



Department of Justice and Attorney-General  
Office of the Director-General

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28 OCT 2015

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In reply please quote: 565871/1, 3023844

23 OCT 2015

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Dear Mr Stewart

Thank you for your letter dated 14 October 2015 regarding the referral of the Retail Shop Leases Amendment Bill 2015 to the Education, Tourism and Small Business Committee. I apologise for the delay in responding.

As requested in your letter, I enclose the initial briefing of the Department of Justice and Attorney-General (DJAG) on the Bill. The briefing includes a description of the differences between the current Bill and the Retail Shop Leases Amendment Bill 2014 (2014 Bill).

Copies of the stakeholder submissions that informed the development of the 2014 Bill (other than those provided on a confidential basis) are published and available at: <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/review-of-the-retail-shop-leases-act-1994>.

I also draw your attention to the submissions received by the Legal Affairs and Community Safety Committee on referral of the 2014 Bill.

The Office of the Queensland Parliamentary Counsel (OQPC) has agreed, on this occasion, to prepare a marked up copy of the *Retail Shop Leases Act 1994* showing the amendments contained in the current Bill as requested in your letter. OQPC has indicated that the marked up copy will be prepared early next week and DJAG will provide it to your Research Director, Ms Sue Cawcutt, as soon as it is available.

I nominate Ms Jane Flower, Acting Principal Legal Officer, Strategic Policy, as the DJAG contact officer for the Bill. Ms Flower is contactable on (07) 3239 6187, or at: [jane.flower@justice.qld.gov.au](mailto:jane.flower@justice.qld.gov.au).

Yours sincerely



David Mackie  
Director-General

Enc.

## **PARLIAMENTARY COMMITTEE BRIEFING NOTE**

For the Education, Tourism and Small Business Committee

### **Retail Shop Leases Amendment Bill 2015**

#### **Background and policy intent of the Bill**

The *Retail Shop Leases Act 1994* (the Act) provides a framework for addressing imbalance in negotiating power and access to information between major shopping centre landlords and small retail tenants through mandatory minimum standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.

Section 122 of the Act requires the Minister to carry out a review of the operation of the Act every seven years to decide whether its provisions remain appropriate, and to prepare and table a report on each review in the Legislative Assembly.

The Bill gives effect to the outcomes of a statutory review of the Act which commenced in late 2011 (the review).

The review consultation included a reference group process to consider options for changes to the Act raised in earlier public consultation and assist in deciding the outcomes of the review.

The reference group comprised representatives from key retail sector and professional stakeholders, being: the National Retail Association, the Australian Retailers Association, the Australian Property Institute, Lease 1, the Property Council of Australia (Qld), the Shopping Centre Council of Australia, the Queensland Newsagents Federation, the Pharmacy Guild of Australia (Qld), the Queensland Law Society, the Large Law Firm Group and the Chamber of Commerce & Industry Queensland (reference group).

The key objectives of the Bill are to:

- improve the Act's efficiency and effectiveness;
- reduce red tape for the Queensland retail sector;
- continue to safeguard small business tenants, without unduly interfering with commercial arrangements or outcomes; and
- align with the position in other key eastern seaboard States, where appropriate, to enhance operational efficiency and legal certainty for landlords and tenants operating across jurisdictions.

The statutory report on the review was tabled on 24 November 2014 by the former Government on introduction of the Retail Shop Leases Amendment Bill 2014 (2014 Bill), which lapsed upon the calling of the 31 January 2015 General State election.

#### **Main features of the Bill**

The amendments contained in the Bill are directed to streamlining the Act and reducing the regulatory burden for the Queensland retail sector, while continuing to safeguard the interests of retail tenants.

#### **Leases excluded from the operation of the Act:**

The Bill contains a number of proposals directed to narrowing the coverage of the Act and reducing red tape for Queensland business. The exclusion of the following categories of lease from the Act will remove existing compliance costs and regulatory restrictions for tenants and their landlords, and align with ordinary commercial leasing practice.



