

## Retail Leases Amendment Bill 2005

### Explanatory note

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

#### Overview of Bill

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

- (a) to vary the rights and obligations of prospective parties to a retail shop lease before the lease is entered into, and
- (b) to vary the rights and obligations of the parties to a retail shop lease during the term of the lease, and
- (c) to establish a system for the deposit of retail shop security bonds with a government facility, and
- (d) to make further provision regarding the review of rent during the term of a retail shop lease, and
- (e) to expand the jurisdiction and functions of the Administrative Decisions Tribunal (the *Tribunal*) in connection with retail shop leases, and
- (f) to make other amendments of a minor, consequential or ancillary nature.

#### Outline of provisions

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

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

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

**Clause 4** is formal provision giving effect to the amendment to the *Fines Act 1996*.

#### **Schedule 1 Amendment of Retail Leases Act 1994**

##### **Short-term leases—Schedule 1 [8] and [9]**

Currently, section 6 provides that the Principal Act does not apply to leases for a term of less than 6 months without any right for the lessee to extend the lease. A new section 6A deals with this matter and provides that the Principal Act will apply to successive short-term leases whose total terms exceed 12 months.

##### **Minimum 5 year terms—Schedule 1 [21] and [29]**

Currently, section 16 provides that the automatic extension to 5 years of a lease expressed to be for a shorter term can be waived by a prospective lessee by obtaining a certificate from a lawyer or conveyancer.

Section 16 is amended to provide for this certificate also to be able to be given within the first 6 months of the lease.

A new section 21A provides a mechanism for rent increases during the additional period, if the lease does not provide for this. The lease is taken to provide that the lessor may increase the rent as from the date of commencement of the additional period and thereafter annually from that date, in line with movements in the Consumer Price Index (All Groups Index) for Sydney and rounded up to the nearest dollar.

##### **Retail tenancy guide—Schedule 1 [10] and [11]**

Section 9 is amended to require a prospective lessor to make a copy of a retail tenancy guide prescribed by or identified in the regulations available to any prospective lessee as soon as negotiations are entered into.

##### **Fit-outs—Schedule 1 [19]**

A new section 13 is inserted to deal with the costs payable by a lessee or prospective lessee for works carried out by the lessor to enable the proposed fit-out of the premises by the lessee. The maximum amount payable by the lessee is to be agreed between the parties before the lease is entered into.

A new section 13A is inserted to provide that, if a prospective lessor of premises in a retail shopping centre requires a particular standard for fit-outs to be carried out by

the lessee, the prospective lessee must be provided with a tenancy fit-out statement that contains the relevant information. The lessee will not be liable to carry out any fit-out to the extent that it is not covered by the statement.

**Security bonds—Schedule 1 [22]; Schedule 1 [20], [47], [53], [54], [65], [68], [72], [85] and [86]**

A new Part 2A is inserted to establish a scheme for the deposit with a government facility of security bonds received for retail shop leases. The scheme is similar to that established under the *Landlord and Tenant (Rental Bonds) Act 1977*. The scheme includes the following features:

- The Director-General of the Department of State and Regional Development is to administer the scheme, assisted by staff, agents and delegates.
- Security bonds are to be deposited with the Director-General within 20 business days after the bond is paid. Existing security bonds already paid are to be deposited with the Director-General within 3 months.
- Machinery is provided for the payment of security bonds on application by either or both of the parties to a lease.
- The amount available to be paid out is to include an amount equivalent to interest at a prescribed rate.
- A Retail Leases Security Bonds Trust Account and a Retail Leases Security Bonds Interest Account are to be established. Annual contributions are payable to the Consolidated Fund from the Interest Account.

Consequential amendments are made to other sections, including sections 14, 45, 47, 63, 70, 72 and 82—**Schedule 1 [20], [53], [54], [65], [68], [72], [85] and [86]**.

Section 40 is amended to provide that the payment of a security bond by an assignee of a retail shop lease is not within the prohibition on the payment of key-money—

**Schedule 1 [47]**.

**Outgoings estimates and statements—Schedule 1 [30]–[34]**

Section 27 is substituted and section 28 is amended to require outgoings estimates and statements provided by a lessor to include a statement of management fees (broken down into the fees to be paid towards the administration costs of running the centre and other fees paid to the management company), a statement of cleaning costs (broken down into the costs of consumables and other costs) and any other particulars prescribed by the regulations—**Schedule 1 [30] and [31]**.

