NSW Legislative Assembly Hansard

RETAIL LEASES AMENDMENT BILL

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Second Reading

Mr DAVID CAMPBELL (Keira—Minister for Regional Development, Minister for the Illawarra, and Minister for Small Business) [11.58 p.m.]: I move:

That this bill be now read a second time.

The Retail Leases Amendment Bill amends the Retail Leases Act 1994. The Retail Leases Act 1994 established a legislative framework for regulating the relationship between landlords and small to medium sized retailers. It introduced minimum standards for the leasing of retail space and created a mechanism for dispute resolution. The legislation's track record speaks for itself. Since its establishment in 1994 the Retail Tenancy Unit has handled over 37,500 inquiries from landlords and retail tenants, resulting in over 3,800 informal mediations and over 1,600 formal mediations. Ninety per cent of these mediations have successfully resolved the matters in dispute.

It is noted also that since the introduction of the Act fewer than 0.004 per cent of the retail leases in New South Wales are formally mediated through the New South Wales Tenancy Unit in any one year. The amendments in the bill implement the recommendations of a national competition policy review of the Act. The review found that the Retail Leases Act 1994 does not have the effect of restricting competition, and recommends retention of the legislative scheme on net public benefit grounds. While the Act imposes some conditions on retail leasing, the associated compliance costs are considered to be minimal and are offset by the associated benefits. The legislation was found to provide a net public benefit.

However, the report did recommend changes: first, to the recovery of lease preparation expenses by landlords from tenants, and, second, to six-monthly statements of expenditure on outgoings. The amendments will prohibit landlords from recovering the costs of preparing and entering into a lease from tenants, except the costs associated with specific requests from tenants. This change will make the negotiating process more transparent, and allow the tenant to see more clearly the cost of entering into a lease. Small business tenants will be surprised no longer by large legal fees and other bills after they sign a lease.

The bill also removes the requirement on landlords to provide an outgoings expenditure report every six months. This reporting requirement was found to be costly to landlords and to provide little benefit to tenants. The requirement to provide written expenditure reports on an annual basis remains. These reforms will assist in creating a more even-handed, better-informed, and more transparent environment for the negotiation of retail leases for small business. In another place the Government has introduced an amendment to the original bill to remove any possible ambiguity relating to the transitional provisions. The amendment to the bill will make it clear that the new provisions of the bill will apply to all renewals and extensions to retail leases that take effect after the legislation commences. The bill does not affect the grant, renewal or extension of the Retail Leases Act before the legislation comes into effect. I commend the bill to the House.

Ms KATRINA HODGKINSON (Burrinjuck) [12.02 p.m.]: I state at the outset that the Opposition will not oppose the Retail Leases Amendment Bill. The object of the bill is to amend the Retail Leases Act 1994 to prohibit, with certain exceptions, lessors under retail shop leases from recovering lease-preparation expenses from lessees and to remove the current requirement for lessors to make available to lessees six-monthly statements of actual expenditure on outgoings to which lessees contribute. The Retail Leases Act 1994 was subject to a national competition policy [NCP] review and this bill is the result of that review. The Retail Leases Act 1994 regulates the relationship between landlords of retail spaces and small- and medium-sized retailers. The final report of the review, which was released in February 2004, found that, although some provisions regulated the rights of landlords and retail tenants that tended to create anticompetitive outcomes in the retail leasing market, they should be retained on the basis that they provide a net public benefit by the promotion of an efficient and fair marketplace.

The provisions identified were in the nature of compliance costs and exclusion of certain types and size of retail shop businesses from protection under the Act. The key NCP recommendations from the review of the Retail Leases Act 1994 final report of February 2004, commissioned by the Department of State and Regional Development, were that section 13 of the Retail Leases Act 1994 be amended to prohibit landlords from recovering lease preparation costs from tenants, except the cost of any alterations to the lease requested by tenants. In particular, the review committee noted that New South Wales is currently the only State that allows landlords to recover lease preparation costs from tenants.

The committee also found that no net public benefit is associated with that particular requirement. The committee noted that the current arrangements impose significant costs on tenants without any balancing benefits for those tenants, consumers, or the broader community. The committee found also that tenants had little control over how much landlords are entitled to recover under the existing provisions. A net public benefit for the proposed amendment was found on that

basis, and I agree with that finding. As a retailer of some 15 years standing I find it interesting to discuss these types of issues with other retailers and to discover how far the lease preparation costs have taken them. Quite often they are surprised to find out that they are responsible for those costs. The NCP review noted that the removal of that provision in its entirety could disadvantage tenants by making landlords reluctant to make any alterations to a lease sought by tenants. In those circumstances the committee considered that it could be reasonable for landlords to be allowed to charge a tenant for the cost of any alteration to the lease requested by the tenant.

