



## HOUSE OF ASSEMBLY

THURSDAY 28<sup>th</sup> SEPTEMBER 2017

### RETAIL AND COMMERCIAL LEASES (MISCELLANEOUS) AMENDMENT BILL

#### *Second Reading*

Adjourned debate on second reading.

(Continued from 5 July 2017.)

**Mr PEDERICK (Hammond) (16:21):** I rise to make a contribution in regard to the Retail and Commercial Leases (Miscellaneous) Amendment Bill 2017. The government bill, which we are debating today, was introduced on 5 July 2017. It intends to amend the Retail and Commercial Leases Act 1995 and deal with recommendations arising out of the 2016 review. It is noted that a bill was introduced in the other place by the Hon. John Darley to deal with an issue arising from the change of regulations in 2010.

Prior to the act passing in 1995, the protection of lessees, particularly in retail shop premises, was provided under the Landlord and Tenant Act 1936. Accordingly, there has been a long held view by many small business operators that their rent is a substantial financial outgoing and that the fair operation of their lease is critical to the success or failure of their business. It is also acknowledged that the significant imbalance of commercial power between the lessee and lessor, can leave the lessee at a significant disadvantage.

There have been a number of amendments to the act, particularly in 1997 and 2002. As the act currently stands, it covers most non-residential landlord tenant relationships, it imposes mandatory disclosure requirements, it prohibits certain conduct by landlords, it deems certain provisions in leases as void and it provides tenant-friendly provisions re renewal of leases and security of tenure. It also provides dispute resolution procedures. The act is supported by the Retail and Commercial Leases Regulations 2010. These are particularly important because the annual rent threshold, which attracted the application of the provisions of the act, was increased from \$250,000 to \$400,000, which was made effective on 4 April 2011.

In December 2013, the state Labor government at the time committed to a review of the act. Alan Moss, a retired District Court judge, was appointed to undertake that review. The review was handed down on 14 April 2016. On 24 May 2016, the review was released for a three-month period of public consultation, and 37 submissions were received. Unusually, the review was handed to the Small Business Commissioner rather than to the relevant minister.

The government bill deals directly with the Moss review, and it accepts 16 of the 20 recommendations. Essentially, what the bill provides for is to allow retail shop leases to move into and out of jurisdiction of the act, adjustment of the rent threshold that triggers the operation of the act and clarification that the figures used are exclusive of GST. There is a clarifying provision of information to lessees at the

time of entering into a lease. It is broadly increasing around the number of 60 per cent the maximum penalties by CPI since 1995, providing maximum penalties of \$8,000 for two new offences, and also permitting the government to exclude certain classes of leases and licences.

What also happens is that it permits the Small Business Commissioner to certify exclusionary clauses and exempt leases and licences from the act. These amendments are supported by the Small Business Commissioner and have been supported by submissions from the Property Committee of the Law Society of South Australia. The Property Council provided a submission to the review. In the main, as has been indicated by the deputy leader, the provisions of the bill are uncontroversial.

However, there is a notable omission in the review and in the government bill, namely, an issue which has been alive since the 2010 regulations and the identification of consequences of increasing the rent threshold of a number of transitional cases—for example, tenancy arrangements entered into prior to 2011 which were subsequently renewed such as another five years after the change. This is particularly concerning given the Law Society and legal and financial advisors to the landlords in question have put these concerns to previous ministers seeking relief by way of amendments to the regulations.

It is to be noted that the government consistently ignored those requests. Submissions were put to Mr Moss and the Small Business Commissioner, and again they were ignored with no explanation in the review as to why no action is being taken. The government's clear published intention back in 2010 was that the new rent threshold would not apply to leases entered into prior to 4 April 2011 or renewals of new leases entered into on right of renewal before this date.

