

Submission

NSW Retail Lease Review

To:
Retail Leases Act Review
The Office of the NSW Small Business Commissioner
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1. INTRODUCTION

This Submission prepared by The Real Estate Institute of New South Wales (**Institute**) is in response to the release on the 22 November 2013 of the “*2013 Review of the Retail Leases Act 1994*” by the Minister for Small Business.

The Institute is the largest professional association of real estate agents and other property professionals in New South Wales. The Institute seeks to promote the interests of its members and the property sector on property-related issues. In doing so, the Institute has a substantial role in the formation of regulatory policy in New South Wales.

2. PRELIMINARY COMMENTS

The importance of small business to the health of the economy in New South Wales cannot be overstated. Retail traders form a significant portion of the small business community and, accordingly, it is in everyone’s interest that the New South Wales Government provide an environment within which retailers can prosper. The current *Retail Leases Act 1994* (NSW **Act**), although from a legislative perspective currently reflects Parliament’s goals, it fails to provide a simple and cost-effective leasing environment due to the interpretation and application of the Act in the professional industry.

The Institute’s members, who provide services to clients in the retail sector, regularly report the frustrations of both landlords and tenants associated with the time consumed in negotiating and completing the retail lease and associated documents.

Below is an extract from the second reading speech of the *Retail Leases Bill (No. 2) 1994*, which is important because of the discussion and parallel identified by Parliament between the residential and retail leasing environments:

“... People are desperate for the legislation, and it is great that tonight this legislation will leave this Chamber unamended, supported by both sides of the Chamber, and will become law in this State as soon as possible. In general terms the bill can be broadly equated with the successful reforms that the Residential Tenancies Act brought to private rental accommodation. That Act was a residential lessee protective measure. This bill, the Government’s bill, is a commercial lessee protective measure.” [Emphasis added]

The Institute supports a standard (prescribed) retail lease which will capture and bring to life Parliament’s intent of providing a cost-effective and efficient retail leasing environment.

3. STANDARD RETAIL LEASE

3.1 Overview

The Act already heavily prescribes many of the terms of a retail lease. It is, therefore, not a quantum leap from the Act to introduce a standard form of lease. It might be argued that it is a natural evolution of the Act and, additionally, the standard lease will better reflect Parliament's legislative intent.

3.2 Unnecessary Complexities

The Institute is aware of many instances where both the landlord and tenant have reached agreement on the essential or fundamental commercial terms of the lease only to find that their respective legal representatives are unable to reach consensus on the peripheral terms, resulting in the tenant being unable to take possession of the premises and the landlord unable to enjoy the flow of rent.

It should also be recognised that many retail leases prepared by very competent lawyers are all but impossible to decipher. The starting point for a test of a good lease, in the Institute's view, is that both the reasonably literate landlord and tenant can read and understand the lease and each of their respective obligations described in it. If they cannot, and that is regularly the case, then it makes it impossible for each of them to be compliant with their respective obligations.

If we examine now, what might be described as a relatively simple and fundamental issue, the payment and calculation of rent. One could be forgiven for asking how this could become so complicated. However, while the tenant expects to pay rent, and the landlord expects to receive it, the question of "what is the rent?" is complicated and problematic. It could be any of the following widely accepted industry terms:

- (1) Face rent;
- (2) Base rent;
- (3) Current rent;
- (4) Effective rent;
- (5) GST inclusive rent;
- (6) Gross rent;
- (7) Turnover rent;
- (8) True rent;
- (9) Net rent; or
- (10) True Gross rent.

As will now be obvious from the immediately preceding paragraph, the simple question of "what is the rent?" is anything but simple. Not surprisingly, even legal practitioners operating in this area regularly do not agree on the practical definition of the above terms. For

completeness in this area and by way of an additional layer of complexity, it is often the case that the rent is determined by what might be described as “side deals” which are buried in the lease or other documents.

We will not pursue the issue in depth, however, additional fruitful grounds for disputes and confusion is the calculation of rental increases.

Clearly rent and the calculation of rental increases is not the only issue that has become complex beyond the scope of the understanding of both the reasonably astute landlord and tenants. In the Institute’s view, a standard lease will alleviate much of that confusion and complexity and will allow both landlords and tenants to understand their rights and obligations under the lease.

The Act requires both parties to supply the other with signed disclosure documents. Those documents contain a synopsis of the pertinent terms and conditions of the relevant retail lease. In principal, the Institute considers that by supplying these documents and having them signed by each party constitutes evidence that the parties have prepared and/or read them, which is a positive outcome. In practice, however, those documents have grown in some instances to exceed 10 pages in length and have become extremely complex that the very people they are designed to inform find them impossible to decipher and a nuisance to complete. The landlord and tenant inevitably wishing to be compliant seek, and pay for, professional assistance in completing and exchanging the documents, but regularly have no knowledge of their contents.