The committee recommended that section 27 of the Retail Leases Act 1994 be amended to remove the current requirement for landlords to provide tenants with a six-monthly statement of actual expenditure on outgoings. As has been stated in another place and by the Minister in this place, that is a sensible and workable amendment to the bill. I know that the review committee found that a net public benefit was no longer associated with the provision of six-monthly reconciliation statements for ongoing expenditure. They added to compliance costs for landlords and they are of no real overall benefit to anybody.

That amendment has received extensive support from various third party interest groups with whom I have consulted on the bill, and I have consulted widely. I know that the many chambers of commerce with which I have consulted, including Chatswood, the State Chamber, Yass, Hornsby and various others, have concerns about the amendments in the bill. I thank them for their contributions and their replies to my correspondence. I note that a couple of interest groups have expressed their concern about the bill, and it is important for the sake of argument and to ensure that interest groups know they are being heard to place some of those concerns on the record. Third parties that have expressed concern include the Law Society and the Shopping Centre Council.

The Law Society wrote quite thoroughly, as it always does. I commend the organisation for taking such an active interest in legislation that comes before this place. It referred to lease preparation expenses and it is concerned that proposed new section 14 (4) (a) to (c) enables lessors to require payment from a prospective lessee or the lessee of a reasonable sum in respect of lease preparation expenses incurred in connection with making an amendment to a proposed lease. The Law Society is concerned that proposed new section 14 (4) (a) to (c) may result in prospective lessees wanting to debate lease terms before committing to a lease. They say that there is also scope for disputes as to whether a particular lease term correctly reflects an agreement referred to in proposed new section 14 (4) (b), and thus falls within the exceptions provided in that paragraph. They say that those comments are equally applicable to the amendments to section 45 of the Act, as proposed by item [9] of schedule 1 to the bill. Section 45 applies to the same regime that is set out in section 14 concerning lease preparation expenses and renewal or extension of a lease.

The Law Society has put forward three alternative cost regimes that are preferred by its committee. Briefly, the Law Society states that one of its alternative cost regimes would be to have no amendment to the existing legislation. The Law Society points out that, under the present regime, there is no prohibition upon the lessor passing on its legal cost of lease preparation to the lessee and that it is in fact current practice in most lease transactions for the lessor to do so. The Law Society also states that it can be argued that determination of this issue by the market is consistent with the Government's policy of promoting competition and that such a system operates under Western Australian legislation by virtue of section 9 (2) of the Commercial Tenancy (Retail Shops) Agreements Act 1985. The Law Society also states that it is important, particularly in evaluating this option, to note the protection given to lessees by section 199 (4) of the Legal Profession Act 1987.

The Law Society's second alternative cost regime is to amend the legislation to provide that each party pay its own costs. The Law Society states that this option promotes the bill's object of prohibiting lessors from recovering lease preparation costs from lessees, and that the removal of the exceptions set out in section 14 (4) reduces the scope for disputes. The Law Society notes that this option is consistent with the current system in the Australian Capital Territory, where section 23 of the Leases (Commercial and Retail) Act 2001 provides that each party is to pay its own costs in respect of the lease and that the party that seeks registration of the lease is to pay the additional costs, such as stamp duty and registration fees.

The third alternative regime put forward by the Law Society of New South Wales is that each party is to pay a proportion of the cost of preparing a lease. The Law Society states that the legislation could be amended to provide that each party pay a specified proportion of the lease preparation costs and that an example of that system is the South Australian legislation, which provides that the lessor is not prohibited from seeking payment of 50 per cent of its preparatory costs of the lease or its renewal in certain circumstances. The Law Society refers to section 15 (3) of the South Australian Retail and Commercial Leases Act 1995. The Law Society made other comments relating to the bill, but the ones I have mentioned are the key points the Law Society was concerned to ensure were mentioned in this House.

As I stated previously, the Shopping Centre Council of Australia has expressed concerns that are similar to those mentioned by the Law Society. In the interests of a full debate, I will draw attention to the points that the council has made. The Shopping Centre Council has said there are some problems with the bill. The definition of "lease preparation expenses" is unclear and the expression "or other expenses incurred by the lessors" is very wide and is also not defined. The exclusion of the registration fees under the Real Property Act leaves uncertain whether stamp duty is included. Although the Duties Act makes the lessee liable for payment of stamp duty under a lease, if the lessee does not pay that duty and the lessor has to enforce the lease, arguably by this bill the lessor will not be able to recover stamp duty from the tenant, should the lessor decide to pay the stamp duty to enforce the lease in court.

Further, if the lessor prepares a lease but the lessee then withdraws from negotiations, the lessor cannot recover any cost of doing so, which is obviously not fair if the lessee has otherwise paid a deposit—for example, prior to entering into a retail shop lease—and has agreed to be responsible for such cost. This situation is specifically preserved by section 13 (3) of the existing Act, which entitles the lessor to recover legal or other expenses incurred in the preparation of a lease

when the person "enters into and then withdraws from negotiations with the lessor or in respect of the lease". The council believes that there is no reason why that section should not be retained.