Section 28 is amended to include strata levies in the list of outgoings for which an audited statement is not required—**Schedule 1 [32]**.

Section 28 is amended to ensure that a lessee is given a reasonable opportunity to make a written submission to the auditor on the accuracy of the lessor's proposed outgoings statement—**Schedule 1 [33]**.

A new section 28A is inserted to entitle a lessee to withhold payment of contributions for outgoings if the lessor has failed for 10 business days to give the lessee the estimate or outgoings statement after being requested to do so by the lessee—

**Schedule 1 [34]**. The lessee must pay the withheld contributions within 28 days after the lessor furnishes the estimate or statement.

**Rent reviews—Schedule 1 [7], [23]–[28], [35]–[43], [73] and [89]**

Specialist retail valuers are appointed to provide valuations to determine current market rents where the parties to a retail shop lease are unable to agree.

The definition of *specialist retail valuer* in section 3 is amended to vary the experience needed by a valuer for the purposes of a valuation relating to a retail specialty shop in a retail shopping centre having both 20 or more retail specialty shops, and a total of lettable areas of retail specialty shops that exceeds 1,000 square metres—**Schedule 1 [7]**. To be within the definition for this purpose, the valuer must have not less than 5 years' experience in valuing retail specialty shops in shopping centres of that kind.

Sections 19 and 31 are amended as follows—**Schedule 1 [23]–[28] and [35]–[40]**:

- to clarify that current market rent is the rent that would be payable as between a willing lessor and a willing lessee in an arm's length transaction, where the parties are each acting knowledgeably, prudently and without compulsion,
  - to provide that, if the lessor and the lessee do not agree as to what the amount of rent is to be, it is to be determined by valuation by a specialist retail valuer appointed by agreement of the parties to the lease, or failing agreement, by the Tribunal,
  - to enable a party to a lease apply to the Tribunal for the appointment of a valuer,
  - to replace references to "relevant information" to be provided to a valuer with a more detailed list of the information to be provided,
  - to enable a party to a lease to make submissions to a specialist retail valuer to assist in the valuer's consideration of the valuation,
  - to provide that a valuer must make the valuation within one month after receiving the relevant information, rather than one month after accepting appointment,
  - to ensure that the reasons for a valuer's determination do not contain information identifying particular lessees or details of a lessee's business.
- Section 32 is amended to provide that, where a lessee with an option to extend or renew the lease seeks an early determination of the current market rent, the period within which the lessee must exercise the option is to be 21 days after the rent determination is notified to the lessee—**Schedule 1 [41] and [42]**. Where relevant, the term of the lease is to be extended until the end of the 21-day period.

A new section 32A is inserted to enable a party to a lease to apply to the Tribunal for the appointment of two specialist retail valuers to conduct a review of a determination of the current market rent made by a specialist retail valuer—

**Schedule 1 [43].**

A new section 72AB is inserted to provide the machinery for the Tribunal to appoint specialist retail valuers—**Schedule 1 [73]:**

- An appointment is to be made from separate lists of nominees prepared separately by the persons for the time being holding or acting in the offices of President of the Australian Property Institute (NSW) and President of the Real Estate Institute (NSW).
- The parties are to pay the costs of the application to the Tribunal in equal shares.
- Specialist retail valuers appointed by the Tribunal are protected from any action, liability, claim or demand for anything done in good faith for the purposes of a determination of rent by valuation carried out under the Principal Act (consistently with the protection given to mediators and neutral evaluators under section 109 of the *Administrative Decisions Tribunal Act 1997*).

Section 85 is amended to enable regulations to be made about the qualifications, appointment and functions of specialist retail valuers and their nomination—

**Schedule 1 [89].**

**Disturbance and relocation—Schedule 1 [44]–[46] and [87]**

Section 34 is amended in connection with the exclusion of liability for a lessor to pay compensation for disturbance—**Schedule 1 [44]**. The lease may include a provision preventing or limiting a claim for compensation in respect of any particular disturbance if a written statement specifically drawing the attention of the lessee to details of the anticipated disturbance was given to the lessee before the lease was entered into, and the statement included the following:

- a specific description of the nature of the disturbance,
- a statement assessing the likelihood of the disturbance occurring, including an indication of the basis on which the assessment was reached,
- a statement of the timing, duration and effect of the disturbance, so far as they

can be predicted.