### **Enhanced and practicable lessor (landlord) disclosure:**

Clause 15 of the Bill replaces the existing lessor disclosure provisions in part 5 of the Act to enhance tenant protection, and provides clarification and appropriate mechanisms to increase flexibility and facilitate effective compliance.

### ***Waiver of lessor disclosure period***

A landlord is required to give a prospective tenant a disclosure statement in the approved form (lessor disclosure statement) at least seven days before the tenant enters into the lease (the lessor disclosure obligation).

The Bill enhances commercial flexibility by streamlining the existing waiver provision for major lessees (i.e. tenants with five or more retail shop leases nationally) in section 22(6) of the Act; and providing a mechanism for waiver of the seven day lessor disclosure period by tenants who are not major lessees.

### ***Clarified and enhanced disclosure for franchise and sub-lease arrangements***

The term 'lease' for the purposes of the Act is broadly defined as an agreement which gives a person a right to occupy premises, regardless of exclusivity. Sub-leases and licences to occupy are therefore 'leases' under the Act.

The lessor disclosure statement provides details on a number of matters which may materially impact a prospective tenant's decision whether or not to enter into a lease, and are not generally within the current or specific knowledge of a sub-lessor or licensor. For example, details of: planned refurbishment/redevelopment of the building or shopping centre in which the leased premises are located; and shopping centre annual turnover, tenancy mix or customer flow.

Submitters to the review sought clarification on the extent to which the lessor disclosure obligation applies to franchise arrangements where the franchisor (who is the tenant of premises under a retail shop lease) grants a franchisee a licence to occupy the premises for the purposes of carrying on the retail business under the franchise agreement. Clarification was also sought in relation to compliance with the lessor disclosure obligation by sub-lessors.

The Bill clarifies the lessor disclosure obligation for franchisors and sub-lessors, and provides the following procedural mechanisms to ensure effective disclosure to franchisees and sub-lessees:

- a head lessor who receives a request from a tenant who proposes to sub-lease, or grant a licence to occupy in conjunction with a franchise agreement (the sub-lessor/franchisor) must, within 28 days, give the sub-lessor/franchisor a current disclosure statement for the leased premises (the head lessor disclosure statement);
- the sub-lessor/franchisor must pay the head lessor's reasonable expenses for preparation of the head lessor disclosure statement; and
- the sub-lessor/franchisor must give the prospective sub-lessee/franchisee: a head lessor disclosure statement that is current at a date not more than two months before it is given to the sub-lessee/franchisee; and a written statement detailing any information which the sub-lessor/franchisor is or could reasonably be aware that affects the information in the head lessor disclosure statement.

### ***New requirement: landlord disclosure on renewal under an option***

Subject to tenant waiver, the Bill requires a landlord to give updated disclosure to a sitting tenant in relation to renewal under an option. The new provision establishes a mechanism to equip the tenant to make a fully informed decision whether or not to renew the lease having regard to the landlord's updated disclosure statement, before the tenant is legally bound to renew.



Clause 28 of the Bill contains technical amendment to align with the wording of the equivalent formula in the NSW Act and clarifying that the SRV must have regard to any responses provided by the lease parties.

#### **Requirements when tenant to contribute to landlord's outgoings:**

Clauses 32 and 33 of the Bill clarify, update and streamline the existing provisions in part 6, division 5 of the Act which regulate tenant liability for a landlord's outgoings for the retail shopping centre or leased building in which the tenant's shop is situated (refer explanatory notes for detail).

These provisions also clarify and align with commercial practice in relation to the treatment of tenant promotion and advertising contributions (promotion amounts) and sinking fund contributions for major maintenance and repairs (maintenance amounts). That is, the provisions relating to liability, apportionment and the accounting/audit requirements apply to promotion amounts and maintenance amounts to the extent that those amounts are treated as part of the landlord's outgoings under the lease. Maintenance amounts are generally treated as part of the landlord's outgoings under the lease. Where promotion amounts are treated as separate to landlord's outgoings under the lease, the stand-alone promotion and advertising provisions apply (see 'Promotion and Advertising' below).

