

RETAIL SHOP LEASES BILL 1994

EXPLANATORY NOTE

GENERAL OUTLINE

Objective of the Legislation

The objective of this Bill is to promote efficiency and equity in the conduct of certain retail businesses in Queensland through the provision of mandatory minimum standards for retail shop leases and a low-cost dispute resolution process for retail tenancy disputes.

The Bill incorporates a number of major amendments to the existing *Retail Shop Leases Act 1984* and restates the entire Act in plain English.

The Bill continues, and further refines, the basic philosophy underpinning the existing Act. The “Long Title” of the existing Act indicates that the purpose of the Retail Shop Leases Act is “to regulate the making of retail shop leases and to provide for the resolution of disputes under such leases and for related purposes”. This initial two-fold legislative objective, namely setting the ground-rules for leasing and providing a forum for dispute resolution, is embodied in the Bill.

The Bill establishes a basic framework which addresses the imbalance in the market power of lessors and small retail lessees to ensure enhanced equity and efficiency in retail leasing relationships and, more broadly, in the Queensland retail sector as a whole.

In relation to the resolution of retail tenancy disputes, the Bill provides for the continuation of Mediation and Tribunal processes.

Reasons for the Bill

The Bill is the result of a detailed review of the existing Act. The review of the Act has its origin in the Government's Systematic Review of Business Legislation and Regulations, market-based concerns particularly in relation to the existing Act's coverage of rent review and outgoings issues, and a provision in the Act itself for a review to be initiated by not later than May 1994.

In February 1993, the review of the Act was initiated with the publication of an Issues Paper and a call for public comment and wide consultation on the matters addressed under the Act. Subsequently, a Position Paper indicating the preferred position of the Queensland Government was released in August 1993 for a further period of consultation.

In general terms, the review of the Act has concluded that the imbalance in market power in lessor/lessee relations is such that continued Government intervention in retail tenancy matters is warranted. This imbalance in market power has manifested itself in practices such as:—

- “ratchet clauses” and “multiple rent review” clauses in leases where “independently” determined market rents can rise but not fall or where the lessor can “select” the highest of a number of rental alternatives;
- the passing on of risks and costs to lessees through “open-ended” outgoings clauses in leases;
- very lengthy “take it or leave it” leases (the cost of which is paid for by the lessee).

The presence of an imbalance in market power does not, of itself, necessitate Government intervention. Any regulatory response must address specific issues to the minimal extent necessary to redress the identified problem. With this in mind, it is proposed that the legislation should continue to promote efficiency and equity in retail tenancy relations through the establishment of minimum mandatory leasing standards and the maintenance of a low cost dispute resolution process.

A range of specific amendments is proposed including amendments in major areas such as outgoings, lease preparation costs, sinking funds and rent review. The trading hours provisions in the Retail Shop Leases Act were considered by Parliament in conjunction with the Trading (Allowable Hours) Amendment Act which came into force in May 1994.

Estimated Cost for Government Implementation

Direct Government costs relate to the ongoing operation of the Retail Shop Leases Registry and the Mediation and Tribunal processes. The base budget allocation to cover these costs in 1994-95 is just under \$250,000. These costs are funded from the base budget allocation for the Department of Business, Industry and Regional Development.

Consultation

Consultation with stakeholders was widespread in the review and included the distribution of the Issues Paper throughout Queensland, four meetings of a Key Stakeholders Advisory Forum and meetings at twelve regional centres. Formal submissions on the Issues Paper and the Position Paper totalled 85 and 69 respectively including major submissions from representative industry associations. Follow-up discussions were held with a wide range of major stakeholders including two joint meetings on the Position Paper proposals with the key industry associations representing retail lessees and lessors.

The key associations, namely the Retailers Association of Queensland (RAQ), the Queensland Retail Traders and Shopkeepers Association (QRTSA) and the Building Owners and Managers Association (BOMA) were also invited to consider and comment on a draft of the Bill. The direct involvement of these associations in the consultation process has provided a mechanism for a negotiated resolution of the issues under consideration.

