

# Retail Tenancies (Amendment) Bill

## EXPLANATORY MEMORANDUM

*Clause 1* explains the purpose of the Bill.

*Clause 2* is the commencement provision. Clauses 1, 2 and 3 commence on the date of Royal Assent. The remaining provisions come into operation on a day(s) to be proclaimed, or if not proclaimed 12 months from the date of Royal Assent, on the first day after this 12 month period.

*Clause 3* defines the **Retail Tenancies Act 1986** as the Principal Act.

*Clause 4* inserts additional definitions in section 3 (1) of the Principal Act for the purposes of new Part 3 of the Principal Act.

*Clause 5* substitutes sub-sections (1) and (4) of section 9 of the Principal Act and amends sub-section (2) of section 9.

New section 9 (1) prohibits the landlord, or any person acting on behalf of the landlord, from requesting, receiving or retaining the payment of any key-money. Furthermore, any provision in a retail premises lease which requires or has the effect of requiring the payment of any key-money, or purports to entitle the landlord to any key-money, is void. The prohibition is intended to cover all situations where key-money is paid, regardless of the circumstances. It extends to all cases where key-money is paid in relation to the granting, renewal or assignment of a lease or sub-lease.

The amendment of sub-section (2) and substitution of sub-section (4) are consequential to this change.

*Clause 6* substitutes a new Part 3 in the Principal Act.

new section 20 defines the disputes to which Part 3 is applicable in the same terms as the existing section 21 (1) and re-enacts the ouster of the jurisdiction of the courts in such cases contained in existing section 21 (4), subject to the appeal provisions of Part V of the **Commercial Arbitration Act 1984** and the key-money provisions of section 9 of the Principal Act;

new section 21 establishes the procedure for commencing dispute resolution;

new section 22 provides that the conciliation must commence as soon as practicable after a conciliator has been appointed. The conciliator has the discretion to refer the matter back to the prescribed person for immediate appointment of an arbitrator, in circumstances where the conciliator believes conciliation is unsuitable, e.g. where there is an urgent case for injunctive relief. Conciliators have a broad discretion as to the conduct of conciliation proceedings;

section 22A stipulates that the conciliator's fees and expenses are to be shared equally between the parties to the dispute. Furthermore, each party is to bear his or her own costs of conciliation;

section 22B provides that where conciliation is successful a written record of the agreement must be prepared by the conciliator and/or the parties and signed by each party and the conciliator.

If in the circumstances described in section 22B (2) conciliation has failed to resolve the dispute, the conciliator must provide written advice to each party and the prescribed person of his or her decision to terminate conciliation proceedings;

- section 22C requires the prescribed person to appoint an arbitrator to the dispute after receiving advice from the conciliator that conciliation is unsuitable or has failed. In the latter instance, written advice must be obtained from the conciliator. The panel member appointed to arbitrate must not have previously conciliated that same dispute.

As in the current Act, arbitration proceedings will generally be subject to the provisions of the **Commercial Arbitration Act 1984**, but the provisions of existing section 22 (2) are re-enacted in new section 22C (3);

- section 22D provides for the appointment of a panel of conciliators and arbitrators and by the Governor in Council, on the nomination of the Minister. The instrument of appointment will specify the panel member's term of appointment (not exceeding 5 years) and any other applicable terms and conditions. Provision is made for resignation or removal from office. This section re-enacts existing section 20;
- section 22E limits the personal liability of panel members, whether acting in the capacity of conciliator or arbitrator, to acts or omissions not done in "good faith";
- section 22F provides that neither a defect or irregularity in the appointment of an individual (either as a panel member or as a conciliator or arbitrator in a particular case), nor the expiry of a panel member's term of appointment (prior to a decision or award being made), invalidates any act, decision or award that the panel member may have made;
- section 22G expressly states an intention to alter or vary the jurisdiction of the Supreme Court in relation to sections 20 and 22E of the Act, in accordance with the requirements of section 85 (5) (a) of the **Constitution Act 1975**;
- section 22H ensures that the new Part 3 will apply to all disputes arising under a retail premises lease, whether the lease was entered into before, on, or after the commencement of the new Part 3.

*Clause 7* provides that, upon the commencement of the new Part 3, the terms and conditions of appointment applying to current panel members will be transferred to the new system of dispute resolution and that they will become working members of the panel of conciliators and arbitrators.

Arbitrations commenced, but not finally determined, prior to the new Part 3 becoming operational, must continue in accordance with the unamended provisions of the Principal Act, i.e. as if this amending Act had not been enacted.

*Clause 8* makes statute law revision amendments to the Principal Act.