

***Public consultation draft Retail Leases Regulation
2022 (NSW)***

**The Real Estate Institute of New South Wales
Limited**

**Submission in response to the public consultation draft
*Retail Leases Regulation 2022 (NSW)***

28 November 2022

**TO: Mr Chris Lamont, Commissioner
NSW Small Business Commission
4 Parramatta Square, 12 Darcy Street
Parramatta NSW 2150**

By email:



1. Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to a public consultation draft of the *Retail Leases Regulation 2022* (NSW) (**Draft Regulation**) and the accompanying Regulatory Impact Statement.

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

This submission was prepared with the assistance of REINSW's Commercial Chapter Committee which comprises agents who are licensed real estate professionals with experience and expertise in the retail and commercial leasing sector. They are therefore able to offer an expert working knowledge about how the *Retail Leases Act 1994* (NSW) applies in practice. This submission outlines issues and recommendations for the NSW Small Business Commissioner (**Commissioner**) to consider when reviewing the Draft Regulation.

2. Comments on the Draft Regulation

REINSW does not oppose the inclusion of a list of retail shop businesses in a schedule to the Draft Regulation as it will allow the list to change more easily over time.

Further, REINSW does not oppose the inclusion of “small bars with a maximum patron capacity of 120” as a “retail shop business” for the purpose of Schedule 1 to the Draft Regulation. REINSW agrees that such a premises falls within the scope of “retail use” especially as such premises will be selling food and drink to consumers.

REINSW does, however, oppose the inclusion of “gymnasiums and fitness centres, including yoga, barre, pilates and dance studios” (**Fitness Businesses**) as “retail shop businesses” for the purpose of Schedule 1 to the Draft Regulation. This is for the following reasons:

- a) REINSW's view is that the services provided by Fitness Businesses are “personal” and not retail in nature. This is because they provide services which allow people to stay fit and healthy and so are more akin to medical practices or other allied health services as opposed to “retail” services. REINSW questions why, if Fitness Businesses are to be considered a “retail shop business” for the purpose of the Draft Regulation, other businesses currently excluded from this definition (for example, medical and allied health businesses and real estate agencies – who also generally lease premises in shopping centres and who provide services directly to consumers) would not also be “retail shops” for the purpose of the *Retail Leases Act 1994* (NSW) (**Retail Leases Act**).
- b) The present definition of a “retail shop” in section 3(1)(b) of the Retail Leases Act incorporates Fitness Businesses located in a retail shopping centre, whereas the Draft Regulation proposes to make Fitness Businesses prescribed as “retail shop businesses” in Schedule 1 to the Draft Regulation. This would mean that even Fitness Businesses not located in a retail shopping centre would be subject to the Retail Leases Act. The problem with this is that the majority of gymnasiums and fitness centres are located in commercial office buildings, not retail shopping

centres. REINSW's view that it is not desirable to deal with a single retail lease when the rest of the building is comprised of commercial office tenancies.

- c) As discussed below in section **Error! Reference source not found.** to this Submission, REINSW's view is that the Retail Leases Act should not apply to retail shops which have a lettable area greater than 500 square metres. REINSW questions why Fitness Businesses, which can be larger than this limit, should be included within this legislative framework, and offered the same protections, in the same way that a small family run business operation might be. This is especially so since page 10 of the Regulatory Impact Statement states that 56.5% of revenue from the health and fitness industry comes from four main brands which operate on franchise models - being large commercial enterprises and which provide franchisees with a lot of template structures, business models and operating procedures. Even though the Regulatory Impact Statement qualifies that businesses over 1000 square metres would be exempt from the requirements of the Retail Leases Act pursuant to section 5, REINSW's view remains that Fitness Businesses are generally larger enterprises with sufficient resources and commercial acumen available to them and so should not be prescribed as "retail shop businesses" by Schedule 1 to the Draft Regulation. Furthermore, as REINSW discusses in section **Error! Reference source not found.** below (in which it recommends that section 5(a) of the Retail Leases Act should be amended so as to not apply to retail shops with a lettable area greater than 500 square metres) even a 500 square metre business is likely to be a large commercial concern and so should not be afforded the same protections as small businesses. As many Fitness Businesses are likely to be greater than 500 square metres this is another reason that REINSW opposes their inclusion in the list of "retail shop businesses" in Schedule 1 to the Draft Regulation.