3.3 Costs

As discussed above, the Institute is aware of many instances where parties to the lease have reached agreement on its essential terms only to have their respective legal representatives engage in protracted negotiations on the non-essential terms. The Institute does not criticise legal practitioners for diligently and vigorously advancing and/or protecting their clients’ interests, as that is their duty. That said, those negotiations are inevitable, very time-consuming and, while they continue, the tenant does not have occupation of the premises and the landlord is not receiving rent. In addition, both parties are incurring substantial legal costs.

To expedite the tenant’s occupation of the retail premises and to avoid the legal costs of preparing a retail lease, the Institute sees great value in the introduction of a standard retail lease.

Interestingly, in the current market there are parties to retail leases that have elected to use a simple form of lease, not because it is the best lease in the market but because the parties are able to avoid delay and legal costs. The standard lease can address some of the

shortcomings of industry documents whilst also allowing the parties to continue to avoid unnecessary costs and delays.

3.4 Other Benefits of a Standard Retail Lease

As the Institute has previously submitted, despite the obligation to draft a lease which is compliant with the Act, there is no single retail lease which has achieved acceptance as a standard document throughout the industry. For example, the Law Society of New South Wales and the Institute (amongst others) currently provide the market with precedent leases.

However, many law firms (particularly the larger firms) prefer to draft and use their own retail lease. A tenant presented with that form of lease will normally retain their own lawyer to review, and advise on, the proposed lease, substantially increasing the costs of the leasing process.

The Institute has been provided, on occasions, with retail leases that are very lengthy and drafted in an extremely complex manner. The Institute queries whether it is necessary for the rights and obligations of the parties to be documented in such a complex manner and believes there is great merit in prescribing a standard form of retail lease. The Institute notes that the residential environment has enjoyed this uniformity of documentation for quite some time and that it has operated efficiently, effectively and without resistance in the industry. Importantly, as mentioned in section 2 of this Submission (“Preliminary Comments”), Parliament has praised the success of the standard form of lease in the residential environment during its discussions of the Act. It appears to the Institute that copying the tried, tested and successful model used in the residential environment is a sensible and logical step to take with respect to the retail industry.

It is often the case that disputes will arise during the term of a retail lease and costs are incurred in the resolution of those disputes. The Institute holds the view that the use of a standard lease would result in efficient dispute resolution processes. That is because NCAT will not waste time determining the precise interpretation and application of disputed clauses and/or different clauses regulating the same matter. Rather NCAT will be able to make determinations in relation to the precedent clauses, saving time and providing guidance and precedent determinations that would be useful and beneficial for the market.

The precedent lease would also provide Government and industry bodies the opportunity to educate the market. A better industry understanding of the rights and obligations of landlords and tenants in a standard lease will positively impact on the number and resolution of disputes as well as business harmony generally.

The use of a standard lease would also bring efficiencies in negotiations which will enable a quicker leasing process and no delay in the commencement of occupation by the tenant. As stated above, the Institute is aware of many occasions when the landlord and tenant have

reached a commercial consensus, however, execution of the lease is delayed because their respective legal representatives are unable to quickly reach agreement on the drafting of the lease.

There are those that will argue that the standard lease does not allow the parties to draft a document that responds to the unique aspects of the premises, the parties and/or their circumstances. While the Institute accepts that there are some matters that will be unique, there will be far more common issues than those with issues that are unique. To address those specific issues, the Institute is of the view that the standard lease should permit special conditions to be included (if desired), provided that those special conditions do not affect the operation of the standard lease and are not in conflict with its terms.

The insertion of a provision similar to section 15(4) of the Residential Tenancies Act 2010 (NSW), which would enable the parties to include additional terms that do not contravene the Act, would not only allow the parties to tailor a prescribed lease to meet any issues which are peculiar to them or a particular premises or situation, but it would also ensure that the lease follows the prescribed form to the greatest extent possible.

4. OTHER STAKEHOLDER INPUT

The Institute has had the benefit from other stakeholders' draft submissions in relation to the review of this Act. The Institute considers that many of those suggestions for amendment to the Act are meritorious. Again, the Institute suggests that the best way to give effect to the Act and the other stakeholders' proposed amendments is through a standard lease.

5. CONCLUSION

Parliament has a golden opportunity, by the prescription of a mandatory lease, to pursue the legislative intent of the Act and to achieve fair, efficient and cost-effective dealings between parties to retail leases. The Institute would be willing to assist in the drafting of any prescribed form of retail lease.

Thank you for the opportunity to provide this Submission and the Institute would welcome the opportunity to discuss it further.

Yours faithfully

A handwritten signature in black ink, appearing to read "Tim McKibbin".

Tim McKibbin

Chief Executive Officer