



New South Wales

Retail Leases Amendment (Review) Bill 2016

Explanatory note

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

Overview of Bill

The object of this Bill is to give effect to recommendations arising from the statutory review of the *Retail Leases Act 1994* as follows:

- (a) to confer a right to compensation on a lessee who terminates a retail shop lease during the first 6 months pursuant to the current right of the lessee to terminate in certain circumstances,
- (b) to require full disclosure in the lessor's disclosure statement of any obligation of the lessee to contribute to the lessor's outgoings and to prevent the recovery from a lessee of outgoings that are not disclosed,
- (c) to require the registration of a retail shop lease that is for a term of more than 3 years (or that is required by the terms of the lease to be registered) and to require lodgment for registration within 3 months after the lease is executed,
- (d) to exclude premises used wholly for certain non-retail purposes from the scope of the Act (including ATMs, vending machines, public telephones, children's rides, internet booths, private post boxes and certain storage uses),
- (e) to make it clear that a lessor is not entitled to recover any expenses involved in the lessor obtaining the consent of the mortgagee of the premises leased,
- (f) to remove the requirement for a 5-year minimum term for retail shop leases,
- (g) to require a lessor to return a bank guarantee to the lessee within 2 months after the lessee has performed all obligations secured by the bank guarantee,

- (h) to revise and clarify the definition of *outgoings* in the Act and to extend the definition to include fees charged by a lessor for services provided by the lessor,
- (i) to allow a retail shop lease with the approval of the Registrar of Retail Tenancy Disputes (*the Registrar*) to impose requirements for police and security checks on the persons who can be employed in or to do work at a retail shop,
- (j) to make it clear that lessee protections under the Act in relation to termination on the grounds of proposed demolition of the building of which a retail shop forms part extend to proposed demolition of any part of the building and that termination on the grounds of proposed demolition is only permissible when demolition requires vacant possession of the shop,
- (k) to change the restriction on when a disputed security bond can be released from a fixed period of 14 days after a judgment to the period within which an appeal against the judgment may be exercised,
- (l) to increase the monetary limit on the jurisdiction of the Civil and Administrative Tribunal (*the Tribunal*) for claims arising under the Act from \$400,000 to \$750,000,
- (m) to expand the grounds on which the Tribunal can order the rectification of a retail shop lease (currently limited to when the parties consent) to include correction of a mistake, giving effect to the intention of the parties or reflecting the actual disclosure of information between the parties, and to extend the rectification power to rectification of a disclosure statement,
- (n) to provide for specialist retail valuers (who determine current market rent when the parties cannot agree) to be appointed by the Registrar rather than the Tribunal, and to make it clear that experience and training requirements for specialist retail valuers can be prescribed by the regulations,
- (o) to clarify the procedure to be followed by a lessee to obtain the consent of the lessor to an assignment of a retail shop lease and protection from liability to the lessor after assignment,
- (p) to provide that where a retail shop lease has been awarded by public tender, consent to assignment of the lease can be refused if the assignee fails to meet any criteria of the tender,
- (q) to provide that for the purposes of the determination of rent by reference to turnover, turnover does not include turnover from online transactions (with limited exceptions),
- (r) to provide that a lessee cannot be required to provide information to the lessor about turnover from online transactions (with limited exceptions),
- (s) to repeal provision for the payment of interest on lease security bonds deposited with the Secretary,
- (t) to provide for the issue of penalty notices for offences under the Act or the regulations,
- (u) to provide for the establishment of an online retail bond service by the Secretary,
- (v) to clarify the application of the Act to shops that are stalls in a market so that the Act will not apply to stalls in a market except a permanent retail market and to allow the regulations to modify the operation of the Act in relation to shops in a permanent retail market, including by providing for a mandatory code of conduct for lessors and lessees,
- (w) to remove an unnecessary exception from the Act for premises in an office tower that forms part of a retail shopping centre (on the basis that an office tower above a retail shopping centre does not form part of the retail shopping centre),
- (x) 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

Section 11 (1) is substituted to simplify and clarify the provision that requires the lessor to give a disclosure statement to the lessee before the lease is entered into. A redundant note at the end of the section is removed.

