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Property Update

May 2011

Proposed amendments to the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA)

The *Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011* (WA) (**Bill**), introduced into the Legislative Assembly on 16 March 2011, has passed its first and second readings and was agreed in its current form after the second reading. It is likely the Bill will pass in its current form, but there is no indication at this stage as to when it will come into force.

Recommended changes to the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) (**Act**) were released in 2003. Some of the recommendations have already been implemented (eg unconscionable conduct provisions), while others have become irrelevant (eg the Commercial Tribunal is now irrelevant with the establishment of the State Administrative Tribunal). This Bill introduces most of the remaining recommendations from the 2003 review, other than the public lease register, which the government is currently developing policy in relation to.

Generally, the Act is designed to give protection to tenants and to give certainty and clarity to landlords through a fair regulatory system. The purpose of the Bill is to further these objectives. In this article, we discuss the substantive proposed amendments to the Act and, therefore, do not focus on minor amendments and transitional arrangements.

Application

The amendments in the Bill may come into force at different times. Regulations may be made which clarify how the provisions will apply at a particular point in time. Currently, the amendments and the Act will not apply to any existing leases which, because of the Bill, are subsequently considered retail leases once the provisions of the Bill commence.

In addition, the amendments relating to new sections 12(3A) (contribution to landlord's fittings void), 14A (relocation) and 14C (refurbishment) of the Act will not apply to existing leases. Sections 6 (disclosure) and 13 (right to at least five years tenancy) will continue to apply to existing retail leases.

There are nine main areas of amendment. These are:

- definitions;
- disclosure statements;
- rent reviews;
- operating expenses (outgoings);
- minimum five year tenancy;
- options;
- relocation and refurbishment clauses;
- lease costs; and
- unconscionable, misleading and deceptive conduct.

Definitions

The changes to the definitions are largely for clarity and certainty.

Deleted - The definitions of 'retail floor area' and 'total lettable area' will be deleted. However, new definitions for 'relevant proportion' and 'total lettable area' will be inserted in section 12 (contribution to landlord's expenses).

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New - New definitions will be inserted for:

- *group of premises* (a further definition of this term is also included in section 12);
- *lettable area*;
- *misleading or deceptive conduct application;* and
- *retail business.*

Amended - The following definitions will be amended:

- *retail shop* (this will provide an exclusion of certain premises by regulation);
- *retail shop lease* (the amendment will narrow excluded leases from all public companies to listed corporations or subsidiaries only, and will allow regulation to prescribe some leases over 1000m² as retail shop leases); and
- *retail shopping centre* (this will provide that a retail shopping centre is only those floors dedicated to retail shops).

Disclosure statements

Currently under the Act, a landlord must give a tenant a disclosure statement at least seven days before the lease is entered into. If the disclosure statement is false or misleading, the tenant has the right to terminate the lease within 60 days.

The proposed amendment will allow a tenant to terminate the lease for being false, misleading or *incomplete* within *six months* of the lease being entered into (italics denote proposed amendment). However, the tenant will not be able to terminate the lease if the disclosure statement is false, misleading or incomplete where:

- the landlord has acted honestly and reasonably;
- the landlord 'ought reasonably' be excused for the failure; and
- where the tenant is in substantially as good a position as it would have been if the disclosure statement was acceptable.

Rent review

The proposed amendments to section 11 clarify what factors should be taken into account during a market review, what information the landlord is required to provide and what happens if the landlord does not provide that information. There is also a new provision specifying that the information should remain confidential.

Excluded factors - Following the amendment, a market review must not take into account:

- the business' goodwill in the shop;
- any stock, fittings or fixtures which are not the landlord's; and
- any structural improvements or alterations carried out or paid for by the tenant.

Landlord information - If the amount of rent is in dispute after a market review and a person or persons are appointed under the *Land Valuers Licensing Act 1978* (WA) (**expert**) to determine the rent, then the landlord must give the expert 'such relevant information as is requested' by the expert about leases for similar shops in the same building or centre within 14 days (**response time**) after the request. This information includes current rents, incentives, actual or proposed variations, outgoings and any other prescribed information.

Landlord failure - If the landlord does not provide the information within the response time, without reasonable excuse, the expert must notify the tenant of the landlord's failure within seven days of the expiry of the response time (ie 21 days after the notice). The tenant can then apply to the Tribunal for an order to compel the landlord to comply with the expert's request for information. However, there does not appear to be any provisions in the Bill to deal with the situation where the expert fails to notify the tenant within seven days of the expiry of the response time. Perhaps this will be dealt with contractually between the appointing party and the expert. Or perhaps the tenant can apply to the Tribunal (with its leave) pursuant to section 11(5) on the basis that the expert is not performing its duties. Either way, there does not appear to be any consequences for the expert provided for in the Bill.