During the course of the review, consultation and detailed discussions were undertaken with a number of public sector agencies including the Department of Justice and Attorney-General, the Treasury (including the Office of State Revenue), the Department of Employment, Vocational Education, Training and Industrial Relations and the Lands Department.

The Litigation Reform Commission has been consulted on the Bill.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 sets out the short title of the Bill

Clause 2 provides for the provisions of the Bill to commence on a day to be fixed by proclamation.

PART 2—OBJECT OF ACT AND ITS ACHIEVEMENT

Clause 3 states the object of the Bill as promoting efficiency and equity in that part of the retail sector covered by the Bill.

The Bill seeks to establish a basic framework within which the market system can operate to the advantage of direct participants in the retail industry and to the broader community.

Clause 4 indicates that the object of the Bill is to be achieved through the provision of mandatory minimum standards for retail shop leases and a low-cost dispute resolution process for retail tenancy disputes.

PART 3—INTERPRETATION

Division 1—Standard definitions

Clause 5 defines certain terms used in the Bill. Certain definitions warrant particular comment.

The definitions which relate to the coverage of the Bill include “lease”, “retail business”, “retail shop”, “retail shop lease”, and “retail shopping centre” (refer Clause 8).

The coverage of the Bill remains essentially the same as for the existing Act with the definitions being modified to simplify interpretation.

In the Bill, a single Schedule of Retail Businesses, which will be prescribed by regulation, will indicate the businesses covered, whether or not the businesses are situated in a retail shopping centre. When five or more such businesses form a retail shopping centre, all businesses in the centre (whether or not in the Schedule) will be covered by the Bill.

A “retail shop lease” is defined to exclude large retail sites of more than 1,000m² operated by public corporations. This continues the existing Act’s focus on small retail lessees. To avoid circumvention of the Bill, the definition of “lease” has been broadened to include licences to occupy premises to operate a retail shop. However, premises at theme or amusement parks or at flea markets and temporary stalls at agricultural or trade shows or carnivals, festivals or cultural events have been specifically excluded.

A “lessee” and “lessor” is defined to include the former lessee and the former lessor in relation to a retail tenancy dispute. This will allow for disputes to be referred to a Retail Shop Leases Tribunal as long as the dispute is lodged within four months of expiry of the lease concerned (refer Clauses 63 and 64).

Division 2—Extended definitions

Clause 6 defines “common areas” of a retail shopping centre.

Clause 7 defines “outgoings” and specifically excludes a number of items from outgoings such as land tax, expenditure of a capital nature and contributions to depreciation or sinking funds.

Clause 8 defines “retail shopping centre”

This definition clarifies that a retail business which is separated from a retail shopping centre only by the common areas of the centre is part of the centre.

Clause 9 defines “turnover” as the gross sales of the business carried on in a leased shop for any particular period and lists a number of items which are excluded from turnover.

PART 4—OPERATION OF ACT AND FORMER ACT

Clause 10 provides that the Bill will bind all persons, including the State.

Clauses 11 and 12 clarify the application of the Bill in relation to when and where a retail shop lease is entered into.

Clause 13 specifies that the Bill applies to all retail shop leases with the exception of Parts 4, 5 and 6, which only apply to leases signed after the Bill's commencement.

The substantive provisions of the Bill are contained in Part 6—Minimum Lease Standards. It is not intended that Part 6 be applied to existing retail shop leases as this would have the effect of the Bill operating retrospectively.

The processes for dispute resolution and administration set out in the Bill will apply to all disputes lodged after the commencement of the Bill, notwithstanding that the lease under which a dispute has arisen was entered into prior to the commencement of the Bill.

In addition, the clause identifies a number of clauses in the Bill which modify the general application of the Bill to those specific clauses.

Clause 14 specifies the provisions in the existing Act which will continue to apply to existing retail shop leases. Generally, the substantive provisions of the existing Act continue to apply to leases entered into before the commencement of the Bill, i.e. leases signed before this Bill commences will still be required to comply with the previous Act.

Clause 15 clarifies that the Bill will not apply to a lease of premises that only becomes a retail shop after the commencement of the lease concerned. However, the Bill will continue to apply to a lease of premises which cease to be a retail shop after the commencement of that particular retail shop lease.

