



New South Wales

Retail Leases Amendment Bill 2011

Explanatory note

Overview of Bill

The object of this Bill is to amend the *Retail Leases Act 1994* (the *principal Act*) as follows:

- (a) to simplify the procedures for the various disclosure statements that lessors and lessees are required to provide under the principal Act,
- (b) to make it clear that shop premises in an office tower that forms part of a retail shopping centre are not excluded from the operation of the principal Act if they are used for a retail shop business listed in Schedule 1 to the principal Act,
- (c) to vary the provisions for a lessor's disclosure statement to make it clear that a lessor's disclosure statement is required when a lease is renewed and to enable a lessee to require a lessor's disclosure statement before exercising an option to renew a lease,
- (d) to make it clear that the termination of a lease for a failure to provide a complete and accurate lessor's disclosure statement does not affect a lessee's right to compensation for a pre-lease misrepresentation,
- (e) to make it clear that when the principal Act applies to a lease, it continues to apply during holding over by the lessee,

exposure draft

Retail Leases Amendment Bill 2011

Explanatory note

- (f) to add the cost of outgoings to the list of costs that a lessee is not required to contribute to unless the liability is disclosed in the lessor's disclosure statement,
- (g) to provide that if the lessor and lessee cannot agree on the maximum cost of, or a formula for calculating the cost of, fit-out works before the lease is entered into, the maximum cost is to be determined by an independent quantity surveyor,
- (h) to require all retail shop leases that are for a term of 3 years or more to be registered under the *Real Property Act 1900* and to include a summary statement for the lease,
- (i) to make it clear that the decision to enter into a retail shop lease for a term of less than the minimum 5 years is at the discretion of the lessee,
- (j) to provide for the publication of guidelines for the assistance of the parties to a retail shop lease in connection with arrangements for providing a bank guarantee as security for the performance of the lessee's obligations under the lease,
- (k) to make it clear that a prohibition against a lease containing a provision that prevents or limits a rent decrease when rent is adjusted extends to a rent adjustment that occurs on the exercise of an option to renew,
- (l) to prohibit the recovery from a lessee of any outgoings attributable to land tax,
- (m) to allow a specialist retail valuer to require a lessor to provide an updated lessor's disclosure statement for the purposes of a valuation of current market rent,
- (n) to increase from 2 months to 6 months the period of notice required to be given to a lessee of an alteration or refurbishment that is likely to adversely affect the business of the lessee,
- (o) to require a lessor, if practicable, to offer alternative accommodation of reasonably comparable commercial value when relocating a lessee, and to enable a lessee to recover the lessee's depreciated fit-out costs if the alternative accommodation offered is not of reasonably comparable commercial value and the lessee terminates the lease,
- (p) to provide that a lessee cannot be required under the lease to make any repairs or improvements after notice of termination on the ground of proposed demolition is given to the lessee (other than repairs for the purposes of ensuring the safety or security of a building),
- (q) to require a provision of a lease for refurbishment or refitting by the lessee to specify when it is required and to sufficiently specify what is required to allow the lessee to make a reasonably accurate assessment of cost,
- (r) to make it clear that it is the responsibility of the lessee to provide sufficient information to the lessor to enable the lessor to be reasonably satisfied as to whether any circumstances exist that entitle the lessor to withhold consent to the assignment of a retail shop lease,

exposure draft

Retail Leases Amendment Bill 2011

Explanatory note

- (s) to simplify the drafting of the procedure to be followed by a lessee to obtain the consent of the lessor to an assignment of lease,
- (t) to entitle a lessee after the end of a retail shop lease to a refund of unexpended contributions made by the lessee towards advertising and promotion of a retail shopping centre,
- (u) to increase the monetary limit on the jurisdiction of the Administrative Decisions Tribunal (the *ADT*) for claims arising under the principal Act from \$400,000 to \$750,000,
- (v) to change the current requirement that the ADT must be assisted by members with lessor and lessee experience when hearing a retail lease matter, so that the requirement will only apply in any case that the Tribunal considers it appropriate,
- (w) to clarify the operation of provisions that impose a time limit on when certain claims can be made under the principal Act,
- (x) to provide that the Registrar of Retail Tenancy Disputes may receive and investigate complaints about the conduct of a party to a retail shop lease,
- (y) to provide that a court is to have regard to an industry code of practice prescribed by the regulations for the purposes of establishing accepted practices and interpretations within the industry concerning the leasing of retail shops,
- (z) to provide for the issue of penalty notices for offences under the principal Act or the regulations,
- (aa) to provide a statement of the objects of the principal Act,
- (ab) to require a further review of the principal Act in another 7 years,
- (ac) to enact consequential savings and transitional provisions and to make miscellaneous minor amendments.