REINSW recommends that:

- a) small bars should be included as a prescribed "retail shop business" within Schedule 1 to the Draft Regulation; and
- b) Fitness Businesses should not be included as a prescribed "retail shop business" in Schedule 1 to the Draft Regulation. Alternatively, if such businesses are to be included, Fitness Businesses which have a premises over 500 square metres in size should be exempt from the application of the Retail Leases Act.

3. Floor area exemption in section 5 of the Retail Leases Act

Section 5(a) of the Retail Leases Act provides that retail shops with a "lettable area of 1,000 square metres or more" are excluded from the application of the Retail Leases Act. REINSW's view is that the size limit in this exemption is too large and should be reduced from premises which are 1,000 square metres or more to 500 square metres or more. REINSW's view is that there are few retail premises which are of this size and that even businesses which have a lettable area of 500 square metres are likely to be large commercial concerns as opposed to small businesses, and so should not be offered the same protections in the Retail Leases Act. This is supported by a portfolio that REINSW is aware of where only two of fifty retail leases that were completed in 2022 were premises greater than 500 square metres in size.

REINSW recommends reducing the size limit in section 5(a) of the Retail Leases Act from 1,000 square metres or more to 500 square metres or more.

There needs to be a distinction between a commercial tenant or owner (who have other forms of protection and usually engage their own lawyers and other property experts) from a small business tenant or owner. Whether that be an area distinction (as above) or, alternatively, a cost of rent distinction (for example, over \$100,000 per year, being the monetary threshold where a business usually becomes a professional business with professional advice), the protection in the Retail Leases Act is important for small businesses as a safeguard against things like unconscionable conduct, to protect people who are putting their superannuation into a franchise, or to prevent the premises next door being leased to a competitor.

4. Section 32B of the Retail Leases Act – Specialist Valuers

The Commissioner has asked for REINSW's view on section 32B of the Retail Leases Act and REINSW's preliminary view is that it has no issues with this section. However, for REINSW to consider this section in more depth, it would need more time to explore this section further.

5. Landlord's possession of property in the event of a natural disaster

The Commissioner has also asked for REINSW's views on the issues with landlords obtaining possession of their property in the event of a natural disaster. **REINSW recommends** that, in the event of a natural disaster, landlords should be able to gain access to their property immediately for the purpose of either preserving it or assisting tenants to preserve their life or the property. However, again, for REINSW to consider this in more depth, it would need more time to explore in detail.

6. Prescribed Retail Lease

REINSW takes this opportunity to continue its lobbying efforts for the introduction of a prescribed retail lease. REINSW's view is that a prescribed retail lease would help resolve many hurdles which small businesses currently face when trying to lease a premises for their enterprise and that, because the Commissioner is already considering changes to the regulatory framework of the Retail Leases Act, it is the perfect opportunity to also, simultaneously, formulate and implement a prescribed retail lease.

This is not a change which has been proposed in the Draft Regulation but is a change that should be incorporated because of the significant benefits it will have for consumers and the retail sector. REINSW has long lobbied for a retail lease to be introduced by regulations supporting the Retail Leases Act, so the Draft Regulation is an ideal mechanism for prescribing such a lease.

In recent years, REINSW has met with the Office of the Small Business Commissioner (**OSBC**), NSW Treasury and NSW Business Chamber on numerous occasions to present

reasons as to why a prescribed retail lease would assist consumers and make the leasing process more efficient, streamlined, simplified and understood. For five years, REINSW was a member of the drafting committee, together with the OSBC and NSW Business Chamber, to develop the NSW Approved Retail Lease (**NARL**). The NARL was drafted with the needs of both landlords and retail tenants in mind and the intention was to encourage the industry to use the NARL since a retail lease was not mandated. It contains all the essential rights and protections for landlords and tenants so that they can have confidence that their interests and property are being protected. A Guide to Completing the NARL was also prepared as a simple step-by-step guide on how to complete the NARL. The project stalled at the Government level despite the amount of time and resources invested in preparing the NARL and its guide, and so REINSW recommends that the NARL be used as the prescribed retail lease in the Draft Regulation. Accordingly, REINSW is willing to provide a copy of the NARL and its guide to the Department if the Department so requests.

