Joint Parliamentary Report recommended that legislation be prepared it suggested.³⁷

11. If there is an obligation in a Retail Shop Lease to pay operating expenses they shall be determined in relationship to the shop's leased area as a proportion of the total leaseable space in the building and only the following costs can be included in operating expenses:

- a) increases in land taxes relating to property;
- b) increases in rates and charges struck by local authorities;
- c) charges for water, gas and oil for heating, electricity, sewerage and garbage;
- d) cleaning of common area including public lavatories, restrooms, etc.;
- e) the running cost of ventilating, air conditioning, heating and cooling of the common area or any part thereof;
- f) cost of providing adequate security service.

12. Where leases provide that landlords and tenants are to share the costs of operating a shopping centre, annual estimates of these expenses shall be presented to tenants at least one month before commencement of the financial year to which the estimate refers.

13. Where estimates, as in 12 are required to be provided, annual audited statements of expenditure in relation to the operating expenses of a shopping centre shall be provided to each tenant within one month of the end of the financial year.

When the Act was introduced no attempt was made to control what was meant by the term 'operating expenses' nor was there any specification on how the expenses should be apportioned. Section 12 deals with what must be specified if the tenant is to pay outgoings. Effect was given to the

36 Ibid 28.

37 Ibid 5.

recommendation that the annual estimates be provided and that the budget be compared with the audited actual figures when available. The only attempt to interfere into the charges raised by the landlord appears to be in section 12(5) where the tenants contribution to land tax must be on the basis that the shopping centre is the only land owned by the landlord. The section as it now stands is after substantial amendments in 1988 and 1989 to ensure that detailed estimates are provided rather than general figures. (See section 12(2)).

Lease Periods and Options

The Cooper Report considered that in relation to lease periods:

The Committee appreciates the concern of small traders for the security of their tenure and considers that, in general, a five year term would be reasonable. However, it feels that as the terms are understood by the tenant before he commits himself, it becomes a matter for market judgment whether he signs the lease or not. The Committee also considers that the important aspect is the total period for which a tenant has security of tenure and sees no difference whether this period is expressed as one term or a term with options.³⁸

Thus, no specific recommendation was made in relation to the lease period. Under this heading the Report seemed more concerned with the practice whereby landlords would seek rent increases prior to granting renewal of the lease. Their recommendation was in terms that provision be made for the appointment of independent arbitration when negotiations break down.³⁹ The Committee clearly however did not support such an approach where no option existed.

The Joint Parliamentary Report however, disregarded this, and recommended that there should be implied into any Retail Shop lease a term that the tenant has an option to extend the lease by a period equal to the initial term provided that the total of the initial term plus the extension do not exceed five years.⁴⁰

When the initial 1984 Bill was introduced this later proposal was adopted.⁴¹ However, this was later cut down so that when the Act was passed the benefit of section 13(1) was apparently designed to be limited to 'provide for an implied option to extend a lease to an overall term of five years where the retail shop in question is being leased for the first time'.⁴²

38 Ibid 30.

39 Ibid 30.

40 Ibid 5, 6.

41 See 1016 of *Qld Legislative Assembly Parliamentary Debates 1983* where the Minister said 'a tenant in his first lease with a landlord is entitled to an initial term of at least 5 years'.

42 *Qld Legislative Assembly Parliamentary Debates 1984* 1577.

This raised a question as to the interpretation of the section. Did it apply to the first term associated with that physical location or did it apply to the first term of the lease with that landlord by that tenant? The provision in this respect created a degree of uncertainty.⁴³ It was consequently amended in 1989⁴⁴ so that now the provision refers to 'the first lease entered into in respect of the premises to which the lease relates'. This would appear to make clear the Parliamentary intention (adopting section 14A of the Acts Interpretation Act) that the section now refers to leases where shops have never previously been leased as retail shops. The logic behind this provision is somewhat difficult to follow. If as the Cooper Report submitted tenants fully understand the terms of the lease and are capable of making a market judgement then such a provision is unnecessary. If on the other hand the position of the Joint Parliamentary Committee were adopted, there seems no basis whatsoever for limiting the provision to the first such lease entered into in respect of the shop. Goodwill may be built up by the 2nd or 3rd or later tenant in a shop just as much as by the 1st tenant so that when these tenants seek to renew their lease they stand to lose just as much as the 1st tenant may have done so.

