RETAIL LEASES AMENDMENT (MEDIATION) BILL 2012

Bill introduced on motion by Mr Paul Lynch, read a first time and printed.

Second Reading

Mr PAUL LYNCH (Liverpool) [10.04 a.m.]: I move:

> That this bill be now read a second time.

The Retail Leases Amendment (Mediation) Bill 2012 aims to restore what has long been considered the procedure required for retail trading leases when a dispute arises between landlord and tenant. The commonly understood position was that recourse could not be had to the courts or a tribunal until mediation had been attempted or the failure of mediation had been certified. That was the common understanding. It is sufficiently common that it is enshrined in the heading of section 68 of the Retail Leases Act.

The SPEAKER: Order! There is too much audible conversation in the Chamber.

Mr PAUL LYNCH: That heading says:

> Disputes and other matters must be submitted to mediation before proceedings can be taken.

A recent decision in the Court of Appeal of New South Wales has changed that position and will now allow access to courts and tribunals with no real regard to attempted mediation or to the certification of its failure. That case is *Kim-Po Sor v Fordham Laboratories Pty Ltd*. The decision was handed down on 14 October 2011 by their Honours Justice Young and Justice Campbell. The legislation at the core of this issue is the Retail Leases Act. It was a product of this Parliament in 1994. The relevant Minister was Mr Ray Chappell, the member for Northern Tablelands, and the shadow Minister was Mr John Murray, member for Drummoyne. The then Minister noted in his second reading speech that retail leases were often a matter of contention. The legislation sought to ensure that retail leasing agreements were entered into from a position of reasonably equal negotiating strength. In the Minister's view the bill provided for cost-effective and timely dispute resolution. That, of course, was not always the case with traditional court arrangements. The shadow Minister noted that the bill dispensed with the myth perpetrated by some that there was somehow a level playing field between lessees and lessors. As the shadow Minister noted:

> A dispute may not be the subject of proceedings before a court, including an arbitrator, unless the registrar has certified in writing that mediation has failed. It can then go to the normal New South Wales court system.

In the Committee stage the Minister stated:

> Should mediation fail, one or both parties will now be able to approach either the commercial tribunal or a court to seek an order.

A little later the Minister stated:

> This is a high priority for me. All parties, regardless of where they live in New South Wales, should have easy and timely access to dispute resolution.

Whilst the identity of tribunals may have changed since 1994, there has been no change in the desirability of the principle since 1994. In 1994 it was a bipartisan position. The relevant provision in the Act is now section 68, which states:

> A retail tenancy dispute or other dispute or matter referred to in section 65(1)(AI) may not be the subject of proceedings before any court unless and until the registrar has certified in writing that mediation under this part has failed to resolve the dispute or matter or the court is otherwise satisfied that mediation under this part is unlikely to resolve the dispute or matter.

The practice of the industry has been that unless mediation occurs or certification is provided that it has failed or is not an option proceedings cannot be instituted. This receives support from the official documents of the Retail Tenancy Unit of the Small Business Commission—a document issued under this Government, not just the last Government and which is still current on the website. Whilst there have been some changes in the wording of this document and that under the previous Government, on this point there has been no change. The application for mediation form has the following wording under the subheading "Mediate":

> Mediation is required by the Retail Leases Act 1994 prior to going to a court or tribunal to have the matter decided. Approximately 80 per cent of the disputes mediated at the SBC are settled.

I am not critical of the wording provided by the Retail Tenancy Unit. It was the common understanding of that section and indeed the understanding of the parliamentarians concerned in 1994 that was reflected in that wording, and it is in the heading to that section. That common understanding has been overturned by a recent court decision. The decision that has prompted this bill is a decision in the Court of Appeal in a case resulting from a lease entered into in May 2003 for retail premises in south Camden. It was a three-year lease with an option to renew for two further terms each for three years. Following the exercise of the first option to renew the lease expired in May 2009, continuing as a monthly tenancy. Disputes arose between the parties. Part, but part only, of the disputes were mediated.

The landlord commenced proceedings in the Local Court on 10 November 2009. The tenants filed a defence which, among other things, referred to section 68 of the Retail Leases Act in relation to so much of the applicant's claims that the matter had not been subject to mediation. The case came on for hearing before a magistrate on 23 August 2010. The magistrate was informed that on the Friday before the hearing the landlord had sought mediation. The magistrate delivered a reserved judgement on 3 September 2010. The magistrate in his judgement said that the landlord had commenced proceedings without all of the dispute being mediated, that the landlord sought to bypass the requirement to mediate before commencing court proceedings and had thus commenced proceedings in the Local Court before complying with the requirement of section 68 of the Retail Leases Act. In the magistrate's decision he stated:

> The statement of claim is an abuse of the process of the court, consequently the pleadings are struck out.

That would seem to be the general understanding of the industry at the time. The landlord then appealed against this decision to the Supreme Court. On 6 May 2011 Justice Price upheld the landlord's appeal on the point of law about whether proceedings could be instituted in these circumstances and remitted the case to the magistrate. It was clear that there were no previous authorities positively deciding whether the terms of section 68 (1) as a matter of law must be complied with before proceedings could be commenced. His Honour

determined that the requirement to mediate is not a condition precedent to the commencement of proceedings. He did find however that the court could not hear and determine a dispute unless satisfied that mediation was unlikely to resolve the dispute. That certainly did not prevent the institution of proceedings before mediation and thus was not what had been commonly understood within the sector. The tenant then appealed to the Court of Appeal and judgement was handed down on 14 October 2011. The Court of Appeal upheld Justice Price's decision and refused leave to appeal. The comments from the Court of Appeal judgement, which recite the argument put to the court by the tenant, are worth noting:

> Justice Price's decision means that a landlord can elect when to go to mediation and that that allows landlords to harass tenants by commencing expensive litigation without complying with the policy of the Act, that policy being that there is to be as inexpensive resolution of the dispute as possible by mediation being commenced before the proceedings are commenced.

The tenant's lawyer had argued that if leave to appeal was not granted the litigants generally would make what they would of Justice Price's decision, that is, that mediation would be optional at some stage but not before the proceedings are commenced. The judgement continued:

> That may be a by-product of the decision.

Likewise, Appeal Justice Campbell in his judgement said:

> It may well be that this is a conclusion that has difficulties from a policy point of view, of a type that Young JS has referred to.

Both Appeal Justices based their decision upon statutory interpretation while adverting to the difficulty this caused to the policy issues surrounding the matter. It is the Parliament's role to resolve policy issues such as this by altering legislation so that it is consistent with good policy. That is precisely what this bill seeks to do. I have raised the matter with the Government but there has been absolutely no action in response. The only thing that happened was that when I gave notice of this bill the Premier accused me of trying to Sovietise New South Wales. That is a reflection of his entire inadequacy on this issue. I commend the bill to the House.

Debate adjourned on motion by Mr Daryl Maguire and set down as an order of the day for a future day.