COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS AMENDMENT BILL 2011

Consideration in Detail

Clauses 1 to 4 put and passed.

Clause 5: Section 3 amended —

Mr A.P. O'GORMAN: Clause 5 of the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011 changes the definition of "lettable area". The bill removes the definitions of "retail floor area" and "retail shop", which people have understood for many years; people commonly know what those terms mean. Will the minister explain what he is changing and why the change is necessary for this particular legislation? The new definition reads —

> ***lettable area***, of a retail shop, means an area of the shop defined or calculated —
>
> (a) in such manner as is prescribed by the regulations; and
>
> (b) if the shop is part of a group of premises, in the same, or a substantially similar, manner as the area for each other retail shop in the group of premises is defined or calculated;

Will the minister explain what this change to the definitions does and how it improves the Commercial Tenancy (Retail Shops) Agreements Act 1985?

Mr T.R. BUSWELL: The advice is that these changes will increase certainty on the definition of "lettable area". In particular, the change reflects recent case law in which there was some dispute or clarification of the way in which "lettable area" is defined. The advice I have is that the changes made to the definition of "lettable area" provide certainty in light of some of those legal outcomes.

Dr A.D. BUTI: The definition of "misleading or deceptive conduct" does not really provide a definition; it simply refers to the application under section 16D(1). I wonder why the minister has not put in a definition of "misleading and deceptive conduct". Is the minister referring to the common law interpretation that we find under the Trade Practices Act 1974 and the Fair Trading Act 1987?

The SPEAKER: Member for Armadale, I clarify that we have passed through clauses 1 to 4 and we are dealing with clause 5. We do not have the capacity to return to clause 4.

Dr A.D. BUTI: I am not returning to clause 4. I refer to the definition of "misleading and deceptive conduct application" below "lettable area" on page 3.

The SPEAKER: Thank you, member.

Mr T.R. BUSWELL: Spot on the money. I know that in this place "misleading or deceptive conduct" has a wide variety of definitions depending on which side you sit on, but that is not really the point. The use and the interpretation of that term is the same interpretation as applied or defined in a couple of pieces of legislation, including the Fair Trading Act at a state level and/or the Competition and Consumer Act 2010, which is the new federal legislation. My understanding is that the application of "misleading or deceptive" as terms of behaviour or conduct under proposed section 16D is captured in those acts and, by extension, the common law.

Mr A.P. O'GORMAN: I refer to the definition of "retail business" in clause 5, which states —

> ***retail business*** means —
>
> (a) a business that wholly or predominantly involves the sale of goods by retail; or
>
> (b) a specified business;

Will the minister explain "specified business"? Most businesses in shopping centres sell something, and by definition "retail" means that someone hands over an amount of cash and receives a product. Why must the bill provide for a "specified business" rather than simply a "retail shop"? I am interested to see what other forms of businesses we are looking at incorporating. I take it that this legislation applies to not only shopping centres, but also strip shops and all retail-type leases. This legislation applies to strip shops in Osborne Park or Mt Hawthorn or anywhere else like that.

Mr T.R. BUSWELL: I am advised that the bill applies to strip shops.

Mr A.P. O'Gorman: We will call it something slightly different, if the minister likes.

Mr T.R. BUSWELL: The member means shops on a retail strip. Regulation 3A of the Commercial Tenancy (Retail Shops) Agreements Regulations 1985 states —

> Each of the following businesses is prescribed to be a "specified business" for the purpose of the definition of that expression in section 3(1) of the Act —

Section 3(1) of the act is amended by clause 5 of the bill —

(a) drycleaning;

(b) hairdressing;

Hairdressing is now unregulated —

(c) beauty therapy;

(d) shoe repair;

(e) sale or rental of video tapes.

I would have to get advice on why those businesses are not regarded under the more general term of "sale of goods by retail", but I can only assume that at some stage in the past those businesses were thought to be outside the definition of "sale of goods by retail" and were therefore included by regulation. This amendment will enable other businesses to become specified by regulation if required.

Mr W.J. JOHNSTON: I seek clarification on businesses that are not retailers that operate in shopping centres, and I heard what the minister said about the businesses that are specified. For example, is a bootmaker or a key cutter classified as a retail business, even though they are not selling, but are providing a service? I will put this in context for the minister. As a former official of the shop assistants union, I recall that our coverage was defined by the sale of goods, so there was always an issue when the sale of goods was not involved. Does the definition that the minister just read out deal with businesses that are retail in nature, but which provide a service?

Mr T.R. BUSWELL: The definition of "retail shop" in the bill refers to any premises situated in a retail shopping centre that are used wholly or predominantly for the carrying on of a business; and any premises not situated in a retail shopping centre that are used wholly or predominantly for the carrying on of a retail business. That picks up the distinction that the member raised; that is, a business that is operating in a retail shopping centre. However, if the business is operating outside of a retail shopping centre, it comes under the definition of "retail business".