The further conditions which are now required by section 13(1) are that

- (a) the term of the lease is less than five years
- (b) the tenant has given the prescribed notice to the landlord not less than ninety days before the end of the original term
- (c) there is no unremedied default by the tenant when giving the notice nor until the old term expires
- (d) the granting of such a renewal is not contrary to the law governing sub leases.

The last requirement has been explained as follows:

'...This is a reference to the option not being available in a sub lease situation where either the head lease contains no option, or the option has not been exercised and to grant a further option to the sub-lessee would constitute a breach of the head lease'.⁴⁵

It would seem however that this also provides an option for a landlord to escape the possible effect of the clause by initially subleasing the premises to a nominee company. This has been raised by Pretty.⁴⁶

43 See Pretty WA *Options Under s13 of the Retail Shop Leases Act 1984* QLSJ June 1984.

44 See s 10 of No 117 of 1989.

45 CCH Ltd 1991 *Qld Conveyancing Law and Practice* paragraph 27-140 CCH, Sydney 1991.

46 Pretty op cit 83.

'If .. the section only applies to new or previously unleased retail shops the effect of the legislation is already restricted to a small class of retail lessees. As regards new shopping centres even this class may well be excluded. The section specifically provides that the benefit of the statutory option is subject to the law governing sub leases. Developers of new shopping centres might, as a matter of practice, now grant a lease to a nominee company for two or three years for the whole centre and require the retail shop owners to be sub lessees of the nominee company thereby avoiding the effect of the section.'

Despite its possible limited application the sub section does leave open a number of issues. Firstly, the option is required to be 'on terms and conditions which shall be the same as those upon which he holds the initial term of the lease',⁴⁷ but 'if the original lease did not exceed five years but was in the form of an initial term of two years with an option for a further two years [is] that original option .. part of the terms and conditions of the lease for the option period.'⁴⁸ It is submitted that both section 14A and section 14B of the *Acts Interpretation Act* will suggest that the option included in the lease is not to continue as part of the option. Section 14A could be applied to show clearly that the intention of the section is to give initial tenants a possible period of five years. It clearly best assists the object of the Act if such an interpretation is promoted. Further, if the section is ambiguous then section 14B could be used to justify looking at say the Report of the Joint Parliamentary Committee which clearly indicated the aim of extending the lease to a five year term 'provided that the total of the initial period and the extension do not exceed five years'.⁴⁹

A second issue which arises is that section 13(1)(f) provides that during the option period the rent payable shall be determined having regard to the market rent in accordance with section 10(2). It has been suggested that this is open to two constructions.⁵⁰

- (a) that, where the lease provides for review of rental during the term of the lease, then those provisions would apply during the option period and rent would be calculated in accordance with the formula provided in the lease, so that a review by market rental would apply only where the original term contained no provisions for review; or
- (b) that the reference to rental review is a reference to rental review for the option period such that if the lease does not make specific provision for review in the option period then, even though it may provide for review during the original term, the rental for the option period would none the less be assessed by reference to market rental.'

It is submitted though that with respect to the rental during the period which

47 Section 13(1)(f).

48 CCH op cit paragraph 27-140.

49 Ibid 5.

50 CCH op cit paragraph 27-140.

the lease is extended by statute, section 13(1)(f) is not ambiguous and that the sub section contains no words of limitation and that it ought to be followed no matter what the lease may provide for. Thus the rent during the extended period should be the market rent in accordance with section 10(2). There seems to be no justification for adopting a more narrow view of the section. Such a construction would not seem to be any more consistent with promoting the object of the Act nor is there any extrinsic material which may support such a view.

