

Act 1994 No. 46

RETAIL LEASES BILL 1994*

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to impose certain requirements and restrictions on leases for retail shops and on the practices of lessors and lessees under those leases.

The expression “retail shop” means a shop in which any of the businesses listed in Schedule 1 is carried on or which is situated in a retail shopping centre.

Generally the Bill applies to leases for a term of between 6 months and 25 years where the shop concerned has a lettable area of less than 1,000 square metres. Because of the definition of “lease” used in the Bill, the Bill will apply to licences of 6 months or more as if they were leases. The Bill does not apply to some retail shops (as provided by clause 5 of the Bill), such as shops that are used for the carrying on of a business by the lessee on behalf of the lessor. Generally the Bill applies only to leases entered into after the proposed Act commences.

PART 1—PRELIMINARY

Clause 1 states the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 provides that notes in the text of the Bill do not form part of the proposed Act and are provided to assist understanding.

Clause 5 lists retail shops which are excluded from the operation of the proposed Act.

Amended in committee—see table at end of volume.

Retail Leases 1994 [Act 1994 No. 46]

Clause 6 excludes certain leases from the operation of the proposed Act. Leases for less than 6 months or more than 25 years are excluded, as are leases entered into before, or entered into under agreements entered into before or options granted before, the commencement of the proposed Act. The regulations can exclude other leases from the operation of the proposed Act.

Clause 7 provides that the proposed Act overrides any provision of a lease or other agreement that is inconsistent with the proposed Act.

Clause 8 provides that a lease is “entered into” as soon as the lessee takes up possession or starts to pay rent (even if the lease has not been executed at that time), or as soon as the lease is executed by both parties, whichever happens first.

PART 2—BEFORE THE LEASE IS ENTERED INTO

Clause 9 prevents a retail shop being offered for lease unless a proposed form of lease is ready, and requires that a copy of the proposed lease be made available to a prospective lessee as soon as negotiations commence.

Clause 10 provides that a party to a lease is liable to pay compensation for damage suffered by another party as a result of a false or misleading statement or misrepresentation made by the party.

Clause 11 requires that a lessee be given a disclosure statement at least 7 days before the lease is entered into or renewed. The disclosure statement contains information about the proposed tenancy. The lessee is given a right to terminate the lease if the disclosure statement is not given or if it is materially false or misleading. There are exceptions to this right if the lessor has acted honestly and reasonably and the lessee has not been disadvantaged.

Clause 12 provides that a lessee is not liable to pay or contribute towards the cost of any fixtures, fittings, equipment or services unless the liability is disclosed in the disclosure statement.

Clause 13 provides that a lessee is not liable to pay more than a reasonable amount in respect of legal or other expenses in connection with the preparation of the lease and requires the lessor to provide the lessee with a copy of any account rendered to the lessor in respect of those expenses.

Clause 14 prohibits a lessor or a person acting on behalf of the lessor from seeking or accepting any payment in the nature of key-money in connection with the granting of a lease.

Clause 15 requires the lessor to provide the lessee with an executed, stamped and (where appropriate) registered copy of the lease within a certain time.

Clause 16 provides that a lease must be for a minimum of 5 years (including extensions and options for renewal available to the lessee) unless the lessee waives this requirement (pursuant to a procedure involving the issue of a certificate by a lawyer who has explained the effect of this to the lessee).

PART 3—RENT AND OUTGOINGS

Clause 17 provides that rent and outgoings that are due to start being payable under the lease when the lessee enters into possession are not payable until any lessor's fitout that is also required is substantially complete. The clause also prevents a lessor denying a lessee possession because the lessor's fitout has not been completed.

Clause 18 prohibits a lease containing certain provisions that require or relate to a change to "base rent" (the rent that consists of a specified amount, as distinct from "turnover rent" which varies with the lessee's turnover). Examples of prohibited provisions are provisions that enable base rent to be changed more frequently than once every 12 months (unless the change is a fixed amount or fixed percentage) and provisions that reserve a discretion as to which method of calculating a change to base rent is to apply.

Clause 19 implies certain provisions into leases that provide for review of rent to current market rent. The provisions relate to what matters are to be taken into account in determining current market rent and the procedure for the determination of that rent if the parties cannot agree.

Clause 20 deals with turnover rent (rent calculated as a proportion of the lessee's turnover) and provides for various receipts of the lessee to be excluded from turnover for the purposes of calculating turnover rent. The clause also provides for an adjustment between the lessor and the lessee for any underpayment or overpayment of turnover rent resulting from actual turnover being different to expected turnover.

Clause 21 provides that the proposed Act does not prevent a lease requiring payment of a special rent to cover the cost of fitout and other items provided by the lessor.

Clause 22 prevents the recovery of outgoings from a lessee unless the lease provides which outgoings are recoverable and how they are to be determined and apportioned to lessees.

Clause 23 prevents a lease requiring a lessee to pay any capital costs.

