



Government of Western Australia
Department of Commerce

EXPLANATORY MEMORANDUM

Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011

A1230426

COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS AMENDMENT BILL 2011

Overview of Bill

The purpose of the Bill is to amend the commercial tenancy legislation in Western Australia in order to improve the tenancy rights of small business and to enhance the clarity and effectiveness of the legislation.

The *Commercial Tenancy (Retail Shops) Agreements Act 1985* (the Act) regulates the relationship between landlords and tenants in retail shop premises in Western Australia. The primary objective of the Act is to facilitate equitable leasing arrangements and provide access to low cost dispute resolution mechanisms. The Act focuses on the need for transparency of information and fairness in retail tenancy lease contracts.

The Bill contains a number of proposed amendments that incorporate new provisions into the Act which will:

- allow tenants to make more informed leasing decisions by requiring landlords to include additional information in the disclosure statements provided to tenants;
- enhance security of tenure by protecting the rights of tenants with respect to options to renew and shopping centre redevelopments or relocations;
- improve the negotiating power of tenants by prohibiting landlords from passing on certain legal fees to tenants;
- assist in the preparation of more consistent and equitable rent reviews by requiring landlords and tenants to supply valuers with relevant leasing information; and
- prohibit misleading and deceptive conduct and give the State Administrative Tribunal the jurisdiction to hear claims in relation to misleading and deceptive conduct.

The proposed reforms will assist in redressing the information imbalance that can occur between landlords and tenants and ensure the Act provides a more transparent framework in which the parties can pursue their commercial interests.

The amendments will provide improved protections for tenants balanced with the need to provide a regulatory environment that is fair to landlords. This will be achieved by reducing disputes between landlords and tenants; reducing the disparity in bargaining power that can exist between parties; and improving the clarity and effectiveness of the legislation.

Preliminary

- Clause 1 Sets out the name of the Act.
- Clause 2 Provides that the Act is to come into operation as follows:
- sections 1 and 2 - on the day on which the Act receives Royal Assent; and
 - the rest of the Act – on a day fixed by proclamation, and different days may be fixed for different provisions.
- Clause 3 Provides that this Act will amend the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.
- Clause 4 Amends the long title to include reference to misleading and deceptive conduct.

Terms used in this Act

- Clause 5 This clause amends section 3(1) of the Act which sets out the terms used in the Act.

The definitions of 'retail floor area' and 'total lettable area' are to be deleted. A new definition of 'total lettable area' is to be included in section 12.

The following definitions are to be included in the Act:

group of premises means –

- (a) a retail shopping centre; or
- (b) 2 or more premises, at least one of which is a retail shop, that are adjacent, or form a cluster -
 - (i) which have, or on being leased would have, a common head lessor; and

are grouped together for the purpose of allocating to each of those premises a portion of an item of operating expenses;

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;

misleading and deceptive conduct application means an application under section 16D(1);

retail business means -

- (a) a business that wholly or predominantly involves the sale of goods by retail; or
- (b) a specified business.

The definition of retail shop is to be deleted and replaced to improve clarity and to provide that certain premises may be excluded by regulation. The definition provides as follows:

retail shop means –

- (a) any premises situated in a retail shopping centre that are used wholly or predominantly for the carrying on of a business; or
- (b) any premises not situated in a retail shopping centre that are used wholly or predominantly for the carrying of a retail business;

but does not include any premises excluded by regulation.

The definition of ‘retail shop lease’ is to be deleted and replaced. The new definition will:

- exclude leases to listed corporations (including corporations listed outside Australia) or subsidiaries of such corporations. Currently leases to all public companies, not just listed companies, are excluded; the amendment will narrow the exclusion; and
- allow for leases of certain types of retail shops, occupying premises with a lettable area exceeding 1000 square metres, to be prescribed as retail shop leases.

The definition of ‘retail shopping centre’ is to be deleted and replaced. The new definition clarifies that, if the premises are in a building with two or more floor levels, that the retail shopping centre only includes those levels of the building where premises that are used for the carrying on of a retail business are situated.