REINSW has already raised the issues in favour of such a prescribed retail lease in two of its previous submissions, which we **enclose** to this submission as Annexure A and B, respectively:

- a) REINSW's submission on the NSW Retail Lease Review dated 7 February 2014; and
- b) REINSW's submission on the *Retail Leases Amendment (Review) Bill 2016* Exposure Draft date 14 September 2016.

REINSW refers the Commissioner to the arguments presented in favour of a prescribed form in the enclosed submissions, however, the numerous advantages can be briefly summarised as follows:

- a) One of Parliament's primary intentions for the Retail Leases Act is to facilitate a cost-effective and efficient retail leasing environment. REINSW's view is that a standard form retail lease will help Parliament better achieve that goal. This is especially so as the Retail Leases Act already prescribes many required terms of such leases and deems them to be included in a retail lease. If a party is not familiar with the Retail Leases Act then, unless their retail lease includes such deemed provisions, they may not be aware that they need to comply with them. Therefore, it would be a natural progression for Parliament to develop a prescribed retail lease that includes all provisions deemed by the Retail Leases Act to be included.
- b) The complexity of the Retail Leases Act means that transacting parties often differ in their interpretation and application of its provisions. The calculation and payment of "rent" is a good example of just how complicated it can be to document commercial terms. As set out in section 3.2 of the enclosed submission on the NSW Retail Lease Review dated 7 February 2014, there are 10 different widely accepted industry terms for the definition of "rent", causing confusion and complexity when interpreting that definition. A prescribed retail lease would provide clarity and ensure parties are on the same page about the interpretation of provisions and how they should work in practice.
- c) Drafting a retail lease can be time consuming and expensive (especially in legal costs) for parties and their legal representatives. Even where the parties agree on the commercial terms it can take a long time to negotiate, and agree on, the non-essential

terms. A standard form lease would make this process faster and far more time and cost effective for all involved.

- d) The retail sector lacks uniformity when it comes to the form and substantive content of a retail lease. The provisions, format and length of retail leases used in the market vary significantly. Many retail leases are long and filled with legal jargon which makes it difficult for parties (especially small businesses who may not have regular experience dealing with complex legal documents) to understand their rights and obligations under the lease. We have seen in the residential leasing environment the benefits and effects of a prescribed residential tenancy agreement. Therefore, REINSW recommends that the Commissioner include in the Draft Regulation a prescribed retail lease for the same reasons and in the same way as Schedule 1 to the *Residential Tenancies Regulation 2019* (NSW) (**RT Regulation**) prescribes a residential tenancy agreement. A standard form retail lease would simplify the document, bring uniformity to the industry, and clarify the essential terms and conditions so that parties clearly know what is expected of them. However, REINSW proposes that the lease could still be tailored to meet the parties individual circumstances by allowing parties to add additional terms by the insertion into the Retail Leases Act of a provision similar to section 15(4) of the *Residential Tenancies Act 2010* (NSW) (**RT Act**).
- e) Creating a prescribed retail lease would reduce the NSW Civil and Administrative Tribunal's (**NCAT**) caseload for two reasons. First, parties clearly understand their rights and obligations under a lease so disputes over the terms and conditions are less likely to arise in the first place. Second, any NCAT determinations on this prescribed retail lease would provide guidance when resolving future disputes, saving time and legal costs for parties and helping NCAT better re-allocate its resources.
- f) It would streamline the processes for incoming and outgoing retail lessees by reducing negotiations and allowing the lessee to occupy the premises, and the landlord to receive rent, more quickly.

