

Property Update

June 2011

The Small Business Commissioner and the proposed amendments to the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)*

In addition to the proposed changes to the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)* (**Retail Shops Act**) set out in our last update, the Retail Shops Act will also be amended by the *Small Business and Retail Shop Legislation Amendment Bill 2011 (WA)* (**Bill**).

Primarily, the Bill amends the *Small Business Development Corporation Act 1983 (WA)* (**SBDC Act**) by updating and clarifying the roles and responsibilities of the Board, Small Business Development Corporation (**SBDC**) and the Minister for Small Business (currently, the Honourable Simon O'Brien MLC).

In addition, the Bill introduces a new role of 'Small Business Commissioner' (**Commissioner**) (being the SBDC's CEO,



currently described in the SBDC Act as the 'Managing Director') who, amongst other things, can receive and investigate complaints by small businesses and provide alternative dispute resolution (**ADR**).

The Bill amends the Retail Shops Act to allow parties to a retail lease to get assistance from the Commissioner in respect of a dispute or matter under the Retail Shops Act or to undertake ADR.

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Small businesses

Logically, incorporating the provisions of the SBDC Act into the Retail Shops Act implies that the new provisions will apply to small businesses that are also subject to the Retail Shops Act.

However, the amendments to the Retail Shops Act do not limit the application of the provisions relating to requests of the Commissioner to small businesses. The Bill refers to 'a party', rather than 'a party who is considered a small business' or similar. Consequently, a landlord or tenant who does not fall within the definition of 'small business', but to whom the Retail Shops Act applies, has the benefit of accessing the Commissioner. The Minister's speech moving that the Bill be read for a second time and the explanatory memorandum does not clarify the matter. The Minister's speech refers to 'resolving disputes between landlords and tenants in retail shopping centres', 'resolution of retail tenancy disputes' and later to the Commissioner being the 'central point for complaints from small business about retail tenancy...disputes'. Therefore, it is unclear whether the amendments were to apply only to small businesses or to all those subject to the Retail Shops Act.

When to use the Small Business Commissioner

Rent review disputes: Section 11 of the Retail Shops Act will be specifically

amended to allow a rent review dispute to be resolved by a licensed valuer nominated by the Commissioner at the request of each (by 'each' presumably it means 'both') of the parties.

The section will also be amended so that parties can use any (or all) of the methods noted in section 11(3) to determine the rent. Currently, parties can only refer their dispute to either one agreed valuer or two valuers (one appointed by each party). Consequently, parties could use the Commissioner nominated valuer in situations where the parties cannot agree on one valuer, would rather not have two valuers or perhaps where the two valuers cannot reach a decision.

The Bill provides that information given to a valuer to determine the rent is confidential, but if the matter is referred to the Commissioner, then that confidential information can be disclosed to the Commissioner, if required.

General matters: 'Part III - Powers and procedure for dealing with matters' of the Retail Shops Act will contain the bulk of the amendments. Once passed it will allow a person to request the Commissioner's assistance to:

- resolve a matter; or
- undertake ADR,

where that person is entitled to make an application, referral or submission (for ease

of reference, together referred to as an *application*) to the Tribunal.

The Commissioner can provide assistance as above in respect of:

- a 'small business dispute'; or
- a matter or dispute under the Retail Shops Act.

A 'small business dispute' is a dispute about an unfair market practice which affects a small business or the actions of a public sector body which affect a small business' commercial activities.

Request to provide assistance: A party who is entitled to make an application to the Tribunal can request the Commissioner's assistance with any dispute or matter under the Retail Shops Act. For example, a failure to provide disclosure statements or tenant guides, rent reviews or leases for a minimum five year term. Regulations can exclude certain matters from being subject of a request to the Commissioner. Presumably, these exclusions will cover circumstances where for example, the Tribunal must endorse particular clauses.

Undertake ADR: If ADR is requested, the Commissioner must decide whether (and to what extent):

- the parties should get further advice or help before ADR starts;
- to start ADR; or
- to refuse ADR.

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If the Commissioner decides to start ADR, it can appoint a facilitator who has the appropriate skills and experience to conduct the ADR. The Commissioner has the power to join others to the ADR proceedings if they have sufficient interest in the matter and consent (eg a head landlord).

Small Business Commissioner's certificate

The Commissioner can issue a certificate if he is satisfied that:

- a matter is unlikely to be resolved with ADR;
- ADR would not be reasonable in the circumstances; or
- ADR has failed.

The certificate must be issued at the request of a person, to allow them to make an application to the Tribunal. The logical corollary of this, though not stated, is that no certificate will be issued where either not requested (even if the Commissioner is satisfied that ADR has not or will not work), or where the Commissioner is not satisfied as above.

The certificate can include information regarding the conduct of the parties if the Commissioner considers it is appropriate in the circumstances.

Restriction of Tribunal application

An application to the Tribunal must not be made unless the Commissioner has issued a certificate, other than regulation excepted circumstances. The fact that an application to the Tribunal cannot be made until a certificate is issued does not prevent a person from making a request to the Commissioner. The Commissioner can intervene at anytime during a Tribunal proceeding. The Tribunal can have regard to a Commissioner's certificate when considering whether to make an order regarding paying fees under the *State Administrative Tribunal Act 2004* (WA).

Small Business Commissioner to perform certain functions

The Commissioner can also provide assistance in attempting to resolve disputes involving retail shop leases and provide information and guidance in

respect of retail shop leases or the Retail Shops Act.

Conclusion

Ideally, the upshot of the Bill will be that those subject to a retail lease can access the 'low-cost, non-litigious means of resolving disputes between landlords and tenants in retail shopping centres' the Western Australian Government hoped for. However, the Bill throws up a number of questions, which will be answered to some extent either through regulations or perhaps by taking guidance from the Victorian model, on which the Western Australian model is based.

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