Clause 16 clarifies that the Bill will not apply to existing leases which were subject to enterprise exemptions under the existing Act. However, as the Bill does not continue general exemption provisions, the existing enterprise exemptions will lapse with the repeal of the previous Act, and any new leases signed by such enterprises will be covered by the Bill.

Clause 17 provides for the limited application of the Bill to retail shop leases for the carrying on of the business of a service station. In effect, this

will mean that only the mediation provisions of the Bill will apply where the Commonwealth's Petroleum Retail Marketing Franchise Act is not applicable.

Clause 18 provides that duties imposed or entitlements conferred under the Bill will be taken to be included in retail shop leases.

Clause 19 prohibits contracting out of the Bill's provisions.

Clause 20 specifies that in the event of inconsistency between a provision in a retail shop lease and a provision in the Bill, the Bill's provision will prevail.

PART 5—PRELIMINARY DISCLOSURES ABOUT LEASES

Clause 21 provides that Part 5 of the Bill will not apply to a periodic tenancy or tenancy at will, a lease entered into or renewed under an option or an assignment of a lease.

Clause 22 requires the lessor to provide the lessee with a draft of the lease and a completed disclosure statement at least 7 days before a prospective lessee enters into the lease.

The particulars contained in the disclosure statement may be prescribed by regulation.

The clause provides a "head of power" in the Bill for an approved disclosure statement form. This will include details on the premises, the term of the lease, rent, outgoings, lease preparation expenses, promotional expenses and particulars on the fitout and occupancy conditions of the lease.

The clause also provides that the lessee may terminate the lease and seek reasonable compensation from the lessor if the lessor does not comply with the requirements to provide a draft of the lease and a disclosure statement.

Clause 23 requires that the lessor provide a certified copy of the signed lease to the lessee within 30 days after the retail shop lease has been signed by the parties.

PART 6—MINIMUM LEASE STANDARDS

Division 1—Preliminary

Clause 24 clarifies that a lessee is only required to pay rent and, if specified in the lease, outgoings to the lessor.

The clause prevents lessees from being required by lessors to contribute to expenses other than rent and outgoings, unless otherwise allowed for in the Bill. This clause references those clauses in the Bill under which other payments are allowed, e.g. promotion and advertising funds.

The clause also addresses the practice of using third parties to overcome the intention of the clause by specifying that lessees are only obliged to pay rent and outgoings, whether such amounts are payable to the lessor or to someone else, or payable by the lessee or someone else.

Division 2—Turnover rent

Clause 25 requires that the formula to be used to calculate any turnover rent must be specified in the lease, and that the lessee must provide information to the lessor on turnover on a regular basis, and must provide an audited statement on turnover each year.

Division 3—Confidentiality of turnover information

Clause 26 requires that a lessor must not disclose to anyone else turnover information obtained from a lessee without the lessee's agreement.

The clause outlines exceptions to this prohibition, e.g. the disclosure of aggregate turnover information for a retail shopping centre as long as such disclosure does not provide information about an individual lessee's turnover.

The clause provides that compensation may be sought by a lessee if a person discloses information in contravention of the clause and the lessee suffers loss or damage because of the disclosure.

Division 4—Rent review

Clause 27 requires that only one basis must be used for each rent review undertaken during the term of a lease or under an option to renew or extend the lease.

The lease must state the timing of the reviews and the basis on which the reviews are to be made. The clause specifies the alternative bases for rent reviews as an index of prices, costs or wages; a fixed percentage; a fixed actual amount; or current market rent. In circumstances where rent is determined as a base rent plus a percentage of turnover above a specified threshold amount, the requirements of this clause will apply to the review of the base rent.

If a retail shop lease provides for review of rent to be undertaken with reference to more than one basis, the rent payable remains the same for the next rental period following a review as the rent which applied to the previous period.

This clause will prohibit the use of “ratchet” clauses (where rent can rise, but not fall) and “multiple rent review” clauses (where rent is reviewed by reference to two or more bases and the method resulting in the highest rent is selected).