A third issue which arises which was identified by Pretty⁵¹ is the position of an assignee of the initial lease in relation to exercising the option. The section does not indicate if any assignee could take advantage of it. As Pretty noted: 'given the frequency with which leases of retail shops are assigned it seems highly desirable that a provision such as this one unequivocally state whether or not the assignee is entitled to exercise the option given to the original lessee'.⁵² Again it is suggested that it would best promote the objects of the legislation if assignees were given the benefit of the section. The section is clearly for the benefit of tenants during the initial lease of a shop. Further there is no clear limitation upon the section indicating that it ought to be restricted. However, *Re Malsons Pty Ltd*⁵³ suggested that an assignment in effect creates a new lease. If that view is correct then there may be significant doubt that the section will apply to an assignee as it could clearly not be the first such lease entered into with respect to the demised premises.

A final issue which arises in relation to section 13(1) is the position of a purchaser of the freehold property. It is clear that a purchaser of property which is being leased ought to carefully check the lease document to ensure that the premises are not subject to the *Retail Shop Leases Act*. If that possibility exists, then further inquiries should be made with respect to whether the statutory option is available to the tenant. Obviously provisions such as section 13(1) do present problems for a purchaser seeking to know his or her true position in relation to the reversion yet not being able to gain all the information required from the register of title.

In 1988 a new section 13(3) was added to cater for a situation where the conditions for section 13(1) do not apply (ie it is not the first lease with respect to the premises and there is no option to renew provided for in the lease). It requires the tenant who seeks another term to request the landlord to renew the lease not less than four months prior to the end of the lease. The landlord has then (not less than three months prior to the end of the lease) the obligation to advise as to whether a new term will be granted and also the terms of that new lease. If the tenant wishes to accept then notice must be given two months before the end of the lease. The tenant must then not default prior to the new lease coming into operation. The important provision

51 Pretty op cit 83.

52 Ibid.

53 (1990) Qld Conv 54-369.

here, is paragraph (e) whereby the tenant is entitled, if the landlord fails to give notice by way of reply, to occupy the premises for three months from the tenancy expiry date upon the same terms and conditions as those of the existing lease. Duncan has made the following comment upon this section

'One would have thought that this subsection is hardly necessary. If the existing tenant who must be aware that he does not have an option to renew, desires to take a new lease, then he could approach the landlord some months before the expiration of the lease and seek advice as to whether or not a new lease would be offered to him and upon what terms. What the subsection does in relation to those leases to which it applies, is to put the onus upon the landlord after receiving notice from the tenant to make up his mind whether or not he will offer the tenant the option to take a new lease and upon what terms. The failure of the landlord to respond to that notice will mean that the lessee can remain a further three (3) months after the expiration of the term upon the same conditions as the existing lease. The section will not appear to apply in respect of a retail shop lease in question where there was an option to renew for a further term and the expiry of the lease referred to was the expiry of the period of that further term.'⁵⁴

Duncan's point appears to be valid. It is difficult to see any significant advantage to a tenant in gaining a mere three months in such circumstances. Also no justification for imposing such a duty on a landlord is apparent given that the lease contains no option to renew and therefore it would seem (as Duncan points out) open to the landlord to refuse to grant such a renewal.

One further issue in respect of section 13(3) is that it would seem that it applies only to leases entered into after 1988. This is because of section 5(3A). Section 5(3A) provides as follows:

[Amendments which purport to affect rights or obligations]. Except where it is expressly provided to the contrary in relation to an amendment of this Act, any amendment of this Act made by the *Retail Shop Leases Act Amendment Act* 1989, or before or after that Act, that purports to affect rights or obligations of a landlord or tenant under a retail shop lease shall be construed so as not to affect rights or obligations of a landlord or tenant provided for or deemed to be provided for by a retail shop lease entered into before the enactment of the amendment.

For the purposes of this subsection an amendment that merely prescribes the manner in which any act or thing is to be done shall be deemed not to purport to affect rights or obligations of a landlord or tenant.

