

24 November 2015

Our ref: 345 – 2 - RSL

Research Director  
Education, Tourism and  
Small Business Committee  
Parliament House  
George Street  
BRISBANE QLD 4000

By post and by email: [REDACTED]

Dear Research Director

### **Retail Shop Leases Amendment Bill 2015 (QLD)**

Thank you for the opportunity to provide feedback on the *Retail Shop Leases Amendment Bill 2015* (QLD).

The Society has been involved in stakeholder consultation and reference groups with respect to the statutory review of the *Retail Shop Leases Act 1994* from 2011. The Society is strongly of the view that periodic statutory reviews and broad consultation on legislative amendments at an early stage is the key to good law. The Society commends the wide stakeholder consultation that has taken place in the lead up to the introduction of this bill.

This letter is written with the assistance of the Queensland Law Society's Property Law and Development and Franchising Law Committees.

#### **Clause 2 – “Commencement”**

The Society notes that the Bill makes significant amendments to the *Retail Shop Leases Act 1994*. As the Act is to commence on a day to be fixed by proclamation, it would assist parties to retail shop leases, the legal and accounting professions and the retail community for there to be a reasonable time period before the provisions come into force. This will allow parties a reasonable time to understand any new obligations and make preparations to ensure compliance with the new amendments.

Further commentary on the operative provisions of the Bill follows below.

**Clause 9 – Replacement of s11 (Application of Act – when lease entered into)**

***“11A”***

Clause 11A states:

*“An assignment of a retail shop lease is entered into on the earlier of the following dates—*

*(a) the first date by which a deed of assignment is signed by the lessor, assignor and assignee;*

*(b) the date the assignee, with the consent of the lessor, enters into possession of the retail shop under the assigned lease.”*

The section is relevant for identifying when a release of an assignor under proposed section 50A will take effect.

There are generally three elements involved in an assignment of lease:

1. An assignment of the lease from the assignor to the assignee;
2. The consent of the landlord to the assignment;
3. The assignee's agreement with the landlord to pay the rent and comply with the lease.

There are several different ways these matters can be documented.

A landlord may require entry into a ***deed of consent to assignment*** which deals with elements 2 and 3 only. The assignor and assignee may enter into a separate deed of assignment or there may be no deed of assignment at all if there is a contract for the sale of the assignor's business to the assignee which provides for assignment of the lease at settlement. There are many instances of a landlord consenting to an assignment by letter without signing a deed.

The terminology used in paragraph (a), namely 'deed of assignment' is unclear as it fails to recognise that there are a number of different ways in which a lease assignment may be documented and it is therefore unclear if it would apply in a number of common transactions. It also fails to recognise that a deed or deeds may be signed by parties but may not take effect until a future date and that they may be signed but conditional upon the satisfaction of further conditions (for example the assignee providing a bank guarantee).

The reference to an assignment being “entered into” is itself likely to be confusing. What it is actually referring to is an assignment “taking effect”.

***Recommendation 1: Section 11A be amended to provide that an assignment takes effect on the earlier of:***

***(a) the date provided for in an agreement between the assignor and the assignee with the consent of the landlord and***

***(b) the date the assignee enters into possession of the premises with the consent of the landlord.***

***\*Corresponding amendments would be required to references to an assignment being entered into in the Act.***

### **Clause 15 – Replacement of ss21 to 22A**

#### ***“21C and 21D”***

The Society notes that section 21C sets out a sublessor's obligation to a sublessee under a sublease and section 21D sets out a franchisor's obligation to a franchisee under a licence/ other similar contractual right to occupy a premises. It is important to note that a Franchisor may, instead of granting a licence/contractual agreement, prefer to have a sublessor/sublessee relationship with the Franchisee. However it is not expressly clear from ss21C and 21D which section is to apply in that event.

As section 21D effectively mirrors s21C, save for subsection (1) which refers to a “licence/ other similar contractual right to occupy a premises “ and appears to redefine “franchisor” under the *Retail Shop Leases Act*, the Society recommends, for simplicity, that section 21D be removed and section 21C be amended to include granting a licence/ other similar contractual right to occupy a premises.

Alternatively if the Committee was minded to retain section 21D the Society recommends that:

- The definition of franchisor align with the definition of franchisor in the *Franchising Code of Conduct 2014*, r4:  
*“franchisor includes the following:*
  - (a) a person who grants a franchise;*
  - (b) a person who otherwise participates in a franchise as a franchisor;*
  - (c) a subfranchisor in its relationship with a subfranchisee;*
  - (d) a subfranchisor in a master franchise system;*
  - (e) a subfranchisor in its relationship with a franchisee.”*
- s21D(1)(b) be clarified that it is to apply to all franchises – irrespective of whether the retail shop lease premises are sub-leased or are occupied pursuant to a licence or other similar contractual right to occupy; and



- Remove the reference in s21D(1)(b) to “wholly or predominantly for the carrying on of a retail business,” as that is inconsistent with s5A definition of a retail shop lease.