Clause 28 provides that where rent is to be reviewed on the basis of current market rent and the lessor and lessee cannot agree on the current market rent, a specialist retail valuer who is independent of the interests of both parties will determine the current market rent.

If the lessor and lessee cannot agree on a specialist retail valuer, a valuer is to be nominated by the chief executive.

Clause 29 specifies the standards to be observed by specialist retail valuers in making determinations of current market rent. For example, the standards include determining rent on the basis of the shop being unoccupied and offered for leasing for the use or a substantially similar use as specified in the lease; using an effective rent basis; and not having regard to the value of goodwill or a lessee’s fixtures and fittings.

Clause 30 provides that a specialist retail valuer may, by written notice, require the lessor to provide any relevant information about leases in the retail shopping centre. If the lessor does not provide the information for the

valuer within 14 days of the notice, a retail tenancy dispute will exist and the lessor or valuer may lodge notice of the dispute.

Clause 31 requires that determinations of current market rent by a specialist retail valuer be in writing, identifying the location of the relevant shop and specifying the matters taken into account by the valuer in making the determination.

Clause 32 requires the specialist retail valuer to provide the valuer's determination of current market rent to the lessor and lessee within one month of being asked to make the determination.

Clause 33 states that the determination by a specialist retail valuer is the current market rent and is the rent payable under the lease for the rental period under the review.

Clause 34 states that the lessor and lessee must each pay one half of a specialist retail valuer's fee.

Clause 35 requires valuers to maintain confidentiality of information on leases disclosed to them in the course of making determinations of current market rent.

Clause 36 reinforces the Bill's provisions on rent review by ruling void certain specified provisions of a retail shop lease that seek to over-ride the Bill's provisions. For example, a lease provision which requires the lessee to appoint someone to determine current market rent other than in accordance with the Bill is void.

Division 5—Lessor's outgoings and other payments

Clause 37 provides that if the lessee is required to pay all or part of the lessor's outgoings, the lease must specify the outgoings that are payable, how the outgoings will be determined and apportioned to the lessee and how the outgoings may be recovered by the lessor.

The lessor is required to give the lessee an itemised annual estimate of outgoings at least one month prior to the commencement of the period to which the estimate relates and an audited itemised annual statement of outgoings within three months after the end of the period.

The audited annual statement must be prepared by an approved auditor. This is defined in the Bill as a registered company auditor or a member of, and a holder of a practising certificate issued by, the Institute of Chartered Accountants or the Australian Society of Certified Practising Accountants. The audited statement must be prepared in accordance with accounting and auditing standards.

The statement must contain a comparison of the annual estimates with the amounts actually spent by the lessor, and the total amount spent by the lessor compared with the total amounts paid by lessees to the lessor during the period.

The clause requires that the audited statement contain the auditor's opinion on whether the statement presents fairly the lessor's outgoings for the period.

Clause 38 specifies the basis of apportioning outgoings to lessees for those outgoings which are shared amongst lessees. For those lessees who are sharing the benefit of the outgoing, a lessee's share of the cost must not be more than the proportion that the area of the lessee's shop bears to the total area of all premises which are enjoying or sharing the benefit.

Clause 39 prohibits the payment to lessors of key money or any amount for the goodwill of a lessee's business. However, this does not prevent a lessor from seeking and receiving payment under certain conditions as set out in the clause. For example, the clause does not prevent a lessor from receiving payment for amounts spent by the lessor for fitting out the leased shop and from receiving payment for the grant of a franchise connected with the grant of a retail shop lease.

Division 6—Other payments for retail shops in retail shopping centres

Clause 40 provides that sinking funds may be maintained by lessors of retail shopping centres for major repairs and maintenance. The lessor may keep only one sinking fund for such purposes. Total payments by lessees into the fund in any year must not exceed five per cent of the lessor's total estimated outgoings for the year and the balance in the fund must not exceed \$100,000.

The accountability and audit provisions for outgoings set out in Clause 37 and the provisions relating to the apportionment of outgoings set out in

Clause 38 apply to payments by lessees into a sinking fund as if such payments were outgoings.

Clause 41 requires that if amounts paid by lessees in a retail shopping centre for promotion and advertising of the centre are not treated as part of the lessor's outgoings, the lessor must only apply such amounts to promotion and advertising which is directly attributable to the centre.