Mr A.P. O'GORMAN: The definition of "retail shop lease" in the bill states that it is a lease that provides for the occupation of a retail shop unless —

(a) the retail shop —

(i) has a lettable area that exceeds 1 000 square metres; and

(ii) is not of a kind prescribed by the regulations for the purpose of this definition;

The way I read it—I hope that the minister is going to correct me—is that a rather large retailer with more than 1 000 square metres will not fall under this definition. For example, a large Coles, Woolworths, IGA or whatever that is over 1 000 square metres receives some exemptions under this clause. Also, paragraph (b) of this definition exempts a listed corporation within the meaning of the Corporations Act. Will this apply only to small businesses or does it apply to larger businesses like Coles, Woolies, the larger IGAs or any store that is over 1 000 square metres? I want the minister to clarify the definition of a retailer in a shopping centre. I want to ensure that the larger operators are doing business on the same basis as the smaller operators in a shopping centre.

Mr T.R. BUSWELL: The member has asked a good question. The advice I have is that the act as it currently stands does not apply in cases where the lettable area exceeds 1 000 square metres or where the entity is a public corporation. The reason for that lies perhaps in the history of the original act in that it was designed to protect small business interests. It was never the intent that the act—I do not have the original second reading speech—would include larger businesses, which at that time were defined as over 1 000 square metres or public corporations. This bill is not changing anything that does not already exist. Paragraph (b) of the definition of "retail shop lease", refers to a listed corporation rather than a public company. My understanding is that a listed corporation is a subset of public companies, so this amendment is in fact reducing the types of companies that can be excluded from this bill to the extent that for exclusion they have to be a listed company or they would have to have over 1 000 square metres. There is a slight tightening of what we currently have. My mind is ticking over about public companies that are not listed companies, but that is a discussion for another day.

Mr A.P. O'GORMAN: This is the crux of the disparity between what is paid by small business and large business in our local shopping centres. It is also the crux of why many of our small businesses are finding it increasingly more difficult to operate in the current economic climate. I do not know whether the minister heard the news reports this morning that Colorado is closing down about 100 of its stores across the nation. This will affect 916 employees, which is a substantial number. Also, the Retail Traders' Association said this morning that

one of the reasons that small business, particularly small retailers, are facing difficulties is that excessive shopping centre rental costs are driving many to the wall. I have seen that in my local shopping centre. In fact, I walked through the other day and I saw another blank hoarding. I cannot remember which shop it was, but it may have been a Colorado shop, if I am not too far off the mark. Has excluding those larger corporations from this bill given them the opportunity to negotiate separately and have a much lower base rent than applicable to small retailers operating in the same centre? The premise all along has been that the larger stores—Coles, Woolies, Targets, Kmarts and all those sorts of stores—are the anchor leases that are supported by small retailers. Shoppers are attracted to the shopping centres by the departmental-type stores and large supermarkets, and then the small businesses fill in around them to provide those other services. What we see, as the Retail Traders' Association said this morning, is that high rents are forcing these small businesses to go belly up. I am sure that the minister knows that the Colorado Group is a pretty large organisation that will be forced out of business. I do not suggest that the collapse of Colorado was the result purely of rental pressure, because I do not know the full issue. However, if these large national chains are feeling the pinch, how the hell are the small mum and dad businesses supposed to survive in this environment—especially when we allow the larger organisations to slip out of the Commercial Tenancy (Retail Shops) Agreements Act, by which we can tie them into an arrangement—not a price-fixing arrangement—that is fair to everybody in the shopping centre in paying a reasonable share of costs?

Mr T.R. BUSWELL: I understand what the member is saying, and I will address some of the issues raised. However, we need to go back to what this act was established to do. It was established to offer protections for small business. The reason for the exclusion was not to hold to account larger operators with a large footprint, or public companies, in shopping centres; it was to provide some protections to small retail businesses or small businesses operating in a retail centre in their engagement with a landlord. It is my understanding that that was the intent of the bill. The exclusion was not to make it harder for small business; it was effectively saying that if businesses are larger than a certain size or, in this case, if they are a public corporation, they can fend for themselves. I accept some aspects of what the member is saying, but he needs to understand the intent of this act when it was first introduced. In effect it says, "Here's some special protections for small business—a special framework to assist small retail businesses. If you're over 1 000 square metres or a public corporation, look after yourself."

As the member knows, unfortunately a range of factors lead to business failure. I am sure rent cost pressures would be part of that equation for some businesses, depending on where they trade and a range of other things. My view is that there are other aspects of this bill that strengthen the current legislative framework to help give further protections to the businesses for whom this bill was designed, and we will discuss those in later clauses.

I acknowledge the point that the member is making. By extension, the member is referring to an amendment he has on the notice paper, which is about a more transparent flow of information, and we will discuss that when that comes up. Within the framework of the bill and within the intent of the original legislation, I think excluding people who in theory should be able to look after themselves is probably not a bad thing.

