

Retail shop leases act – burying the ratchet!

Recent amendments to the *Retail Shop Leases Act 1994* have made provisions commonly known as 'ratchet' rent provisions void in any lease for a retail shop. The changes reflect the fact that rents may go down as the market moves in more difficult economic times.

Ratchet provisions are defined in the new Section 36A of the Act as follows:

'ratchet rent provision means any provision of a retail shop lease to the extent that it —

- (a) prevents, or enables the Lessor or another person to prevent, the rent decreasing under a rent review; or
- (b) limits or specifies, or allows the limitation or specification of, the amount by which the rent may decrease under a rent review; or
- (c) prevents, or allows the avoidance of, the rent review by the Lessor or another person for a purpose mentioned in paragraph (a) or (b).'

The common understanding of the ratchet rent provision is a mechanism whereby the review of rental ensures that the rent for the subsequent lease year will never be less than the rental for the current lease year. An example of which would be a market review where if such review resulted in a decrease of rental, the rental amount would be ratcheted and therefore remain at the current rental for the subsequent lease year rather than decreasing.

This has been a common practice by Landlords for some time.

The definition above seems broad and is yet to be fully tested in a court. It is unclear whether the intention behind the amendment is to broaden the generally accepted definition of a ratchet rent provision or whether it is meant to reinforce it.

If you are a landlord our advice generally would be to keep rental reviews at a fixed percentage to avoid any ambiguity or potential pitfalls. A recent case leading to the change of law enabled a tenant because the ratchet clause was void, to choose the method of rent review. Of course the tenant chose the lowest rent and this will continue throughout the lease so it is an ongoing problem for landlords in current leases.

Whether you wish to rent your retail shop or are entering into a lease in a retail shop as tenant, talk to us so you can be sure you are getting good, up to date advice. Ring 3849 6263 or email koneill@oneillslawyers.com.au