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.

Schedule 1 Amendment of Retail Leases Act 1994 No 46

Disclosure statements

Schedule 1 [11] amends the provisions dealing with the obligation of a lessor to provide a lessee with a lessor's disclosure statement:

exposure draft

Retail Leases Amendment Bill 2011

Explanatory note

- (a) to make it clear that a lessor's disclosure statement is required when a lease is entered into by way of renewal or extension of a lease (except an extension with no increase in rent), and
- (b) to enable a lessee to require a disclosure statement to be given at least 7 days before the last day for the exercise of an option to renew.

Schedule 1 [14] makes it clear that the termination of a lease for failure to provide a lessor's disclosure statement or for providing an incomplete or false or misleading lessor's disclosure statement does not affect any entitlement of the lessee to claim compensation for damage suffered as a result of a false or misleading representation.

Schedule 1 [2], [4], [6], [12], [13], [15], [51], [52] and [54] make consequential amendments and amendments to simplify the provisions that require the giving of a lessor's or lessee's disclosure statement before a lease is entered into.

Costs payable by lessee

Schedule 1 [16] adds the cost of outgoings to the list of costs that a lessee is not required to contribute to unless the liability is disclosed in the lessor's disclosure statement.

Schedule 1 [17] provides that if the lessor and lessee cannot agree on the maximum cost of, or a formula for calculating the cost of, fit-out works before the lease is entered into, the maximum cost is to be determined by an independent quantity surveyor appointed by agreement between the lessor and lessee or (if there is no agreement) by the Director-General of the Department of Services, Technology and Administration (the *Director-General*).

Registration of leases

Schedule 1 [19] requires all retail shop leases that are for a term of 3 years or more to be registered under the *Real Property Act 1900* and to include a summary statement for the lease that includes the information and is in the form prescribed by the regulations.

Minimum lease term

Schedule 1 [20] and [21] make it clear that the requirement for a minimum 5 year term for a retail shop lease (and the mechanism for waiving the minimum term) operates at the discretion of the lessee.

Bank guarantees

Schedule 1 [22] and [23] provide for the Director-General to publish guidelines to assist the parties to a retail shop lease to determine when it is appropriate for the lessor to draw down on a bank guarantee provided as security for the performance of the lessee's obligations under the lease, and guidelines for the assistance of the parties in connection with the appropriate procedures to be followed by the parties in connection with the arrangements for such a bank guarantee.

exposure draft

Retail Leases Amendment Bill 2011

Explanatory note

Land tax

Schedule 1 [25] imposes a total prohibition on the recovery from a lessee of land tax for which the lessor is liable. Currently the lessor is allowed to recover the lessor's outgoings attributable to land tax calculated as if the land concerned were the only land owned by the lessor.

Rent adjustments

Schedule 1 [24] makes it clear that a prohibition against a lease containing a provision that prevents or limits a rent decrease when rent is adjusted extends to a rent adjustment that occurs on the exercise of an option to renew.

Schedule 1 [27] and [28] extend the powers of a specialist retail valuer who is carrying out a valuation of current market rent so that the valuer can require the lessor to provide an updated lessor's disclosure statement for the lease.

Alterations, refurbishment and refitting

Schedule 1 [29] increases the period of notice that a lessor is required to give a lessee of proposed alterations or refurbishment of the building or retail shopping centre of which the lessee's shop forms part that are likely to adversely affect the lessee's business. The current notice period is 2 months and will be increased to 6 months (or 3 months if the lease is for less than 12 months, under **Schedule 1 [30]**).

Schedule 1 [34] replaces an existing provision that requires a provision of a lease for refurbishment or refitting by the lessee to indicate generally the nature, extent and timing of the required refurbishment or refitting. The replacement provision will require the provision of the lease to specify when the refurbishment or refitting is required and sufficient details of the nature and extent of the refurbishment or refitting to enable the lessee to make a reasonably accurate assessment of likely cost.

Relocation of lessee to alternative premises

Schedule 1 [31] requires a lessor to make alternative accommodation of reasonably comparable commercial value available to the lessee when the lessee is required to relocate, unless it is not reasonably practicable for the lessor to do so.

Schedule 1 [32] provides for the lessee to recover the lessee's depreciated fit-out costs if the alternative accommodation offered is not of reasonably comparable commercial value and the lessee terminates the lease (whether or not it was reasonably practicable for the lessor to offer alternative accommodation of reasonably comparable commercial value).