Mr A.P. O'GORMAN: I thank the minister, and I accept that explanation. Proposed section 3(1), which deals with exemptions, states instances whereby —

> (c) the lease is held by —
>
> > (i) a body corporate whose securities are listed on a stock exchange, outside Australia and the external territories, that is a member of the World Federation of Exchanges; or it is a body corporate whose securities are listed on the stock exchange outside Australia and external territories; or
> >
> > (ii) a subsidiary (within the meaning of the *Corporations Act* ...

For the sake of clarity, not particularly for us here in this place but for people who will have to operate under this, can the minister explain that so it is clear and on the record what people are looking at?

Mr T.R. BUSWELL: My advice is that that is really a clause to include foreign-listed companies—companies such as Aldi and Costco, which are starting up in the eastern states. Aldi is not here yet, unfortunately. That is its choice. One of the reasons it tells me it cannot come here, amongst some other issues, is that it is too hard for it to get a large enough number of sites through the planning approvals process to get itself kicked off. Who knows when that company will come, if at all? Without trying to canvass those issues, my understanding is that that is the reason for proposed paragraph (c). It is really just to pick up on foreign listed entities.

Clause put and passed.

Clause 6: Section 4 amended —

Mr A.P. O'GORMAN: Clause 6 states, in part —

(4) Regulations may be made exempting from all or any of the provisions of this Act —

(a) a prescribed person, retail shop lease or retail shop; or

(b) a prescribed class of persons, retail shop leases or retail shops.

Why are we seeking to put an exclusion in? If we are trying to help small business, what is the purpose of having an exclusion that can actually take out some of those small businesses? What are the types of businesses that we are looking at excluding in this particular clause?

Mr T.R. BUSWELL: It is a very good question. The advice I have is that it is an administrative clause, which will provide a capacity for unforeseen circumstances or anomalies that arise from the implementation of the bill to be dealt with by regulation. My advice is that there is obviously no expectation to use it at this stage, or I assume it would have been picked up through the amendments that we are dealing with. However, I would assume it is a mechanism to enable relatively small inconsistencies to be picked up and dealt with on a more timely basis than would be the case via legislative change, whilst of course acknowledging that regulation is subject to scrutiny of the Parliament, fortuitously.

Mr W.J. Johnston: While the minister is on his feet, is there a similar provision currently in the act? I am sorry; I am not familiar with all the details.

Mr T.R. BUSWELL: No, there is not. However, the advice I have is that there are similar provisions in other jurisdictions—not that that is an excuse for us doing it.

Mr W.J. Johnston: Could the minister outline the circumstances that he might imagine using the regulations?

Mr T.R. BUSWELL: Perhaps if the member stands and asks the question, I will get some advice.

The ACTING SPEAKER (Mr P.B. Watson): The member for Gosnells. Sorry; the member for Cannington.

Mr T.R. Buswell: Not yet. He is moving south, but not at that rate!

Mr W.J. JOHNSTON: Gosnells is in fact east of the seat of Cannington, not south, but we will not worry about that. To the south is in fact the seat of Riverton.

Minister, I could have saved the house's time, but I ask: what are the circumstances that are contemplated by a regulation power?

Mr T.R. BUSWELL: An example is that there might be a retail shopping centre, which I understand is defined as five or more retail businesses in a shopping centre. It may be the case that there are some offices that operate within that shopping centre. There might be a mixed arrangement where there might be some shops at the front and offices around the back. It may well be that the lessor does not want to have the commercial tenancy agreements applied—that is, some aspects of the amended legislation we are dealing with. This would enable them to be excluded, I assume, while they maintain the use over that space for the purpose of this legislation.

Mr W.J. JOHNSTON: Later provisions in the legislation change the way rent reviews are conducted. That is one of the principal purposes of this bill. Suppose a shopping centre has 20 shops, two of them are being used as an office and one is leased by a public corporation; therefore, three premises out of that 20 are not capable of being used to examine the like leasing arrangements for the other 17 shops. Is that the intention? To take the minister's example, of the 20 shops, one gets leased as an office for a solicitor. The solicitor does not want to be part of the retail shops agreements amendment, so they are, by regulation, excluded. When the tenants go for rent review, which is dealt with in clause 12 of the bill, the premises that are leased by the solicitor are not capable of being included in the like premises that the landlord is required to provide information about. Does the minister understand what I am asking?

Mr T.R. BUSWELL: I am just getting some more advice on that. My understanding is that the review mechanism mentioned by the member refers to comparable retail shops. Clearly, if a business is operating within the commercial tenancies framework, and it works through the rent review process, on the odd chance that someone has used section 6 of this legislation to be excluded, it would not be a like retail shop, because if it were a like retail shop it would not be able to be excluded.

Clause put and passed.

