

# COMMERCIAL TENANCY (RETAIL SHOPS) AMENDMENT BILL 2009

## EXPLANATORY MEMORANDUM (E 81)

*(Introduced by the Hon. Fran Logan, MLA)*

This Bill will amend the *Commercial Tenancy (Retail Shops) Agreements Act 1985* to supplement the rights of and provide protection to tenants under the Act, to establish the role of Commissioner for Small Business to deal with retail shop leases, and to enhance the effectiveness of the Act.

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### **Part 1 Preliminary**

#### **Clause 1. Short Title**

Provides for the Act to be cited as the *Commercial Tenancy (Retail Shops) Amendment Act 2009*.

#### **Clause 2. Commencement**

Provides for this Act to come into operation on a day fixed by proclamation.

### **Part 2 Amendments to the *Commercial Tenancy (Retail Shops) Agreements Act 1985***

#### **Clause 3. The Act amended**

Provides that the amendments in this Part are to the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (the Act).

#### **Clause 4. Amendment of section 3**

Amends section 3(1) of the Act to insert two new definitions, namely to define the terms “Commissioner” and “Commissioner for Small Business”. This allows for the establishment of the role of Commissioner for Small Business, created under new Part IIB of the Act and discussed below.

#### **Clause 5. Replacement of section 7**

Replaces section 7 and inserts new section 7 to prohibit the charging of rent based on the turnover of a retail business, unless by agreement between the parties.

Section 7(1) provides that a clause of a lease which has the effect of determining rent on the basis of the turnover of a tenant’s business is void. Section 7(2) creates a penalty for entering into a lease with such a clause, or for using the turnover of the business to determine rent. However, the effect of subsections 7(1) and 7(2) is qualified by section 7(3), which allows rent to be determined by reference to the turnover of the business only where the tenant agrees and elects to do so in writing to the landlord.

**Clause 6. Amendment of section 8**

- (1) Amends section 8(1) to make void any provision in a retail shop lease requiring a tenant to furnish turnover figures, where previously such turnover figures were “not generally required”.

This does not prohibit a tenant from providing turnover figures to a landlord where they wish to do so (in accordance with clause 8(3) of the Act).

- (2) Replaces section 8(2) with a new provision which makes it an offence for a landlord to enter into a retail shop lease containing a clause which requires the tenant to furnish turnover figures, or to require a tenant to furnish turnover figures, for example, as a condition of entry into a retail shop lease. Section 8(2) also establishes a penalty in the range of \$10,000 to \$100,000 to apply where a landlord commits an offence under the section.
- (3) Inserts section 8(3) to allow a tenant to voluntarily provide turnover figures to a landlord, and to expressly permit the landlord to access figures voluntarily provided by the tenant.

**Clause 7. Amendment of section 11**

Amends section 11(5) to remove the conditions on which a party to a retail shop lease may refer questions as to rent payable as a result of a rent review to the Tribunal.

This amendment sits with the other changes to the Act which broaden the circumstances and enhance the methods by which parties to a retail shop lease may seek to resolve disputes, potentially saving time, cost and resources.

**Clause 8. Replacement of section 12C**

Deletes and replaces section 12C to prohibit the charging of outgoings by reference to additional hours the retail shopping centre is able to open for business. Section 12C(1) provides that a clause in a retail shop lease which requires a tenant to open the retail shop at specified times, or to pay outgoings in respect of any time during which the shop is not open for business, is void.

Inserts section 12C(2) to give tenants the right to refer to the Commissioner for Small Business instances where a landlord has attempted to induce a tenant to open a retail shop at specified hours or times, including in lease negotiations.

Section 12C(3) gives tenants the right to apply to the Tribunal for compensation where a landlord has refused to renew a retail shop lease, and the tenant believes that this refusal was because they did not open the shop at specified hours or times, or pay any outgoings in respect of time during which the retail shop was not open for business. Such compensation is in respect of the pecuniary loss suffered by the tenant as a result of the failure to renew the retail shop lease.

**Clause 9. Replacement of section 13B**

Replaces section 13B in respect of a landlord's intentions at the end of a lease term. Section 13B(1) provides that a landlord must notify the tenant in writing of the landlord's intentions in respect of a renewal or extension of the retail shop lease not less than 3 months and not more than 12 months before the expiry of the lease. Section 13B(2) provides for the tenant to have a period of 1 month to consider the offer before it may be revoked by the landlord.

Section 13B(3) provides that if the landlord fails to notify the tenant of its intentions in relation to the renewal or extension of the lease in accordance with section 13B(1), the lease may be extended for a further 3 months by the tenant giving written notice to the landlord before the lease would otherwise have expired.

Section 13B(4) provides that where a tenant has accepted an offer for renewal or extension of the lease under subsection (1), by giving written notice of the tenant's acceptance of the offer within 30 days, the landlord is bound by the offer.

Section 13B(5) provides that a proposal provided by a landlord to a tenant in respect of rent to be charged constitutes an offer to renew or extend the lease, which the tenant may accept in accordance with subsection (4).

Section 13B(6) provides that where a lease has been extended by 3 months in accordance with the provisions of subsection (3), a tenant may terminate that lease by providing 1 month's written notice to the landlord.

Section 13B(7) provides that section 13B does not apply to leases containing an option to renew or extend, or where a lease is the subject of an agreement to renew or extend.