REINSW's view is that a prescribed retail lease would be as beneficial for small businesses renting retail premises as the prescribed residential tenancy agreement has been for the residential tenancies sector. Furthermore, it is REINSW's view that the current review of the regulatory framework of the Retail Leases Act provides the Commissioner with a timely opportunity to implement such a change. For this reason, REINSW recommends that the Commissioner include in the Draft Regulation a prescribed retail lease in the same way as the residential tenancy agreement is prescribed in Schedule 1 to the RT Regulation, with provision allowing parties to include additional terms not inconsistent with the prescribed retail lease equivalent to section 15(4) of the RT Act.

7. Summary

In summary, REINSW recommends:

- a) Small bars should be included as a prescribed "retail shop business" within Schedule 1 to the Draft Regulation.
- b) Fitness Businesses should not be included as a prescribed "retail shop business" in Schedule 1 to the Draft Regulation. Alternatively, if such businesses are to be included,

Fitness Businesses which have a premises over 500 square metres in size should be exempt from the application of the Retail Leases Act.

- c) Clearly distinguishing larger commercial tenants/owners from small business tenants/owners. This can be done by reducing the size limit in section 5(a) of the Retail Leases Act from 1,000 square metres to 500 square metres or introducing a cost of rent distinction (for example, over \$100,000 per year, being the monetary threshold where a business usually becomes a professional business with professional advice).
- d) That in the event of a natural disaster, landlords should be able to gain access to their property immediately for the purpose of either preserving it or assisting the tenant preserve their life or property.
- e) That the Commissioner should include in the Draft Regulation a prescribed retail lease in the same way as the residential tenancy agreement is prescribed in Schedule 1 to the RT Regulation, as well as a provision allowing parties to include additional terms not inconsistent with the prescribed retail lease equivalent to section 15(4) of the RT Act. For this purpose, REINSW recommends that the Commissioner consider the NARL as a precedent for the prescribed retail lease.

8. Conclusion

REINSW has considered the Draft Regulation and has provided its comments above, aiming to provide input on as many pertinent aspects of the Draft Regulation as possible. However, REINSW's resources are very limited and, accordingly, it does not have the capacity to undertake a thorough review and is unable to exhaustively investigate all potential issues in this submission. Nonetheless, REINSW has identified a number of matters that it believes will cause significant consumer detriment, some of which appear above.

REINSW appreciates the opportunity to provide this submission and would be pleased to discuss it further, if required.

Yours faithfully



Tim McKibbin
Chief Executive Officer

Annexure A

The following pages include REINSW's submission on the NSW Retail Lease Review dated 7 February 2014.



Submission

NSW Retail Lease Review

To:
Retail Leases Act Review
The Office of the NSW Small Business Commissioner
GPO Box 5477
Sydney NSW 2001

Email: retail.review@smallbusiness.nsw.gov.au

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

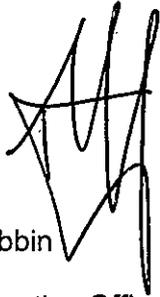
The Institute has had the benefit from other stakeholders' draft submissions in relation to the review of this Act. The Institute considers that many of those suggestions for amendment to the Act are meritorious. Again, the Institute suggests that the best way to give effect to the Act and the other 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 be 'Tim McKibbin', written over a faint, illegible stamp or background.

Tim McKibbin

Chief Executive Officer

Annexure B

The following pages include REINSW's submission on the *Retail Leases Amendment (Review) Bill 2016* Exposure Draft dated 14 September 2016.

**The Real Estate Institute of New South Wales
Limited**

Submission dated 14 September 2016

*Retail Leases Amendment (Review) Bill 2016
Exposure Draft*

By email:

nicola.gorton@smallbusiness.nsw.gov.au

1. INTRODUCTION

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the release of the Exposure Draft *Retail Leases Amendment (Review) Bill 2016* (NSW) (**Draft Bill**) by the Office of the NSW Small Business Commissioner on 5 September 2016.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. Many of its members provide services to clients in the retail sector. REINSW seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in NSW.