Clause 7: Section 6 amended —

Dr A.D. BUTI: Subclause (4) seeks to insert a proposed new section 6(3), which states in part —

> A tenant cannot terminate a lease under this section on the ground that the tenant has been given a disclosure statement that is incomplete or contains false or misleading information if —
>
> (a) the landlord has acted honestly …

That is very important; the landlord must have acted honestly —

> (b) the tenant is in substantially as good a position as the tenant would have been if the statement had been complete or had not contained the false or misleading information.

Of course there is always an issue about what is meant by "substantially". However, I will leave that for the moment. My question is about the words "as good a position". Do those words include opportunity cost? The minister, as a former student of economics, would understand what is meant by opportunity cost. When does opportunity cost come into play when determining what is meant by the words "as good a position"?

Mr T.R. BUSWELL: I am ratcheting my rather slow brain back to those halcyon days in the mid-1980s when I was on the university campus and learning about opportunity cost and the perils of being a member of the university ALP club—for one year, and one year only—ably assisted by comrade Cuomo —

Ms R. Saffioti interjected.

Mr T.R. BUSWELL: I was there, as I recall, when the centre left—is that what it used to be called?—was formed by Peter Cook.

Dr A.D. Buti: Yes; around 1983 or 1984.

Mr T.R. BUSWELL: I remember going to meetings—I am digressing a bit—at the miscellaneous workers' union building in Hay Street. That was not with the centre left but was when I was with my other group, and then we splintered off, led by a fellow by the name of "Chuck" Bonzas. That is where I learned about opportunity cost. It does not matter, but did Chuck not allegedly have a brush with the law and claim it was his mum's Christmas cake?

Several members interjected.

Mr T.R. BUSWELL: I seem to remember the former member for Armadale sharing that with me one night here.

Would opportunity cost be picked up? Ultimately, I think that such matters would be determined by the State Administrative Tribunal. This is reflective of similar terminologies in other jurisdictions. I do not have advice at hand as to how this has been interpreted by courts in other jurisdictions. I would imagine, though, that if a tenant could reasonably show that he had forgone an opportunity for commercial gain as a result of whatever had happened, he could argue that he was not in as good a position. I cannot imagine that such a case could not be put before a court. I cannot provide the member with a definitive answer, because I do not have available how that has been interpreted in other jurisdictions. The member would probably know better than I do the inner workings of the courts. I imagine that SAT would give consideration to such a matter, but I am not entirely sure.

Clause put and passed.

Clause 8: Section 11 amended —

Mr A.P. O'GORMAN: This is the crux of the bill, because it sets the scene for what is required in a rent review. A market rent review is usually undertaken at the end of a five-year lease if there is a rollover clause. Clause 8(1) seeks to amend section 11(2)(a) of the act by providing that in negotiating the rollover of a lease, the landlord is not to take into account the value of —

> (i) the goodwill of the business carried on in the retail shop; or
>
> (ii) any stock, fixtures or fittings in the retail shop that are not the property of the landlord; or
>
> (iii) any structural improvement, or alteration, or the retail shop carried out, or paid for, by the current tenant;

This covers many of the things that tenants have complained to me that landlords have tried to slip in when they have been negotiating a rollover of their lease.

Clause 8(2) seeks to insert a new subsection (3B), which states —

> A landlord under a retail shop lease must, to assist in determining the rent payable as a result of the review, within 14 days after being given a written request to do so by a person who acts under subsection (3), give that person such relevant information as is requested, including any of the following information, about leases for comparable retail shops in the same building or retail shopping centre —
>
> (a) current rental for each lease;
>
> (b) rent free periods or any other form of incentive;

(c) recent or proposed variations of any lease;

(d) outgoings for each lease;

(e) any other information prescribed for the purposes of this paragraph.

Paragraph (e) is a catch-all. Am I correct in thinking that if a rent review is being undertaken, the tenant has the right to be given the information that is outlined in paragraphs (a) to (d)?

Mr T.R. BUSWELL: The member has raised a very good point. The crux of the issue is: what is meant by the words "comparable retail shops"? I do not think that is included in the definitions section of the act. The question I asked of my advisers is: what is comparable; is it comparable by footprint? The answer to that is: more than likely. The next question is: is it comparable by activity? The advice I have is that in a retail shopping centre, the definition of "comparable" that would apply would be "retail". I am assuming for the record that "comparable retail shops" would cover similar-sized shops performing similar retail activities. Therefore, a shoe shop would be no different from a butcher. However, I will need to get some firm advice around that, because this is the crux of the issue. The section of the act that we are amending—section 11—defines who this information may be provided to, but, effectively, it would be a valuer appointed by the lessor. I am advised that it would be based upon valuation principles. The issue that the member has raised is: does "comparable" mean that if there is no comparable retail shop in the shopping centre, the landlord does not need to provide this information? That is definitely not the intent of the amendment. My understanding is that the intent of the amendment, which is to insert a new subsection (3B), is to ensure that it is comparable on a retail basis. However, we will need to get some more advice on that. We can provide that advice either later today, assuming that we will not get through this bill today, or when this bill goes to the other place.

