

[Act 1998 No 169]



New South Wales

Retail Leases Amendment Bill 1998

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The object of this Bill is to amend the *Retail Leases Act 1994* (the **Principal Act**) for the following purposes:

- (a) to make it clear that the assignment of a lease not currently subject to the Principal Act will not bring the lease under the Principal Act,
- (b) to impose greater sanctions on lessors under retail shop leases who fail to give disclosure statements to lessees before the lease is entered into,
- (c) to impose a requirement on proposed lessees under retail shop leases to give disclosure statements to lessors before entering into leases,
- (d) to enable licensed conveyancers to sign certificates enabling requirements relating to the term of retail shop leases not to apply,
- (e) to prevent certain decreases in rent being specified or limited under retail shop leases.

* Amended in committee—see table at end of volume.

- (f) to provide for the appointment and powers of specialist retail valuers in relation to the determination of current market rents for the purposes of retail shop leases and to limit the information that may be disclosed by valuers,
- (g) to prohibit provisions in retail shop leases that require lessees to pay amounts in respect of interest and other charges incurred by lessors,
- (h) to prohibit provisions in retail shop leases that require lessees to pay amounts in respect of land other than land associated with the retail shop concerned,
- (i) to establish requirements relating to sinking funds and to provide for their distribution,
- (j) to apply provisions relating to forced relocation to retail shops not located in retail shopping centres,
- (k) to make compensation available for a fitout paid by a lessee where a retail shop lease is terminated on the ground of proposed demolition,
- (l) to provide for statements to be given by assignors of leases to assignees and to provide protection from liability for assignors who give such statements and guarantors of assignors,
- (m) to prohibit lessors and lessees from engaging in unconscionable conduct in connection with retail shop leases and to provide for a remedy for any loss or damage caused by unconscionable conduct,
- (n) to confer jurisdiction on the Administrative Decisions Tribunal (the *Tribunal*) to deal with claims under the Principal Act and to set out the powers of the Tribunal when doing so and to make other provision with respect to dispute resolution. claims and proceedings under the Principal Act,
- (o) to extend the period within which the Principal Act must be reviewed from 5 years to 7 years,
- (p) to make savings and transitional provisions consequent on the enactment of the proposed Act.

The Bill also amends the *Administrative Decision Tribunal Act 1997* to establish a Retail Leases Division of the Tribunal to deal with the new jurisdiction imposed by the Bill and makes a consequential change to the proposed *Fair Trading Tribunal Act 1998*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

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

Clause 3 is a formal provision giving effect to the amendments to the *Retail Leases Act 1994* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to other Acts set out in Schedule 2.

Schedule 1 Amendment of Retail Leases Act 1994

Application of Act

Schedule 1 [7] excludes from the operation of the Principal Act any lease that is not subject to that Act and that is assigned after that Act commences.

Disclosure statements by lessors

Lessors under retail shop leases are required to give to lessees disclosure statements (now called *lessor's disclosure statements*). Currently, a lessee who is not given a disclosure statement may terminate the lease at any time within 3 months after it is entered into if a statement is not given to the lessee. The proposed Act extends this period to 6 months (**Schedule 1 [12]**) and also makes it an offence for a lessor to fail to give a lessee a lessor's disclosure statement, with a maximum penalty of \$5,500 (**Schedule 1 [15]**).

Schedule 1 [2], [8], [10], [11], [13], [14] and **[24]** make consequential amendments.

Disclosure statements by lessees

The proposed Act inserts proposed section 11A which requires a proposed lessee under a retail shop lease to give the proposed lessor a lessee's disclosure statement not later than 7 days (or within such further period as may be agreed) after receiving the lessor's disclosure statement. The statement is to contain the matters set out in Part 2 of the form contained in proposed Schedule 2, including a statement that the lessee has or has not sought independent advice in relation to the lease and the representations that the lessee is relying on in entering into the lease. It will be an offence for a lessee to fail to give a lessor a lessee's disclosure statement as required by the proposed section, with a maximum penalty of \$5,500 (**Schedule 1 [16]** and **[59]**).

Schedule 1 [9] applies provisions that give a party a right to compensation for damage attributable to the party's entering a lease as a result of a false or misleading statement by or on behalf of another party, to certain representations made by lessees in disclosure statements. These provisions also apply to lessor's disclosure statements.