New section 11 (2A) confers an entitlement to compensation on a lessee when the lessee terminates the lease during its first 6 months pursuant to an existing right of the lessee to terminate for a failure by the lessor to give a disclosure statement or for giving an incomplete or false or misleading disclosure statement. The compensation is for costs reasonably incurred by the lessee in entering into the lease, including expenditure in connection with fit-out.

Section 11 (6) is substituted to replace the existing criminal penalty provision for a failure to give a lessor's disclosure statement (to be repositioned to subsection (1)) with provision that allows the parties to agree to an amendment of the lessor's disclosure statement.

Section 11A (1) is substituted to simplify the provision that requires the lessee to give a disclosure statement to the lessor and the provision now includes the penalty currently located in **section 11A (3)**, which is repealed. A redundant note at the end of section 11A is removed.

New section 85 (4) is a consequential amendment.

Disclosure of lessee's financial obligations

New section 12A limits the lessee's liability for outgoings to outgoings disclosed in the lessor's disclosure statement. If the lessor's disclosure statement provides an estimate of the amount of an outgoing and there was no reasonable basis for the estimate, the lessee's liability for the outgoing will be limited to the estimated amount and future increases in the outgoing will be limited by reference to the estimated amount. Advertising and promotion costs are not outgoings for this purpose.

New section 3A provides a revised definition of *outgoings* to clarify the existing definition and to extend the definition to fees charged by a lessor for services provided by the lessor that would be outgoings under the existing definition if provided and charged to the lessor by a third party.

Section 12 is amended and **section 12 (2)** is added to make it clear that an existing provision that limits the lessee's liability for the cost of finishes, fixtures, fittings, equipment or services does not apply to outgoings.

Section 22 is amended to insert a note about the operation of new section 12A.

Section 27 and Part 5 of Schedule 2 are amended consequentially.

Mortgagee consent expenses

Section 3 is amended by changing the definition of *lease preparation expenses* to include expenses incurred in connection with obtaining the consent of a mortgagee of the premises to which a retail shop lease relates. The definition is used in provisions that prevent a lessee being required to pay lease preparation expenses in connection with the granting, renewal or extension of a lease.

Exclusion of non-retail uses from operation of Act

Substituted section 5 (d) and new Schedule 1A exclude premises used wholly for certain non-retail purposes from the operation of the Act (including ATMs, vending machines, public telephones, children's rides, signage display, internet booths, private post boxes and certain storage uses). The substitution of section 5 (d) also removes an exception from the Act for premises in an office tower that forms part of a retail shopping centre (on the basis that the

exception is unnecessary because an office tower does not form part of a retail shopping centre merely because it is in the same building as, or is above, the retail shopping centre).

Repeal of 5-year minimum term

Section 16 is repealed (by being substituted) which removes the requirement for a 5-year minimum term for retail leases. The requirement can currently be disapplied by a certificate from a lawyer or licensed conveyancer who explains to the lessee the effect of doing so. The new section 16 deals with the requirement for registration of some leases, as referred to below.

Section 6A is amended consequentially.

Section 21A is repealed because it will be redundant as a result of the removal of the requirement for a minimum 5-year lease term.

Section 48 (3) is repealed to remove a provision about the giving of independent legal advice for the purposes of contracting out of the minimum 5-year term.

Lease execution and registration

Substituted section 15 simplifies provisions dealing with the execution, return and registration of a retail shop lease and increases from 1 month to 3 months the period within which a lessor is required to provide the lessee with a signed copy of the lease after the lessee has signed and returned the lease to the lessor. **Substituted section 16** changes the existing requirements for lease registration so as to require the registration under the *Real Property Act 1900* of a lease that is for a term of more than 3 years or that is required by the terms of the lease to be registered. A lease must be lodged for registration within 3 months after the executed lease is returned to the lessor. Failure to register a lease in compliance with the requirement will be an offence with a maximum penalty of 50 penalty units.