Mr A.P. O'GORMAN: I think this is really the thing that upsets many of our small business retailers, because when they get a rental review, it is very difficult for them to understand what they are being compared with and where the comparison comes from. I will use a surf shop at Lakeside Joondalup shopping city as an example. When the surf shop went for a rent review, the rent review comparisons came in from surf shops all over Australia. I assume, for example, that the surf shop on the Gold Coast right on the beachfront in a lovely shopping centre with an opportunity for large turnover —

Mr T.R. Buswell: I do not mean to be rude and interrupt, but I just want to point out one thing. Proposed section 11(3B) specifically states —

… comparable retail shops in the same building or retail shopping centre

Mr A.P. O'GORMAN: That is what I ask; it is tying that comparison down into that building, so the rent review is based on that shopping centre.

Mr W.J. JOHNSTON: As we have already discussed, this is one of the most critical parts of the bill. As the minister knows, Westfield Carousel Shopping Centre is in my electorate and dominates retail trading in the corridor around Cannington, Victoria Park, Gosnells and those areas. It is such a large centre; it is 800 metres from the Woolies to the Coles—half a mile in the old language. A coffee shop near the JB Hi-Fi, the low-volume end of —

Mr T.R. Buswell: Have you ever been to a JB Hi-Fi?

Mr W.J. JOHNSTON: I have.

It is the Niche Cafe; it is my favourite coffee shop in the centre. It is down at the low-volume end of the centre whereas the other franchise coffee shop is in a much busier part of the centre near the cinemas—there are such variations. This question of comparable retail is what annoys retailers who have talked to me. They say that it is not just about the business they are in, but it is where they are and all sorts of things. Clearly, there is a great science, I imagine, in the valuers being able to say that they take notice of all these things, but this area needs to be carefully managed. The critical issue in this clause is how we can be confident about that word "comparable", and what comfort we can have about people whose properties are being valued knowing that they are given something fair out of the valuing process by valuers. I recognise that Westfield makes a bucket-load of money; it is the largest retail shopping centre operator in the world. Westfield knows how to operate a shopping centre—I do not say that it does not—but tenants get concerned about these issues. I am sure that they come into the minister's office just as much as they come into mine. What can we do to assure retailers that this is how things will work and that they should be confident about that?

Mr T.R. BUSWELL: I thank the member for the question. I want to drop back to one issue about the composition of the surf shop's comparison to other retailers. The important point to note is that in the existing act, with respect to valuation, section 11(2)(a) states, in part —

… that retail shop were vacant and to let on similar terms …

Therefore, I do not think that use is important; we can deal with that one.

I think that the issue of comparable shops is an important issue. What we have to remember is that currently valuers do not get the information contained in paragraphs (a) to (d) of proposed section 11(3B). This will give the valuers access to more information that will help them to accurately determine a valuation. The important extension to that is to enable them to more clearly articulate to the tenant why they have reached the decision that they have as part of the evaluation process. I would agree, that in the absence of some of that information, it is bit like a smoke-and-mirrors program for the tenant, with the valuer saying that he has applied his valuation principles—it is difficult if there is not the information to compare. The reason that these provisions have been included is to address the very issues that the member has raised. I am not sure whether people will say that this has given them what they conceive or perceive to be a fairer outcome. I will not comment on the valuation process, but I think that these provisions will give the valuer access to more pertinent information, specifically in relation to shops in the same building or retail shopping centre, which is an important part of these provisions. Let us not forget that these provisions will provide additional guidance to the State Administrative Tribunal should it be required to deal with matters of market rent review disputes. Therefore, I am confident that what we do here will address a lot of the issues that the member has raised. Will it address all of them? I cannot say absolutely. There will possibly be people, who, as a result of this, still say that they do not understand the process and the rent has gone up too much, but I think that this will mitigate against that to a significant degree.

Clause put and passed.

Clauses 9 to 13 put and passed.

Clause 14: Sections 14A, 14B and 14C inserted —

Dr A.D. BUTI: This question regards relocation, and specifically proposed section 14A(2)(c)(ii), which states —

> the rent for the alternative shop is to be no more than the rent for the existing retail shop, adjusted to take into account any difference in the commercial values …

It is understandable that that provision has been put into this bill, but could it be used as a way for the landlord to ensure that the tenant does not take up the relocation to an alternative shop and as a result allow the landlord to absolve himself from having to pay the compensation referred to in proposed section 14A(2)(e), which states that if no alternative shop is offered, compensation needs to be paid to the tenant? In proposed section 14A(2)(c), as long as an alternative shop is offered, compensation does not need to be paid, but of course it could be ensured that the commercial value of the new premises is significantly greater and therefore the rent would be a lot greater and that would be reasonable under that proposed section as it is framed at the moment.

