

## Retail Leases Amendments Bill 2011

Blackstone Waterhouse Lawyers

### Introduction

In January 2011 the NSW Government released an exposure draft of the *Retail Lease Amendment Bill 2011 (Draft Bill)* to implement further amendments to the *Retail Leases Act 1994 (Act)*. The Draft Bill is designed to provide certainty and fairness in retail leasing arrangements and establish cost effective mechanisms to resolve disputes. The Government has invited submissions on the Draft Bill before **11 February 2011**. It is too early to know whether the State Opposition will go ahead with the Draft Bill in the (increasingly likely) event that the current NSW Government is not returned in the up-coming election in early 2011.

Nevertheless, it is clear that even if only some of the proposed changes are enacted, the amendments to the Act will result in greater costs and risks for lessors to enter into retail leases, and further burdens of red tape and paperwork on lessors and lessees alike.

### Summary of Draft Bill

The following is a summary of some of the more significant amendments outlined in the Draft Bill.

#### Disclosure obligations

***Lessor's disclosure statement*** - Lessors will be specifically required to provide a disclosure statement before a retail lease is entered into by way of:

- A renewal or extension of a current retail lease (*except* where there is no increase in rent); and
- Exercise of an option, at least 7 days before the last day for exercise of the option.

There will be no obligation to give a disclosure statement for a holding over tenancy.

***Lessee's rights*** - Lessee's rights are to be further reinforced so that a lessee does not give up the right to claim compensation for false, misleading or incomplete information in a lessor's disclosure statement just because the lessee chooses to terminate a retail lease for that conduct.

***The lessee will be permitted to choose either or both remedies depending on the circumstances.***

## Term and registration

**Short term tenancies** - A new section 6B is to be inserted to make it clear that the Act will apply to any period of holding over after the end of a retail lease provided the lessee remains in possession. A period of holding over will also be specifically included to determine whether or not the Act applies to a short term retail lease.

This means that a short term retail lease will be *automatically* covered by the Act if the lessee occupies the premises under that retail lease for a total period of 6 months or more. This change will not have a substantial impact on retail leasing. It reinforces the need for lessors to consider the risk of short term tenancies.

***When in doubt, lessors should treat short term tenancies as retail leases and comply with the Act, to avoid unintended and costly consequences of a short term tenancy being regulated by the Act.***

**5 year term** - Section 16 is to be amended to clarify that the lessee has the right to **elect** to take a minimum 5 year term.

***Lessors should take extra care if they intend to grant a retail lease for a term less than 5 years (when the initial term and any option are aggregated).***

**Compulsory registration** - A lessor will be required to register a retail lease if the retail lease says it is to be registered, or if the term of the retail lease (when the initial term and any option term are aggregated) is 3 years or more.

## Outgoings and fitout costs

**Outgoings** - An amendment to section 12 will state that a lessor cannot recover **outgoings** which are not disclosed in a disclosure statement given to the lessee before the retail lease was entered into.

***This amendment is unnecessary to protect lessees as the restriction is already contained in section 22 (recovery of outgoings).***

**Fitout costs** - If the lessor and lessee cannot agree on the cost (or formula to work out the cost) of fitout works before the retail lease is entered into, an independent quantity surveyor is to be appointed.

***Lessors should avoid this additional layer of regulation and cost by ensuring that they stipulate and document the cost (or formula to work out the cost) of fitout works as part of the agreed commercial terms before the retail lease is entered into.***

**Land tax** - Another amendment proposes to prohibit the recovery of **any amount** for land tax payable by a lessor. This appears to be a knee jerk reaction by the NSW Government to lessees' complaints about increases in land tax contributions as a result of substantial increases in some property values.

**Promotion levy** - Amendments to section 56 will require that at the end of the retail lease the lessor refund any unspent contribution to a **promotion levy** within 4 months after the end of the retail lease.

***Lessors will need to ensure that they have proper systems in place to track and repay any unspent amounts.***

### **Ratchet clauses**

The prohibition against **ratchet clauses** is to be reinforced to make it clear that ratchet clauses are prohibited for rent reviews on exercise of an option.

***This is unnecessary to protect lessees because the existing ratchet prohibition applies to all rent reviews and most lessors are already aware of this.***

### **Alterations and relocation**

The period of notice required to be given to a lessee before a lessor may carry out works affecting premises is extended from 2 months to **6 months**.

The **relocation provisions** in section 34A are to be amended to include:

- New premises to be offered to a lessee must have a **commercial value** that is reasonably comparable to the existing premises; and
- If the new premises do not have a commercial value that is reasonably comparable to the existing premises and the lessee chooses to terminate rather than take the new retail lease, the lessor is required to pay the lessee's **depreciated fitout costs**.

***This is a new requirement and lessors will need to factor in the potential additional costs to their project feasibility.***

### **Limit on Tribunal's jurisdiction**

The monetary limit on claims in the ADT is further increased to **\$750,000.00**.

### **Commencement of changes**

Most of the proposed amendments set out in the Draft Bill would not apply to retail leases that were entered into before the proposed amendments are enacted (if at all). The transitional provisions (and indeed all the terms of the proposed amendments) warrant detailed review if and when they are presented as a bill to Parliament.

We will monitor progress of the Draft Bill in the coming months and up date you from time to time. Please do not hesitate to contact us if you would like us to expand on or clarify any of our comments on the Draft Bill.

*Note - This paper is a summary of only some of the more significant provisions of the Draft Bill and does not purport to be exhaustive. Advice contained in it is by necessity a general overview. Lessors should not rely upon this general advice but should seek specific advice for their particular circumstances.*

**If you have any queries in relation to this Draft Bill please contact:**

**Danny Arraj**

**Managing Partner**

02 9279 0288

darraj@blackstonewaterhouse.com.au

**Mark Fitzpatrick**

**Special Counsel**

02 9279 0288

mfitzpatrick@blackstonewaterhouse.com.au