Security bonds and bank guarantees

New section 16BA requires a lessor to return a bank guarantee to the lessee within 2 months after the lessee completes performance of the obligations under the lease that are secured by the bank guarantee. **Section 16Q** is amended consequentially.

Section 16C (6) is amended to transfer from the Minister to the Secretary the power to approve an extension of the period within which a security bond must be lodged with the Secretary.

Section 16D (1) is substituted to remove a spent transitional arrangement that applied when the requirement to lodge a security bond with the Secretary was first introduced.

Section 16G (2) is substituted to remove a limitation on when an application to the Secretary for the return of a security bond can be made.

Section 16H (6) is repealed to remove a provision that requires the balance of a security bond to be paid to the other party when an application is made for the partial return of a security bond.

Section 16I (2) is substituted to allow the Secretary to pay out a security bond pursuant to the terms of an agreement reached after successful mediation as notified by the parties (and not just on the basis of a certificate of the Tribunal or a mediator, as at present).

Section 16K (1) is substituted to change the period during which the Secretary is not permitted to pay out a security bond on the basis of a judgment or order (to allow time for an appeal against the judgment or order). Instead of being a fixed period of 14 days, the period will be the period within which an appeal can be made.

Section 16M is repealed to remove the provision that requires interest to be paid on security bonds deposited with the Secretary. **Sections 16E and 16V** are amended consequentially.

New section 16WA provides authority for an online retail bond service under which transactions for the purposes of Part 2A can be conducted electronically.

Section 16ZA (1) updates the provision for the service of documents for the purposes of Part 2A.

Section 16A is amended to omit an unnecessary definition.

Section 16B is amended consequentially.

Reviews of current market rent and specialist retail valuers

Sections 31 (1) and 32A (1) and (4) are amended so that sections 31 and 31A will deal with reviews of current market rent and the related protection of confidentiality of information in circumstances currently covered by sections 19 and 19A (to prevent repetition of provisions). **Sections 19 and 19A** are repealed as a result.

Sections 31 (1) (b) and (1A) and 32A (1) and (13) are amended to provide for the Registrar (instead of the Tribunal) to appoint specialist retail valuers for reviews of current market rents. **New section 32B** provides for the appointment of specialist retail valuers by the Registrar and also expands the list of industry bodies authorised to nominate persons for appointment as specialist retail valuers. **Section 70** is amended consequentially.

Section 85 (2) (a) is amended to make it clear that the regulations can prescribe experience and training requirements for the appointment of specialist retail valuers.

Demolition

Section 35 is amended to make it clear that the protections afforded to a lessee when the lease is to be terminated on the grounds of a proposal to demolish the building of which the shop forms part extend to termination on the grounds of proposed demolition of any part of the building. The section is also amended to make it clear that termination on the grounds of proposed demolition is only permissible if the proposed demolition cannot be carried out practicably without vacant possession of the shop.

Item 18 of Schedule 2 is amended consequentially.

Assignment of lease

Sections 41 and 41A are substituted to simplify and clarify the procedure for obtaining the lessor's consent to the assignment of a retail shop lease and the disclosure procedure to be followed by an assigning lessee to obtain the protection from liability to the lessor for liabilities of the assignee.

New section 39 (1) (e) provides that where a retail shop lease has been awarded by public tender, the lessor can refuse consent to assignment of the lease if the proposed assignee fails to meet any criteria of the tender.

Schedule 2A is amended consequentially.

Section 3 is amended to remove a redundant definition of *assignor's disclosure statement*.

Online transactions

Section 20 is amended to prevent revenue from online transactions from being included in turnover for the purposes of the determination of rent on the basis of turnover except for transactions where goods or services are delivered or provided from or at the retail shop or retail shopping centre or where the transaction takes place while the customer is at the retail shop.