Schedule 1 [44] makes a consequential amendment.

exposure draft

Retail Leases Amendment Bill 2011

Explanatory note

Termination on grounds of proposed demolition

Schedule 1 [33] provides that a lessee cannot be required under the lease to make any repairs or improvements to the building occupied by the lessee after notice of termination on the ground of proposed demolition of the building is given to the lessee (other than repairs for the purposes of ensuring the safety or security of the building).

Assignment of lease

Schedule 1 [35] makes it clear that it is responsibility of the lessee to provide sufficient information to the lessor to enable the lessor to be reasonably satisfied as to whether any circumstances exist that entitle the lessor to withhold consent to the assignment of a retail shop lease.

Schedule 1 [36] simplifies the drafting of the procedure to be followed by a lessee to obtain the consent of the lessor to an assignment of a retail shop lease. **Schedule 1 [37]–[39]** are consequential amendments.

Refund of unexpended advertising and promotion contributions

Schedule 1 [40] provides that at the end of a retail shop lease a lessee is entitled to a refund of any amount of the lessee's contributions towards advertising and promotion costs of the lessor that immediately before the end of the lease is unspent and required to be applied towards future expenditure on advertising or promotion.

Claims to ADT

Schedule 1 [45] and [46] amend provisions dealing with the time limit on lodging a claim with the ADT to make it clear that a claim can, if the ADT so orders, be lodged more than 3 years and up to 6 years after the liability or obligation that is the subject of the claim arose.

Schedule 1 [47] increases the monetary limit on the jurisdiction of the ADT under the principal Act from \$400,000 to \$750,000.

Other amendments

Schedule 1 [1] provides a statement of the objects of the principal Act.

Schedule 1 [3] updates the definition of *key money* and amends the definition of *lease preparation expenses* to specifically include expenses incurred in connection with obtaining the consent of the mortgagee.

Schedule 1 [5] and [7] make it clear that premises in an office tower that forms part of a retail shopping centre are not excluded from the operation of the principal Act if they are used for a retail shop business listed in Schedule 1 to the principal Act.

Schedule 1 [8]–[10] make it clear that when the principal Act applies to a lease, it continues to apply during any period that the lessee continues in possession pursuant to holding over. The amendments also make it clear that a period of holding over is to be included in the period of a lessee's possession under a lease for the purposes of

exposure draft

Retail Leases Amendment Bill 2011

Explanatory note

determining whether the lease is a short-term lease that is excluded from the operation of the principal Act.

Schedule 1 [18] and [26] move provisions that apply only to shops in retail shopping centres to the Part of the principal Act that contains provisions that apply only to retail shopping centres.

Schedule 1 [42] provides that the Registrar of Retail Tenancy Disputes may receive and investigate complaints about the conduct of a party to a retail shop lease. **Schedule 1 [41] and [43]** make consequential amendments.

Schedule 1 [48] requires a court to have regard to an industry code of practice prescribed by the regulations for the purposes of establishing accepted practices and interpretations within the industry concerning the leasing of retail shops.

Schedule 1 [49] provides for the issue of penalty notices for offences under the principal Act and the regulations.

Schedule 1 [50] requires a further review of the principal Act 7 years after the date of assent to the proposed Act.

Savings and transitional provisions

Schedule 1 [53] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [55] inserts savings and transitional provisions.

Schedule 2 Amendment of Administrative Decisions Tribunal Act 1997 No 76

Schedule 2 changes the current requirement that the ADT must be assisted by members with lessor and lessee experience when hearing a retail lease matter, so that the requirement will only apply in any case that the ADT considers it appropriate.



New South Wales

Retail Leases Amendment Bill 2011

Contents

| | Page |
|---|------|
| 1 Name of Act | 2 |
| 2 Commencement | 2 |
| Schedule 1 Amendment of Retail Leases Act 1994 No 46 | 3 |
| Schedule 2 Amendment of Administrative Decisions Tribunal Act 1997 No 76 | 18 |

exposure draft



New South Wales

Retail Leases Amendment Bill 2011

No. , 2011

A Bill for

An Act to amend the *Retail Leases Act 1994* to make further provision for the application of the Act to retail shop leases, the rights and obligations of lessors and lessees, leasing procedures, dispute resolution and miscellaneous matters; and for other purposes.

exposure draft

Clause 1 Retail Leases Amendment Bill 2011

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Retail Leases Amendment Act 2011*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

exposure draft

Retail Leases Amendment Bill 2011

Amendment of Retail Leases Act 1994 No 46

Schedule 1

Schedule 1 Amendment of Retail Leases Act 1994 No 46

[1] Section 1A

Insert after section 1:

1A Objects of Act

The objects of this Act are:

- (a) to provide certainty, fairness and transparency in retail leasing arrangements, and
- (b) to provide for efficient and cost effective mechanisms to resolve retail leasing disputes.

