Speech by

Mr S. SANTORO

MEMBER FOR CLAYFIELD

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RETAIL SHOP LEASES AMENDMENT BILL

Mr SANTORO (Clayfield—LP) (4.16 p.m.): Although this is a relatively small Bill and only the first instalment of a more comprehensive review of retail shop legislation, it is nonetheless an important initiative and one which has long been sought by the retail sector. Figures released by the Australian Bureau of Statistics indicate that retail businesses make up almost 17% of all business establishments in Queensland and employ 20% of all Queenslanders. Critically, these businesses employ 45% of all workers in the 15 to 25 age group. This sector plays a pivotal role in the creation of youth employment initiatives.

As we all know, most of the retail shop lease disputes that arise emanate from the so-called shopping centre industry. This important segment of the overall retailing industry, according to research which was released only in February, provides more than 107,000 jobs to the Queensland economy, or around 6.7% of the State's employment, which compares with 10.8% in manufacturing, 3.1% in finance and 1.3% in mining. Looked at from another angle, shopping centres contribute 4.4% to Queensland's gross State product.

In 1998, shopping centres accounted for 49% of Queensland's retail sales, which in that year totalled $21.9 billion. Of the $10.7 billion generated from shopping centres, 42% emanated from discount department store complexes, 31% from supermarket outlets and 27% from regional properties. There are 193 shopping centres ranging in size from Pacific Fair on the Gold Coast with 101,900 square metres in floorspace to small centres of less than 10,000 square metres of floorspace. Some of these shopping centres have very few individual traders, but the majority have in excess of 30, the largest being Indooroopilly Shopping Centre with 269 specialty stores. In the 193 shopping centres there are 9,500 stores, of which 41% are independently owned, 10% are franchises and 26% are part of national chains.

As can be seen from these figures, legislation governing the basic obligation of parties in this sector is important not just because it affects so many people directly but also because of the indirect effect that this industry has on the whole Queensland economy. In 1998 there were more than 360 million visits to shopping centres, which is the equivalent of every single Queenslander visiting a shopping centre twice a week.

Unfortunately, despite these impressive figures, there is no doubt that this vital sector is going through very tough times. I know that there have been many complaints about the proliferation of shopping centres and the effect that this has had on existing retail outlets. In fairness, a report prepared for the then Department of Tourism, Small Business and Industry in 1997 concluded that the growth in shopping centres and retail floorspace roughly matched the growth in the State's population.

The report concluded, however, that the spatial distribution of the additional retail floorspace was very even, resulting in localised problems. As the Minister would no doubt be fully aware, the report specifically drew attention to the oversupply of retail floorspace in the Capalaba and Cleveland areas, with consequent problems for the local economy and also for local traders. Although the growth in shopping centres may simply reflect overall growth patterns, in some areas problems—and occasionally very severe problems—have arisen.

As I mentioned, the latest information available indicates that there are fundamental problems of inequity and inefficiency in the shopping centre industry in this State. Based on four year trading trends in Queensland regional

shopping centres, it would appear that average sales have remained static at $200m, which is a net decline of 9.7%, compared with a net increase of the same amount interstate. Overall sales on a square metre basis have actually declined by $264 per square metre, or a drop of 8.2%—and this compares unfavourably with a growth of 2.6% interstate.

Specialty shops, which pay around 70% of total rent, have experienced sales reductions on a square metre basis of $298m, or minus 6.14%, and again this compares with a decline of only 0.03% interstate. Compounding this problem, shop rents have increased from 13.8% of sales to 14.6%, and it would appear that rents are increasing overall irrespective of whether there is any increase in sales. The studies also suggest that there has been a deterioration in average retail shop profitability in the order of $22,000 over this four year period, resulting in increasing hardships and business collapses.

These are very troubling statistics and all point to the need for appropriate action by the Government. I know that there has been quite a deal of legislative action interstate over the past six months. In March, new retail shop lease requirements commenced in New South Wales. Among other things were new disclosure requirements, new provisions for the release of tenants on assignment and the incorporation of unconscionable conduct provisions in State law based on section 51AC of the Trade Practices Act. I know that the Retail Traders Association of Queensland has been calling for the incorporation of this section into State law for some time now so that Queensland retailers can avoid going through the Federal Court at great cost to have their grievances heard. I mention these reforms simply to highlight that the Government will have to start moving quickly and decisively in this area and stop dragging its feet.