Section 3(3) of the Act outlines those matters falling within the scope of ‘a question arising under a retail shop lease’. Section 3(3)(a) is to be amended to include ‘a question as to forfeiture’. This is to ensure that the State Administrative Tribunal has the power to consider all relevant matters arising in relation to a retail shop lease.

Application

Clause 6 This clause inserts section 4(4) to provide that regulations may be made exempting from all or any of the provisions of the Act –

- a prescribed person, retail shop lease or retail shop; or
- a prescribed class of persons, retail shop leases or retail shops.

Section 4(5) is also inserted so that the regulations may provide for conditions and restrictions subject to which an exemption is to apply.

Disclosure

Clause 7 Section 6 of the Act provides that a landlord must provide a tenant with a disclosure statement seven days prior to entry into a lease. If the landlord fails to provide the disclosure statement or if the disclosure statement contains false or misleading information the tenant currently has a right to terminate the lease within 60 days after the lease was entered into.

This clause amends Section 6(1) to extend the 60 day period to six months.

Section 6(1) is also amended to clarify that the tenant has the right to terminate the lease or seek compensation if a disclosure statement is incomplete.

This clause also inserts section 6(3) which provides that a tenant may not terminate a lease under section 6(1) if a landlord has provided a disclosure statement that is incomplete or contains false or misleading information if:

- the landlord has acted honestly and reasonably and ought reasonably to be excused for the failure concerned; and
- the tenant is in substantially as good a position as the tenant would have been in if the failure had not occurred.

Rent Review

Clause 8 This clause amends section 11(2) to provide that a market valuation of rent is not to take into account the value of:

- the goodwill of the business carried on in the retail shop; or
- any stock, fixtures or fittings in the retail shop that are not the property of the landlord; or
- any structural improvements, or alteration, of the retail shop carried out, or paid for, by the current tenant.

Section 11(3B) is to be inserted in the Act. This section provides that a landlord must provide the following information about leases for comparable retail shops in the same building or shopping centre to a person who acts under subsection (3)(a) or (b) (a licensed land valuer), on request, for the purposes of undertaking a market review of rent:

- current rental for each lease;
- rent free periods or any other form of incentive;
- recent or proposed variations of any lease;
- outgoings for each lease;
- any other information prescribed.

Section 11(3C) is also inserted and provides that if a landlord fails to comply with a request for information made under subsection (3B) without reasonable excuse:

- the valuer must, within 7 days, give the tenant written notice of the landlord's failure; and
- the tenant may apply to the State Administrative Tribunal for an order that the landlord comply with the request.

Confidentiality of information supplied under section 11

Clause 9 This clause inserts section 11A, which provides that a person provided with information by a landlord under section 11(3B) must not disclose that information to any other person, except in specified circumstances.

A person is not prevented from disclosing information that was publicly available at the time the disclosure concerned was made.

If a person discloses information in contravention of this provision and the landlord or tenant suffers loss or damage, the tenant or landlord is entitled to be paid compensation by the person who made the disclosure. If the parties do not agree on the amount of compensation payable, the State Administrative Tribunal may make a determination upon an application from a landlord or tenant.

Contribution to landlord's expenses

Clause 10 Section 12 makes provision for the allocation of operating expenses to retail shop tenants. Operating expenses (sometimes referred to in lease documents as "outgoings" or "variable outgoings") are the costs incurred by the landlord in operating, repairing, or maintaining the landlord's premises, including any building common areas. Typically these costs include rates and taxes, cleaning, airconditioning, security, insurances and other valid expenses of running the property.

This clause amends section 12(1)(b) to provide that the provision operates subject to subsection 12(1)(1e) which applies to referable expenses. Referable expenses are expenses directly attributable to the retail shops that share the benefit of that operating expense.

Section 12 is also amended by inserting subsection (3A). This subsection provides that a provision in a retail shop lease to the effect that a tenant is obliged to contribute towards the cost of any of the landlord's fixtures, fittings, equipment or services is void unless the disclosure statement given to the tenant under section 6 contains a statement notifying the tenant to the effect of such a provision.