[2] Section 3 Definitions

Omit the definitions of *assignor's disclosure statement*, *lessee's disclosure statement* and *lessor's disclosure statement*.

Insert instead:

assignor's disclosure statement—see section 3A.

lessee's disclosure statement—see section 3A.

lessor's disclosure statement—see section 3A.

[3] Section 3, definitions of “key-money” and “lease preparation expenses”

Omit the definitions. Insert instead:

key-money means money that a lessee is to pay, or a benefit that a lessee is to give, that is by way of a premium, or something similar in nature to a premium in that there is no real consideration or no true consideration given for the payment or benefit (for example, it is so disproportionate to the benefit that it cannot be true consideration), and that is consideration for:

- (a) a lease being granted or an agreement being made to grant a lease, or
- (b) the variation of a lease, or
- (c) the renewal of a lease or the granting of an option for the renewal of a lease, or
- (d) consent being given to the assignment of a lease or to the subleasing of the premises to which a lease relates.

exposure draft

Retail Leases Amendment Bill 2011

Schedule 1 Amendment of Retail Leases Act 1994 No 46

lease preparation expenses means legal or other expenses incurred by the lessor in connection with the preparation or entering into of a retail shop lease, including expenses incurred in connection with obtaining the consent of a mortgagee to the lease, but not including registration fees under the *Real Property Act 1900*.

[4] Section 3, definitions of “lessee’s disclosure update” and “lessor’s disclosure update”

Insert in alphabetical order:

lessee’s disclosure update means a written statement that updates the provisions of a lessee’s disclosure statement.

lessor’s disclosure update means a written statement that updates the provisions of a lessor’s disclosure statement.

[5] Section 3, definition of “retail shopping centre”

Insert at the end of the definition:

,
but does not include any premises in an office tower that is part of, adjoins or is above the premises of a retail shopping centre.

[6] Section 3A

Insert after section 3:

3A Disclosure statements

- (1) There are to be the following disclosure statements for the purposes of this Act:
 - (a) a lessor’s disclosure statement,
 - (b) a lessee’s disclosure statement,
 - (c) an assignor’s disclosure statement.
- (2) A disclosure statement is a statement in writing that contains the information, and is accompanied by the material, that is contained in or required to complete or accompany the prescribed form for the disclosure statement (but only to the extent that is relevant to the lease concerned). The layout of a disclosure statement need not comply with that of the prescribed form.
- (3) The *prescribed form* for a disclosure statement is:
 - (a) for a lessor’s disclosure statement—the form set out in Part 1 of Schedule 2 or (if the regulations prescribe a different

exposure draft

Retail Leases Amendment Bill 2011

Amendment of Retail Leases Act 1994 No 46

Schedule 1

form for a lessor's disclosure statement) the form prescribed by the regulations, or

- (b) for a lessee's disclosure statement—the form set out in Part 2 of Schedule 2 or (if the regulations prescribe a different form for a lessee's disclosure statement) the form prescribed by the regulations, or
- (c) for an assignor's disclosure statement—the form set out in Schedule 2A or (if the regulations prescribe a different form for an assignor's disclosure statement) the form prescribed by the regulations.

[7] Section 5 Certain retail shops excluded from operation of Act

Omit section 5 (d).

[8] Section 6A Application of Act to short-term leases

Insert "or by reason of the lessee holding over after the end of the term of a lease" after "those means" in section 6A (2).

[9] Section 6A (7), note

Insert at the end of section 6A (7):

Note. See also section 6B.

[10] Section 6B

Insert after section 6A:

6B Application of Act during holding over

- (1) Any period during which the lessee under a retail shop lease is in possession (or entitled to be in possession) of a retail shop pursuant to a provision of the lease for holding over by the lessee is considered to be a period of possession (or entitlement to possession) under the lease.
- (2) Accordingly, if this Act applies to a retail shop lease, this Act continues to apply while the lessee holds over after the end of the term of the lease.

Note. A provision for holding over is not taken into account when determining the term of the lease for the purposes of section 6A (1) (see section 6A (7)). However, a period of holding over does count towards the period for which a lessee is in possession or entitled to possession for the purposes of section 6A (2).

exposure draft

Retail Leases Amendment Bill 2011

Schedule 1 Amendment of Retail Leases Act 1994 No 46

[11] Section 11 Lessor's disclosure statement

Omit section 11 (1). Insert instead:

- (1) At least 7 days before a retail shop lease is entered into, the lessee must be given a lessor's disclosure statement for the lease. The lessor's disclosure statement must have attached to it (and is not complete for the purposes of this section unless it has attached to it) a form to be completed by the lessee in the form prescribed for a lessee's disclosure statement.