The accountability and audit provisions for outgoings set out in Clause 37 apply to payments by lessees for promotion and advertising as if such payments were outgoings.

Division 7—Implied provisions for compensation

Clause 42 provides that the compensation provisions set out in Clauses 43 and 44 will be taken to be included in retail shop leases.

Clause 43 outlines a number of situations in which the lessor is liable to pay the lessee reasonable compensation for loss or damage suffered by the lessee. The situations include physical circumstances such as relocation of a lessee during the term of the lease and other circumstances such as false or misleading statements or misrepresentations by the lessor.

Clause 44 provides that the amount of compensation payable to the lessee will be decided by the dispute resolution process if the lessor and lessee cannot agree on the amount.

Division 8—Lease dealings

Clause 45 provides that the lessor must not obstruct or hinder a lessee in dealing with the lease or other assets of the business by way of security. However, the lessee is not entitled to deal with the lease or other assets of the business by way of security without the lessor and the prospective secured creditor entering into an agreement about a range of matters specified in the clause in regard to the rights of the creditor and the lessor. This clause does not apply to a retail shop lease if the lease specifically excludes such provisions.

Clause 46 specifies timeframes for notices in relation to lease renewals. The clause applies where the lessee does not have an option to renew the lease.

When a lessee seeks, in writing, renewal of the lease, the lessor must respond within one month of receipt of the lessee's notice or six months before the end of the lease whichever is the later.

Where the lessor does not respond to a lessee's written notice seeking renewal, the lessee is entitled to occupy the shop for six months from the end of the lease on the same conditions which existed under the lease.

Division 9—General

Clause 47 establishes the lessee or prospective lessee's right to independent legal advice. A lessee cannot be compelled to use or pay for the services of a lawyer nominated by the lessor.

Clause 48 clarifies that a lessee is not liable to pay any amount for the lessor's legal or other costs of lease preparation. However, this does not prevent a lessee being required to pay survey fees, stamp duty, registration charges and reasonable expenses associated with obtaining a mortgagee's consent to the lease.

Clause 49 states that lessors must not include in a lease a provision preventing or restricting lessees from joining or forming commercial associations.

Clause 50 provides that, under certain conditions, a retail tenancy dispute exists between a lessor and lessee in relation to the assignment of a lease. The clause covers situations where the lessor's consent to an assignment is being unreasonably withheld or where the lessor seeks to impose conditions on a prospective assignee different from those applying to the lessee.

PART 7—RETAIL SHOP LEASE TRADING HOURS

Clause 51 defines the terms used in Part 7 of the Bill.

The terms “eligible shop” and “eligible lessee” extend the trading hours provisions of the Bill to all tenancies in a retail shopping centre (not just smaller lessees).

Clause 52 specifies how a vote to determine core trading hours in a shopping centre is to be taken. A 75 per cent majority of all lessees is required to set new trading hours.

Clause 53 places restrictions on what leases can specify in relation to trading hours.

A lessor may only require a lessee to open for trading during the core trading hours of a shopping centre.

A lessee that does not open for business outside core trading hours cannot be required to pay any additional outgoings resulting from extended trading.

PART 8—RETAIL TENANCY DISPUTE RESOLUTION

Division 1—Preliminary

Clause 54 protects the right of a party to lodge a dispute under this Bill, despite any provision in a lease.

Division 2—Mediation of retail tenancy disputes

Clause 55 specifies how a dispute is to be lodged.

Clause 56 outlines the chief executive’s responsibilities in processing the dispute once it has been lodged.

The chief executive is required to arrange and give written notice of a mediation conference within seven days.

Clause 57 provides that a party must conduct its own case at mediation unless otherwise approved by the Mediator.

Clause 58 requires that mediation conferences are to be held in private.

Clause 59 provides that a party cannot be compelled to attend mediation.

Clause 60 allows the Mediator to permit an interested party to take part in the mediation, but not to be a party to the dispute.

Clause 61 requires an agreement reached at mediation to be put in writing and signed by the respective parties.

Clause 62 prevents anyone from making an official record of a mediation conference.