Clause 24 prevents the recovery from a lessee of any amount in respect of depreciation.

Clause 25 requires amounts recovered from lessees for the cost of provision by way of a sinking fund for major items of repair or maintenance to be invested by the lessor in an account bearing interest. Amounts in the sinking fund (and net interest earned on those amounts) must not be spent by a lessor except for the purpose for which the sinking fund was established.

Clause 26 limits the lessor's right to recover land tax from the lessee to land tax calculated on a single holding basis (that is, as if the land were the only land owned by the lessor).

Clause 27 requires the lessor to give the lessee written estimates of expenditure on outgoings and to make a written expenditure statement available to the lessee detailing all expenditure by the lessor on outgoings.

Clause 28 requires the lessor in most cases to provide a lessee with audited reports on expenditure by the lessor on outgoings to which the lessee contributes. In some cases copies of receipts can be provided as an alternative to the report being audited.

Retail Leases 1994 [Act 1994 No. 46]

Clause 29 requires an adjustment between the lessor and the lessee in respect of outgoing expenditure on the basis of the lessor's actual expenditure on outgoing properly and reasonably incurred.

Clause 30 limits a lessee's liability for outgoing that are not specifically attributable to the lessee's shop, with the limit based on the ratio of the lettable area of the lessee's shop to the lettable area of all shops enjoying the benefit of the outgoing.

Clause 31 implies certain provisions into leases that provide an option to renew at current market rent. The provisions relate to what matters are to be taken into account in determining current market rent and the procedure for the determination of the rent if the parties cannot agree.

Clause 32 provides a procedure which allows the lessee to require a determination of current market rent between 6 months and 3 months before an option to renew the lease at current market rent must be exercised, if the parties cannot agree as to what that rent is to be.

PART 4—ALTERATIONS AND OTHER INTERFERENCE WITH THE SHOP

Clause 33 requires a lessor to give the lessee at least 2 months' notice of any alterations or refurbishment that are likely to adversely affect the business of the lessee. The 2 month notice period can be shortened in an emergency.

Clause 34 confers an entitlement on the lessee to compensation from the lessor in respect of certain disturbances to the lessee's "quiet enjoyment" of the shop.

Clause 35 imposes certain restrictions on the termination of a lease on the ground of intended demolition, substantial repair or other action by the lessor that requires vacant possession of the shop. The lessee must be given at least 6 months' notice of termination on that ground, there must be a genuine proposal for the demolition or other action concerned.

Clause 36 implies certain provisions into a lease to deal with the situation where the shop is damaged. Liability for rent and outgoing is reduced in proportion to the diminution in useability caused by the damage. Rights of early termination are also conferred if the damage is not to be repaired.

Clause 37 prohibits a lease from containing provisions that limit the lessee's right to employ persons of the lessee's own choosing (with certain exceptions for ensuring minimum standards of competence and behaviour' protecting the lessor's fittings and fixtures and ensuring compliance with industrial awards and agreements).

Clause 38 requires that provision in a lease requiring the lessee to refurbish or refit the shop must contain general details of the nature, extent and timing of the required refurbishment or refitting.

PART 5—ASSIGNMENT AND TERMINATION

Clause 39 permits the lessor to refuse consent to assignment of the lease if (and only if) the proposed assignee proposes to change the use to which the shop is put or has inferior financial resources or retailing skills compared to the current lessee, or the

Retail Leases 1994 [Act 1994 No. 46]

current lessee fails to comply with the procedure for obtaining consent set out in clause 41. The lessor is entitled to withhold consent pending payment of legal and other expenses but the lessee is entitled to have those expenses substantiated.

Clause 40 prohibits requirements for key-money in connection with the granting of consent to assignment of a lease.

Clause 41 provides a procedure for the obtaining of consent to assignment of a lease. Requests for consent must be in writing and the lessee must first have given the proposed assignee an updated disclosure statement for the lease. The lessor must deal expeditiously with a request for consent and is deemed to have granted consent 42 days after the request is made unless the lessor has refused consent by then.

Clause 42 permits the lease to reserve an unfettered right for the lessor to refuse consent to the subleasing, parting with possession of or mortgaging of the lease.

Clause 43 provides that a section of the Conveyancing Act 1919 (which also deals with the rights of the lessor and lessee in respect of a proposed assignment) does not apply to the extent that it is inconsistent with the proposed Act.

Clause 44 requires the lessor to notify the lessee between 6 and 12 months before the lease expires as to whether or not the lessor offers the lessee a new lease of the shop. Any offer made by the lessor is held open for 1 month. If the lessor fails to notify the lessee as required by the clause, the lease can be extended at the option of the lessee until the lessor has given the required minimum 6 months notice of intention.

Clause 45 prohibits requirements for key-money in connection with the renewal or extension of a lease.

PART 6—MISCELLANEOUS

Clause 46 voids a provision of a lease that imposes trading hours on a lessee that are unlawful.