Note. Because the disclosure statement need only include information relevant to the lease, if the retail shop is not in a retail shopping centre the disclosure statement need not include information that is relevant only to shops in retail shopping centres.

The definition of **retail shop lease** includes an agreement to lease, so this section also requires a lessee to be given a disclosure statement before an agreement to lease is entered into.

- (1A) This section extends to the entering into of a lease by way of renewal of a lease, and for that purpose renewal of a lease includes extending the term of a lease (otherwise than pursuant to a provision of the lease for holding over). A lessor's disclosure statement is not required to be given under this section when the term of a lease is extended with no increase in rent.
- (1B) If a lease provides an option to renew the lease, the lessee may, by notice in writing to the lessor, require a lessor's disclosure statement to be given to the lessee for the renewed lease at least 7 days before the last day for the exercise of the option (in which case a disclosure statement is not required to be given under subsection (1) for the renewed lease).
- Note.** Subsection (4) provides that when a lease is to be renewed, a disclosure statement can be updated as an alternative to giving a new disclosure statement.

[12] Section 11 (2)

Omit "as required by subsection (1)".

Insert instead "as required under subsection (1) or (1A)".

[13] Section 11 (4)

Omit "a lease is entered into". Insert instead "a lease is to be entered into".

[14] Section 11 (5A)

Insert after section 11 (5):

- (5A) The termination of a lease under this section does not limit or otherwise affect any right of the lessee to compensation under section 10 in respect of a representation arising from the

exposure draft

Retail Leases Amendment Bill 2011

Amendment of Retail Leases Act 1994 No 46

Schedule 1

disclosure statement concerned. A reference in section 10 to a party to a retail shop lease includes a reference to a person who was a party to a retail shop lease before its termination.

[15] Section 11A Lessee's disclosure statement

Omit section 11A (1). Insert instead:

- (1) Not later than 7 days after receiving a lessor's disclosure statement, or within such further period as may be agreed with the prospective lessor, the lessor must be given a lessee's disclosure statement for the lease.

[16] Section 12 Lessee not required to pay undisclosed contributions

Omit "or services". Insert instead " , services or outgoings".

[17] Section 13 Costs before fit-out

Insert after section 13 (2):

- (2A) If the lessor and lessee cannot agree on the maximum cost of the works or a basis or formula with respect to those costs before the lease is entered into, the maximum cost is to be determined by an independent quantity surveyor appointed by agreement between the lessor and lessee or (if there is no agreement) by the Director-General. The lessor and lessee are to pay the costs of the independent quantity surveyor in equal shares.

[18] Section 13A Tenancy fit-out statement or guide

Re-number as section 49A and transfer to Part 7.

[19] Section 15

Omit the section. Insert instead:

15 Lease documentation and registration

- (1) A retail shop lease is taken to include provision to the following effect:
 - (a) If the lease is not required to be registered, the lessor must provide the lessee with an executed copy of the lease within 1 month after the lease is returned to the lessor or the lessor's lawyer or agent following execution of the lease by the lessee.
 - (b) If the lease is required to be registered:
 - (i) the lease must include a summary statement for the lease that includes the information, and is in the

exposure draft

Retail Leases Amendment Bill 2011

Schedule 1 Amendment of Retail Leases Act 1994 No 46

- form, prescribed by the regulations under the Act, and
- (ii) the lessor must lodge the lease for registration within 3 months after the lease is returned to the lessor or the lessor's lawyer or agent following execution of the lease by the lessee, and
 - (iii) the lessor must provide the lessee with an executed copy of the registered lease within 1 month after the lease is returned to the lessor or the lessor's lawyer or agent following registration of the lease.
- (c) The periods specified in paragraphs (a) and (b) are to be extended for delays attributable to the need to obtain any consent from a head lessor or mortgagee and not due to any failure by the lessor to make reasonable efforts to obtain the consent.
- (2) A retail shop lease is required to be registered if:
- (a) the lease provides, or the lessor and lessee otherwise agree, that the lease is required to be registered, or
 - (b) the lease is for a term of 3 years or more.
- (3) If a retail shop lease that is for a term of 3 years or more is not lodged for registration within the time required by a provision of the lease under this section or within such further time as the Registrar may allow in a particular case, the lessor is guilty of an offence.
- Maximum penalty: 10 penalty units.
- (4) For the purposes of this section, the term of a lease includes any term for which the lease may be extended or renewed at the option of the lessee.
- Note.** For example, a lease is for a term of 3 years or more if it is for a term of 1 year with an option to renew for a further 2 years or it is for a term of 2 years with an option to renew for a further 3 years.
- (5) This section does not affect the operation of the *Real Property Act 1900*.
- (6) In this section, **registered** means registered under the *Real Property Act 1900*.