The Shopping Centre Council of Australia also states that there are further problems with the amendments to section 14. The prohibition on lease preparation expenses is said to be "in connection with the granting of a retail shop lease". The definition of lease preparation expenses relates to the "entering into of a retail shop lease". It is not clear whether the draftsman intended there to be a difference between those two provisions. The council also states that specific provisions in new section 14 (4) and (5) will also prove to be unworkable in practice. First it will be difficult to separate what costs are in respect of lease amendments and what costs are in respect of "entering into a retail shop lease" in any particular circumstance. Second, it will slow down lease negotiations, whereas previously when dealing with amendments the lessee would want to know what the "reasonable sum" is likely to be. Third, amendments to remedy a failure to include or omit a term, which is referred to in new section 14 (4) (b), will be the subject of a dispute, as the parties could easily have different interpretations of the wording of a term they had agreed on in principle, such as a particular type of rent review provision.

The Shopping Centre Council of Australia believes that the proposed amendments are unnecessary and cumbersome. The council also believes that the existing provisions of the Act in section 13 are an effective way to protect a tenant from exploitation. I have read those comments onto the record for the sake of facilitating a full debate. It is important for interest groups to be given an opportunity to have their concerns ventilated in this House. The Coalition supports retailers and people who are prepared to fight to ensure that their businesses are given a fair go. Obviously small business people have to deal with many issues on a daily basis—compliance costs, government regulations, payroll tax, superannuation costs, workers compensation costs and occupational health and safety laws—without imposing upon them the added burden of having to pay the cost of establishing a lease. Their concerns should not be overlooked. Having raised the concerns of stakeholders, I indicate that the Opposition does not oppose the bill.

Mr PAUL McLEAY (Heathcote) [12.15 p.m.]: I support the Retail Leases Amendment Bill. My comments will be directed chiefly to the provisions that apply to the recovery of lease preparation costs and the repeal of the requirement for half-yearly statements. The main purposes of the bill are to meet the New South Wales Government's commitments under national competition policy and to further improve the position of small retailers in their dealings with landlords. The Retail Leases Act 1994 has been reviewed as part of the Government's commitment under national competition policy to review legislation that potentially restricts competition. The Act was reviewed through an extensive process of consultation with key industry, community, and other interested stakeholders. While the review found that the Act did not restrict competition and that the framework should be retained because it produced a net public benefit, the review recommended some changes.

Consistent with the recommendations of the review, the Government has approved the amendments to improve the fairness and efficiency of the Act. First, section 13 of the Act will be repealed, and section 14 will be amended to prohibit landlords from recovering lease preparation costs from tenants. Second, section 27 of the Act will be amended to remove the current requirement for landlords to provide tenants with a six-monthly statement of actual expenditure on outgoings. In relation to the proposed amendments of section 13 and section 14 of the Act, the review found that the current arrangements impose significant costs on landlords, without any countervailing benefits for tenants, consumers or the broader community. Tenants were also found to have little control over the amount of costs that landlords are entitled to recover under the existing provisions. Based on a net public benefit, grounds for the amendment were found to exist.

In relation to the proposed amendment of section 27 of the Act, the review found there was no longer a net public benefit associated with the provision of six monthly reconciliation statements for outgoing expenditure. The provisions were found to impose compliance costs on landlords associated with the preparation of written budgets and associated reports, and the review considered that these costs would be effectively passed on to tenants and possibly consumers, with little additional benefit for tenants above what is already provided through the provision of annual reconciliation statements. On that basis, tenant and landlord groups, including the Shopping Centre Council of Australia, the Property Council of Australia, and the Australian Retailers Association, supported the abolition of the existing six-monthly reporting requirement.

The proposed reforms will help to cut red tape and reduce associated costs for businesses, and they will provide a more effective and equitable environment for promoting profitability in the retail trade sector, with expected benefits for small business retailers in the retail leasing arrangements, for landlords in the retail accommodation industry, and benefits for the broader community generally. By reducing compliance costs for business, the reforms are expected to reduce the likelihood of those costs being passed on to consumers in the form of increased prices for goods or services. These amendments are a win-win for landlords and tenants because tenants will benefit from reduced lease preparation costs and landlords will have reduced administration costs by not having to prepare six-monthly reconciliation statements for outgoings.

The proposed amendments are more good news for small businesses in New South Wales. The small business sector has accurately been described as the lifeblood and the engine room of the economy. The amendments to the retail leasing framework will directly benefit small retailers. This is another example of the Carr Labor Government's hard work and support for small businesses in New South Wales. As a result of the Government's hard work, there are now more small businesses in New South Wales employing more people than ever before. This State has the largest small business sector in the country, with more than one million people employed in non-agricultural firms that employ fewer than 20 staff.