Mr T.R. Buswell: Is the point you are trying to make that it could be misused?

Dr A.D. BUTI: Exactly.

Mr T.R. BUSWELL: The advice I have is that the situation the member refers to is possible, if a landlord chose to act in an unconscionable way. If that was the case, then there are those provisions in the legislation that provide protection to the tenant.

Mr W.J. JOHNSTON: There is nothing in this clause, from my reading of it, that would prevent a landlord giving notice to relocate and then leasing the space that is vacated to an equivalent business. Am I right? Let us take the example of the key cutter down one end of the mall who gets a relocation notice to move to the other end of the mall and then the landlord leases out the space that is vacated to another key cutter. There is nothing in this provision that seems to prevent that. Am I right in my reading of this provision?

Mr T.R. BUSWELL: The short answer is that the member is right, with two caveats: first, provided that the landlord acted within the framework of the legislation to be amended. There are certain requirements on the landlord in the event of relocation. The second caveat is that some leases may include some form of exclusivity whereby the business only agrees to a lease in that complex, if I can use that term, so the landlord is prohibited by an exclusivity agreement from having someone else coming in. Otherwise, there are not the sorts of protections that the member seeks. I am not sure how we can deal with that.

Mr A.P. O'GORMAN: I stuffed up a little. I did have a question on clause 13. I turn to clause 14 and proposed section 14B, "Liability for costs associated with lease". This is a major change to the commercial tenancy act. Previously a landlord transferred the legal costs of writing up a lease to the tenant in the instance of the first lease, a renewal and an extension. This provision is changing that quite dramatically; it is an excellent provision. Basically, the landlord would use these lawyers as much as he wanted to, to draw up the lease. The tenant had no control over those costs and just got a bill for all those costs when signing the lease. Can the minister confirm that I am correct in assuming that the onus will be put on landlords to pay their own legal costs? Could the minister extend that answer a little and confirm whether the same onus will be changed under proposed section

14C? Previously when the lease was changed to a rollover, the onus was on the tenant but it will now fall back on the landlord to advise the tenant between a six and 12-month period. I am sorry that I missed that. Can the minister address that?

Mr T.R. BUSWELL: They are both very valid points. The term in proposed section 13C is "the landlord must notify the tenant in writing". I think that clears up what has been a bit of a grey area, which unfortunately has occasionally led to claims that it has been misused, to the detriment of the tenant. In relation to liability, I understand that landlords have no capacity to pass on those legal costs as a result of this provision. Therefore, they have absolute responsibility for paying their own bills. It has always struck me as an anomaly when a tenant had to pick up the tab of a landlord who incurred costs; for example, as a result of a dispute or a rewrite of the lease. Without meaning to go off on too much of a tangent, that was also the case in retirement villages. I had a case in my electorate in which people had a dispute with the retirement village. The retirement village engaged lawyers and the people with the dispute had to pay for them. That was ludicrous. This provision clearly and unequivocally deals with that.

I wish to make a very important point of clarification. This provision certainly deals with the costs of drawing up a lease. As we know, they can be quite horrendous. As the member for Armadale pointed out in his speech on the second reading, these leases can be quite complicated for the tenant and the landlord. There may well be provisions in the lease so that if issues arise in a tenancy—for example, a default by the tenant in relation to an aspect of the lease, generally not paying rent or something like that—the landlord would have the capacity to pursue those costs from the tenant. That is a separate issue to the broader issue that the member is canvassing.

Mr A.P. O'GORMAN: I thank the minister. I just wanted to get that clear. There is one exclusion, under proposed section 14B(1)(b), which states —

> obtaining the consent of a mortgagee to the lease; or

I seek some clarification of that. If the landlord has to go to a mortgagee to get confirmation of something in the agreement, does that relate to putting up a bond, which the landlord is seeking? I am just trying to figure out what it means and why we need this provision. It seems to be an exemption, and the landlord can claim legal costs in obtaining the consent of a mortgagee to the lease. I assume that is about bonds, where landlords hold a bond over a tenancy for failure to pay rent on time.

Mr T.R. BUSWELL: I understand that that is not an exclusion. I assume that the member is referring to the very top of page 19 of the bill and proposed section 14B(1)(b), which is an "or". That "or", by my reading of this, ties those costs into items that cannot be excluded. Those costs would be where a landlord has to go to his mortgagee to seek approval for entering into the lease. Some financial institutions vet the lease as part of the mortgage and then pass those costs on to the person with the loan, which in this case would be the landlord. This provision says that if a landlord incurs costs, by virtue of this provision he cannot pass the costs back to the tenant. It is not an exclusion; it is actually a further inclusion over and above proposed section 14B(1)(a) and in addition to 14B(1)(c). Proposed section 14B(1)(c) is a further "or" and means that if the landlord has to get legal advice to make sure he complies with this legislation, he cannot ping the tenant for that cost either.