**Clause 10. Insertion of section 13C**

Inserts section 13C to prohibit a landlord from advertising or inviting tenders or interest in the availability of a retail shop for lease unless a number of conditions are met. Section 13C provides that a landlord must not advertise by written or broadcast advertisement, or invite expressions of interest for tendering, during the term of the tenant's lease, unless —

- (a) the landlord has offered and the tenant has not accepted within 1 month the offer for a renewal or extension of the lease (under section 13B(1)(a)), and the landlord has notified the tenant in writing that negotiations are concluded; or
- (b) the landlord has informed the tenant in writing that the landlord does not propose to offer a renewal or extension of the lease, and there are no arrangements for the tenant to remain in possession of the retail shop; or
- (c) the tenant has informed the landlord in writing that they do not wish to negotiate the renewal or extension of the lease, or that the tenant wishes to withdraw from such negotiations; or

- (d) the tenant has vacated or agreed in writing to vacate the shop; or
- (e) the tenant consents in writing to the publication of the advertisement.

Section 13C creates a penalty of \$1,000 for contravention of the section.

Section 13C(2) expressly notes that the section does not affect industry practices of market evaluation and testing which do not involve written or broadcasting advertisement.

**Clause 11. Insertion of section 14A**

Inserts section 14A to create a register of retail shop leases. Section 14A(1) provides that a landlord must notify the Commissioner for Small Business in writing within 14 days (or such other period as agreed between the landlord and the Commissioner for Small Business) after a retail shop lease is signed by all parties of the address of the retail shop, the landlord's name and address, the tenant's name and address, the rental value per square metre of leased area, and such other matters as may be prescribed by the regulations. Failure to provide these details in accordance with section 14A(1) results in a penalty of \$1,000.

Section 14A(2) provides that, except for the name and address of the landlord and tenant, the lease information provided to the Commissioner for Small Business is to be made available to the public.

**Clause 12. Insertion of Part IIB heading and sections 15G, 15H, 15I and 15J**

Part IIB is inserted to provide for and set out the role of the Commissioner for Small Business.

**Section 15G Functions of the Commissioner**

Section 15G(1) deals with the requirements for creating the title of Commissioner for Small Business.

Section 15G(2) sets out the functions the Commissioner for Small Business has under the Act. These functions include making arrangements for the resolution of retail shop disputes, taking proceedings for offences under the Act, reporting to the Minister on the operation of the Act, authorising a standard lease document, publishing information for the public, creating and maintaining a register of information regarding retail shop leases, and any other functions conferred on the Commissioner for Small Business by or under the Act.

Section 15G(3) sets out the powers conferred on the Commissioner for Small Business to eliminate conduct which is contrary to the provisions of the Act. This includes powers of investigation, consultation, review, development of programmes and policies, and publication.

Section 15G(4) provides that the Commissioner for Small Business is to have regard to mediation or other forms of alternative dispute resolution when arranging for the resolution of retail tenancy disputes.

Section 15G(5) also confers on the Commissioner for Small Business the power to conduct mediation or other non-binding alternative dispute resolution procedures to resolve a retail tenancy dispute.

Under section 15G(6), where the parties agree, the Commissioner for Small Business can conduct a binding arbitration in accordance with the procedure agreed between the parties.

Section 15G(7) provides that the Commissioner for Small Business is entitled to remuneration for conducting alternative dispute resolution processes. The maximum fee may be prescribed by the regulations.

Section 15G(8) provides that the Commissioner for Small Business may also charge for giving authorisation under section 15G(1)(d) to a body that wishes to make a standard lease available to the public.

Section 15G(9) establishes that the Commissioner for Small Business is an independent role not subject to the minister's control or direction when exercising the functions provided under subsections 2(a), 2(b) and 3.

#### **Section 15H Commissioner may decline to take further action**

Section 15H(1) gives the Commissioner for Small Business the power to determine whether referral of a matter by parties to a retail shop lease should be considered further, and provides that the Commissioner for Small Business may decline to take any further action by notice in writing to the parties. Under section 15H(2), that notice must advise of the reason for declining to take any further action, and the rights of the parties under section 15J to refer the matter to the Tribunal.

#### **Section 15I References to the Tribunal**

Section 15I(1) provides that where the Commissioner for Small Business has conducted mediation or another form of non-binding alternative dispute resolution, and is either of the opinion that the matter cannot be resolved by such methods, has endeavoured to do so, is of the opinion that the matter should be referred to the Tribunal, or is satisfied that either party has not acted in good faith to resolve the matter, the Commissioner for Small Business shall refer the matter to the Tribunal. The matter will be referred together with a report on the matter by the Commissioner for Small Business.

Section 15I(2) provides that when a matter is referred to the Tribunal by the Commissioner for Small Business, the Commissioner for Small Business shall, when requested, assist to present the case to the Tribunal, and may, where requested, contribute towards the costs of witnesses and other expenses involved in enabling a party to provide evidence to the Tribunal.

Section 15I(3) provides that any contribution may be subject to conditions the Commissioner for Small Business thinks fit. Section 15I(4) provides that where the Commissioner for Small Business imposes a condition that the party repay whole or part of the contribution, the Commissioner for Small Business may recover that contribution from the party through court proceedings.

Section 15I(5) ensures that evidence adduced in the course of non-binding alternative dispute resolution proceedings is not admissible in later proceedings before the Tribunal.

**Section 15J Reference to Tribunal at requirement of referring party or parties**

Section 15J(1) provides for the referring party or parties, upon receipt of notice from the Commissioner for Small Business that no further action will be taken, to apply in writing to the Commissioner for Small Business within 21 days to have the matter referred to the Tribunal.

Under section 15J(2), upon receipt of such notice, the Commissioner must refer the matter to the Tribunal together with a report relating to the matter. This report must include the grounds for the Commissioner for Small Business declining to take any further action.