The following definitions are inserted in section 12(3):

group of premises includes part of a group of premises (the definition of group of premises in section 3(1) includes premises that are not retail shops);

relevant proportion, in relation to a retail shop that is part of a group of premises, means the proportion that the lettable area of the retail shop bears to the total lettable area of the group of premises at the commencement of the accounting year;

total lettable area, in relation to a group of premises, or part of a group of premises, means the aggregate of -

- (a) the lettable areas of the premises that are retail shops (or areas set aside for retail shops); and
- (b) if any of the premises are not retail shops, the lettable area of those premises defined or calculated in such manner as is prescribed by the regulations.

These definitions are for the purposes of the Act only and calculating the total lettable area and relevant proportions of retail shops. The provisions are not intended to regulate the manner in which landlords deal with tenants of non-retail shops.

This clause further amends section 12 by replacing the term “retail floor area” with “lettable area” and including the other defined terms, such as “group of shops”, where appropriate.

The definition of strata title levy in section 12(3) is amended to insert a semi-colon.

Right to at least 5 years’ tenancy

Clause 11 Amends section 13(1) to provide that the Act is to apply to all retail shop leases, but that the right of tenants to a statutory option to extend the term of a lease to 5 years will only apply to leases with a term of more than 6 months.

Section 13(2A) is inserted to provide that a lease for a term of more than 6 months includes a tenancy where the tenant has been continuously in possession of the retail shop for more than 6 months as a result of the lease being renewed and/or continued.

Section 13(3)(a) is amended to provide that instead of 90 days notice, tenants only need to give the landlord 30 days notice, in writing, before the expiry of the current lease term in order to seek an extension to the lease.

Section 13(6) is amended to clarify that the statutory rights set out in the Act to protect a tenant’s minimum 5 year term also apply in relation to leases initially granted for 5 years or more.

Section 13(6) sets out those circumstances in which a landlord can terminate a lease prior to the expiry of the initial 5 year statutory term. Currently, a provision may be included in a lease allowing for termination prior to expiry of the 5 year term if that provision is approved by the State Administrative Tribunal.

Section 13(6) is to be amended to provide that certain provisions may be prescribed for the purposes of this section. This will allow for standard classes of provisions to be prescribed, for example those allowing for termination on the liquidation or bankruptcy of a tenant. The parties will be able to include these provisions in retail shop leases without the need to obtain the approval of the State Administrative Tribunal.

Notices as to renewals of leases

Clause 12 Pursuant to section 13B of the Act, if upon expiry of a lease, a tenant has no right to extend the term, the tenant may require the landlord, within 12 months before the expiry date of the lease, to state the landlord's intentions as to the grant of a further lease. If there is no response from the landlord within 30 days of the tenant's request, the expiry of the current term of the lease is deemed to be extended by a period equal to the period of non-compliance (i.e. the period after the 30 days has expired). For example, if a tenant made a written request to a landlord and the landlord did not provide a response for 90 days, the term of the lease would be extended by 60 days.

As a result of the operation of the current provision, the landlord may delay responding to the tenant's notice and cause the tenant to be locked into a lease for a period longer than the original lease.

Amends the Act by inserting sections 13B(4A) and 13B(4B) which set out how a tenant may terminate a lease which is deemed to be extended under subsection 13B(3).

Section 13B(4C) is also inserted to provide that if a lease is renewed after the original term of the lease ends, as a result of the operation of subsection (3), the lease for the new term commences on the expiry of the term of the original lease.

Obligation to notify tenant of option to renew

Clause 13 This clause inserts new section 13C in the Act.

Section 13C(1) imposes an obligation on the landlord to notify a tenant in writing of the date after which an option to renew the lease is no longer exercisable. This notice must be provided at least 6 months and no more than 12 months prior to the option expiry date.

Section 13C(1) provides that if the landlord fails to provide the notice then the retail shop lease is taken to provide that the date after which an option to renew can no longer be exercised is instead 6 months after the landlord notifies the tenant as required.

Sections 13C(2)(c) and 13C(3) set out how a tenant may terminate a lease that has been extended as a result of the landlord's failure to provide the required notice.

Section 13C(4) is also inserted, to provide that if a lease is renewed after the original term of the lease ends, as a result of the operation of subsection (2)(b), the lease for the new term commences on the expiry of the term of the original lease.

