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Dear Minister

Retail Leases Amendment Bill 2011

Thank you for your letter inviting comments on the exposure draft Retail Leases Amendment Bill 2011.

The Bill has been considered by the Law Society's Property Law Committee (Committee).

The Committee's comments on the specific provisions of the exposure draft Bill, in the context of the stated objects of the Bill where appropriate, are set out below.

Key money

Section 3 definitions

The Committee notes that this definition differs substantially from the current definition. The definition is also significantly different from the definitions in the Victorian and Western Australian retail leasing legislation (which definitions have been the subject of appellate consideration in their home jurisdictions – see the analysis in *Gordon v The Trustees of the Roman Catholic Church of the Diocese of Lismore* [2010] NSWADT 230 (21 September 2010)).

The Committee is especially concerned that concepts of "true consideration" "real consideration", and the money or benefit being "so disproportionate to the benefit" are novel and unintuitive, and would almost inevitably invite litigation to determine the scope of the definition. For example, it is not immediately clear to the Committee how the Tribunal would have applied the proposed definition to the facts in *Gordon*.

Application of Act to short term leases

Section 6A

- (e) *to make it clear that when the principal Act applies to a lease, it continues to apply during holding over by the lessee*

The proposed amendment appears to reverse the current position by providing that any holding over period is considered to be a period of possession under the lease (for the purposes of section 6A (2)).

The current position is that at the expiry of the lease term often lessors and lessees are content with holding over under the lease on the basis that either party can give a months notice to cancel the lease arrangements. This suits the parties because the position can remain fluid while each party arranges its affairs.

The proposed change means that as a result of the lessee holding over for the relevant period after the expiry of the term of a lease, the Act (including the minimum term provisions of section 16) applies to the lease.

The likely result of this change is that at the expiry of the term of a lease, the lessor will (unless the lessor has offered a renewal or extension of the lease under section 44) require either the lessee to vacate or enter into a new lease immediately, rather than run the risk of the lessee obtaining a lease with a five year term that the parties have not negotiated. The direct result of this proposed amendment is that the fluidity and practical convenience of a holding over by mutual consent is lost.

The Committee understands that the current position was the result of a deliberate policy decision and would be interested to ascertain the reason for the reversal of that policy decision.

Lessor's Disclosure Statement

Section 11 (1B)

The Committee notes that the time allowed for the lessor to provide the disclosure statement does not fit within the disclosure statement regime provided elsewhere in the Act, i.e. it is necessary for the disclosure statement to provide particulars of rent and outgoings for the renewed term which is not adequately allowed for in the timeframe provided in the proposed subsection.

The Committee suggests that the subsection should mirror the requirements set out in section 32.

Costs before fit-out

Section 13 (2A)

Section 13 (2) provides:

"(2) The maximum amount of the costs of the works, or a basis or formula with respect to those costs, is to be agreed in writing by the lessor and lessee before the lease is entered into."

The new section 13 (2A) then provides a formula in the event that the parties fail to agree.

For these subsections to be read together logically, subsection 13 (2) needs to be made subject to subsection 13 (2A).

Registration

Section 15

- (h) *to require all retail shop leases that are for a term of 3 years or more to be registered under the Real Property Act 1900 and to include a summary statement for the lease*

The Committee questions the need for the imposition of this requirement. The existing law (sections 42(1) (d) and 53 of the *Real Property Act 1900*) provides for the registration of any lease for a term **exceeding** three years.

Section 15(2) should be amended to provide for registration where the lease is for a term exceeding three years so that the requirement for registration for all the leases is consistent. The position of a lessee under an unregistered lease is protected by section 42(1) (d) of the *Real Property Act 1900*, which is a well recognized exception to the principle of indefeasibility.

The Committee also questions the need for the lessor to provide a "summary statement for the lease that includes the information, and is in the form, prescribed by the regulations under the Act". It is difficult to comment in detail on a document which is to be in a prescribed form in the absence of a draft Regulation. However, the Committee noted that the lessee will have already been supplied with all pertinent information in the lessor's disclosure statement, and in the lease itself. If this provision becomes law, the lessor must provide the summary information three times (in a disclosure statement, the lease and the summary). The necessity for such over-regulation is not apparent.