The intent of this section seems clear but the effect of it on particular provisions is difficult to predict. This is because many provisions could be

54 Duncan WD *The Retail Shop Leases Act Amendment Act 1988 'A Sledgehammer to Crack a Nut'* QLSJ 1988 385 at 389.

seen to prescribe the manner in which something may be done but they may alternately be said to affect rights or obligations. The question may arise with respect to section 13(3); for example, does it merely prescribe the manner in which a thing is to be done or does it affect rights and obligations.

On the introduction of this amendment, the Minister said it

'removes particular concern in relation to certain wording within the Act implying retrospectively [sic]. The Act and the Bill have no retrospectivity'.⁵⁵

These words could assist in giving greater effect to the basic prohibition and less to the proviso.⁵⁶ Also the use of the word merely may be of significance in limiting the effect of the proviso. However, it must be recognised that the words of the statute have to be given effect to so that there may still be an argument that section 13(3) does merely prescribe the manner in which something is to be done.⁵⁷

Assignment of Leases

Here the Committee's concern seemed to centre upon the delay in reply to consent for an assignment and the charges levied by the landlord in respect of approving such an assignment.⁵⁸ This was taken up in the legislation mostly in section 11. Section 11(1) provides that where a landlord fails to give an answer within 30 days of being given a notice in writing by a tenant requesting such and providing adequate particulars, then a dispute is deemed to be created. This can then trigger the mediation provisions.⁵⁹ It is interesting to note that the Cooper Report suggested 14 days was sufficient to allow investigation of the assignment by the landlord.⁶⁰ It seems that 30 days is more reasonable (although the section initially had 42 days).

Section 11(3) goes on to deem certain other situations to constitute a dispute within the meaning of the Act. These include where a landlord.

- a) introduces new obligations on the assignee,
- b) withdraws rights from the new assignee, or
- c) seeks to impose a condition on the assignment that the tenant considers unreasonable.

It must be asked whether this provision is justified given the existence of section 121(1)(a)(i) of the *Property Law Act*. A number of issues remain unsolved in relation to this section also. It is not clear that section 11 can

⁵⁵ See *Qld Legislative Assembly Debates* 1989 1783.

⁵⁶ Based upon the use of S14B of the *Acts Interpretation Act* (Qld).

⁵⁷ The other difficulty that arises here is the problem identified in *Malsons Case* (supra) where the question was just when did the lease come into effect.

⁵⁸ See 31 of the Report op cit.

⁵⁹ See Part IV of the Act.

⁶⁰ See 31 op cit.

apply where there is an express prohibition against assignment as distinct from prohibition without consent. Because this provision has moved beyond what was suggested by the Cooper Report, it is difficult to establish any legislative intention to apply where there is an express prohibition. It would seem to be still consistent with the object of the legislation however, if it were to be interpreted to apply only where assignment is possible under the lease. Also as is clear from a reading of section 11(3), it is not necessary that new obligations or withdrawal of rights by the landlord be unreasonable. Thus it would seem that a landlord could act reasonably and a tenant or assignee unreasonable yet still be caught in a dispute. Hopefully such a matter would be resolved in favour of a landlord at mediation but going through such a process is not without costs. It would seem that only paragraph (c) is really justifiable as a basis of a dispute. Even that test is generous in that it is presumably subjective.

In addition to the above in relation to assignment, it should also be noted that a lessee is only entitled to reasonable costs incurred in investigating a proposed assignee (see section 11(2)) but only if the lease allows for it and an itemised account is presented. Also section 8(1) prohibits certain payments to a landlord including payment in connection with assignment goodwill or any other payment or benefit and section 8(2A) prohibits payments into a sinking fund for extensions or structural improvements. Certain payments to a landlord are excluded from the effect of section 8(1) including the cost of investigation of the assignee, preparation of documents bonds etc (see section 8(2)). Any amount accepted in contravention of this section is recoverable as a debt. The effect of such sections is of course that landlords will simply change the form of their payments into a form which is permitted eg by building into the rental an element for amortisation or risk that the tenant will fail in the business. The only advantage from a tenants point of view is the fact that the payment may be more obvious if it is, say, in the form of rental.