Relocation

Clause 14 Currently, section 13(6) provides that a provision in a retail shop lease allowing a landlord to terminate the lease before the expiry of the minimum tenancy period of five years must be approved by the State Administrative Tribunal. This means that any provision in a retail shop lease allowing a landlord to relocate a tenant or terminate the lease where a shopping centre is undergoing repairs or renovations (often called redevelopment or relocation clauses) must be approved by the State Administrative Tribunal. There is currently no requirement for approval of a redevelopment or relocation clause that operates after the initial five year lease term.

This clause amends the Act to insert new section 14A, which provides that a provision in a retail shop lease about the relocation of the tenant's business is void unless:

- it is in the prescribed form; or
- it is in a form approved by the State Administrative Tribunal; or
- if five years of the term of the lease has already expired, it is in accordance with subsection (2).

Subsection (2) requires a relocation clause to contain provisions to the following effect –

- the tenant's business cannot be relocated unless the landlord has given at least 6 months written notice (a relocation notice);
- the relocation notice is to give details of an alternative retail shop (the alternative shop) to be made available to the tenant, and if the lease is for a retail shopping centre, the alternative shop is to be situated in the shopping centre;
- the tenant is to be offered a new lease of the alternative shop on the same or better terms and conditions as the existing lease, except that the term of the new lease is to be no shorter than the remainder of the term of the existing lease, and the rent for the alternative shop is to be no more than the rent for the existing shop, adjusted to take into account the commercial values of the existing retail shop and the alternative shop at the time of the relocation;
- the landlord is to pay the tenant's reasonable costs of the relocation, including packing, removal, dismantling and reinstatement of fittings and legal costs incurred by the tenant; and

- if the landlord does not offer the tenant a new lease of an alternative retail shop then the landlord is liable to pay to the tenant such reasonable compensation as is agreed in writing between the parties or determined by the State Administrative Tribunal.

Subsection (3) provides that the State Administrative Tribunal may, on application made to it by the landlord, notice of which has been given to the tenant, approve of the inclusion in a retail shop lease of another form of relocation provision under subsection (1)(b) if the Tribunal is satisfied that circumstances exist by reason of which such approval ought to be given. Subsection (4) provides that a landlord may make an application in relation to a retail shopping centre in relation to a number of leases in respect of that centre where the landlord is of the view that the same special circumstances exist in relation to each lease the subject of the application.

Liability for costs associated with lease

Amends the Act to insert section 14B to provide that a landlord under a retail shop lease is not able to claim from any person (including the tenant) the landlord's legal or other expenses relating to –

- the negotiation, preparation or execution of the lease, or a renewal of the lease or an extension of the lease; or
- obtaining the consent of a mortgagee to the lease; or
- the landlord's compliance with the Act.

The provision will not prevent a landlord from claiming the reasonable legal or other expenses incurred by the landlord in connection with an assignment of the lease or a sub-lease, including investigating a proposed assignee or sub-lessee and obtaining any necessary consents to the assignment or sub-lease.

Refurbishment and refitting

Amends the Act to insert section 14C to provide that a provision in a retail shop lease requiring the tenant to refurbish or refit the shop is void unless it gives such details of the required refurbishment or refitting as may be necessary to indicate generally the nature, extent and timing of the required refurbishment or refitting.

Unconscionable conduct and misleading and deceptive conduct

- Clause 15 This clause amends the heading of Part IIA – by adding the words “and misleading and deceptive conduct”.
- Clause 16 This clause inserts a new sub-heading in the Act – “Division 1 – Unconscionable conduct”.
- Clause 17 Amends section 15A by replacing the word “Part” with “Division”.