Confidentiality - The proposed amendment provides that, as a general rule, disclosure of the landlord's information for rent determination is prohibited. However, it provides a list of situations when disclosure is permitted. Most of the situations are straightforward such as with both parties' consent, for legal proceedings, as required by law or with 'lawful excuse' (though it is unclear exactly what 'excuses' this would include). It can also be disclosed to enable the rent to be determined or to specify the things which the expert had regard to when determining the rent (provided it is in a way which does not identify the parties, the tenant's business or the premises). The information can be disclosed if it is publicly available at the time it is disclosed.

If any person discloses the information and either the landlord or tenant suffer loss or damage as a consequence, that party is entitled to reasonable compensation agreed between the discloser, the landlord and tenant, or as determined by the Tribunal.

Operating expenses

Section 12 (contribution to landlord's expenses) will be amended by the Bill to clarify a tenant's obligation to pay referable expenses.

Tenant's proportion and referable expenses - Section 12 will be amended for largely drafting and clarification by the Bill. The only significant amendment is to section 12(1)(b) which provides that a tenant's proportion of operating expenses must not be more than its relevant proportion. After the proposed amendment is passed, this section will be subject to section 12(1e) which provides that a tenant may pay its proportion of an expense which is referrable only to a group of premises. For example, if a tenant's relevant

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proportion was, say 5%, it would pay 5% of the general operating expenses. However, the tenant may end up paying more than it's 5% proportion if, in addition to the general operating expenses, the tenant is one of, say, four shops to which a particular expense applied. In this situation, the tenant would pay its 5% proportion plus 25% of the particular expense, resulting in the tenant paying more than its proportion due to the particular expense.

Landlord's fittings and fixtures - Once the Bill is in force, a provision which requires tenants to contribute to the landlord's finishes, fittings, fixtures, equipment or services will be void, unless the disclosure statement contains a statement which notifies the tenant of the provision.

Definitions - The amendments to section 12 include new definitions for 'group of premises', 'relevant proportion' and 'total lettable area' and consequently the language in section 12 will be amended.

Minimum five year tenancy

Minimum six month lease to qualify - Under the Bill, the automatic right to a term of up to five years in the Act will be narrowed slightly and will only apply to leases with a term (or term and option) of more than six months but less than five years (**Short Lease**). Currently there is no minimum term and consequently a lease for a month would trigger the right to a five year term. A tenant's continuous possession of a retail shop for more than six months as a result of a lease renewal or continuance is considered a lease for more than six months and will therefore attract the minimum five year term. Generally speaking, this amendment will have little practical effect for most landlords. However, it gets landlords 'off the hook' from having to provide a minimum five year lease in relation to very short leases (ie under six months).

Time to exercise option - Tenants will receive an extra two months to exercise their option for a minimum term of five years under the Bill. Therefore a tenant must exercise its option no less than 30 days before the end of the term (Bill), rather than no less than 90 days (Act). See our comments below regarding a new obligation on the landlord to notify tenants of their option. Given that the landlord must now notify the tenant of the date their option expires, it seems unusual that the tenant would also be given an extension in order for it to respond. In practice, this may give a landlord only one month to find a new tenant for the premises and may impinge their ability to properly and effectively manage their centre.

Termination of lease - The wording in section 13(6) will be clarified to provide that landlords cannot terminate a lease before five years expires (whether a Short Lease or a longer lease where five years has not yet passed) other than in circumstances already specified in the Act. This is essentially a clarification of the existing section.

An additional exception will be added to allow a landlord to terminate a lease before the five year term in accordance with a provision which is the same or substantially similar to a prescribed provision.

The final exception on the termination restriction will be amended to provide that a landlord can only terminate a lease before the five year term where the Tribunal orders (on application by the tenant) that an option of renewal does not arise in relation to its Short Lease.

There are also minor drafting changes to other parts of the section.

Notices as to renewal of leases

Termination - Currently, section 13B allows a tenant to request a further term from its landlord where an option for a further term has not been provided for in the lease. Where a landlord fails to comply with the Act within 30 days, the lease is extended until the landlord complies. The Bill will give a tenant the right to terminate a lease during this extended period by written notice to the landlord. The lease will terminate on the date provided in the notice. However, if a renewed lease is granted during the extended period, the renewed lease will start on the expiry stated in the lease and will not take into account the lease extension.