This Submission should be read in conjunction with the Draft Bill because REINSW has chosen to comment only on specific proposed amendments.

2. COMMENTS ON DRAFT BILL

(a) Prescribed retail lease

REINSW strongly maintains its position that a standard form of retail lease for strip shops should be prescribed by regulation. A mandatory retail lease will address the many pitfalls associated with, and experienced in, the retail leasing environment.

There are considerable benefits to the industry that will accompany a document that prescribes the terms of a retail lease for strip shops, including (without limitation):

- (i) it will address Parliament's intent of providing a cost-effective and efficient retail leasing environment;
- (ii) the *Retail Leases Act 1994* (NSW) (**Act**) is an extremely complex piece of legislation and it is common for there to be differences in interpretation and application of the Act by various parties to a transaction;
- (iii) despite the lessor and lessee agreeing to the commercial terms, it becomes quite a time-consuming process for each of their legal representatives to prepare the retail lease and associated documents whilst engaging in protracted negotiations on what could be non-essential terms, not to mention at a substantial legal cost;
- (iv) there is huge diversity in the form of retail lease in the current market, many leases being lengthy, impossible to decipher and extremely complicated;
- (v) it will alleviate much confusion and complexity in the marketplace and will permit both lessors and lessees to understand their rights and obligations under the lease;

- (vi) a simple, easy to understand prescribed form of lease would encourage lessees to have occupation of the premises sooner rather than later and lessors to receive rent without unnecessary costs and delays; and
- (vii) it will result in a decrease in disputes and more efficient dispute resolution processes because NCAT would be able to make determinations in relation to precedent clauses, saving time and providing guidance and precedent determinations that would be useful to, and beneficial for, the market.

The real estate industry has seen the above benefits in the residential leasing environment, which has enjoyed this mandatory approach for quite some time. With the existence of a prescribed residential tenancy agreement, the residential leasing environment operates efficiently and effectively, without resistance in the industry or from the parties involved in the transaction. Parliament has even praised the success of the standard form of residential lease during discussions on the Act (refer to the second reading speech of the *Retail Leases Bill (No. 2) 1994*). REINSW is of the view that replicating the tried, tested and successful model used in the residential environment is a sensible and logical step to take in the retail industry.

For the reasons set out above, REINSW recommends that Section 85 of the Act should include an additional subsection stating that the regulations may prescribe a standard form of retail lease.

Despite the prescribed nature of a standard form of retail lease, REINSW envisages that parties would be permitted to draft a document that responds to their particular circumstances and to the unique aspects of the premises. For that reason, REINSW recommends the inclusion in the Draft Bill 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. That way, parties could always tailor the prescribed lease to meet any matters that are peculiar to them or a particular premises or situation.

(b) General Comments

Rather than include new sections in the Act with peculiar numbering (for example, Sections 15A, 16BA and 16WA as included in the Draft Bill), REINSW recommends the Government use this review as an opportunity to tidy up the numbering throughout the Act so that it is easier to read and understand.

The use of the expression “sinking fund” throughout the Act may need reconsideration in light of the strata reform changes. In particular, the *Strata Schemes Management Act 2015* (NSW) has replaced the concept of a sinking fund with a “capital works fund”.

(c) Section 3: Interpretation

REINSW queries the rationale behind the removal of the definition of “assignor’s disclosure statement”, particularly since the expression remains in Section 41A and Schedule 2A to the Act. It is REINSW’s opinion that the definition should remain.

(d) Section 3. definition of “lease preparation expenses”

REINSW supports the view that the lessor should be entitled to reimbursement of the costs involved with obtaining the consent of a mortgagee as well as head lessor.

(e) Section 3(2)

With the introduction of this new subsection, Section 3 needs to be renumbered so that the definitions comprise Section 3(1).

(f) Section 11: Lessor’s Disclosure Statement

For clarity, REINSW suggests that the two references to “disclosure statement” in the second “Note” at the end of Section 11(1) of the Draft Bill be references to “lessor’s disclosure statement”.