It would be very hard for me to stand here today and oppose this Bill. It would also be very hard for me to stand here today and not congratulate the Minister on his second-reading speech. The reason is that this Bill is almost identical to the one introduced into this House by the honourable member for Noosa on 18 March 1998 when he was a very competent and hardworking Minister. The speech delivered by the Minister is almost identical, word for word, minus or plus a few cosmetic changes, to that given by the member for Noosa. Except for the fact that one speech was given on 18 March 1998 and the other one was given on 24 March 1999, one would think that we were experiencing the Australian equivalent of Groundhog Day. I congratulate the Minister and the Government on having the commonsense to proceed with very good coalition legislation. However, as usual the Minister has totally failed to acknowledge this debt to the member for Noosa and has taken almost nine months simply to reintroduce a Bill that was already completed.

Whether members look at the recently passed Justice Legislation (Miscellaneous Provisions) Bill, this Bill, or the current Equity and Fair Trading (Miscellaneous Provisions) Bill, again and again they see coalition Bills being reintroduced long after the event by this Government. As I said, I do not argue with the logic of Labor copying coalition initiatives. However, I object to the delay and sloth which seems to be an increasingly obvious hallmark of the Beattie "can't do until it has to" Government.

Indeed, there is even more nostalgia with this Bill. When carrying out some research for the debate on this Bill, I came upon an article in the Australian Financial Review of 8 March 1994 titled "Protecting Tenants". The article dealt with the claims by the member for Capalaba that legislation that he was then introducing, which is now the Act that we are amending, would abolish the so-called ratchet clauses and allow tenants to plan with more certainty. Five years down the track, we are still trying to deal with the issue in a way that will prevent small retailers being subjected to unfair and unconscionable behaviour by those who have the market power and who use it, sometimes quite ruthlessly.

This Bill has three stated objectives. The first is to provide the Retail Shop Leases Tribunal with the ability to deal with frivolous or vexatious claims. At the moment, each party to a dispute before the tribunal must bear their own costs. Under the Bill, this general principle is subjected to the power of the tribunal to make an order for costs where it is satisfied that the dispute is frivolous or vexatious, or that one party has incurred costs because another party, firstly, sought an adjournment of the hearing without giving reasonable notice, or secondly, contravened a procedural requirement. As can be seen, the object of the Bill does in fact go further than frivolous or vexatious claims and also deals with those situations that often arise in which one side, through sharp practices, tries to obtain a tactical advantage over the other. Although vexatious disputes most probably would not be all that common, I am sure that the remainder of this amendment will prove useful in preventing parties from misusing the tribunal and bringing it into disrepute by clogging it up with silly claims or engaging in unfair behaviour.

The examples that I have heard of where the power to award costs could prove useful include the failure by one party to attend mediation hearings and inordinate delays in complying with tribunal directions, thereby undermining the capacity of the other party to continue.

At the moment in both New South Wales and Western Australia, there is no ability to order costs and both jurisdictions have the same legislative approach that Queensland has currently. However, I think that the proposed

change is a very sensible one and will help to maximise the effectiveness of the tribunal. The change is also not open-ended and, unlike in the ACT where there are no specified circumstances, the Queensland provisions strike the right balance.

My only other comment on this reform is that I was most interested in the Minister's reference to the uniform civil procedure rules, which will be coming into effect on 1 July. The fact that the tribunal will have the power to award costs in accordance with the bases outlined in those rules should overcome any problems that may otherwise have arisen.

The second object of the Bill is to provide that rent reviews may occur only annually, with the exception of the first year of the lease. The Explanatory Notes justify this change on the basis that it will provide a degree of certainty about the outcome of rent review negotiations. I agree with that proposition, because it has become clear that, at the moment, although the Act was drafted on the presumption that rent reviews would occur yearly, the Act does not, in fact, expressly regulate the period which must pass between each review. As a result, there is nothing to prevent rent reviews from occurring more frequently than annually. Limiting rent reviews to an annual basis is fair and I doubt whether there would be much opposition to this reform as it simply reflects current industry practice. Only those lessors who have acted in a way that is not in accordance with normal industry behaviour would have cause to complain. I think that this clause is appropriate, because it only mandates a minimum standard that is fair to both sides.