Clause 33 includes technical amendments to section 38 of the Act (which prescribes how landlord's outgoings are to be apportioned) to exclude from the total area of a shopping centre or leased building taken into account in determining the apportionable outgoings for a leased shop, areas within a common area of the centre or building used for certain purposes. This provision is supported by industry stakeholders to reduce red tape for shopping centre outgoings apportionment.

Clause 33 also provides that the total area taken into account in determining the apportionable outgoings for a leased shop is the total area of the shopping centre or leased building owned by the landlord. This clarifies the operation of the apportionment provision with respect to a retail shopping centre subject to a community titles scheme.

In addition, the Bill includes stand-alone provisions (new sections 38A and 38B) to clarify the accounting and audit requirements for apportionable outgoings. This includes a new requirement for both the annual outgoings estimate and the audited annual statement to provide a breakdown of shopping centre administration costs, including management fees.

The Bill removes the existing penalty provision for a landlord's failure to give the tenant an outgoings estimate or audited annual statement and replaces it with new section 38C, which entitles a tenant to withhold payments in relation to apportionable outgoings until the landlord gives the relevant statement(s) in the approved form.

#### **Promotion and advertising:**

Provisions in part 6, division 6 of the Act apply if promotion amounts are treated as separate to landlord's outgoings under the lease.

The Bill inserts a new provision (in line with other key jurisdictions) requiring the landlord to, before the start of each accounting period, make available to the tenant a marketing plan detailing the proposed spend on promotion and advertising for the period.

The Bill also amends section 41 to require the landlord to:

- carry forward unspent promotion amounts to be applied towards future promotion spend for the centre; and
- make available to the tenant an audited annual statement of the landlord's expenditure on promotion amounts within three months after the end of the relevant accounting period.



### **Trading hours**

The Bill replaces and updates existing section 53 of the Act which makes requirements in leases for tenants to trade outside core trading hours for a retail shopping centre void. The Bill includes a provision to clarify that a condition of a retail shop lease that permits rather than requires the tenant to open the shop for trading outside the core trading hours for the centre is not void. This amendment reflects modern shopping centre practice and mix – i.e. increasingly there are tenants, such as restaurants located on the exterior of a centre, who trade outside of core hours (but within the allowable trading hours) by agreement with the landlord.

### **Removal of penalty provisions**

The Bill removes a number of existing offence provisions on the grounds that: they are not necessary; the aggrieved lease party would have recourse to the dispute resolution process under the Act in relation to the act or omission of the other party; or replacing the offence provision with an implied term provides a more direct and effective compliance incentive.

Certain offence provisions in the Act are to be retained to underscore the importance of the provision. For example, the offence provisions with respect to unauthorised disclosure of tenant turnover information by a landlord or their agent; or unauthorised disclosure of lease or submission information by an SRV.

### **QCAT jurisdiction**

The Bill removes an existing limitation on the jurisdiction of the Queensland Civil and Administrative Tribunal (QCAT) and a mediator in relation to disputes about rent arrears, and includes a technical amendment to align the monetary jurisdiction limit for a mediator with that of QCAT.

Appropriate amendments to part 8 divisions 3 to 5 of the Act to clarify the nature and extent of QCAT's jurisdiction in the context of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) will be progressed as part of the Department of Justice and Attorney-General (DJAG) audit of the specialist procedures and powers in the legislation that confers jurisdiction on QCAT (the QCAT review). Issues to be addressed in the QCAT review include: whether a party to a retail shop lease dispute can seek urgent injunctive relief under the QCAT Act if the parties have not been through the mediation process under the Act; and QCAT's power to extend the timeframe for an application to QCAT in circumstances where the lease has ended more than one year before the application is lodged.

### **Amendments to the Retail Shop Leases Regulation 2006**

Related amendments to the *Retail Shop Leases Regulation 2006* (the Regulation) are proposed to be progressed following passage of the Bill. These amendments will include the reference group recommendation that the legal advice report contain a statement by the tenant's lawyer that the tenant has been appropriately advised regarding insurance and indemnity provisions in the lease.