Small businesses continue to grow and thrive in New South Wales because the Carr Labor Government's micro-economic reforms continue to reduce the cost of doing business. The economic reforms introduced during the eight years to June 2003 have seen average real reductions in electricity charges of up to 17 per cent, port charges of 31 per cent, water

charges of 44 per cent, and freight rail charges of 44 per cent. In addition to the reductions in government charges, taxes have also fallen. The Government has cut payroll tax; under the Coalition Government it hit 8 per cent, today it is only 6 per cent. Apprentices and trainees had been exempted from tax and the tax-free threshold has been increased to $600,000. Since 1999 other key cuts to business have included the abolition of the debits tax, the reduction of the general insurance stamp duty rate to 5 per cent, and the suspension of the electricity distribution levy. The New South Wales Government supports business because businesses create jobs. The Government will continue to create an economic business climate that supports businesses succeeding and growing.

In other good news for small business, I inform the House that yesterday Mr Tony Burke, a former member of the other place in this Government, was appointed as Labor's shadow spokesman for small business. I know he will take to that task with enormous enthusiasm and I am sure he will work with his New South Wales colleagues, including the Minister for the Illawarra, and Minister for Small Business, David Campbell, as well as the honourable member for Illawarra, who has spoken in this debate. Minister Campbell continues to do an outstanding job in this State. He is a team player, he works with us all and supports us all, and we do likewise with him. I am sure he will show the same support for Tony Burke and take the challenge to the Howard Government with gusto. In summary, these reforms will assist in improving the negotiating position for small to medium size retailers by creating a transparent, more even-handed environment for the negotiation of retail leases. I commend the bill to the House.

Ms NOREEN HAY (Wollongong) [12.22 p.m.]: I add my congratulations to the former Government member of the other place, Tony Burke. I am absolutely convinced that he will do a magnificent job in his shadow portfolio. Retail tenancy legislation has been in place in New South Wales since 1994 in the form of the Retail Leases Act. That legislation has provided a basis for good leasing practices in the retail industry, provided for a more equitable bargaining position between the parties to a lease, and provided a cost-effective and timely dispute resolution process. The Retail Leases Act 1994 established a legislative framework for regulating the relationship between landlords and small- to medium-size retailers in retail leasing arrangements.

The Act introduced minimum standards for leasing of retail space and created a dispute resolution mechanism. The Act applies to all businesses that satisfy the size and lease term criteria and are located in either a shopping centre or in a shop facing a street. It is estimated that 55,000 retail leases in New South Wales are currently covered by the Act. The framework for retail leases was introduced in response to pressure from the retail leasing industry for measures to ensure a just and equitable retail leasing environment, with a view to protecting small-to medium-size retailers and overcoming the disadvantage small retailers face in negotiating with better resourced landlords.

Since the introduction of the legislation it has been strongly supported by both landlords and tenant industry bodies as providing a basis for good leasing practices in New South Wales. The legislation's track record speaks for itself. Since its establishment in 1994, the Retail Tenancy Unit has handled more than 37,500 inquiries from landlords and retail tenants, resulting in more than 3,800 informal mediations and more than 1,600 formal mediations; and, as the Minister said, based on current figures, 90 per cent of the mediations conducted by the Retail Tenancy Unit were successful in resolving matters in dispute. The proof of its operational effectiveness is clearly demonstrated by the relatively low incidence of disputes between landlords and tenants.

As the Minister said, currently less than 0.004 per cent of retail leases in New South Wales are formally mediated through the New South Wales Retail Tenancy Unit in any one year. Since the introduction of the Act there has been a range of amendments, with some of the most significant reforms introduced in 1998. First, more specific disclosure statements were designed to ensure that property owners and managers offering a lease, retail merchants taking up a lease, and merchants taking over a lease on assignment are much better informed about the terms and conditions of leases and the commercial obligations of the parties.

The 1998 amendments introduced a requirement for retail merchants to make a disclosure statement to the landlord declaring whether they have taken independent advice on the commercial terms of the lease and whether they are able to meet all the conditions of the lease, including the ability to pay the rent and other outgoings. The amendments established a fairer process for the determination of current market rent and the right of a tenant to reasonable compensation for a shop fit-out if the lease is terminated on the grounds of demolition, whether or not the demolition occurs. However, the greatest achievement of the 1998 amendments was the draw-down of the unconscionable conduct provisions of the Trade Practices Act, which provided affordable access to justice on matters of unconscionable conduct.