***Recommendation 2: That section 21D be removed and section 21C be amended to include granting a licence/ other similar contractual right to occupy a premises.***

***Alternatively if the Committee was minded to retain section 21D the Society recommends that:***

- ***The definition of franchisor align with the definition of franchisor in the Franchising Code of Conduct 2014, r4:***  
***“franchisor includes the following:***
  - (a) a person who grants a franchise;***
  - (b) a person who otherwise participates in a franchise as a franchisor;***
  - (c) a subfranchisor in its relationship with a subfranchisee;***
  - (d) a subfranchisor in a master franchise system;***
  - (e) a subfranchisor in its relationship with a franchisee.”***
- ***s21D(1)(b) be clarified that it is to apply to all franchises – irrespective of whether the retail shop lease premises are sub-leased or are occupied pursuant to a licence or other similar contractual right to occupy; and***
- ***Remove the reference in s21D(1)(b) to “wholly or predominantly for the carrying on of a retail business,” as that is inconsistent with s5A definition of a retail shop lease.***

#### ***“21F”***

Clause 21F sets out that a lessee may terminate a retail shop lease by giving notice if the lessor has not complied with the disclosure statements either on entry into the retail shop lease or on renewal (“defective statement.”). However the proposed section will permit a lessor to object to a lessee’s termination and, ultimately, require the matter to be determined by QCAT. The Society does not support this proposed regime. If a landlord gives a dispute notice the lessee is left in an untenable position until the matter is resolved (which may take some time). By giving an objection notice, in many cases, the tenant will be obliged to proceed with fitting out the premises and to start paying rent. Once that is done, commercially the lessee will have no option but to proceed with the lease regardless of QCAT’s determination. In addition, the drafting of the provision leaves of several important questions open:

- If QCAT determines the lessee is entitled to terminate the lease, does the termination take effect when the lessee gave the notice or when the determination is made?

- If the termination takes effect from the date of the notice but the lessee continued trading pending the outcome of the matter, is it required to pay rent?
- Is a lessee required to proceed fitting out its premises and to pay rent until a dispute is determined. Is the lessee entitled to reimbursement of its expenses if it is subsequently determined that the termination was valid?

***Recommendation 3: Section 21F be amended to remove the lessor's ability to object to a lessee's termination for a defective disclosure statement.***

**Clause 16 – Amendment of s22B (Assignor's and prospective assignee's disclosure obligations to each other**

***"22B"***

The Society identified that there is an issue with the existing assignor disclosure regime in that, in most circumstances, the Act requires disclosure about the lease to be made *after* the prospective assignee has signed a binding contract to take an assignment of the lease. The Society is therefore supportive of the amendment to require disclosure to be made before a prospective assignee enters into a contract to purchase the assignor's business. However the requirement that disclosure be made at least 7 days before a contract is entered into is overly restrictive and likely to make it much harder for a small business owner to sell his or her business. It is sufficient to require that disclosure is made before a contract is entered into (which the Society notes is common in many other forms of statutory pre-contract disclosure – for example a disclosure statement required to be given prior to the sale of a unit under the *Body Corporate and Community Management Act 1997*). There should at least be an ability to waive the 7 days' notice requirement consistent with the proposed section 21B(2) in relation to pre-lease disclosure although the latter solution would impose additional red tape which in the Society's view is not necessary.

***Recommendation 4: Section 22B be amended to remove the '7 days prior' requirement or to include an opportunity to waive the disclosure.***

**Clause 32 – Replacement of s37 (Requirements when lessee to pay lessor's outgoings)**

***"37"***

The Society considers clause 32 (which amends s 37(1)): to provide "a lessee under a retail shop lease is not liable to pay an amount to the lessor unless the lease specifies (a) the outgoings payable... (b) how the outgoings will be determined... and (c) how the outgoings may be recovered by the lessor" will significantly increase disputes between lessors and lessees. The calculation of outgoings, particularly the apportionment of costs between different parts of a centre and the extent to which different parts may "benefit from" an outgoing, can be complex. It is unclear to what extent the new s37(1) requires the lease to specify how the outgoings will be

determined (for example is it sufficient to say that they will be allocated based on the benefit to which the tenants in a particular area benefit from an outgoing or is it necessary to specify the exact formula which will be used.?).

The Society believes it is desirable for disputes about outgoings which will arise to be determined by QCAT so that the parties to a dispute have ready access to an affordable resolution process.

***Recommendation 5: Any disputes under s37 (as amended) are considered to be a "retail tenancy dispute" that may be determined by QCAT and that section 37(1)(b)(iii) be deleted.***

**Clause 33 – Amendment of s38 (Lessee's liability to pay proportion of lessor's apportionable outgoings)**

***"38B"***

Section 38B sets out that a lessor under a retail shop lease must give the lessee an audited annual statement of the lessor's apportionable outgoings. Section 38B(8) specifies that if the centre is sold part way through a financial year, the purchaser is not required to provide the audited statements for the whole financial year. However the drafting of the new provision is defective as it is not clear that:

- the purchaser is required to provide audited statements from the date it became owner to the end of the financial year;
- the previous owner is required to provide an audited statement up to the date it ceased to be owner.

This is an important provision for the protection of lessees as it requires outgoings to be properly collected and accounted for.

***Recommendation 6: Section 38B provide provision for previous owners to provide an audited statement to the date it ceased to be the owner within 90 days of settlement.***

Thank you for the opportunity to provide commentary on the *Retail Shop Leases Amendment Bill 2015 (QLD)*. If you wish to discuss any aspect of this submission please contact our Policy Solicitor, Ms Louise Pennisi, on [REDACTED]

Yours faithfully

[REDACTED]  
Michael Fitzgerald  
President