[20] Section 16 Minimum 5 year term

Insert after section 16 (2):

- (2A) This section does not apply to a lease if the lessee elects to enter into a lease for a term of less than 5 years and obtains a certificate for the lease under subsection (3).

exposure draft

Retail Leases Amendment Bill 2011

Amendment of Retail Leases Act 1994 No 46

Schedule 1

[21] Section 16 (3)

Omit “This section does not apply to a lease if a lawyer, or a licensed conveyancer, not acting for the lessor certifies (before, or within 6 months after, the lease was entered into) in writing that:”.

Insert instead “A lawyer or licensed conveyancer (not being a lawyer or licensed conveyancer who is acting for the lessor) may at the request of a lessee or prospective lessee give a certificate in writing, before or within 6 months after the lease is entered into, certifying that:”.

[22] Section 16B Guarantees and other forms of security

Insert “(a *bank guarantee*)” after “authorised deposit-taking institution” in section 16B (1).

[23] Section 16B (3)

Insert after section 16B (2):

- (3) The Director-General may publish guidelines to assist the parties to a retail shop lease to determine when it is appropriate for the lessor to draw down on a bank guarantee and generally for the assistance of the parties in connection with the appropriate procedures to be followed by the parties in connection with the arrangements for a bank guarantee.

[24] Section 18 Restrictions on adjustment of base rent

Insert after section 18 (4):

- (5) Subsection (4) extends to a provision of a retail shop lease that provides for a change to base rent on the exercise of an option to renew the lease.

[25] Section 26

Omit the section. Insert instead:

26 Prohibition on recovery of land tax

A provision of a retail shop lease is void to the extent that it requires a lessee to pay any amount in respect of land tax under the *Land Tax Management Act 1956* for which the lessor is liable.

[26] Section 30 Non-specific outgoings contribution limited by ratio of lettable area

Renumber as section 49B and transfer to Part 7.

exposure draft

Retail Leases Amendment Bill 2011

Schedule 1 Amendment of Retail Leases Act 1994 No 46

[27] Section 31 Reviews of current market rent

Insert after section 31 (1) (d):

- (d1) The lessor must, not later than 14 days after being requested to do so by a specialist retail valuer appointed under paragraph (b), supply the valuer with a lessor's disclosure update that updates the lessor's disclosure statement most recently given to the lessee.

[28] Section 31 (3)

Omit "comply with a request referred to in subsection (1) (d)".

Insert instead "comply with a request under subsection (1) (d1), or with a request under subsection (1) (d)".

[29] Section 33 Lessee to be given notice of alterations and refurbishment

Omit "2 months". Insert instead "6 months".

[30] Section 33 (2)

Insert at the end of section 33:

- (2) If the lease is for a term of 12 months or less, the period of 6 months in subsection (1) is shortened to 3 months.

[31] Section 34A Relocation

Insert after section 34A (b):

- (b1) The alternative shop to be made available to the lessee is to have a commercial value that at the time of relocation is reasonably comparable to the commercial value of the existing retail shop, unless it is not reasonably practicable for the lessor to make such an alternative shop available to the lessee.

[32] Section 34A (2) and (3)

Insert at the end of section 34A:

- (2) If the alternative shop offered to be made available to the lessee does not have a commercial value that is reasonably comparable to the commercial value of the existing retail shop (whether or not it was reasonably practicable for the lessor to make such an alternative shop available) and the lease is terminated as referred to in subsection (1) (d), the lessor is liable to pay the lessee compensation for the lessee's depreciated fit-out costs.

exposure draft

Retail Leases Amendment Bill 2011

Amendment of Retail Leases Act 1994 No 46

Schedule 1

- (3) The lessee's *depreciated fit-out costs* are the costs incurred by the lessee for the fit-out of the existing retail shop reduced in proportion to the depreciated value of the fit-out at the time the lease is terminated.

[33] Section 35 Demolition

Insert after section 35 (1) (b):

- (b1) If notice of termination on that ground is given to the lessee, the lessee cannot be required under any provision of the lease to make any repairs or improvements to the building after the notice is given, other than repairs for the purposes of ensuring the safety or security of the building.

[34] Section 38

Omit the section. Insert instead:

38 Refurbishment and refitting

Provision in a retail shop lease requiring the lessee to refurbish or refit the shop is void unless:

- (a) the provision specifies when the refurbishment or refitting is required, and
- (b) the nature and extent of the refurbishment or refitting is sufficiently specified to enable the lessee to make a reasonably accurate assessment of the likely cost of the refurbishment or refitting.

