

Retail Tenancies (Amendment) Bill

No.

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LEGISLATIVE ASSEMBLY

Read 1° 26 April 1995

(Brought in by Mr Heffernan and Mr Gude)

A BILL

to amend the **Retail Tenancies Act 1986** to establish a conciliation procedure, to extend the prohibition on key-money and for other purposes.

Retail Tenancies (Amendment) Act 1995

The Parliament of Victoria enacts as follows:

1. *Purpose*

The main purpose of this Act is to amend the **Retail Tenancies Act 1986**—

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- (a) to establish a procedure for conciliation of disputes; and
 - (b) to extend the prohibition on the receipt of key-money by landlords or people on their behalf.

Section headings appear in bold italics and are not part of the Act.
(See **Interpretation of Legislation Act 1984**.)

2. Commencement

- (1) Sections 1 and 3 and this section come into operation on the day on which this Act receives the Royal Assent.
- (2) Subject to sub-section (3), the remaining provisions of this Act come into operation on a day or days to be proclaimed. 5
- (3) If a provision referred to in sub-section (2) does not come into operation within a period of 12 months beginning on, and including, the day on which this Act receives the Royal Assent, it comes into operation on the first day after the end of that period. 10

No. 106/1986, reprinted to No. 83/1991 and subsequently amended by No. 91/1994.

3. Principal Act

In this Act the **Retail Tenancies Act 1986** is called the Principal Act. 15

4. Definitions

In section 3 (1) of the Principal Act insert the following definitions—

“**arbitrator**” means the member of the panel who is appointed under section 22C to arbitrate a dispute; 20

“**conciliator**” means the member of the panel or other person who is appointed under section 21 to conciliate a dispute;

“**panel**” means the panel of conciliators and arbitrators appointed under section 22D; 25

“**prescribed person**” means the person prescribed for the purposes of section 21;’.

5. Prohibition on key-money

(1) In section 9 of the Principal Act for sub-section (1) substitute— 30

“(1) Subject to sub-section (2)—

- 5
- (a) a landlord, or a person on behalf of a landlord, must not request, receive or retain the payment of—
- (i) any key-money; or
 - (ii) any consideration for the goodwill of the business carried on at the retail premises; and
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- (b) a provision in a retail premises lease is void to the extent—
- (i) that it requires or has the effect of requiring the payment of any key-money or consideration for goodwill; or
 - (ii) that the landlord, or a person claiming through the landlord, is entitled to any key-money or consideration for goodwill.”.
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- (2) In section 9 (2) of the Principal Act for “make void a provision in a retail premises lease for” **substitute** “make it unlawful for the landlord or make void a provision in a retail premises lease allowing”.
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- (3) In section 9 of the Principal Act for sub-section (4) **substitute**—
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- “(4) Any payment made, or the value of any benefit conferred, by a tenant and received by or on behalf of the landlord in contravention of sub-section (1) (a) or any payment made, or the value of any benefit conferred, under a provision in a lease that is made void by sub-section (1) (b) may be—
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- (a) recovered from the landlord by the tenant in a court of competent jurisdiction as a debt due; or
 - (b) ordered to be paid by the landlord to the
- 35
- tenant by an award made under Part 3.”.

6. Determination of disputes

For Part 3 of the Principal Act **substitute**—

“PART 3—DETERMINATION OF DISPUTES

20. *Disputes to which this Part applies*

- (1) This Part applies to any dispute between a landlord and a tenant arising under a retail premises lease, other than a claim by the landlord solely for the payment of rent or a dispute that is capable of being determined by a valuer under section 10, 11 or 13. 5
- (2) Subject to Part V of the **Commercial Arbitration Act 1984** and section 9 (4) of this Act, a dispute to which this Part applies is not justiciable in any court or tribunal. 10

21. *Disputes to be referred for conciliation* 15

- (1) A landlord or tenant or both may give notice of a dispute to which this Part applies in the prescribed form to the prescribed person.
- (2) As soon as practicable after receiving the notice, the prescribed person must appoint to conciliate the dispute— 20
 - (a) a member of the panel or other person nominated by the parties to the dispute; or 25
 - (b) if the parties fail to nominate a person, or cannot agree on a nomination, a member of the panel chosen by the prescribed person.

22. *Conduct of conciliation* 30

- (1) Subject to sub-section (2), the conciliator must commence conciliation as soon as practicable after being appointed to conciliate the dispute.

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- (2) If the conciliator considers that the dispute is unsuitable for conciliation or is unlikely to be resolved by conciliation he or she may advise the prescribed person that conciliation is not appropriate.
- (3) The procedure for conciliation is at the discretion of the conciliator.
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- (4) Evidence of anything said or done in the course of a conciliation is not admissible in an arbitration or any other proceedings relating to the subject matter of the dispute.

22A. *Costs of conciliation*

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- (1) The fees and expenses of the conciliator are to be borne jointly by the parties to the dispute.
- (2) The parties to the dispute must bear their own costs of the conciliation.