Amendments to the Regulation may also be needed to address the outcomes of any industry stakeholder driven review of the landlord disclosure statement. The reference group noted that a uniform landlord disclosure statement (including standardised disclosure items, terminology and form) for use at least across Queensland, NSW and Victoria would achieve significant red tape reduction and costs savings to the retail sector and recommended further consideration of this issue by industry rather than government.

### **Fundamental Legislative Principles**

The Bill is consistent with fundamental legislative principles.

### **Differences between the current Bill and the 2014 Bill**

The amendments contained in the Bill largely mirror those in the 2014 Bill. The areas of difference are set out in the table at **Attachment 1** to this brief.

## Differences between Retail Shop Leases Amendment Bill 2015 and Retail Shop Leases Amendment Bill 2014

2014 Bill	2015 Bill
N/A	Currently, the key definitions for <i>retail shop lease</i> , <i>retail shop</i> and <i>retail business</i> are contained in the dictionary in the Schedule to the Act. Clause 6 also relocates these key definitions to the 'Interpretation' provisions at the front of the Act (new ss. 5A, 5B and 5C).
<p><b>Exclusion of certain non-retail areas in a retail shopping centre from the operation of the Act:</b></p> <p><b>Cl. 5(2)</b> amend section 8 (Meaning of <i>retail shopping centre</i>) to provide that a retail shopping centre does not include a level of a building where none of the premises on that level are used for carrying on a retail business; or (if the retail shopping centre consists of two or more buildings separated by common areas or a road) premises located in a building if none of the premises in that building are used for carrying on a retail business.</p>	<p><b>Exclusion of certain non-retail leases in a retail shopping centre from the operation of the Act:</b></p> <p><b>Cl. 5, new ss. 5A(3) to (7)</b> - amend the definition of <i>retail shop lease</i> to exclude from the operation of the Act non-retail leases:</p> <ul style="list-style-type: none"> <li>• on a level of a shopping centre; or</li> <li>• in a building that is part of a shopping centre</li> </ul> <p>where (at the time the non-retail lease is entered into) 25% or less of the total leased floor area of the level or building is leased for retail business purposes.</p>
N/A	<p><b>Cl 9</b> - inserts a <b>new section 11A (Application of Act - when assignment entered into)</b>. Section 11A provides that an assignment is entered into on the earlier of (a) the first date by which a deed of assignment is signed by the lessor, assignor and assignee; and (b) the date the assignee, with the consent of the lessor, enters into possession of the retail shop under the assigned lease.</p>
N/A	<p><b>Cl 16</b> - inserts <b>new section 22B(1A)</b> which provides that the assignor must give the lessor a copy of the disclosure statement given to the assignee under section 22B(1) on the day the lessor is asked to consent to the assignment.</p>
<p><b>Cl 49</b> - replaces section 50A (Release of assignor from lease). New section 50A (Release of assignor and any guarantor from lease) provides that, when an assignment of a retail shop lease is entered into, the assignor and any guarantor of</p>	<p><b>Cl 51-</b> replaces section 50A (Release of assignor from lease). New section 50A (Release of assignor and any guarantor from lease) provides that, subject to the assignor pre-conditions in section 50A(1), when an assignment of a retail shop lease is entered into, the assignor and any guarantor of the assignor</p>



<p>the assignor are released from any liability under the lease arising from any default by the assignee.</p> <p>[Note: this provision removed all of the existing pre-conditions to release in current section 50A(1) of the Act]</p>	<p>are released from any liability under the lease arising from any default by the assignee. The assignor pre-conditions in section 50A(1) are that the assignor has complied with section 22B, or an order under section 22E(2) imposed on the assignor; and the assignor's disclosure statement is not a defective statement.</p>
<p><b>Cl 57 - omit mandatory statutory review requirement in section 122 of the Act.</b></p> <p>Section 122 requires the Minister to carry a review of the Act every 7 years to decide if its provisions remain appropriate, and to prepare and table a report on the review outcome.</p>	<p>N/A (i.e. section 122 to be retained in Act).</p>