The provision that the first year of the lease is treated differently is also appropriate. From my discussions with people in the retail industry, it is clear that during an initial period after a lease is executed there may be rent abatements or rent-free periods. Nothing in this Act should limit the capacity of parties to enter into these sorts of arrangements as they can be absolutely critical during the initial periods of the establishment of a business. If the parties are placed into a well-meaning but misdirected statutory straitjacket from the outset, the capacity of small operators to get going could otherwise be unintentionally harmed.

The third object of the Bill is to clarify the basis for rent reviews. At the moment, under section 27 the Act specifies the bases upon which rent reviews are permitted to be made. They are: an independently published index of prices, costs or wages; a fixed percentage of the base rent; a fixed annual amount; the current market rent of the leased shop; or another basis prescribed by regulation. Subsection 2 of section 27 of the Act provides that reviews must be made using only one basis for each review. In other words, one can only increase the rent by using either CPI movements or one of the other methods that I have just outlined. Under the Bill, a new subsection 2 of section 27 is proposed to be inserted, which provides that the rent may be reviewed using different bases during the term of the lease, but each review must be made using only one basis. This overcomes the current uncertainty as to whether rent reviews are limited to only one basis for the entire period of the lease or whether each separate review can be made on one of the prescribed bases.

I agree with the Minister's contention that this maximises the flexibility for both the lessor and lessee and permits parties to tailor their rent review needs. This amendment has to be read in conjunction with the requirement of annual reviews. The cumulative effect of both of these amendments is to prevent lessees from being faced with multiple methods of rent review over relatively short periods. It has even been suggested to me that at the moment there are leases in existence that define a period as being one day, and then require a market review of rent one day and a percentage increase the next. If this suggestion is actually correct, and I have no reason to doubt that it is, then it is totally unacceptable and highlights once again that a small minority of retail lessors are misusing their retail power.

The Minister highlighted that a major review of this Act is under way, with a discussion paper having been released in November last year, and with submissions currently being analysed. As I mentioned a little earlier, in March this year amended retail shop leases legislation became operational in New South Wales and last July major changes were made to Victoria's laws. The Minister would be aware that last October Pat McKendry of the Retailers Association said that Queensland had now been overtaken by New South Wales and no longer had best practice legislation. The Minister also knows that there is tremendous interest in the end of lease situation, particularly in regard to the issue of whether an existing tenant should have a first right to re-lease an outlet, subject to an independent valuer settling the issue of an appropriate new rent. Perhaps the Minister may also be interested to know that it was none other than Bob Carr who in December 1997 insisted that the Federal/State communique proposing uniform national retail tenancy laws deal specifically with end of lease issues.

I have been approached by people who are concerned that the Bill does not deal comprehensively with the current practice of subverting the intent of the Act by the use of modified ratchet rent clauses. For the information of those members who are unaware of what these clauses are, I point out that they give the landlord the right to use the higher of two or more alternative methods of rent review. As I understand it, contracts are being written that give the lessor the choice of whether or not to initiate a

market rent review. Such a clause gives the landlord a two-fold advantage, namely, not being subject to market review in circumstances in which such a review is necessary to restore equity, and use of the costs of the review and uncertainty of outcome as a lever to secure a rent increase which would otherwise be unjustified.

I mention these matters simply to highlight that this industry, which is absolutely critical to the economic wellbeing of Queensland, requires ongoing, proper and sensible supervision. I recognise the validity of the point made by the Property Council that any further limitations on the discretion of landlords or procedural requirements often entails a compliance cost, but if any extra cost is entailed, it is well worth it if it prevents some small retailers from being sent to the wall.

With all due respect, the Minister has obviously dithered with this legislation since last July, even though he just copied a coalition Bill. Therefore, I hope that he does not sit on his hands in relation to the submissions that he will receive to his discussion paper.

I have outlined that the retail sector in this State is not doing all that well. Although the passing of legislation is not a magic wand, there may well be some help that can be given and, if so, no delays can be tolerated. In conclusion, along with other speakers from this side of the House, I support the Bill. I hope that it will not be too much longer before the Minister introduces more comprehensive reforms into the House.