Schedule 1 [3] makes a consequential amendment.

Licensed conveyancers

Currently, the term of a retail shop lease must not be less than 5 years, except where a lawyer certifies in writing that the right to that length of term has been explained to a lessee as has the effect of the certificate on that right. **Schedule 1 [17]** enables licensed conveyancers under the *Conveyancers Licensing Act 1995* to sign the certificates, as well as lawyers.

Schedule 1 [3]. [5] and [32] make consequential amendments.

Decreases in rent

Under the Principal Act, a provision of a retail shop lease is void to the extent that it prevents or enables the lessor or any other person to prevent base rent decreasing pursuant to a provision of the lease that provides for such a change in base rent. **Schedule 1 [18]** makes a provision of a lease void to the extent to which it limits or specifies, or allows the limitation or specification of. the amount by which the base rent is to decrease.

Current market rent

The Principal Act contains provisions relating to retail shop leases that make provision as to events when rent is to be changed to current market rent and provide for the appointment of a person to determine the amount of the rent where the parties fail to agree on the actual amount of the rent. **Schedule 1 [19]** sets out the factors to be considered when determining current market rent and provides that a specialist retail valuer (who is a person having at least 5 years' experience in valuing retail shop leases) is to be appointed where parties fail to agree. In making a valuation the specialist retail valuer is to take into account specified factors but is not to take into account the value of the goodwill or the lessee's fixtures and fittings. A valuation is to be in writing and contain specified matters and the lessor must supply relevant information to assist the valuer in determining the current market rent not later than 14 days after being requested to do so. The valuation must be made not later than 1 month after the appointment is accepted. The proposed section also enables a valuer to apply to the Tribunal for an order that a lessor comply with a request for relevant information.

Schedule 1 [6] defines *specialist retail valuer*.

Schedule 1 [20] inserts proposed section 19A which makes it an offence for a specialist retail valuer to use for another purpose, or communicate or divulge, information supplied by a lessor or a lessee for the purpose of determining

the amount of rent, or to permit another person to do so. Information may be communicated or divulged with the consent of both the lessor or the lessee or in making the determination (but only in a way that does not identify a particular lease or lessee or disclose information relating to the lessee's business). The maximum penalty will be \$5,500. A valuer who contravenes the proposed section is liable to pay compensation to the lessor or lessee for any loss or damage resulting. The Tribunal may determine the amount of any compensation if no amount is agreed.

The Principal Act contains provisions relating to retail shop leases that make provision as to events when rent for a lease that is to be renewed is to be the current market rent and provide for the appointment of a person to determine the amount of the rent where the parties fail to agree on the actual amount of the rent. **Schedule 1 [25]** sets out the factors to be considered when determining current market rent and provides that a specialist retail valuer (who is a person having at least 5 years' experience in valuing retail shop leases) is to be appointed where parties fail to agree. In making a valuation the specialist retail valuer is to take into account specified factors but is not to take into account the value of the goodwill or the lessee's fixtures and fittings. A valuation is to be in writing and contain specified matters and the lessor must supply relevant information to assist the valuer in determining the current market rent not later than 14 days after being requested to do so. The valuation must be made not later than 1 month after the appointment is accepted. The proposed section also enables a valuer to apply to the Tribunal for an order that a lessor comply with a request for relevant information.

Schedule 1 [26] inserts proposed section 31A which makes it an offence for a specialist retail valuer to use for another purpose, or communicate or divulge, information supplied by a lessor or a lessee for the purpose of determining the amount of rent, or to permit another person to do so. Information may be communicated or divulged with the consent of both the lessor or the lessee or in making the determination (but only in a way that does not identify a particular lease or lessee or disclose information relating to the lessee's business). The maximum penalty will be \$5,500. A valuer who contravenes the proposed section is liable to pay compensation to the lessor or lessee for any loss or damage resulting. The Tribunal may determine the amount of any compensation if no amount is agreed.

Prohibited payments

Schedule 1 [21] inserts proposed sections 24A and 24B. Proposed section 24A makes a provision in a retail shop lease void to the extent that it requires a lessee to pay an amount in respect of interest and other charges incurred by the lessor on amounts borrowed by the lessor.