A general statement to the effect that disturbances may occur during the term of the lease without setting out those details is specifically excluded (proposed section 34 (3A)).

A new section 82A is inserted to provide that RailCorp is not liable under section 34 to its lessees of retail shops for disturbance caused by anything done for rail safety or security or satisfying regulatory requirements—**Schedule 1 [87]**. This is consistent with protections provided for Sydney (Kingsford-Smith) Airport.

Section 34A is amended to provide that—**Schedule 1 [45] and [46]**:

- a lessee is entitled to be paid the lessee's reasonable fit-out costs and legal costs in connection with a relocation, and
- if the parties do not agree as to what the actual amount of reasonable costs of the relocation are to be, the amount of the costs is to be determined by a quantity surveyor appointed by agreement between the parties or, failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Institute of Quantity Surveyors.

**Assignment of retail shop leases—Schedule 1 [48]–[51]**

Section 41 is amended to provide that the lessor must deal expeditiously with a request for consent to the assignment of a retail shop lease, and is taken to have consented to the assignment if the lessee has complied with the requirements of the section, and the lessor has not, within 28 days, given notice to the lessee either consenting or withholding consent.

Section 41A protects an assignor of a retail shop lease (and any guarantor or covenantor) from having to pay the lessor any amounts payable by the assignee. The section is amended so that the protection is available only if the assignor gives the assignor's disclosure statement at least 7 days before the assignment.

**Negotiations for renewal or extension of retail shop leases—Schedule 1 [52]**

A new section 44A is inserted to prohibit a lessor from publicly advertising the availability of retail premises during the term of the lease, unless:

- the lessor has offered the lessee a renewal or extension of the lease, the offer has not been accepted and the lessor informs the lessee that negotiations are concluded without result, or
- the lessor informs the lessee that the lessor does not propose to offer the lessee a renewal or extension of the lease and there are no arrangements to allow the lessee to remain in possession of the shop, or
- the lessee informs the lessor that the lessee does not wish to enter into negotiations for the renewal or extension of the lease or that the lessee wishes to withdraw from the negotiations, or
- the lessee has vacated or agrees in writing to vacate the shop, or
- the lessee consents in writing.

**Advertising and promotion statements—Schedule 1 [55]–[58]**

Sections 54 and 55 are amended to provide that the half-yearly and annual advertising and promotion expenditure statements must include specified details about lessor and lessee contributions and unspent amounts carried forward.

**Non-provision of marketing plan or advertising and promotion statement—Schedule 1 [59]**

A new section 55A is inserted to entitle a lessee to withhold payment of contributions for advertising or promotion costs if the lessor has failed for 10 business days to make available to the lessee a marketing plan, details of proposed expenditure on an opening promotion, an expenditure statement or an advertising statement after being requested to do so by the lessee. The lessee must pay the withheld contributions within 28 days after the lessor furnishes the plan, details or statement.

**Misleading or deceptive conduct—Schedule 1 [60]–[62], [64] and [68]**

A new Division 2 is inserted into Part 7A to provide that a party to a lease must not engage in conduct that is misleading or deceptive to another party to the lease or that is likely to mislead or deceive another party to the lease. The injured party may make a claim for compensation as a retail tenancy claim. The dual provisions dealing with unconscionable conduct and misleading or deceptive conduct reflect the schemes contained in the *Trade Practices Act 1974* (Commonwealth) and the *Fair Trading Act 1987* (NSW). Consequential amendments are made to sections 62A and 70.

**Extension of time for making claims to Tribunal—Schedule 1 [71]**

A new section 71B is inserted to allow the Tribunal to accept claims within a further 3-year period after the initial 3-year limitation period has expired.

**Monetary jurisdiction of Tribunal—Schedule 1 [74]–[76]**

Section 73 is amended in connection with the monetary limit on the Tribunal's jurisdiction. The monetary figure is increased from \$300,000 to \$400,000, with provision for increases each 3 years in line with movements in the Consumer Price Index (All Groups Index) for Sydney. The monetary figure is applied, where relevant, on a balance of account or after set-off or otherwise (this terminology is consistent with the District Court's jurisdictional limit under the *District Court Act 1973*).