22B. *Result of conciliation*

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- (1) If the parties reach agreement following conciliation—
- (a) a written record of that agreement is to be prepared by the conciliator or the parties; and
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- (b) each party and the conciliator must sign that record; and
- (c) the conciliator must give each party and the prescribed person a copy of the signed record.
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- (2) If—
- (a) the parties inform the conciliator in writing that there is no likelihood that they will reach agreement; or

(b) the conciliator is satisfied that there is no likelihood that the parties will reach agreement—

the conciliator must advise each party and the prescribed person in writing as soon as practicable that the conciliation has failed to resolve the dispute. 5

22c. Arbitration if conciliation fails or is inappropriate

(1) As soon as practicable after receiving the conciliator’s advice under section 22 (2) or 22B (2) the prescribed person must appoint a member of the panel (other than the conciliator) to arbitrate the dispute. 10

(2) Subject to sub-section (3) and sections 20 (2) and 22E, the arbitration must be conducted in accordance with, and subject to the provisions of, the **Commercial Arbitration Act 1984**. 15

(3) In the arbitration— 20

(a) in addition to the powers conferred by the **Commercial Arbitration Act 1984**, the arbitrator has power to make a declaration as to the rights of the parties to the dispute and to grant injunctive relief in any case in which the Supreme Court would have power to make such a declaration or to grant such relief; and 25

(b) the fees and expenses of the arbitrator are to be borne jointly by the parties to the dispute unless the arbitrator is of the opinion that a party has behaved in a frivolous or vexatious manner, in which case the arbitrator may make such order as to those fees and expenses as he or she thinks just; and 30 35

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- (c) the parties to the dispute must bear their own costs unless the arbitrator is of the opinion that a party has behaved in a frivolous or vexatious manner, in which case the arbitrator may make such order as to costs as he or she thinks just.

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22D. *Panel of conciliators and arbitrators*

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- (1) The Governor in Council may, on the nomination of the Minister, appoint persons to be members of a panel of conciliators and arbitrators for the purposes of this Act.
 - 15 (2) A member of the panel holds office for the period, not exceeding 5 years, specified in his or her instrument of appointment and is eligible for re-appointment.
 - 20 (3) The **Public Sector Management Act 1992** (except Part 9 or in accordance with Part 8) does not apply to a member of the panel in respect of the appointment.
 - (4) The Governor in Council may specify terms and conditions of appointment in the instrument of appointment.
 - 25 (5) The Governor in Council may at any time remove a member of the panel from office.
 - 30 (6) A member of the panel may resign from office in writing signed by him or her and addressed to the Governor in Council.

22E. *Liability of panel members*

A member of the panel is not personally liable for anything done or omitted to be done by the member in good faith—

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- (a) in the capacity of conciliator or arbitrator under this Act; or

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- (b) in the reasonable belief that the thing was done or omitted to be done in the capacity of conciliator or arbitrator under this Act.

22F. *Effect of defect or irregularity in appointment* 5

An act, decision or award of a member of the panel is not invalid only because—

- (a) of a defect or irregularity in the appointment of the member, either as a member of the panel or as the conciliator or arbitrator in a particular dispute; or 10
- (b) of the expiry of the member’s term of appointment before the act, decision or award was done or made. 15

22G. *Supreme Court—limitation of jurisdiction*

It is the intention of this section to alter or vary section 85 of the **Constitution Act 1975** to the extent necessary to prevent the Supreme Court from— 20

- (a) entertaining any action in relation to a dispute referred to in section 20, other than an appeal or application in accordance with Part V of the **Commercial Arbitration Act 1984** or an action under section 9 (4) for the recovery of key-money or goodwill; and 25
- (b) entertaining any action for liability in relation to a matter in respect of which section 22E provides that there is no liability. 30

22H. *Transitional provision*

This Part applies to a dispute arising under a retail premises lease whether the 35

lease was entered into before, on or after the commencement of section 6 of the **Retail Tenancies (Amendment) Act 1995.**”.

5 **7. Continuity of current panel and current arbitrations**

- 10 (1) A member of the panel of arbitrators under section 20 of the Principal Act as in force immediately before the commencement of section 6 who is then in office becomes a member of the panel of conciliators and arbitrators on that commencement for the balance of his or her term of appointment, subject to the terms and conditions of his or her appointment, but may resign or be removed by the Governor in Council.
- 15 (2) If an arbitration under section 21 of the Principal Act as in force immediately before the commencement of section 6 has commenced but has not been finally determined, it must continue in accordance with the Principal Act as if this Act had not been enacted.
- 20 (3) For the purposes of sub-section (2), an arbitration is taken to have commenced if an arbitrator has been appointed to determine the dispute.

8. Statute law revision

In the Principal Act—

- 25 (a) in section 24 (1) (b) before “arbitration” insert “conciliation or”;
- (b) in the Schedule for “the Department of Industry, Technology and Resources” substitute “Small Business Victoria”.