The adoption of the unconscionable conduct provisions in the retail leases legislation provided a mechanism that enables both merchants and landlords to pursue their commercial decisions with regard to retail leasing, as long as they comply with the legislation and do not behave in an unconscionable manner in their dealings with one another. The Retail Leases Act has been reviewed to determine whether it restricts competition. That public stocktake of the framework surrounding retail leases presented an important opportunity to consider how well the Act achieved its objectives. The review found that the retail leasing framework is working well. The framework received overwhelming support for its retention from industry and community and professional groups, and it was found to produce a net public benefit.

The objectives of the Act remain relevant and there is sufficient justification for the continuing use of the framework to govern retail leasing in New South Wales. In order to streamline and improve the framework for both landlords and small businesses, two reforms have been recommended. The bill introduces those reforms; and they will help to further cut red tape and provide a more effective and equitable environment for retail leasing, thus promoting a more profitable retail sector in New South Wales. I congratulate the Minister for Small Business on taking this important issue on board and I commend the bill to the House.

Mr DARYL MAGUIRE (Wagga Wagga) [12.28 p.m.]: The Retail Leases Amendment Bill makes two main amendments to

the Retail Leases Act 1994. The bill amends section 14 to stop landlords from recovering from lessees the cost of preparing and entering into a lease, other than costs incurred in making amendments to the lease at the request of the lessee. The bill omits sections 27C and 27D, thereby removing the requirement for landlords to provide an outgoings expenditure statement every six months. I have a retail background and I know that these amendments to the Act will be welcomed by small businesses and retailers. The removal of a requirement for an outgoings expenditure statement is non-controversial and is certainly supported by most parties consulted by the Coalition.

The Opposition does not oppose this bill but I want to refer to a scenario that I would like the Minister to consider. This bill is aimed at retail leases, which are an important part of the economic base in New South Wales and in Australia. They make an enormous contribution to employment and to our social and economic wellbeing. I would also like the Minister to consider commercial leases that are entered into by people other than retailers, who are not covered by any legislation. I refer to a problem that has been brought to my attention that involves retail as well as commercial operations.

Owners of retail leases can air their disagreements and concerns about a particular lease and an independent arbitrator can make a decision in relation to that lease. However, people in the commercial sector cannot. The only way that they can resolve their problems is through solicitors and the courts, which comes at an enormous cost to them. Small businesses and commercial operators operating in a commercial building might have a retail front. Today I give as an example a business that manufactures furniture and has a retail outlet. That business operates under a commercial agreement, not a retail agreement.

This small business man who manufactures furniture has in place a five-year plan which has enabled him to move to the city, lease commercial premises, build furniture at the rear of the building and retail it at the front. In June 2002 he agreed to lease a commercial building. The building was only partly constructed and the site had not been completed. The agent assured him that the work would be finished and that his lease would commence on 1 August 2002. He needed that assurance because his manufacturing business depended on the retail outlet at the front of the building. He entered into the lease and began manufacturing furniture.

Twenty-one months after the commencement date of his lease that work had still not been done and he was forced to put the matter into the hands of his solicitor. He had no other avenue of appeal. He could not complain to the real estate agent, who deals with the paperwork and leasing arrangements, and he could not complain to the owner. The matter dragged on and he was totally frustrated. In 2004 he came to see me. He tried to get the local council to approve the building. He entered into the contract before the building was completed on the promise that the work would be done. It was written into the contract but it was not completed.

He asked council, first, to approve the building and, second, to allow him to implement his five-year plan which would enable him to market his products in his shopfront and use the car park on Sunday to sell second-hand and restored furniture. That did not occur and, as a result, his business suffered. During that time he carried out all the necessary work. He repaired the building, laid the turf and completed the landscaping because the landlord and the agent refused to complete the work that they had promised to do. His only avenue of appeal was to take expensive legal action to obtain a result. People who hold commercial leases must be able to have their complaints heard in a fair and reasonable manner and at a reasonable cost.

Tenants holding residential leases have an avenue of appeal under the Residential Tenancies and Tribunals Act. Tenants and landlords have an opportunity to raise their grievances with the Department of Fair Trading. As a result of the proposed amendments to the Retail Leases Act retailers will be able to take their complaints before relevant bodies and have them heard. People with commercial leases have nowhere to go. It is impossible for small manufacturers, such as the one to whom I referred, to fight large corporations or investors who have great wealth, assets and resources and to obtain an outcome that is fair and reasonable. I ask the Minister to take into consideration the complications for small business men of commercial leases. I ask the Minister to assist them in resolving these complexities and to enable them to have their complaints heard in a fair and cost-effective manner.

Mr BRAD HAZZARD (Wakehurst) [12.36 p.m.]: The Liberal-Nationals Coalition does not oppose the Retail Leases Amendment Bill. However, it is opportune to reflect briefly on why the Retail Leases Act, the subject of these amendments, was introduced in 1994. By definition there is often a great deal of difference in the relative commercial strengths of lessors and lessees. The 1994 legislation really only addresses retail lease outlets. There are a number of other commercial leasing arrangements but that is the broader description of retail leases. Retail leases are a sub-group of the broader commercial leasing arrangements.