Clause 47 requires a security deposit paid by a lessee to be held by the lessor on behalf of the lessee in an account bearing interest and to account to the lessee for the net interest on the deposit.

Clause 48 prevents the lessee being compelled to use the services of a particular lawyer nominated by the lessor.

PART 7—ADDITIONAL REQUIREMENTS FOR RETAIL SHOPPING CENTRES

Clause 49 provides that the proposed Part applies only to retail shopping centres.

Clause 50 requires turnover information obtained from lessees to be kept confidential.

Clause 51 requires the lessor to make statistical information obtained by the lessor available to the lessee if the lessee has contributed to the cost of obtaining it.

Clause 52 prevents a lessee being compelled to advertise except by a requirement that the lessee contribute to the lessor's advertising expenses for the retail shopping centre.

Retail Leases 1994 [Act 1994 No. 46]

Clause 53 requires the lessor to make an advertising and promotion marketing plan available to lessees who are required to contribute towards the advertising and promotion of the retail shopping centre.

Clause 54 requires the lessor to make 6-monthly advertising and promotion expenditure statements available to lessees who are required to contribute to the lessor's advertising and promotion costs.

Clause 55 requires the lessor to provide a lessee with an auditor's report detailing expenditure by the lessor on advertising and promotion.

Clause 56 requires unexpended advertising and promotion contributions to be carried forward for future advertising and promotion.

Clause 57 implies provisions into a lease that allows the lessee to be relocated on the ground of proposed refurbishment etc. of the retail shopping centre. The implied provisions give the lessee certain entitlements, such as a minimum notice period of relocation and an entitlement to a lease of alternative accommodation.

Clause 58 prohibits a lease from containing a provision that allows the lease to be terminated on the ground of failure to achieve specified sales or turnover performance.

Clause 59 prohibits a lease from containing provision that prevents or restricts the lessee carrying on business outside the retail shopping centre.

Clause 60 prohibits a lease from containing a provision that would prevent the lessee joining or forming a tenants association.

Clause 61 deals with core trading hours in shopping centres (the hours during which all shops are required to be open). The clause provides that the lessor cannot change core trading hours without the approval in writing of a majority of the lessees of retail shops in the retail shopping centre.

Clause 62 provides for how various provisions of proposed Part 7 are to apply when the shopping centre is subject to a strata scheme. Generally, obligations that fall on the lessor will fall also or (in appropriate cases) instead on the body corporate or the centre manager appointed by the body corporate.

PART 8—DISPUTE RESOLUTION

Clause 63 defines "retail tenancy dispute", as meaning a dispute between the parties to a retail shop lease concerning the lease or the use or occupation of the shop. An extended definition of lease applies so that leases in existence when the proposed Act commences will also be subject to proposed Part 8. A definition of "court" is also included, to include arbitrators.

Clause 64 provides for there to be a Registrar of Retail Tenancy Disputes.

Clause 65 deals with the functions of the Registrar. The principal function of the Registrar is to arrange for the mediation of retail tenancy disputes. The Registrar is also empowered to intervene in proceedings before a court or arbitrator concerning a retail tenancy dispute.

Clause 66 deals with how a lessor or lessee refers a retail tenancy dispute to mediation under the arrangements made by the Registrar.

Retail Leases 1994 [Act 1994 No. 46]

Clause 67 provides that mediation is not limited to formal mediation and includes preliminary steps for advising the parties as to their rights and attempting to resolve their differences at an early stage.

Clause 68 requires mediation of a retail tenancy dispute to be attempted before the dispute is litigated before a court (or heard by an arbitrator).

PART 9—ANCILLARY INTERPRETATION PROVISIONS

Clause 69 provides that a court (including an arbitrator) interpreting this Act is to have regard to accepted practices and interpretations within the industry.

Clause 70 deals with the situation of a lease partly for a retail shop and partly for other premises. The clause provides that the proposed Act applies to such a lease only to the extent that it is a lease for a retail shop.

Clause 71 provides that “renewal” of a lease is constituted by the lessor and the lessee entering into a new lease for the same shop (whether or not on the same terms).

PART 10—GENERAL

Clause 72 provides that extension of the term of a lease by operation of a provision of the proposed Act does not operate for the purposes of the Real Property Act 1900 until a lease is registered under that Act giving effect to the extension, or a variation of the lease is registered giving effect to the extension.

Clause 73 is a power to make regulations creating exemptions from the operation of the proposed Act.

Clause 74 provides that the proposed Act binds the Crown.

Clause 75 deals with how proceedings for offences are to be taken.

Clause 76 is a general regulation making power.

Clause 77 provides for the Minister to review the proposed Act 5 years after the date of assent.

SCHEDULES

Schedule 1 lists the businesses that are referred to in the definition of “retail shop” in clause 3.

Schedule 2 contains the form of disclosure statement required by the proposed Act.