New section 47 prevents the lessee from being required to provide the lessor with information about online transactions except for transactions where goods or services are delivered or provided from or at the retail shop or retail shopping centre or where the transaction takes place while the customer is at the retail shop.

Employment restrictions

Section 37 is amended to extend the employment restrictions that a retail shop lease is permitted to impose on a lessee to include requirements for police and security checks for persons who are employed in or to do work at a retail shop but only if the Registrar has approved of their inclusion in the particular case.

Permanent retail markets

New section 6B provides that the Act does not apply to a retail shop that is a stall in a market unless the market is a permanent retail market, and provides a definition of *permanent retail*

market. The new section also inserts a regulation-making power to authorise the regulations to modify the operation of the Act in its application to a retail shop in a permanent retail market. The regulations can prescribe a mandatory code of conduct for lessors and lessees of shops in a permanent retail market.

Section 3 is amended to insert a reference to the definition of *permanent retail market* in new section 6B, and a definition of *premises* to make it clear that a stall in a market constitutes premises for the purposes of the Act. The definition of *retail shopping centre* in section 3 is amended to make it clear that a market is not a retail shopping centre.

Jurisdiction of Tribunal

New section 72AB expands an existing power of the Tribunal to order the rectification of a lease with the consent of the parties so that the Tribunal will be able to order the rectification of a lease or disclosure statement, or to order that a disclosure statement is deemed to have been given, in the additional circumstances set out in the section. **Sections 70 and 72** are amended consequentially.

Section 73 is amended to increase the monetary limit on the jurisdiction of the Tribunal for claims arising under the Act from \$400,000 to \$750,000.

Penalty notices

New section 83A provides for the issue of penalty notices for offences against the Act or the regulations that are prescribed by the regulations as penalty notice offences. **Section 16P**, which currently provides for the issue of penalty notices but only for offences under Part 2A (Security bonds), is consequentially repealed.

Minor amendments

Section 3 is amended to remove an obsolete definition of *Director-General* and add a new definition of *Secretary* (to mean the Secretary of the Department of Industry, Skills and Regional Development).

Sections 16A (1), 16C (2)–(4), 16D (2) and (4), 16E (1), 16F, 16G (1) and (3), 16H, 16I (1) and (3), 16J (1) and (2), 16K (2) and (3), 16L, 16N (1) and (4), 16Q (3), 16U (1), 16W, 16ZA (2), 16ZB, 16ZC (1) and 82B are amended to update references to the Director-General of the Department of State and Regional Development to the Secretary of the Department of Industry, Skills and Regional Development.

New section 3B repositions the provision that extends the operation of the Act to agreements to lease (to make the provision more prominent). The new section also makes it clear that new lessor's and lessee's disclosure statements are not required or permitted when a lease is entered into pursuant to an agreement to lease (so that disclosure statements given for an agreement to lease will operate for the purposes of a lease entered into pursuant to the agreement to lease). A consequential amendment is made to the definition of *retail shop lease* or *lease* in section 3.

New section 85 (3) authorises the regulations to create offences with a maximum penalty of 20 penalty units. **Section 16ZC (3)** is repealed consequentially.

New section 3 (2) makes it clear that a reference in the Act to a lessor or lessee includes a reference to a proposed lessor or proposed lessee. **Section 13 (4)** is made redundant by new section 3 (2) and is repealed.

Sections 16Z and 82B are amended to update references to the Department.

Minor and consequential amendments are made to the heading to **Part 2** and to **Schedule 2**.

Savings and transitional provisions

Schedule 3 is amended to:

- (a) make a consequential change arising from other amendments, and
- (b) enable savings and transitional regulations to be made as a consequence of the amendments to be made by the Bill and any other Act that amends the Act, and

- (c) enact savings and transitional provisions for the purposes of the proposed amendments.

Schedule 2 Amendment of other legislation

Schedule 2 to the Bill makes amendments to other legislation that are consequential on the amendments made by Schedule 1 to the Bill.