Section 15 (3)

Under the proposed regime, lessors are exposed to penalty provisions unless they lodge a lease for registration within the time stipulated or seek an extension of time from the Registrar. It is acknowledged in subsection (c) that such an extension may be necessary, for example, due to delays caused by the need to obtain mortgagee's consent.

The Committee questions the need for section 15 (3). It appears to the Committee to be imposing public policy objectives on a private commercial arrangement in a way that is not appropriate.

The Committee also strongly opposes the expansion of the inclusion of "offences" in relation to breaches of obligations of the Act that do not relate to those currently contained in the Act (key money, disclosure statements, security bonds).

The parties to retail leases are parties to a negotiated private commercial arrangement. It is not appropriate to make a breach of that private commercial arrangement an offence.

Minimum 5 year term

Section 16

- (i) *to make it clear that the decision to enter into a retail shop lease for a term of less than the minimum 5 years is at the discretion of the lessee.*

The Committee questions whether the amendment effected by inserting section 16(2A) has the effect that paragraph (i) appears to suggest that it does. As a matter of commercial reality, a lessee cannot insist on a 5 year lease without the agreement of the lessor. The term of the lease is a matter for negotiation between the parties. If the intention of the amendment is to make it clear that, in the absence of a certificate which complies with section 16, it is for the lessee (and not for the lessor) to elect whether the term of the lease is to be extended by virtue of the section, the Committee considers that the wording of paragraph (i) does not clearly articulate that intention.

The Committee also questions whether it is appropriate that the utility of a section 16(3) certificate be restricted to a certificate provided within six months of entering into the lease. To take one example considered by the Committee: Lessor and Lessee enter into a lease with little formality (and possibly without the benefit of legal advice). Seven months after doing so, Lessor becomes aware of section 16. If Lessor seeks, and Lessee is willing to obtain, a certificate under section 16(3), there seems no reason in principle why that should not be permitted, and the term of the lease shortened effective from the time of giving the certificate. The situation would, the Committee considers, be analogous to a purchaser of residential property who had exchanged contracts with a cooling off period, agreeing to supply a certificate under section 66W of the *Conveyancing Act 1919* shortening the cooling off period. The current section 16(3) (and the proposed amendment) would not allow for a certificate to take effect if provided more than six months after the lease was entered into.

Bank guarantees - guidelines

Section 16B (3)

- (j) *to provide for the publication of guidelines for the assistance of the parties to a retail shop lease in connection with arrangements for providing a bank guarantee as security for the performance of the lessee's obligations under the lease.*

The Committee questions the need for the imposition of a set of undisclosed guidelines in a commercial relationship.

Land Tax

Section 26

- (l) *to prohibit the recovery from a lessee of any outgoings attributable to land tax.*

The Committee considers that land tax is not such an invidious impost that alone amongst all other imposts lessors should be prohibited from passing it on to retail lessees. The current limitation set out in section 26 of the Act on provisions requiring the lessee to pay money to the lessor in respect of outgoings attributable to land tax, to an amount assessed on a "single holding basis", is fair and appropriate.

If the Government is of the view that retailers should not be exposed to the impost of land tax, then all premises subject to the *Retail Leases Act 1994* should be exempt from the impost of land tax.

Notice for Alteration or Refurbishment

Section 33

- (n) *to increase from two months to six months the period of notice required to be given to a lessee of an alteration or refurbishment that is likely to adversely affect the business of the lessee.*

It is noted that section 33 must be read together with section 34 which provides for the lessee to be compensated for disturbance as a result of alterations and refurbishment.

The Committee questions the need for the extension of the time period from two months to six months. What mischief does this change seeks to address?

If the change is implemented, the Committee expects it will prevent lessors from undertaking changes which may well be of benefit to the centre, because of the much longer lead times. The sanctions in section 34 are, in the Committee's view, an entirely adequate means of regulating such changes.

