The Real Estate Institute of New South Wales Limited

Submission dated 14 September 2016

Retail Leases Amendment (Review) Bill 2016
Exposure Draft

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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