**Transfer of proceedings from Tribunal to Supreme Court—Schedule 1 [77]–[79]**

Section 76A is amended to provide that, if proceedings for an unconscionable conduct claim are transferred from the Tribunal to the Supreme Court, any part of the proceedings relating to a retail tenancy claim may also be transferred.

**Appeals in proceedings for unconscionable conduct claims—Schedule 1 [80] and [81]**

Section 77 is amended so that appeals in proceedings for unconscionable conduct claims are to be dealt with in the same way as appeals in proceedings for retail tenancy claims, by removing provisions conferring jurisdiction on the Supreme Court in relation to unconscionable conduct claims.

**Retail shop businesses—Schedule 1 [4], [6], [82], [90] and [93]**

The list of retail shop businesses in Schedule 1 to the Principal Act is replaced, so as to add new retail shop categories and remove others no longer needed as a result of being included in new categories. Provision is made for the listed businesses in Schedule 1 to be amended by regulations and eventually moved to the regulations. Consequential amendments are made to sections 3 and 80B—**Schedule 1 [6] and [82]**.

**Disclosure statements—Schedule 1 [12]–[18], [91] and [93]**

The lessor's and lessee's disclosure statements in Schedule 2 to the Principal Act and the assignor's disclosure statement in Schedule 2A to the Principal Act are replaced to provide more details. Provision is made for the forms in Schedules 2 and 2A to be amended by regulations and eventually moved to the regulations. Consequential amendments are made to sections 11 and 11A.

**Savings and transitional provisions—Schedule 1 [88], [92] and [93]**

Sections 84B and 84C are inserted to deal with the consequences of changes to the list of businesses covered by the Act. By way of background:

- Schedule 1 currently contains a list of businesses, and the Bill substitutes the list of businesses and provides for the regulations to amend the list and eventually move the list to the regulations, and
- a retail shop is defined as premises used for a listed business (whether or not in a retail shopping centre) or premises used for any business in a retail shopping centre, and
- a retail shopping centre is defined as a cluster of premises at least 5 of which are used for carrying on a listed business (as well as having other attributes).

Section 84B provides that a change to the list of businesses does not affect existing

leases, except in so far as the regulations otherwise provide.

Section 84C provides that a cluster of premises does not become a “retail shopping centre” just because a legislative amendment has the effect of making the business carried on in one or more of the existing leased premises a listed business. For example, a centre might have 5 shops, only 4 of which are used to carry on listed businesses (the centre would not be a “retail shopping centre”). If the legislative change results in the business carried on in the fifth shop becoming a listed business, proposed section 84C will ensure that the centre does not become a “retail shopping centre” until the existing lease expires.

Schedule 3 to the Principal Act is amended to include savings and transitional provisions, and to enable regulations of savings or transitional nature to be made, consequent on the enactment of the Bill.

#### **Miscellaneous amendments**

The Bill contains a number of other amendments, including the following:

- **Notes—Schedule 1 [1] and [5]**

Notes in the Principal Act are adjusted to reflect amendments made by the Bill.

- **Definition of “lettable area”—Schedule 1 [2]**

The definition in section 3 is amended to exclude car parking spaces and unattached storage areas from the determination of the lettable area of a retail shop.

- **Definition of “outgoings”—Schedule 1 [3]**

The definition in section 3 is amended to refer to expenses that are “reasonably”, as well as directly, attributable to the operation, maintenance or repair of the building in which a retail shop is located.

- **Unconscionable conduct claims—Schedule 1 [63] and [70]**

Sections 62B and 71A are amended to make it clear that a guarantor or covenantor may make an unconscionable conduct claim.

- **Statute law revision—Schedule 1 [66] and [83]**

Amendments to sections 63 and 80D are amended by way of statute law revision.

- **Service—Schedule 1 [84]**

Section 81A is inserted to provide methods of service of notices and other documents for the purposes of the Principal Act, based on section 170 of the *Conveyancing Act 1919*.

- **Delegation—Schedule 1 [87]**

Section 82B is inserted to empower the Director-General of the Department of State and Regional Development to delegate functions under the Principal Act.

- **Superseded organisations or office-holders—Schedule 1 [89]**

Section 85 is amended to allow the regulations to substitute references to any superseded organisation or office-holder referred to in the Principal Act.

#### **Schedule 2 Amendment of Fines Act 1996**

Schedule 1 to the *Fines Act 1996* is amended to insert a reference to proposed section 16P of the *Retail Leases Act 1994*, in relation to penalty notices.