Division 3—Reference of retail tenancy disputes to tribunal

Clause 63 outlines the circumstances under which a dispute may be referred by a Mediator to the chief executive (for referral to a Retail Shop Leases Tribunal)—for example, if the parties cannot reach agreement at mediation.

A dispute cannot be referred to the chief executive unless it is within a Tribunal's jurisdiction.

A dispute cannot be referred to the chief executive if the lease concerned expired more than four months before the dispute was lodged.

Clause 64 outlines the circumstances under which a party to a dispute can refer a dispute to a Tribunal, through the chief executive.

A party may refer such a dispute if a mediation agreement has been breached or if the Mediator refuses to refer the dispute to the Tribunal due to lack of jurisdiction—the latter being an appeal mechanism against the Mediator's ruling.

As in *Clause 63*, a dispute cannot be referred if the lease concerned expired more than four months before the dispute was lodged.

Clause 65 outlines the chief executive's responsibility in referring a dispute to a Tribunal. The chief executive must arrange and give written notice of the Tribunal hearing within 14 days.

Division 4—Retail tenancy disputes hearings

Clause 66 enables the Chairperson of the Tribunal to hold a Directions hearing prior to a hearing before the full Tribunal.

At a Directions hearing, the Chairperson alone constitutes the Tribunal. The Chairperson has the powers of the full Tribunal, other than the powers to make orders.

A Directions hearing can be held to determine questions of law, jurisdictional issues, discovery of documents, or representation at hearings.

Clauses 67 to 70 outline some procedural aspects of the Tribunal. They include—

- the Chairperson presides at hearings,
- the Chairperson decides the venue for hearings,
- hearings are to be held in private, unless the Tribunal and both parties agree otherwise,
- the Tribunal may allow persons, other than the parties to the dispute, to appear before the Tribunal.

Clause 71 limits a party's right to be represented at a hearing.

Any representative of a party to a dispute must be approved by the Tribunal. However, a party may not be represented at a hearing if the dispute does not involve the payment of money or if the sum of money involved is less than a "small claim" under the Small Claims Tribunals Act (currently \$5,000).

In addition, representation at a hearing cannot be changed if it has been previously agreed to at a Directions hearing unless the other party agrees to it.

Clause 72 generally provides for the procedures to be adopted by the Tribunal. Tribunals are required to quickly hear disputes, consistent with the fair and proper treatment of the issues under consideration.

Clause 73 allows the Tribunal to amend a dispute during the hearing. This allows the Tribunal to hear related matters if they arise during the hearing.

Clause 74 requires that matters before the Tribunal are to be decided by a majority, other than questions of law, which are to be decided by the Chairperson.

Clause 75 requires the Tribunal to keep records of hearing proceedings.

Clause 76 grants the Tribunal certain procedural powers, including power to require a person to give evidence on oath and require a person to attend a hearing.

Clause 77 outlines the procedures for the Tribunal to inspect documents.

Clause 78 establishes offences for—

- failure to attend a hearing when required to,
- failure to take an oath,
- failure, without reasonable excuse, to answer a question or to produce a document.

Clause 79 excuses a person from answering a question or producing a document if this might tend to incriminate the person.

Clauses 80 and 81 establish an offence for saying, or producing anything in writing, that is false or misleading before a Tribunal.

Clause 82 outlines actions that would be considered contempt of the Tribunal.

Division 5—Provisions about tribunal orders

Clause 83 grants the Tribunal a general power to make orders that it considers appropriate to resolve a dispute.

An order may be for a person to take an action, e.g. undertake maintenance of a common area; or discontinue an action, e.g. remove obstacles to pedestrian traffic; to pay money, e.g. compensation; or not be required to pay money, e.g. key money prohibited under the Bill.

The Tribunal may also issue an order that an outgoing item, or part of an outgoing item, was, or was not, reasonably incurred in, or directly attributable to, operating, maintaining or repairing a shopping centre or a building.

The Tribunal may also order that a formula for compensation under a lease is fair and reasonable (and should therefore be the basis for determining compensation).