[35] Section 39 Grounds on which consent to assignment can be withheld

Insert after section 39 (2):

- (3) It is the responsibility of the lessee to provide sufficient information to the lessor to enable the lessor to be reasonably satisfied as to whether any circumstances exist that entitle the lessor to withhold consent to the assignment of a retail shop lease.

[36] Section 41 Procedure for obtaining consent to assignment

Omit section 41 (a) and (b). Insert instead:

- (a) Before requesting the consent of the lessor to a proposed assignment of the lease, the lessee must furnish the proposed assignee with a copy of any disclosure statement given to the lessee in respect of the lease, together with details of any changes that have occurred in respect of the information contained in that disclosure statement since it was given to the lessee (being changes of which the lessee

exposure draft

Retail Leases Amendment Bill 2011

Schedule 1 Amendment of Retail Leases Act 1994 No 46

is aware or could reasonably be expected to be aware). The lessee may also give the proposed assignee an assignor's disclosure statement.

Note. The lessee is not required to give an assignor's disclosure statement but will not get the protection of section 41A unless it has been given to the proposed assignee and a copy of it given to the lessor.

- (b) A request for the lessor's consent to an assignment of the lease must be made in writing and the lessee must provide the lessor with such information as the lessor may reasonably require concerning the financial standing and business experience of the proposed assignee. The lessee may also provide the lessor with a copy of any assignor's disclosure statement given to the proposed assignee by the lessee.

[37] Section 41 (c)

Omit "paragraph (b)" wherever occurring. Insert instead "paragraph (a)".

[38] Section 41, note

Omit the note.

[39] Section 41A Protection of assignors and guarantors

Omit section 41A (1) (a) and (b). Insert instead:

- (a) an assignor's disclosure statement for the lease to the proposed assignee, and
(b) a copy of that assignor's disclosure statement to the lessor.

[40] Section 56 Unexpended advertising and promotion contributions

Insert at the end of the section:

- (2) After the end of a retail shop lease, the lessee is entitled to a refund of any amount of the lessee's contributions carried forward (or required to be carried forward) pursuant to a provision included in the lease under this section that immediately before the end of the lease is unspent and required to be applied towards future expenditure on advertising or promotion of the centre.
- (3) The refund to which a lessee is entitled under this section is payable within 4 months after the end of the lease and is recoverable as a debt.

exposure draft

Retail Leases Amendment Bill 2011

Amendment of Retail Leases Act 1994 No 46

Schedule 1

- (4) The regulations may make provision for or with respect to the calculation of a refund provided for by this section (including provision for determining a lessee's proportionate share of the amounts contributed by lessees in the shopping centre in respect of advertising or promotion costs of the lessor and carried forward or required to be carried forward towards future expenditure).

[41] Part 8, Division 2, heading

Omit the heading. Insert instead:

Division 1A Registrar of Retail Tenancy Disputes

[42] Section 65 Functions of Registrar

Insert after section 65 (1) (a1):

- (a2) to receive and investigate any complaint made by a party or former party to a retail shop lease or former retail shop lease about any conduct engaged in by another party or former party in connection with the retail shop lease,

[43] Part 8, Division 2, heading

Insert before section 66:

Division 2 Mediation

[44] Section 70 Definitions

Insert "34A," after "34," in paragraph (a) (x) of the definition of *retail tenancy claim*.

[45] Section 71 Lodging of retail tenancy claims with Tribunal

Insert "(unless section 71B allows the claim to be lodged later than that)" after "claim arose" in section 71 (2).

[46] Section 71A Lodging of unconscionable conduct claims with Tribunal

Insert "(unless section 71B allows the claim to be lodged later than that)" after "conduct occurred" in section 71A (2).

[47] Section 73 Monetary limit on Tribunal's jurisdiction

Omit "\$400,000" from section 73 (1). Insert instead "\$750,000".

exposure draft

Retail Leases Amendment Bill 2011

Schedule 1 Amendment of Retail Leases Act 1994 No 46

[48] Section 78 Interpretation based on industry practice

Insert “and, for the purpose of establishing what those accepted practices and interpretations are, is to have regard to any publication that is prescribed by the regulations as an industry code of practice for the purposes of this section” after “retail shops”.