(g) Section 12A: Lessee not required to pay undisclosed outgoings

REINSW is of the view that if new outgoings arise during the term of the lease that were not disclosed in the lessor’s disclosure statement because they did not exist at the time it was prepared, then the lessor should not be prevented from imposing those new outgoings on the lessee.

REINSW recommends that the drafting at the end of Section 12A(2)(a) be clarified so that it is clear what “*and is to be reduced accordingly*” means and how the reduction will be made. REINSW also suggests the drafting of Section 12A(2)(b) be made clearer as it appears to be quite a complicated section.

On a minor note, the reference to “our” in the second line of Section 12A(3) should be changed to “or” and the reference to “disclosures” in that same line should be changed to “disclosure”.

(h) Section 16: Minimum 5-year term

The current minimum five-year term has been removed. REINSW’s concern with this amendment is that it may result in leases having shorter terms which would give greater flexibility to lessees and less certainty to lessors. Section 16 is a commonly accepted concept in practice and ensures that both parties to the lease are properly advised of their rights and obligations by way of a section 16(3) certificate, reducing the likelihood of disputes. The requirement of a section 16(3) certificate assists with encouraging parties to seek independent legal advice before the lease is entered into, benefiting both lessors and lessees. Accordingly, REINSW opposes the repeal of section 16 of the Act.

Consequently, REINSW also opposes the repeal of Sections 21A (*Rent variations for short-term leases*) and 48(3) (*Independent legal advice*) as well as the new Clause 44 in Schedule 3, Part 7 of the Draft Bill, noting that they are provisions relating to Section 16.

(i) Section 16BB: Requirement for prior notice of claim on bank guarantee

REINSW is not comfortable with the inclusion of Section 16BB(2) on the basis that it is restricting the landlord’s right to litigate on whatever grounds they believe are appropriate. Failure of the landlord to notify the lessee of any non-performance prior to claiming on or

realising a bank guarantee would constitute a breach of statute under the new Section 16BB(1), and REINSW believes that to be sufficient protection for the lessee.

(j) Section 16BD: Obligation to return bank guarantee

REINSW has concerns with Section 16BD(1) in that 2 months may not be a sufficient amount of time before which facts surface giving rise to a claim. REINSW recommends that the time period be longer to accurately reflect how long it may take after a lease ends for the lessor to gather enough evidence and realise they are entitled to make a claim on the bank guarantee. Further, the Section requires the lessor to return the bank guarantee within 2 months after the lessee *completes* performance of their obligations under the lease for which the bank guarantee is provided as security. REINSW anticipates that this Section might cause potential disputes where the lessee considers they have completed their obligations but the lessor disagrees. REINSW suggests the Section be clarified and that it is the lessor who reasonably determines whether the lessee has completed their obligations.

(k) Section 16EA: Receipts to be given for security bonds

Although Section 16EA(3) reflects the current Act, REINSW recommends a term be included for the length of time in which copies of receipts given under this Section must be kept. It is unreasonable to expect a lessor, or lessor's agent, to keep receipts indefinitely and the Draft Bill should provide guidance on that.

(l) Section 16ZA: Service of notices and other documents on Director-General

For clarity, the Draft Bill should define "Department", particularly because it is referenced in the proposed Section 16ZA(1).

(m) Section 32B: Appointment of specialist retail valuers

REINSW is greatly appreciative of its reference in Section 32B(2) and points out that its proper name is "The Real Estate Institute of New South Wales Limited". Hence, that name should replace the reference to "the Real Estate Institute (NSW)".

(n) Section 34AA: Rights of lessee concerning conduct of owners corporation

REINSW objects to the inclusion of this clause in the Draft Bill predominantly on the basis that the lessor cannot control the actions of the owners corporation and may not have any influence in that regard. REINSW considers this clause to be unfair on the lessor and is to their detriment. If the acts or omissions of an owners corporation cause the lessee to suffer loss or damage, the lessee is entitled to exercise its rights against the lessor (if permitted under the lease and depending on the circumstances) and the owners corporation. It is unjust to give the lessee a statutory right against the lessor if the lessee suffers loss or damage as a result of the owners corporation's actions, which is beyond the lessor's control. The risk exposure that this proposed Section is trying to address comes with the nature of leasing a retail lot in a strata scheme, the same way as it comes with the nature of leasing a residential lot in a strata scheme (noting that the *Residential Tenancies Act 2010* (NSW) does not include a similar right on the part of the lessee).

