

29 July 2011

Ms Amanda Blackwell
Department of Commerce
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PERTH WA 6850

Email: Amanda.Blackwell@commerce.wa.gov.au

Dear Ms Blackwell

**COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS AMENDMENT BILL
2011 – LEGISLATIVE COUNCIL AMENDMENTS**

Thank you for your informing the Law Society of Western Australia of the amendments made by the Legislative Council to the *Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011*.

The Society's position has not changed from that expressed in our submission of 12 August 2009 to the Department of Commerce commenting on each of the Recommendations in the 'Overview of Amendments to the Act.' The Society's unchanged position is reflected in our comments on the Legislative Council amendments.

1. Definition of "retail shop lease"

You have advised that:

- The effect of the amendment is to remove the exclusions currently included in the definition of retail shop lease.
- This will mean that any lease of a retail shop (as defined in the Act) will be subject to the requirements of the Act – regardless of the size of the premises or tenant.

Comment

The Society opposes the proposed new definition. The 1,000 square metre exemption was introduced to comply with the Retail Shop Principle, that is, that the Act only applies to small retail premises.

It is the Society's view that the existing definition should continue to apply but provide that regulations can prescribe premises where the area of the premises exceeds 1,000 square metres.

A public company should continue to be exempt. The exemption should also relate to subsidiaries or related companies of public companies as defined in the *Corporations Act*, and to foreign companies not registered on the ASX.

2. Proposed section 11(3B) – information to be provided to valuers

You have advised that the effect of the Legislative Council amendment would see the removal of the word ‘comparable’.

Comment

The Society opposes this amendment. The obligation to provide information should be limited to comparable retail shops.

The proposed amendment would require full disclosure potentially of all Retail Shop Leases. This could result in “fishing expeditions” with considerable cost entailed.

In many cases, Tenants would be extremely concerned if the Landlord was to disclose information concerning specific commercial arrangements made between the Tenant and the Landlord. Some arrangements between a Tenant and a Landlord would not, on the face of it, appear to be reasonable and could lead to further disputation. For example, in some cases a Landlord may grant special rent to a Tenant who operates a café or restaurant business where it is clear that a commercial return will be almost impossible to obtain if rent were to be paid, on the basis of other retail premises in a complex. Inevitably, a Tenant learning of information of this nature would argue that any special rent so agreed should also apply to the Tenant.

The proposed amendment may be well intended for transparency in the market but it appears to ignore commercial reality. It is not understood how it could be relevant for the valuation of a 50 sq metre space to disclose details of the lease for a 1,000 sq metre space in the same complex. For a proper, informed valuation, it is comparable information that is relevant.

3. Proposed section 11A – confidentiality of information provided under section 11(3B)

You have advised that the effect of the Legislative Council amendment would see section 11A replaced with the following:

A person given information by a landlord under section 11(3B) may disclose that information, with the exception of information relating to financial turnover, to any other person.

Comment

The Society opposes this amendment. As a general rule and except in specific cases, information of the nature which is to be provided should be retained as confidential. There is no over-riding public interest for the information to be simply available to the public.

On the contrary, Parliament has enacted privacy laws to protect private information.
The proposed 11A seems to be out of kilter with privacy principles in modern society.

Yours sincerely

A handwritten signature in black ink, appearing to read "H. Quail", written in a cursive style.

Hylton Quail
President