Notify tenant of option - The Bill will introduce new obligations on a landlord to notify a tenant of its option to renew its lease. Under the Bill, the landlord will be required to notify its tenant in writing of the date after which the option cannot be exercised. The landlord must notify the tenant at least six months but not more than 12 months before that date. The obligation to notify the tenant will not apply where the tenant exercises or tries to exercise the option before the obligation to notify arises.

If a landlord fails to notify its tenant where it is required to do so or does not do so within the time frame, then:

- the date by which the tenant must exercise the option becomes the date six months after the landlord notifies the tenant;
- the lease will continue until that six month period expires even where it extends beyond the term of the lease; and
- the tenant can terminate the lease by written notice to the landlord after the expiry stated in the lease and before the end of the six month period.

Again, where the tenant terminates the lease during this time, the lease will terminate on the date provided in the notice. However, if the option to renew the lease is granted after the expiry stated in the lease but before the six month period expires, the option lease will start on the expiry stated in the lease and will not take into account the lease extension.

Relocation

Relocation - New sections will be introduced under the Bill to provide for tenant relocation.

Relocation clauses will be void unless it is in the prescribed form, approved by the Tribunal, or is not a Short Lease and is in accordance with the Act.

A relocation clause is in accordance with the Act if it provides that:

- the landlord must give at least six months written notice of a proposed relocation (**relocation notice**);
- the relocation notice gives details of an alternative shop for the tenant (if in a shopping centre, the alternative must also be in the shopping centre);
- the tenant is offered a new lease of the alternative shop on the same or better terms except that:
  (a) the term must not be shorter than the remaining term of the existing lease; and

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(b) the rent is no more than the rent for the current premises (adjusted for the difference in commercial value of the current and alternative premises at the time of relocation); and

- the landlord must pay the tenant's reasonable relocation costs including:
  (a) dismantling fittings, equipment or services;
  (b) replacing, re-installing or modifying finishes, fittings, equipment or services to the standard in the current premises just before the relocation, but only to the extent they are reasonably required in the alternative shop;
  (c) packing and removal costs; and
  (d) incurred legal costs.

If the landlord does not offer the tenant an alternative shop, the landlord must pay the tenant reasonable compensation as agreed in writing or determined by the Tribunal.

The Tribunal can approve an alternative relocation provision if it is satisfied that special circumstances exist which require it to approve the provision. The tenant must be given notice of the landlord's application to the Tribunal. There is no guidance as to what may be considered 'special circumstances'. However, it is likely the Tribunal will assess these on a case by case basis.

In respect of a shopping centre, a landlord can make an application to the Tribunal for approval of a relocation clause for any number of retail leases to which the landlord considers the special circumstances apply.

Refurbishment - A clause requiring a tenant to refurbish or refit its premises will be void unless the clause provides sufficient detail of the refurbishment or refit to indicate the nature, extent and timing. This proposed section is quite broad and allows landlords to include refurbishment clauses provided they meet the vague standards of the section.

Legal costs

Once the Bill is passed, a landlord will not be able to claim legal costs or other expenses relating to:

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

Landlords can still claim reasonable legal costs and other expenses incurred for an assignment of lease or sublease, including evaluating the proposed assignee and for any necessary consents.

Unconscionable, misleading and deceptive conduct

Part IIA – Unconscionable conduct will be amended by the Bill to include misleading and deceptive conduct. Part IIA will be divided in two: Division 1 will contain the unconscionable conduct provisions and Division 2 will contain the misleading and deceptive conduct provisions. A number of minor drafting changes will be made for readability. The amendments to the unconscionable conduct provisions do not affect the operation of the misleading and deceptive conduct provisions and vice versa.

Unconscionable conduct - There is only one proposed change to the unconscionable conduct provisions. Section 15F will be widened to allow a landlord or tenant who suffers or is *likely to suffer* loss or damage due to the unconscionable conduct of another to apply to the Tribunal for compensation or other relief. This allows parties to take pre-emptive action to avoid suffering inevitable loss or damage.

Misleading and deceptive conduct - An entirely new Division 2 – misleading or deceptive conduct, will be introduced. The provisions will apply to all retail leases, but importantly will not apply to conduct which occurs before the sections commence.

Once passed, the Act will provide that a lease party must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive another lease party in connection with the lease. The wording of the section basically reflects section 18 of the *Competition and Consumer Act 2010* (Cth) (previously section 52 of the *Trade Practices Act 1974* (Cth)) with the necessary variations for retail leases.

The remainder of the proposed provisions in Division 2 are the same as the unconscionable conduct provisions in Division 1, with the required amendments for misleading and deceptive conduct.

Other amendments

There are a number of other proposed amendments which will be made to the Act when the Bill is passed. The balance of amendments are drafting, clarification or transitional provisions.

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