Mr A.P. O'GORMAN: My final question relates to proposed section 14C, "Refurbishment and refitting". This is one of those areas in which we get lots of complaints. For example, tenants are forced into a refurbishment or refit agreement before leases are rolled over or there is a provision within the lease that says the tenant will refit at the end of a certain period. This happened recently and was the cause of one of my small clothing retailers walking away from the rollover of his lease. He was happy with the rent—he thought he could comply with the rent and the outgoings—but not the cost of the refitting and the rollover. It was a retail clothing store, which had very little wear and tear over a five-year period. The cost of the refit being demanded on the rollover was just exorbitant. When he sat down and did his calculations, the cost of that refit made it unviable for him to continue. Purely because of the cost of the refit, he walked away from a 14-year-old business. Can I get an understanding that this provision means that a shopping centre cannot force a refit? Under the current act, landlords cannot force tenants to use a particular company for a refit but there seems to be ways around it; for example, where the architect specifies certain fittings and certain things that forces the tenant to go to a particular company to do that refit.

Mr T.R. BUSWELL: That is a good point, member. It does not exclude a requirement for a refurbishment or a refit. However, it does say that if that is in the lease, the nature and extent of that refurbishment or refit must be clearly defined at the time the lease is signed. In other words, to the extent possible, it should give some certainty to the tenant of the nature and extent of the refit the tenant will have to finance at the end of the lease period.

Mr A.P. O'Gorman: Minister, you have an amendment on the notice paper.

Mr T.R. BUSWELL: Yes; I have just been politely reminded of that.

The ACTING SPEAKER (**Mr P.B. Watson**): We are getting to that, member.

Mr T.R. BUSWELL: With the support and encouragement of the member for Joondalup, I move —

Page 18, line 9 — To delete "in respect".

Amendment put and passed.

Clause, as amended, put and passed.

Clause 15 put and passed.

Clause 16: Part IIA Division 1 heading inserted —

Dr A.D. BUTI: Proposed section 16C covers "Misleading or deceptive conduct in connection with retail shop leases". I was hoping that this clause might allow us to get over the doctrine of privity of contract because at the moment it refers to only misleading or deceptive conduct of a party to the lease and 16D covers a party to a lease or former party to a lease. What if a party to a lease gives misleading and deceptive —

The ACTING SPEAKER: Member, which clause are you talking about? We are on clause 16.

Dr A.D. BUTI: It is 16C.

The ACTING SPEAKER: No; you have jumped ahead of yourself.

Dr A.D. BUTI: I am sorry; I got very excited.

Clause put and passed.

Clauses 17 to 19 put and passed.

Clause 20: Part IIA Division 2 inserted —

Dr A.D. BUTI: I have given the minister a little bit of preparation time. Proposed section 16C is headed "Misleading or deceptive conduct in connection with retail shop leases". At the moment it refers to only misleading and deceptive conduct of a party to a lease and 16D refers to a former party to the lease. What about a party that does not communicate something that is deceptive conduct to the other party to a lease but to a third party, knowing that the third party will relay that information to a party to the lease? Under this clause they will not be caught.

Mr T.R. BUSWELL: While we get our head around that scenario can the member for Armadale give an example of when it could happen?

Dr A.D. BUTI: If the minister were a party to a lease and I were the other party and I tell the member for Joondalup, who is not a party to the lease, something misleading that I know he will relay to the minister, the minister would get that misleading and deceptive information as a result of my communication to the member for Joondalup. Under this provision, as I read it, that would not be caught, when it should be.

Mr T.R. BUSWELL: I understand what the member is saying. I do not have the member's experience in law and knowledge of how people attempt to circumvent things; that is not my nature! However, I cannot imagine that that would not be picked up under the broad definition of "conduct". The member for Armadale may have a different view. If the member tells the member for Joondalup something and he tells me, I cannot imagine that would not be due to the member's conduct. It seems logical to me that it is the member for Armadale's conduct that would have caused me to be misled or deceived. I have not appeared before the State Administrative Tribunal, but I cannot imagine that a court would not pick that up within the broad concept of conduct.

Dr A.D. Buti: All right.

Mr W.J. JOHNSTON: Are these provisions intended to relate only to parties to a lease or are they also related to potential parties to a lease? If someone is looking at a shopping centre lease will these provisions apply to that person as well?

Mr T.R. BUSWELL: My advice is that, strictly speaking, they will not. But I suppose the member for Cannington is saying that someone might engage in conduct that means someone does not sign a lease who may have been intending to for a time. My advice is that there are other legal frameworks through which that person could seek redress if they thought they had been wronged, but, strictly speaking, no.

Mr W.J. JOHNSTON: If the deceptive conduct takes place prior to signing the lease and then the person signs the lease, could action be taken?