Proposed section 24B makes a provision in a retail shop lease void to the extent that it requires a lessee to pay an amount in respect of rent and other costs associated with unrelated land.

Sinking funds

Currently, amounts payable by lessees under retail shop leases for major items of repair or maintenance are required to be paid into a sinking fund, if the lease provides for the establishment of a sinking fund to fund provision for such items.

Schedule 1 [22] adds to the provisions taken to be included in leases provisions limiting the items of repair and maintenance for which contributions may be required, limiting the amounts payable to the maximum amounts set out in the Principal Act, requiring full and accurate accounts to be kept in relation to a sinking fund, requiring statements as to the fund to be given to lessees and setting out the accounting standards applicable to sinking funds.

Schedule 1 [23] inserts proposed sections 25A and 25B. Proposed section 25A provides that only one sinking fund at any one time is to be established by a lessee in relation to any one building or retail shopping centre. A lessor must not require or accept total contributions relating to a retail shop in a retail shopping centre exceeding 5% of the lessor's estimated total outgoings for the year concerned for the centre. The lessee must not require or accept further contributions to the sinking fund if the amount outstanding to the credit of the sinking fund exceeds \$250,000. It will be an offence for a lessor to contravene the proposed section (maximum penalty \$5,500).

Proposed section 25B provides for the repayment to lessees of money outstanding to the credit of a sinking fund in the event of the destruction or demolition of a building or retail shopping centre, or of a retail shopping centre ceasing to operate. Each lessee is entitled to a proportion equivalent to the proportion of the total lettable area of their retail shop to the total lettable area of the retail shops of the contributors to the sinking fund.

Relocation of retail shops

Currently, section 57 of the Principal Act sets out requirements to be included in retail shop leases relating to retail shopping centres if those leases provide for the business of the lessee to be relocated. The provisions relate to the giving of sufficient notice and other entitlements.

Schedule 1 [27] re-enacts section 57 as proposed section 34A, so that it applies to other retail shops in addition to retail shops contained in retail shopping centres.

Schedule 1 [33] repeals section 57.

Compensation for demolition

Currently, the Principal Act includes provisions in retail shop leases that provide for the termination of the lease on the grounds of proposed demolition where demolition does not proceed. The lessor is liable to pay reasonable compensation to the lessee for damage suffered as a consequence of the early demolition.

Schedule 1 [28] provides a right to reasonable compensation for the fitout of a retail shop if the lessee is required under the lease to fitout the retail shop and the retail shop lease is terminated on the ground of demolition, where the demolition does not proceed within a reasonably practicable time.

Assignment of leases

Schedule 1 [29] and **[30]** provide for an assignor of a retail shop lease that is assigned in connection with the lease of a retail shop that will continue to be an ongoing business to give a statement (*assignor's disclosure statement*) to the proposed assignee, and a copy to the lessor. The form of the statement is to be set out in proposed Schedule 2A (see **Schedule 1 [59]**) and contains information about outstanding notices, the lessor's disclosure statement, encumbrances and other matters relating to the lease.

Schedule 1 [31] inserts proposed section 41A which provides that an assignor of a retail shop lease that is assigned in connection with the lease of a retail shop that will continue to be an ongoing business, and any guarantor of the assignor, is not liable for any amounts payable to the lessor by a person to whom the lease is assigned, if the assignor has given copies of the assignor's disclosure statement, as provided for in section 41 of the Principal Act.

Schedule 1 [1] makes a consequential amendment.

Unconscionable conduct

Schedule 1 [34] inserts proposed Part 7A (proposed sections 62A and 62B). Proposed section 62A applies the proposed Part to retail shop leases entered into before the commencement of the Principal Act, if the Act would apply to them had they been entered into after that commencement. Proposed section 62B prohibits both lessors and lessees from engaging in unconscionable conduct in connection with a retail shop lease. The proposed section sets out the matters to be considered by the Tribunal in determining whether there has been a contravention of the proposed section and requires the Tribunal not to have regard to any matters not reasonably foreseeable at the time of the alleged contravention. A person will not be taken to have engaged in unconscionable conduct by reason only that the person commences legal proceedings or fails to renew a lease or issue a new lease. The remedy available for a contravention is a claim for loss or damage suffered as a result of the contravention.