Relocation

Section 34A (b1)

- (o) *to require a lessor, if practicable, to offer alternative accommodation of reasonably comparative commercial value when relocating a lessee, and to enable a lessee to recover the lessee's depreciated fit-out costs if the alternative accommodation offered is not of reasonably comparable commercial value and the lessee terminates the lease.*

The Committee suggests that the addition of this subsection is unnecessary, particularly given that subsection (c) has not been amended and is incompatible with the proposed paragraph (b1). As such, the change will make the provision unworkable.

The proposed new paragraph contains the word "reasonably" twice in the same sentence – the alternative shop is to have a commercial value "reasonably comparable" to the commercial value of the existing retail shop, unless it is not "reasonably practical". The Committee suggests that the additional section does not add clarity to the parties' obligations under the Act. A lessee also has additional protection afforded by the "unconscionable conduct" provisions contained in Part 7A of the Act.

Refurbishment and refitting

Section 38

- (q) *to require a provision of a lease for refurbishment or refitting by the lessee to specify when it is required and to sufficiently specify what is required to allow the lessee to make a reasonably accurate assessment of cost.*

The Committee considers that the current provision and the existing law are adequate to protect the interests of the lessee in the event of a refurbishment or refitting.

Unexpended Advertising and Promotion contributions

Section 56

- (t) *to entitle a lessee after the end of a retail shop lease to a refund of unexpended contributions made by the lessee towards advertising and promotion of a retail shopping centre.*

It is the Committee's view that this proposal is unrealistic and unworkable. With many lessees leaving at different times it will result in unnecessary and complex accounting for lessors.

Monetary limits on the Tribunal's jurisdiction

Section 73

- (u) *to increase the monetary limit on the jurisdiction of the Administrative Decisions Tribunal (ADT) for claims arising under the principal Act from \$400,000 to \$750,000.*

The Committee notes the proposal to extend the jurisdiction of the ADT to \$750,000 being the same current monetary jurisdiction as the District Court. It is vital in the Committee's view, that this monetary increase is accompanied by a corresponding increase in the level of resources available to the Tribunal to allow it to deal with the anticipated increase and complexity in caseload.

Industry Code of Practice

Section 78

- (y) *to provide that court is to have regard to an industry code of practice prescribed by the regulations for the purposes of establishing accepted practices and interpretations within the industry concerning the leasing of retail shops.*

"Section 78 Interpretation based on industry practice" provides:

"In the interpretation of this Act, a court (as defined for the purposes of Part 8) is to have regard to accepted practices and interpretations within the industry concerning the leasing of retail shops."

It is proposed to insert: "and, for the purpose of establishing what those accepted practices and interpretations are, is to have regard to any publication that is prescribed by the regulations as an industry code of practice for the purposes of this section."

The Committee questions whether these additional words add an extra dimension to the matters that can be considered by a court. It will be a question for evidence in any dispute as to what the accepted practices and interpretations are within a particular industry. The Committee suggests that these concepts are broad enough to encompass applicable industry codes of practice.

Penalty notices

Section 84AA

- (z) *to provide for the issue of penalty notices for offences under the principal Act or the regulations*

The Committee acknowledges that the current Act contains provision for penalty notices restricted to Part 2A dealing with security bonds.

The Committee is firmly of the view that it is not appropriate to expand the range of matters to which penalty notices apply as proposed under section 84AA.

The principal Act seeks to regulate private commercial arrangements. The parties to these arrangements are not subject to a licensing regime and do not deal with public money in the same way, for example as licensees regulated by the Department such as real estate agents or travel agents. It is therefore not appropriate, in the Committee's view to make breaches of the Act the subject of penalty notices.

Further, the ability to investigate, mediate and penalize would reside in the same area of government, which the Committee considers highly inappropriate irrespective of the subject matter. This concentration of power can lead to conflict, and lack of transparency and public confidence, in the overall system.

Lead time

The Committee considers that it is crucial that a proper lead time is allowed for any legislative amendments to enable proper notification to and consideration by all of the stakeholders in the retail leasing arena.

Conclusion

The Committee members would appreciate the opportunity to discuss these issues further and the Committee Chair proposes contacting Mr Jeremy Tucker to arrange a meeting as suggested in your letter.

Once again, the Committee appreciates the opportunity to provide comments on the exposure draft of the Bill.

Yours sincerely



pw
Stuart Westgarth
President