Clause 84 outlines the procedures by which a person can enforce a Tribunal “enforcement order” (an order for a party to do, or not to do, anything) through the Supreme Court, if the other party fails to comply with the order.

Clause 85 outlines the procedures by which a person may enforce a payment order, through the appropriate Court, if the other party fails to pay the amount in accordance with that order.

Clause 86 establishes an offence for the failure to comply with a Tribunal’s order.

Clause 87 makes it clear that a Tribunal’s order is final and binding on both parties.

Clause 88 restricts the right of appeal on a Tribunal’s order to the grounds of lack of jurisdiction or denial of natural justice.

Division 6—Renewal of retail tenancy disputes

Clauses 89 and 90 outline the procedures for renewing a dispute if a party fails to comply with a Tribunal’s order. This enables the Tribunal to issue further orders to resolve the dispute.

Division 7—General

Clause 91 requires that each party to a dispute is to pay its own costs.

Clause 92 allows witnesses to be paid an allowance for their attendance at a hearing.

Clause 93 allows a party to withdraw a dispute at any time after the dispute is lodged.

Clause 94 prevents any dispute from being heard by arbitration or by any Court once it has been lodged as a dispute under this Bill.

This section does not apply if the dispute is withdrawn, if the dispute is outside the Mediator's or Tribunal's jurisdiction, or if Court proceedings have already commenced on the matter.

PART 9—ADMINISTRATION

Division 1—Mediators

Clause 95 enables the Minister to appoint Mediators.

Clauses 96 and 97 outline the functions and jurisdiction of Mediators.

A Mediator cannot hear a dispute if it is subject to arbitration or a Court hearing, or has been determined by either arbitration or a Court.

The Mediator is precluded from hearing disputes about arrears of rent or the amount of rent payable under a lease, or the amount of outgoings under a lease.

However, the Bill clarifies that a Mediator has jurisdiction to mediate disputes about the procedures involved in determining rent, but not disputes solely over the actual dollar amount of the rent. For example, a Mediator may seek to resolve a dispute as to whether the Bill's provisions in relation to rent review have been complied with.

Similarly, while a Mediator cannot seek to resolve a dispute on purely the dollar amount of outgoings, the Mediator can mediate disputes on how outgoings are determined. For example, a dispute may arise as to the basis for apportioning outgoings amongst lessees in a retail shopping centre.

In addition, a Mediator can mediate on whether an outgoing item or any part of such item was reasonably incurred in, or directly attributable to, the operations, maintenance or repair of a retail shopping centre or building containing a retail shop. This, for example, may involve a dispute as to whether an outgoing item incurred by a lessor was to the benefit of the lessees or to the benefit of the lessor's private or other business interests.

Clauses 98 to 100 outline the basis for the appointment, and removal from office, of Mediators.

Clause 101 requires a Mediator to present an annual report to the chief executive within two months after the end of each financial year.

Division 2—Retail shop leases tribunals

Clauses 102 to 105 provide for the appointment of members of a Retail Shop Leases Tribunal Panel, the duration and condition of such appointments, and the grounds for their removal from office.

The Panel is to consist of:

- a person who has been a Supreme or District Court Judge or a lawyer of five years standing; and
- representatives of lessors and lessees.

Clause 106 requires that a Tribunal to hear a dispute is to comprise three persons—the person who has been a Judge or a lawyer of five years standing plus one representative of lessors and one representative of lessees. The members of each Tribunal are drawn from the Tribunal Panel to hear each case.

Clause 107 provides that the aforementioned former Judge or lawyer is to be the Chairperson of each Tribunal.

Clauses 108 to 110 specify the Tribunal's functions, jurisdiction and general powers.

A Tribunal cannot hear a dispute that is currently the subject of arbitration or a Court hearing, or has been previously determined by arbitration or by a Court.

A Tribunal cannot hear a dispute about arrears of rent or the amount of rent or outgoings payable under a lease. However, as with Mediators, a Tribunal can hear disputes concerning the process by which rent and outgoings are determined under a lease. The Bill specifically empowers a Tribunal to determine whether an outgoing item, or part of an outgoing item, was reasonably incurred in, or directly attributable to, operating, maintaining or repairing a retail shopping centre or building containing a retail shop.