[49] Section 84AA

Insert after section 84:

84AA Penalty notices

- (1) An authorised officer may serve a penalty notice on a person if it appears to the officer that the person has committed an offence against this Act or the regulations, being an offence prescribed by the regulations as a penalty notice offence.
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person can pay, within the time and to the person specified in the notice, the amount of the penalty prescribed by the regulations for the offence if dealt with under this section.
- (3) A penalty notice under this section is declared to be a penalty notice for the purposes of the *Fines Act 1996*.
- (4) A penalty notice may be served personally or by post.
- (5) If the amount of penalty prescribed for an alleged offence is paid under this section, no person is liable to any further proceedings for the alleged offence.
- (6) Payment under this section is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
- (7) The regulations may:
 - (a) prescribe an offence for the purposes of this section by specifying the offence or by referring to the provision creating the offence, and
 - (b) prescribe the amount of penalty payable for the offence if dealt with under this section, and
 - (c) prescribe different amounts of penalties for different offences or classes of offences.
- (8) The amount of a penalty prescribed under this section for an offence is not to exceed the maximum amount of penalty that could be imposed for the offence by a court.

exposure draft

Retail Leases Amendment Bill 2011

Amendment of Retail Leases Act 1994 No 46

Schedule 1

- (9) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (10) In this section, *authorised officer* means:
- (a) a member of staff of the Department of Services, Technology and Administration authorised in writing by the Director-General as an authorised officer for the purposes of this section, or
 - (b) an officer appointed under section 18 of the *Fair Trading Act 1987* as an investigator for the purposes of that Act.

[50] Section 86 Review of Act

Omit “date of assent to this Act” from section 86 (2).

Insert instead “date of assent to the *Retail Leases Amendment Act 2011*”.

[51] Schedule 2A Assignor’s disclosure statement

Omit “This statement is to be provided”.

Insert instead “This statement is provided”.

[52] Schedule 2A, note 2

Omit “assignor or lessee” from paragraph (d).

Insert instead “assignor or lessor”.

[53] Schedule 3 Savings and transitional provisions

Insert at the end of clause 1 (1):

Retail Leases Amendment Act 2011

[54] Schedule 3, clause 20

Omit the clause.

[55] Schedule 3, Part 7

Insert after Part 6:

Part 7 Retail Leases Amendment Act 2011

37 Definition

In this Part:

2011 amending Act means the *Retail Leases Amendment Act 2011*.

exposure draft

Retail Leases Amendment Bill 2011

Schedule 1 Amendment of Retail Leases Act 1994 No 46

38 Undisclosed contributions

An amendment made to section 12 by the 2011 amending Act does not apply to a retail shop lease entered into before the commencement of the amendment.

39 Costs before fit-out

An amendment made to section 13 by the 2011 amending Act extends to a retail shop lease entered into before the commencement of the amendment.

40 Lease documentation and registration

Section 15 applies to a retail shop lease entered into before the substitution of that section by the 2011 amending Act as if the section had not been substituted.

41 Prohibition on recovery of land tax

Section 26 as substituted by the 2011 amending Act does not apply to a retail shop lease entered into before the commencement of that section as substituted. Section 26 continues to apply to a lease in force immediately before the substitution of that section by the 2011 amending Act as if the 2011 amending Act had not been enacted.

42 Notice to lessee of alterations and refurbishment

An amendment made to section 33 by the 2011 amending Act does not apply in respect of any alteration or refurbishment that commences within 9 months after the commencement of the amendment.

43 Relocation

An amendment made to section 34A by the 2011 amending Act does not apply in respect of the relocation of a lessee's business of which written notice was given to the lessee (as referred to in section 34A (b)) before the commencement of the amendment.

44 Refurbishment and refitting

Section 38 applies to a retail shop lease entered into before the substitution of that section by the 2011 amending Act as if the section had not been substituted.

exposure draft

Retail Leases Amendment Bill 2011

Amendment of Retail Leases Act 1994 No 46

Schedule 1

45 Unexpended advertising and promotion contributions

An amendment made to section 56 by the 2011 amending Act extends to a retail shop lease in force immediately before the commencement of the amendment.

46 Monetary limit on Tribunal's jurisdiction

The amendment made to section 73 by the 2011 amending Act extends to a retail tenancy claim or unconscionable conduct claim that arises before the commencement of the amendment but not to proceedings pending before the Tribunal immediately before that commencement.

exposure draft

Retail Leases Amendment Bill 2011

Schedule 2 Amendment of Administrative Decisions Tribunal Act 1997 No 76

Schedule 2 Amendment of Administrative Decisions Tribunal Act 1997 No 76

Schedule 2 Composition and functions of Divisions

Omit “The Tribunal is to be assisted” from clause 4 (2) of Part 3B.

Insert instead “The Tribunal may, in any case that the Tribunal considers it appropriate, be assisted”.