As a Liberal and as someone who believes in the value of free enterprise, a return for effort, and a return for a preparedness to take a chance, to get out into the marketplace and do business, it is my view that, as far as practical, the Government should stay out of commercial arrangements between parties in the business community. In 1994 it was recognised that there had been some changes. Large groups of companies developed large shopping centres. In that environment a real problem emerged in that the weaker party—the tenant or the lessee—was subjected to whatever fees and charges the lessor imposed.

The Liberal-Nationals Coalition introduced the Retail Leases Act in 1994, which at the time was the subject of a great deal of community debate as to how far the Government should go to try to protect individual commercial enterprises. Some would say that the Government did not go far enough and some would say that it went too far. Even today that is the view that is held by people in various sections of the community. In the end the Government made some effort to correct the power imbalance between lessees who, by definition, are generally smaller enterprises than the larger conglomerates who tend to run retail centres. Without reflecting personally on individual companies, I note in passing that big companies—Westfield, AMP and so on—have the opportunity to develop larger retail centres.

The legislation established certain safeguards for retail tenants; I am not sure that some of them were practical. The basic formula used to be that most commercial tenants would request at least a three-year lease, possibly with a three-year option and perhaps even a further three-year option. But the legislation developed the concept that leases should last a minimum of five years unless a solicitor's advice was sought. I know of tenants who did not, and do not, want to pay legal fees to get advice about matters with which they are already familiar. Some smaller lessees are very business savvy and possibly do not need some the protections in the Retail Leases Act 1994, but others do. The situation has played out over the years, sometimes to the advantage and sometimes to the disadvantage of lessees. But at least the legislation created awareness and served as a reminder to lessors that if they get too silly about the provisions and requirements they impose on lessees, at some point governments of both political persuasions are prepared to consider trying to empower lessees and level the differential between lessors and lessees.

The 1994 Act was, as the House is now well aware, subject to a national competition policy review, which highlighted some of these issues. It was decided that, on the one hand, some amendments should be made but, on the other hand, those changes could have certain negative consequences. So the amending bill ultimately made only very minor amendments to the original Act. The differential imbalance between lessor and lessee was finally addressed in 1994 towards the end of the Coalition Government's time in office. Then Minister Ray Chappell, the member for Northern Tablelands, had carriage of the legislation and was very keen to provide some opportunities to redress that imbalance. The review uncovered only a couple of minor matters, which the shadow Minister has addressed. However, I must mention the question of key money and legal costs. New section 14 (1) states:

A person must not, as lessor or on behalf of the lessor, seek or accept the payment of key-money or lease preparation expenses in connection with the grant of a retail shop lease and any provision of a retail shop lease is void to the extent that it requires or has the effect of requiring the payment of key-money or lease preparation expenses in connection with the granting of the lease.

A further provision makes a slight exemption in the case of modification or alteration of a lease that is done at the tenant's request. Essentially, the bill turns on its head the orthodoxy of the lessee paying the lessor's costs. I think, on balance, that is a good thing but one sometimes wonders whether prescriptive legislation has the desired effect. For example, it will not take two seconds for some of the large groups that run shopping centres—who still have a lot of power—to work out that they have only to increase the rent ever so marginally over the period of the lease to recover the legal costs and whatever might otherwise have been labelled "key money." Perhaps the Carr Labor Government thinks the bill is somehow addressing this issue but I am not sure that it is. I do not mean to reflect unfairly on the Carr Government in this case because I think it is probably trying to address this issue. But perhaps it has no sense of connectedness with the reality of the power differential between lessor and lessee.

I believe the development of centralised shopping centres run by large conglomerates has produced some issues that the Government must address. It needs to strike a balance between supporting the private sector in developing essentially fabulous services for the community and simultaneously providing real safeguards and protections for lessees, who put their life savings and their blood, sweat and tears into establishing businesses only to find themselves at the total mercy of often distant, very large conglomerates with very large shopping centres. I have seen, both as a member of Parliament and as a lawyer, lessees move into a vacant shop in a retail centre, with great hopes and excitement and bearing an enormous financial burden. They work long hours to establish and build the business and are then treated in some cases with little more than contempt by the shopping centre managers.

Some incredible provisions can be inserted in commercial leases and subset retail commercial leases that are so onerous they destroy people's lives. I think particularly of provisions that are often created in a vacuum, with no consideration of their impact on the lessee. For example, lessees might be required to update the shop every three to five years. They could spend $100,000, $200,000 or $300,000 updating the premises in accordance with the views of the shopping centre management about how the centre should develop. The Labor Party purports to be doing something for lessees. Yet, in reality, this bill removes $500, $600 or $700 from the cost of the lease up front and then throws lessees to the wolves for the balance of the lease.