One of the casualties of this inaction resulted in a retail tenancy which was originally referred to minister Kenyon and then minister Koutsantonis. The shadow minister wrote to the Attorney-General in May 2017, and it is noted that the current minister, minister Hamilton-Smith, responded and advised that the matter was complex. After further correspondence, he disclosed it was a matter for parties entering into a lease to obtain their own independent legal advice. It is noted that he also said:

With regard to the Moss review, the advice to the State Government was that this area needed to be clarified (i.e. leases may move in or out of the Act). It is the State Government's intention to reinforce this point in amendments to the Act which will be brought to the Parliament in due course.

As has been noted by the deputy leader, there have been two significant Supreme Court cases on this issue. One of them was the Buffalo Motor Inn case and more recently Daikou Nominees Pty Ltd v Gouger Nominees. Both these cases have the new rent thresholds which apply to existing leases. It is noted that these are ongoing issues in the courts.

In regard to the bill that was introduced in the other place by the Hon. John Darley, this bill was brought into the other place to remedy inequities consequential on changing the threshold in 2010 by regulation and protecting the interests of parties, particularly landlords with pre-existing leases. A direct consequence of the effect of the changes relates to the liability to pay land tax.

Section 30 of the act provides that lessees who have an annual rent higher than the threshold can have land tax recovered from them by the owner. The threshold increase resulted in a situation where owners who had previously passed the land tax to their tenants would be liable to pay it. This could be at a cost of tens of thousands of dollars. Clearly, this was a matter taken into account when negotiating the lease before the 2010 threshold changed by regulation. The Hon. John Darley from the other place has confirmed that parties affected by this have approached his office for relief.

This bill specifically provides statutory relief in view of the government's refusal to provide regulatory relief: specifically, if a lease was entered into or renewed before 4 April 2011 and the rent at that time was more than \$250,000, then the act will not apply. The effect of that will protect the existing rights

and obligations of those owners and lessees. As the deputy leader has stated, there will not be any financial implications to the government because the Treasurer will get his land tax from someone, whether it is the lessee or the lessor; I do not think he cares which one it is.

It is noted that the Small Business Commissioner advised our party and confirmed that he had advised the government against providing regulatory or statutory relief to the cases trapped between 4 April 2011 and the passage of this bill. He also advised that, to his knowledge, there were three cases affected (two being the subject of proceedings as we discussed earlier). It is noted that if the provision of relief was made, it could mean an unidentified number of other cases would come forward.

It is obvious that the government have been entirely relaxed about this for six years; they have not taken any responsibility. It is noted that the deputy leader put in a request to meet with Alan Moss; however, that was met with a response that his contract had finished last year. It is concerning that submissions were put to this review to specifically address this anomaly but there is no reference to the basis on which any relief was rejected in the mind of the reviewer. In fact, the government's claim that the reviewer had considered the application of the act was to expressly provide that retail shop leases could 'move into and out of' jurisdiction of the act.

In their submission, the Law Society of South Australia had requested that the government deal with any anomalies by regulation in past submissions to the review and to the Small Business Commissioner. I think it is vital that we take into account the many thousands of leases that are undertaken across the state and throughout all our separate electorates, especially in retail, which has expanded quite heavily in my electorate, including Murray Bridge, which is my main centre. We have had a couple of new shopping centres built in the last five or six years.

Currently, we are running two Woolworths stores, two Coles stores, and we have a Big W and a couple of significant shopping centres with other shops. Target is a big lessee, as is Cheap as Chips, but there is a vast range of smaller operations that come and go. The deals they have made with the lessor and the profitability of how they run their business affect how they stand up financially into the long run. What we need to find in this legislation—and I note the amendments that we are going to move from this side—is equity for everyone involved so that there is no confusion, whether you are a lessor or a lessee, as to who is going to do what under the legislation when it goes through.

It is noted that, with the amendments that are going to be debated shortly, it is about time lines around lodging the lease being taken into account to protect the people involved in these arrangements. This is significant because it can mean a real issue around the land tax component and who pays it, and it could mean inequities from either end of the argument, whether you are the lessor or the lessee. As the jurisdiction state parliament looking after this, we need to make sure we get this right so that businesses can operate effectively and that lessors get a fair go as well.