- Clause 18 Amends sections 15B(1) and (2) by replacing the word “Part” with “Division”.
- Inserts a definition of “relevant day” by reference to section 4(3) of the Act.
- Inserts clause 15B(3) which provides that nothing in this Division affects the operation of Division 2 (misleading and deceptive conduct).
- Clause 19 This clause amends section 15F to make it clear that a landlord or tenant, or former landlord or tenant, who is likely to suffer loss or damage because of the unconscionable conduct of another person that contravenes section 15D or 15D (as well as a person who has actually suffered loss or damage) is entitled to make an application to the State Administrative Tribunal in respect of that loss or damage. Section 15F is also amended to make it clear that a party may also seek other appropriate relief.
- Clause 20 This clause inserts misleading and deceptive conduct provisions into the Act as Division 2 of Part IIA. The purpose of this amendment is to ensure that the State Administrative Tribunal has the jurisdiction to hear all relevant matters in relation to a retail shop lease.
- Section 16A defines misleading and deceptive conduct.
- Section 16B(1) provides that in addition to a retail shop lease to which or in relation to which this Division would otherwise apply, this Division also applies to or in relation to a retail shop lease for the purposes of the Act that was entered into before the commencement of the Act, or entered into pursuant to an option granted or agreement made before the commencement of the Act.
- Section 16B(2) defines relevant day by reference to section 4(3) of the Act.
- Section 16B(3) provides that this Division does not apply to conduct that occurred before clause 19 comes into operation.
- Section 16B(4) provides that nothing in this Division affects the operation of Division 1 (unconscionable conduct).
- Section 16C provides that a party to a retail shop lease must not, in connection with the lease, engage in conduct that is misleading or deceptive to another party to the lease or that is likely to mislead or deceive another party to the lease.
- Section 16D provides that a party, or former party, under a retail shop lease, or former retail shop lease, who suffers, or is likely to suffer loss or damage because of the misleading or deceptive conduct of another party or former party to the lease may apply in writing to the State Administrative Tribunal for an order that the other party, or former party, pay compensation in respect of the loss or damage, or for other appropriate relief.

A misleading and deceptive conduct application is required to be lodged within 6 years after the alleged conduct occurred.

Without limiting the remedies set out in section 26 of the Act, the State Administrative Tribunal may make the following orders in relation to a misleading and deceptive conduct application:

- an order that a party to the proceedings pay money to a specified person by way or debt, damages or restitution or refund any money; and
- an order that a specified amount of money is not due or that a party to the proceedings is not entitled to a refund of any money paid to another party;

The State Administrative Tribunal may make any necessary ancillary orders, impose any conditions on orders made under this section and may make interim orders.

Subsection 16D(7) provides that “specified” in relation to an order, means specified in the order.

State Administrative Tribunal

- Clause 21 This clause inserts a new heading “Division 3 – Reference of questions to State Administrative Tribunal”.

Orders of Tribunal

- Clause 22 This clause amends section 26(1aa) to give the State Administrative Tribunal the power to make an order terminating a retail shop lease in order to resolve a matter.

- Clause 23 Amends section 27 to provide that misleading and deceptive conduct claims are to be dealt with in the same manner as unconscionable conduct claims by amending subsection (4) to include a reference to a misleading and deceptive conduct application and amending subsections (5) and (6) by replacing “unconscionable conduct application” with “application referred to in subsection (4)”.

Transitional provisions

- Clause 24 Provides that Schedule 1 sets out transitional provisions.

- Clause 25 Inserts Schedule 1

Clause 1 Provides that this Schedule does not affect the operation of the *Interpretation Act 1984* Part V.

Clause 2 Provides for the making of regulations for any transitional matter not otherwise provided for.

Clause 3 Defines the terms used in the Schedule.

- Clause 4 Sets out how the Act is to apply to existing leases. Sections 6 (disclosure) and 13 (right to at least 5 years' tenancy) as in force immediately before the amendments made by the 2011 amending Act continue to apply to existing leases. New sections 12(3A) (contribution to landlords fixtures and fittings), 14A (relocation) and 14C (refurbishment and refitting) will not apply in relation to an existing lease.
- Clause 5 Sets out how the Act is to apply to a lease that became a retail shop lease as a consequence of the 2011 amending Act. The Act does not apply (except for section 16) to a lease if:
- the lease was entered into before the amendment took effect; or
 - the lease was renewed under an option granted under a lease entered into before the amendment took effect; or
 - the term of the lease was extended by agreement entered into before that amendment took effect.
- Clause 6 Provides that this Division applies despite an agreement to the contrary between the parties to a retail shop lease.