Mr T.R. BUSWELL: Yes; effectively, the person would then be a party to the lease.

Mr W.J. Johnston: Even if the conduct had occurred previously?

Mr T.R. BUSWELL: Yes.

Clause put and passed.

Clause 21 put and passed.

New Clause 21A —

Mr A.P. O'GORMAN: I move —

21A. Part IIB inserted

After section 16 insert:

Part IIB — Registers of information relating to certain retail shop leases

17. Terms used

In this Part —

register means a register established and maintained in relation to a retail shopping centre under section 19;

retail shopping centre means a retail shopping centre for which there is a common head lessor, as stated in paragraph (b)(i) of the definition of ***retail shopping centre*** in section 3(1).

18. Application of Part

(1) In addition to a retail shop lease to which or in relation to which this Part would otherwise apply, this Part also applies to or in relation to a retail shop lease that was entered into —

(a) before the relevant day; or

(b) pursuant to an option granted or agreement made before the relevant day,

if this Act would have applied to the lease had it been entered into on or after that day.

(2) In subsection (1) —

relevant day has the meaning given to that term by section 4(3).

19. Registers to be established and maintained

(1) The common head lessor for a retail shopping centre must establish and maintain a register that contains, for each retail shop lease in respect of premises in the retail shopping centre, the following information —

(a) the address of the retail shop;

(b) the parties to the retail shop lease;

(c) the lettable area of the retail shop;

(d) the rental value of the retail shop on a cost per metre basis, or details of how the rental for the retail shop lease is determined;

(e) any rent free periods or any other form of incentive;

(f) the basis on which outgoings for the retail shop lease are determined;

(g) any other information prescribed by the regulations.

(2) The register is to be established and maintained in accordance with the regulations.

(3) The common head lessor may provide access to or information from the register only to —

(a) the tenant under a retail shop lease in respect of premises in the retail shopping centre or a person who the common head lessor is satisfied is a prospective tenant; or

(b) a valuer appointed by a tenant or prospective tenant referred to in paragraph (a).

(4) In subsection (3) —

valuer means a person licensed under the *Land Valuers Licensing Act 1978*.

20. Confidentiality of information gained under section 19

(1) A person who gains information under section 19 in relation to a retail shop lease must not disclose the information to any other person unless the disclosure is made —

(a) with the consent of both the tenant and the landlord of the relevant retail shop; or

(b) for the purposes of any legal proceedings arising out of this Act or any report of any such proceedings; or

(c) as required or permitted under this Act or any other law; or

(d) with any other lawful excuse.

(2) Subsection (1) does not prevent a person from disclosing information that is publicly available at the time the disclosure is made.

(3) If a person discloses information in contravention of subsection (1) and the tenant or landlord of the relevant retail shop suffers loss or damage because of the disclosure, the tenant or landlord is entitled to be paid by the person who made the disclosure compensation for the loss or damage —

(a) of such reasonable amount as is agreed between the person and the tenant or landlord; or

(b) failing agreement, of such amount as may be determined by the Tribunal on the application of the tenant or landlord.

As the minister knows, this legislation has come before the chamber because of an agreement reached between the Leader of the Opposition and the Premier. Part of that agreement was that a lease register would be incorporated into the bill. The lease register we would like would be one that is registered with Landgate, so that it is a public register, and tenants or potential tenants would have an opportunity to interrogate the lease register and find out a level of information about the shopping centre they are going into or a level of information about similar businesses that operate in the area. The lease register would give small operators an opportunity to gain some information so that they can work from a position of power or equality, if we like, rather than entering blind into a lease. This was a really important part of the agreement between the Premier and the Leader of the Opposition. Unfortunately, it does not appear in this bill before us this afternoon. I am seeking to include it with this amendment, although it is not the preferred lease register; as I said, that would be a lease register with Landgate. I think at one point I suggested that a lease register held by the shopping centre landlords can be likened to putting Dracula in charge of the blood bank. That is still the situation. However, this legislation excludes the blood bank; it does not even have the blood bank there. This amendment seeks to include the blood bank and, hopefully, a future Labor government will rectify the legislation and provide for a proper lease register that is publicly accessible and allows for a more level playing field for smaller businesses in shopping centres.

Mr T.R. BUSWELL: I think it probably better that we continue this discussion after question time. By way of indicating the government's position, I can say that it will not support the amendment. I think I made that clear in my reply to the second reading debate. I acknowledged members' views on this matter. In not supporting the amendment to introduce a lease register, the government is not saying that it does not support the introduction of a lease register, but that it feels more work needs to be done to consult more broadly ahead of the potential introduction of a lease register.

Mr E.S. Ripper: When?

Mr T.R. BUSWELL: That is a very good question, Leader of the Opposition. We have just finished drafting the consultation paper.

Debate interrupted, pursuant to standing orders.

[Continued on page 4285.]