I am not suggesting that that is the intention of the New South Wales Labor Party or the Labor Government. But New South Wales Labor in government should be pursuing and addressing some bigger-vision policy issues. One of those issues is the way in which harsh provisions can be incorporated in commercial retail leases. I know of people who have had to walk away after 5 or 10 years in business. Those people put their heart and soul, their life savings and any accumulated profits into invigorating and renewing their business and growing goodwill. That is a crucial issue. Any small business person will say that retail is not just about generating income but about developing goodwill and having something to sell as that person gets older or moves on to another business. That is when it all falls apart.

I can think of a coffee shop in a particular shopping centre—which I will not name—that generated excellent goodwill. It was developed by a Greek family, who worked very hard on the business over many years. They built a great reputation in the local community. They served fabulous coffee and good food and had a great friendly spirit. Their business did not fit with what the shopping centre management had decided for that centre. They did not have the fiscal support to change the lay-out of the inside of the shop, and were effectively driven out of the coffee shop. The family had worked in the coffee shop in that centre for as long as I can remember, and suddenly one day it was gone.

I say to the Carr Government, and to both sides of politics, that a review of how best to protect retail lessees in these big centres is timely, whether under the national competition policy or otherwise. How can we ensure that we strike the balance between supporting free enterprise—the initiative of individuals—and encouraging business, and protecting the very people whose entire livelihoods are wrapped up in businesses? The issues dealt with in this bill are small chips

compared with the very serious issues facing retail lessees in New South Wales today.

Mr WAYNE MERTON (Baulkham Hills) [12.50 a.m.]: The Opposition does not oppose this legislation. The question of shopping centre leases and the Retail Leases Act was first visited by a Coalition Government in 1994. To be frank, it is not easy to reconcile the interests of landlords, the lessors, and tenants, the lessees. Tenants want to meet certain criteria and landlords have inherited rights as owners of the real estate. The question of trying to balance those priorities is one that taxed the Coalition Government in 1994 when it introduced the legislation that is being revisited in 2004. The Retail Leases Act 1994 introduced a number of reforms so far as tenants were concerned, and a number of conditions were imposed on landlords. For example, in relation to rent variation clauses, the landlord had to elect how the rent was to be adjusted and did not have the luxury of enjoying multiple choice or multiple factors to increase the rent.

In other words, a rent could be adjusted on a consumer price index [CPI] basis, a fixed percentage basis or a current market valuation basis at each rent review period. Landlords could not choose the greater of the CPI increase, the fixed percentage increase or the current market rental. They had the option to vary the method of rent review at each rent variation period. For example, a landlord could nominate the CPI the first year, the current market rental the second year, and a fixed percentage increase the third year. There were no ratchet clauses. If a landlord elected the current market, and the current market rental decreased in any period of time, the rent would also decrease. The landlord did not have the luxury of saying that the rent would be not less than it was during the 12 months prior to the rent review period.

That has been the law since 1994. In addition, a certificate endorsed by an independently instructed solicitor was attached to the lease stating that the lease document had been explained to the lessee and specifying the term of the lease. If a certificate was not issued the landlord was deemed to have granted the tenant a minimum five-year lease, irrespective of what was specified on the lease. I presume that over the years some landlords who rented out shops have not had an independent certificate affixed to the lease on behalf of the tenant, and have found that, by virtue of the legislation, a one-year, two-year, three-year or four-year lease automatically created a tenancy of five years. In essence, they were big changes.

It seems that this bill is an attempt to look at the perimeter of the issue. I have no doubt that a number of tenants in shopping centres have done very well. But, as the honourable member for Wakehurst said, many have also done disastrously. I am not here to attribute blame. In many cases people are ill-prepared. With no business or retail experience they seize the opportunity to have their own business—many cannot get in quick enough—and then the cold reality of running a commercial entity soon becomes obvious. The rent and outgoings are paid, sales do not come in, and many people simply go broke. For many families it has been a recipe for disaster when they have borrowed money and mortgaged their homes. Some have never recovered. In those circumstances one cannot require a landlord to be responsible or liable.

Within the ambit of free trade no-one compels a tenant to sign a lease for a shop. That is another issue, and one that has caused some distress. Some landlords are highly geared and have debts and outgoings to pay, and unless the rent is forthcoming it is difficult for them to meet those debts. Let us not assume that every retail lease is in a complex of 100 shops: it could be a single shop or a strip of shops. This bill provides that a landlord who rents a shop cannot recover from a lessee the cost of preparation of the lease. As the Minister for Roads knows, when he was a lawyer the landlord used to send out the lease and, without an option, the tenant would sign it if he wanted a shop. He would cop it sweet because he had to pay the landlord's costs of preparation of the lease.

Mr Carl Scully: Did you give advice or did your paralegals give advice?