Goodwill

This concerned the practice whereby owners of a centre demanded a percentage of goodwill associated with the sale of a business. The Report said:

The Committee found that the demand by owners for a share of goodwill upon the sale and assignment of a lease is almost a universal practice in the industry ...

... The Committee is prepared to accept the principle of some sharing mechanism for goodwill between the landlord and the tenant, but is somewhat concerned regarding the actual percentages or ratios shared between the respective parties ...

... The Committee was informed of some owners who revert to the same sharing

sharing arrangements when leases are renewed as when the leases were first entered into. This practice directly contradicts the rationale submitted by owners for the high share of goodwill in the initial period of a lease. The Committee is of the opinion that this practice should cease.⁶¹

Again however, the Joint Parliamentary Report took the matter beyond those recommendations and suggested an absolute prohibition on payments for goodwill.⁶² This prohibition was reflected in the Act in section 8(1)(b) (see above). As discussed above the economic effect of such prohibitions is that landlords (given the demand for their product remains the same) will charge tenants in a different form. If they build an element into say rental for the costs of establishing the goodwill of the centre, then it will result in all tenants paying extra not just those who are assigning or selling. This is therefore not beneficial to tenants who do not sell or assign.

Leasing Procedures

Under this heading the Cooper Report discussed a number of issues.⁶³ One issue was the delay in renewal of the lease and the Act's provisions in this area have been discussed above. The Report also commented upon delays in relation to entering into a lease where documentation is not prepared before occupancy.

The suggestion put to the Committee was however that the legal profession was 'entirely to blame for not reacting quickly'.⁶⁴ They suggested that :

Good management suggests that tenants be fully informed of all their major commitments and obligations under the lease document before the tenancy is entered into. The practice of some landlords of presenting prospective tenants with a proforma copy of the lease should in the Committee's view be universal.

Whether a proforma lease is available or not, the Committee believes that in all cases a document covering in detail the major provisions of the intended lease, but expressed in layman's terms, should be exchanged between landlord and tenant.⁶⁵

The Joint Parliamentary Committee did not take up this suggestion and oddly the legislature did not encompass any provision in the legislation initially. It was not until the 1988 amendments that this was given effect to in section 15A. The section is not without its problems. It requires a landlord to serve upon a proposed lessee a copy of a draft of the relevant lease at least 14 days prior to entering the lease. Section 5(5) defines what is meant by

61 Ibid 31-32.

62 See 5 of the Report.

63 See 32-36.

64 See 32-33.

65 Ibid.

entering into the lease. This is the earlier of the date on which the tenant enters the premises as tenant or the date on which the agreement for lease becomes binding. As Duncan⁶⁶ points out:

'Often a copy of the proposed lease is annexed to a 'letter of intent' which may or may not be an enforceable agreement to grant a formal lease depending upon form execution and certainty and certainty of contents'

Thus, it is often difficult to establish just when a lease is entered into so that the section can create a degree of uncertainty given the tenant's remedies in section 14A(2). This subsection provides

[Landlord's failure to comply]. If, before a person has entered into a retail shop lease as tenant, the landlord fails to comply in all respects with such of the provisions of subsection (1) as are apposite to the lease, the tenant may, by notice in writing given to the landlord

- a) terminate the lease within 14 days (and no later) after the tenant receives the draft lease and such particulars prescribed by subsection (1) as are apposite to the lease;
- b) terminate the lease within two months (and no later) after the tenant enters into the lease where the draft lease and such particulars prescribed by subsection (1) as are apposite to the lease are not received by him.

It would seem that paragraphs a) and b) are alternate although no 'or' is included. Also just what are adequate particulars in relation to a particular area may be difficult to determine given the definition in section 4(1) which requires there to be either matters that the parties have agreed upon to be such or alternately particulars sufficient to make a sound commercial decision.