Schedule 1 [49] inserts proposed section 71A which enables unconscionable conduct claims to be lodged.

Schedule 1 [51] inserts proposed section 72AA which sets out the orders the Tribunal may make in relation to unconscionable conduct claims.

Schedule 1 [55] inserts proposed section 76A which enables a party in proceedings before the Tribunal for an unconscionable conduct claim to apply to have the proceedings transferred to the Supreme Court. The Tribunal is required to transfer the proceedings if the claim is one that may be more effectively and appropriately dealt with by the Supreme Court and the interests of justice do not require the matter to continue to be dealt with by the Tribunal. Jurisdiction is conferred on the Supreme Court to deal with a transferred matter.

Schedule 1 [48] and **[52]** make consequential amendments.

Administrative Decisions Tribunal, alternative dispute resolution and proceedings under the Act

Schedule 1 [35] makes it clear that a retail tenancy dispute can arise in relation to former parties to former leases.

Schedule 1 [37] and **[38]** enable the Registrar of Retail Tenancy Disputes (the *Registrar*) to facilitate the resolution of retail tenancy and other disputes under the Principal Act by mediation or other appropriate forms of alternative dispute resolution.

Schedule 1 [39] makes it clear that the Registrar has power to take proceedings for an offence under the Principal Act or regulations under that Act or to authorise persons to take any such proceedings.

Schedule 1 [40]–[42] and **[44]–[46]** extend the application of the mediation provisions to unconscionable conduct claims and other claims relating to valuations that are proposed to be inserted by the proposed Act.

Schedule 1 [43] gives a mediator exercising functions under the Principal Act the same protections and immunities as a Judge of the Supreme Court.

Schedule 1 [49] substitutes section 71. The proposed section enables the lodging of claims under the Act with the Tribunal and imposes a time limit of 3 years after the liability or obligation the subject of the claim arose.

Schedule 1 [50] substitutes section 72. The proposed section sets out the orders that the Tribunal may make with respect to retail tenancy claims. These orders include orders requiring money to be paid, that a party to proceedings do specified work or perform a specified service and other orders, including orders relating to rights and liabilities under a retail shop lease. The Tribunal may also make ancillary and interim orders. **Schedule 1 [36]** and **[47]** make consequential amendments.

Schedule 1 [53] increases the monetary limit on the Tribunal's jurisdiction from \$250,000 to \$300,000.

Schedule 1 [54] makes it clear that the provisions relating to alternative dispute resolution contained in the *Administrative Decisions Tribunal Act 1997* do not apply to proceedings under the Principal Act.

Schedule 1 [56] inserts proposed sections 77–77C. Proposed section 77 applies the appeal provisions under the *Administrative Decisions Tribunal Act 1997* to claims made to the Tribunal under the proposed Act (other than unconscionable conduct claims). These enable an appeal to an Appeal Panel of the Tribunal, both on the merits and a question of law, and also an appeal on a matter of law from a decision of the Appeal Panel to the Supreme Court. The proposed section also enables an appeal against a decision relating to an unconscionable conduct claim to be made to the Supreme Court on a question of law and also, with the Court's leave, a review of the merits of the Tribunal's decision to be sought before the Court.

Proposed section 77A enables the Tribunal to award costs.

Proposed section 77B excludes provisions relating to assessors from applying to the Tribunal when exercising its jurisdiction under the Principal Act.

Proposed section 77C gives parties the right to be represented at proceedings before the Tribunal.

Review of Act

Currently, the Principal Act provides for the Act to be reviewed as soon as possible after the period of 5 years from the date of its assent.

Schedule 1 [57] extends this to as soon as possible after the period of 7 years from the date of its assent.

Savings and transitional provisions

Schedule 1 [60] and **[61]** insert savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other Acts

Administrative Decisions Tribunal Act 1997

Schedule 2.1 [1] and **[2]** establish a Retail Leases Division of the Tribunal. The Divisional Head is to be a Deputy President of the Tribunal. The Retail Leases Division is to exercise the functions of the Tribunal under the *Retail Leases Act 1994*.

Schedule 2.1 [3] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Fair Trading Tribunal Act 1998

Schedule 2.2 makes a consequential amendment to the *Fair Trading Tribunal Act 1998*.