Mr WAYNE MERTON: No, I used to deal with these matters because they are important. No doubt the Minister would have done so also, because there are ramifications later down the track when someone knocks on the door.

Mr Carl Scully: I did my own conveyances, but you didn't! You had paralegals.

Mr WAYNE MERTON: No, not at all. I did it very well, and I did it for many more years than you did.

Mr Carl Scully: You had a sausage factory!

Mr WAYNE MERTON: No, I did not have a sausage factory. You have probably had plenty of experience of eating sausages but, judging by your weight, it would not show.

Mr Carl Scully: If I ate sausages I might look like you!

Mr WAYNE MERTON: No, not at all. If you looked like me it would be an improvement. The day they make seaweed sausages you might eat them. This legislation simply provides that if the landlord prepares the lease, the landlord has to pay for it, unless the tenant wants some amendments to it. The cost of the lease will be included in the rent after the landlord has worked out the cost of preparing it. This bill will not achieve anything. It is interesting that the Government has introduced it when there are so many more important issues relating to retail tenancies that it is not grappling with. It is trying to balance the rights of the tenant and the landlord.

A lot can be done. It is most interesting that the Government sees fit to introduce legislation that deals with only one aspect of leases, that is, the cost of preparation of the lease. That cost is a small proportion of the overall expenditure incurred by both landlords and tenants. The Government amendment means well, but it does not try to address the real issues that affect the retail leasing sector day in and day out. The Government should look at some of the other important issues. However, the Opposition will not oppose the bill. At least it deals with that one aspect of retail leasing.

Mr DAVID CAMPBELL (Keira—Minister for Regional Development, Minister for the Illawarra, and Minister for Small Business) [1.00 p.m.], in reply: It is interesting that the honourable member for Baulkham Hills undermined what was said earlier by the shadow Minister. However, I acknowledge the Opposition's support for this bill. The honourable member for Baulkham Hills and the honourable member for Wakehurst commented on the history of the bill. The Act being amended is a 1994 Act, introduced by the Government at that time as a consequence of a private member's bill introduced in another place by a member of the Labor Opposition, the Hon. Bryan Vaughan. I mention that because until the contribution of the honourable member for Baulkham Hills, there had been a seriously bipartisan approach to this legislation in an attempt to achieve the difficult balance that must be struck. These amendments result from a review of national competition policy. They are being introduced to ensure that New South Wales complies with national competition policy principles and to ensure that a penalty is not imposed by Treasurer Peter Costello as a consequence of this State not passing these amendments.

The honourable member for Wagga Wagga related a sorry story about a business in the his area. I take on board his comments about commercial agreements. However, his comments emphasise to all of us that people must be made aware of the importance of understanding the rules before they enter into an agreement. I note the honourable member for Wagga Wagga nods, indicating his agreement with that comment. I accept that it was a sorry saga, but it underlines the fact that honourable members of this place should be advising constituents to always read the fine print and understand the terms of an agreement before entering into it. Most of us would agree that we should not necessarily accept the word of an agent or the owner of a building. We must understand the ground rules before entering into arrangements.

These amendments are good for small to medium size retailers and landlords alike. In New South Wales—which has the largest retail sector in Australia, accounting for approximately 32 per cent of the national market—a thriving retail sector is vital for the State's economy. These amendments continue to improve the framework governing retail leases in New South Wales. They build on the framework set up by Labor when it was in Opposition in 1993-94. The amendments are yet another good example of the strong work of the Carr Government in supporting small businesses in New South Wales. I note the comments of the shadow Minister that the Opposition supports that work for small business, on this occasion following a national competition policy review. The honourable member was quite complimentary of the work that the New South Wales Government has done on this occasion, although that contribution was undermined somewhat by what was said by the honourable member for Baulkham Hills.

As we heard in the contribution of the honourable member for Heathcote, the Carr Government's economic reforms have reduced the cost of doing business in New South Wales. The Government supports businesses because businesses create jobs, and the Government's support for business is showing results around the State. I conclude by acknowledging that the honourable member for Wollongong made some valid points about unconscionable conduct. Those comments reflect her commitment to equitable treatment for all and a sense of natural justice. For the most part, there has been a commonsense approach to the debate on this bill. I repeat that the Government's amendments support both retailers and landlords. That is important. I commend the bill to the House.

Motion agreed to.

Bill read a second time and passed through remaining stages.

[*Mr Deputy-Speaker left the chair at 1.05 p.m. The House resumed at 2.15 p.m.*]

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- Subjects:
  Trade Practices; Federal State Relations; Rental Accommodation; Retail Trading
- Speakers:
  Campbell Mr David; Hodgkinson Ms Katrina; McLeay Mr Paul; Hay Ms Noreen; Maguire Mr Daryl; Hazzard Mr Brad; Merton Mr Wayne
- Speech Type:
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