In addition, a Tribunal cannot hear a dispute if the amount in dispute is beyond the monetary limit of a District Court (currently \$200,000).

Clause 111 allows a Court to transfer a proceeding to a Tribunal, and conversely, allows a Tribunal to transfer a matter to a Court.

Clause 112 requires the Tribunal Chairperson to present an annual report to the chief executive within two months after the end of each financial year.

Division 3—Confidentiality, privilege and immunity

Clause 113 prevents a Mediator or Tribunal member from disclosing information coming to their knowledge during a dispute resolution process, unless the parties otherwise agree or on other grounds specified in the clause.

Clause 114 gives Mediators, Tribunal members, parties to a hearing and witnesses the same protection and immunity afforded parties in a Supreme Court hearing.

Clause 115 prevents anything said in a mediation conference or a Tribunal hearing from being admissible before any Court hearing.

Division 4—General

Clause 116 requires the chief executive to keep a register of Mediators, Tribunal Panel Members and Retail Tenancy Disputes.

The matters to be contained in the register of Retail Tenancy Disputes are specified and include the names of the parties to the dispute, the nature of the dispute and the results of the dispute resolution process.

The chief executive must keep the register open for inspection and permit persons to take extracts from the register.

Clause 117 enables the Minister and the chief executive to delegate their powers under the Bill. For example, the chief executive is able to delegate all the powers, duties and responsibilities associated with the dispute resolution process to the Registrar of the Retail Shop Leases Registry.

Clause 118 enables the chief executive to approve forms used under the Bill.

Clause 119 outlines the chief executive's responsibilities under the Bill. The chief executive is responsible for ensuring lessors and lessees are advised of the practices and procedures of dispute resolution under the Bill. The chief executive is also responsible for advising lessors and lessees on potential disputes before they are formally lodged under the Bill.

PART 10—MISCELLANEOUS

Clause 120 specifies the evidentiary provisions where there is a proceeding for an offence under the Bill.

Clause 121 enables the Governor-in-Council to make regulations under the Bill.

Clause 122 requires the Minister to carry out a review at five yearly intervals after the commencement of this Bill, with reports on each review to be tabled in Parliament.

PART 11—REPEALS AND CONSEQUENTIAL AMENDMENTS

Clause 123 specifies the Acts to be repealed.

Clause 124 provides for amendments to the Valuer's Registration Act as specified in the Schedule to the Bill.

PART 12—SAVINGS AND TRANSITIONAL PROVISIONS

Clause 125 defines the "commencing day" for Part 12 of the Bill.

Clause 126 enables the Governor-in-Council to make regulations to facilitate transitional arrangements from the existing Act.

Clauses 127 and 128 provide that references of dispute started under the current Act may be continued or completed under existing arrangements.

Clause 129 specifies that Part 12 of the Bill will expire six months after the commencing day.

SCHEDULE

This Schedule amends the *Valuer's Registration Act 1992*.

Clause 1 inserts the definition of “specialist retail valuer” in Section 3 of the Valuer's Registration Act.

Clause 2 amends the headings in Part 3 of the Valuer's Registration Act.

Clause 3 inserts Division 2—Specialist Retail Valuers in Part 3 of the Valuer's Registration Act.

The clause requires the Valuer's Registration Board to keep a list of specialist retail valuers and outlines the procedures for a registered valuer to apply to be designated a specialist retail valuer, and for the Board to grant or refuse such application.

The Board is required to keep the list of specialist retail valuers open for inspection and to permit a person to take extracts from the list.

If a person is removed as a registered valuer, the person's name must be removed from the list of specialist retail valuers.

The clause also allows the Valuer's Registration Board to take disciplinary action against a specialist retail valuer who is knowingly not independent of the interests of the parties to a valuation, or who undertakes a valuation other than in accordance with the provisions set out in the Retail Shop Leases Bill.

Clauses 4 and 5 enable a person to appeal against any decision of the Valuer's Registration Board in relation to being designated a specialist retail valuer.

Clause 6 continues the existing list of specialist retail valuers maintained under the current Retail Shop Leases Act.