REINSW also opposes the introduction of the new Clause 47 in Schedule 3, Part 7 of the Draft Bill, being a provision relating to the proposed Section 34AA.

(o) Section 39: Grounds on which consent to assignment can be withheld

REINSW insists that the existing Section 39(1)(b) remain in the Act and objects to the inclusion of Section 39(1)(b) in the Draft Bill. A lessor should be entitled to withhold consent to an assignment if, amongst other things, the proposed assignee has financial resources or retailing skills that are inferior to that of the lessee at the time of assignment, and not at the time when the lease was signed. REINSW believes that this proposed amendment is unjust and unreasonably harsh on the lessor, particularly since it is inevitable that the economy, business and industry will change after the start of a lease. The lessor's circumstances may also change as well as the cost of living. Therefore, REINSW sees no reason why the lessor should not be entitled to refuse consent to an assignment if the proposed assignee has worse financial resources or retailing skills than the lessee at the time of assignment. REINSW's objection to the inclusion of the new Section 39(1)(b) is particularly poignant when having regard to a long-term lease. REINSW can see no reason why the lessor should be put in the position they were in when the lease was signed (for instance, 10 years ago).

If the lessee wants to assign the lease for their own benefit or self-interest, REINSW cannot see why the lessor should be put in a position where they may suffer loss as a result. That would be the effect of the proposed Section 39(1)(b). Rather, the lessor should be put in a similar position to that which they are in prior to any assignment.

For the reasons above, REINSW also objects to the inclusion of the words "when the lease was first entered into" at the end of the proposed Section 41(b) in the Draft Bill.

(p) Schedule 2, Part B: Lessee's Disclosure Statement

REINSW does not support the omission of Items 5 and 6 from the prescribed form of lessee's disclosure statement. Those items make it clear, beyond doubt, which statements, representations, warranties, etc the lessee has relied upon when entering into the lease. REINSW considers this to be a good protective measure for both parties and to remove the items would cause uncertainty and a lack of awareness on that front.

(q) Schedule 2A, Part B: Assignor's Disclosure Statement, Certification and Acknowledgement

To remove duplication and potential ambiguity and confusion, REINSW recommends the deletion of:

- (i) "and have also provided the assignee with the lessor's disclosure statement and details of changes as referred to in paragraph (a)"; and
- (ii) "and of the lessor's disclosure statement and details of changes as referred to in paragraph (a)",

since the assignor's certification and assignee's acknowledgement each refer to paragraphs (a)-(f) (which obviously includes paragraph (a) and hence covers the lessor's disclosure statement and details of changes).

(r) Clause 38 in Schedule 3, Part 7: General operation of amendments

This provision makes it clear that the amendments in the Draft Bill will apply to leases entered into, and disclosure statements given, before the commencement date of the amendments, except as provided for by Schedule 3. REINSW is not opposed to the amendments applying retrospectively provided that Schedule 3 lists all exceptions that would otherwise disadvantage the parties.

3. CONCLUSION

REINSW reiterates its position that the retail leasing environment would benefit from the introduction of a mandatory retail lease for strip shops, which should be enacted by way of regulation. This review presents an opportunity, by the prescription of a mandatory retail lease, to pursue the legislative intent of the Act and to achieve fair, efficient and cost-effective dealings between the parties to a retail lease. It would substantially decrease the costs and increase the speed of the leasing process as well as bring efficiencies in negotiations, without delaying the lessee's occupation. REINSW considers it to be a win-win situation for all parties involved.

REINSW welcomes discussion on the issues raised in this submission with the Office of the NSW Small Business Commissioner and appreciates the opportunity to make this submission.

Yours faithfully



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The Real Estate Institute of New South Wales Limited