Other Problem Areas

These represented a number of minor items which were of significance. The Cooper Report explains:

Both the Committee and the Small Business Development Corporation became aware of a whole series of actions by landlords which tended to affect in varying degrees the interests of small bodies of tenants. Each of these areas is now reported and commented upon.⁶⁷

These were identified as:⁶⁸

1. Failure of plant such as air-conditioning. The Report suggested some sharing of losses which flow from this..

66 Op cit 391.

67 Ibid 36.

68 See generally 36-38 of the Report.

2. Disruption to trade during major renovations. The Committee saw merit in compensation being payable if normal trading was distorted.
3. Car parking. The Committee did not see any need for special facilities in this regard for proprietors.
4. Key money and bonds. The Committee received no evidence that key money was demanded. In general the Report seemed satisfied with the arrangements for the payment of bonds as well
5. Merchant associations. The Committee seemed to believe that these associations did not fairly represent the views of the small tenant but were in fact dominated by the larger tenants and the centre management.
6. Communication. The Committee generally felt that efforts to improve communication between the parties involved should be encouraged.

In relation to the first two matters raised, it is possible to identify their 'solution' in section 15(1) of the Act. The provision in its present form implies into every retail shop lease (other than a periodic tenancy or tenancy at will) a number of conditions. These deal largely with compensation to be payable by the landlord in certain cases. It is clear however that the section goes well beyond the matters raised in the Cooper Report. For example, it is possible to obtain compensation for a situation where the landlord 'inhibits in a substantial manner access by the tenant to the retail shop' or takes action which substantially inhibits or alters access by customers (see section 15(1)(a)(ii) and (iii)). If as suggested earlier in this paper, the effect of section 14A of the *Acts Interpretation Act* is to give this section a wide meaning, it substantially affects the landlords position as against that of the tenant. It also creates an added element of uncertainty to the landlord-tenant relationship in terms of having to speculate on how far the provisions may extend in particular cases. This is against a background where some of the areas addressed were apparently not seen as problems in the first place by the Cooper Report.

In relation to key money then as was pointed out above, section 8 effectively bans this even though the Report said they could find no evidence of it being charged. In relation to merchant associations, it should be noted that section 6A was inserted in 1988 to specifically prohibit landlords from prohibiting tenants forming associations or joining associations to protect their interests.

Conclusion

The aim of this paper has been to examine the major recommendations of the Cooper Report in the light of the current legislation and recent developments within the *Acts Interpretation Act*. It is submitted that the current legislation has moved well beyond the initial report in some areas. In other areas however, it has failed to take up suggestions or has acted in an ineffective way. As a result of this, the use of the original material to assist in the

interpretation of the Act is limited. However, it is clear that a purposive approach to interpretation may lead to a slightly wider meaning being given to some of the provisions.

On the second reading of the original Bill, the Minister said:

What is now before members is a clearer and more certain piece of legislation. It will do the job it is intended to do. As I said in introducing the Bill to the House in December last, it will establish the ground rules upon which leases in future will be drafted, and it will provide the hard-working tenant and the landlord with recourse to a form of low-cost resolution of disputes.⁶⁹

Unfortunately, it is doubtful if the legislation as it now stands is either clear or certain in many areas. Further, it is difficult to see just what job it is intended to do. As Duncan has concluded after the 1988 amendments:

With the great armoury of consumer protection legislation, particularly since the passing and strengthening of the *Trade Practices Act* 1974, which really covers this field quite adequately, one wonders whether or not we are heading down a path where the perception of consumer protection is just not matched by the reality in the market.⁷⁰

In addition, the Trade Practices Act is now supplemented by the *Fair Trading Act* (Qld) 1989. It can therefore be suggested that the Act ought to be reviewed. Serious consideration needs to be given to the proposition that other legislation may adequately cover the problems raised in the Cooper Report. Many of the more extreme provisions require greater justification for their continued existence. In the present economic climate, the reduction of unnecessary regulation and the encouragement of investment would seem preferable goals if tenants could be adequately protected by other legislation.

69 Queensland Legislative Assembly Parliamentary Debates 1984 1579.

70 Duncan op cit 393.