

CHANGES TO RETAIL LEASING LEGISLATION – WHAT YOU NEED TO KNOW

By Anthony Herro



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The key amendments to the *Retail Leases Act 1994* ('the Act') are as follows:

Increase in the jurisdictional limit

At present, the NSW Civil and Administrative Tribunal (NCAT) can only hear retail lease disputes for claims up to \$400,000. When one considers the costs that a tenant incurs to fitout a typical specialty retail shop in a shopping centre (say \$300,000 to \$400,000) and the annual gross rental (say \$250,000 to \$300,000 per year), it is readily apparent that the damages flowing from a retail lease dispute, in light of the monetary commitment, can easily exceed the current jurisdictional limit. The Bill will increase the jurisdictional limit to \$750,000. This will provide greater access to justice for both landlords and tenants.

No minimum five-year term

The Act will now no longer require that a retail lease must be for a minimum term of five years. There is no longer a requirement to obtain a section 16(3) certificate from the tenant's solicitor to waive the minimum five-year term.

This is a significant departure from one of the fundamental protections embedded in the Act. The reason for the minimum term was to ensure that a tenant had sufficient lease tenure to allow it the opportunity to realise the substantial investment in its fitout costs. On the other hand, s 16 can yield unjust outcomes in certain circumstances. For example, if a landlord and tenant enter into a two-year lease and neither party is aware of the requirements of the Act, but later if one party obtains legal advice (and it could be either a landlord or tenant) and then demands the statutory five-year minimum term – there does seem to be an injustice in enforcing a five-year lease when it was not in the contemplation of either party and does not reflect the common intention of the parties. There have been cases where a landlord innocently grants a short-term lease or licence at a concessional rent to a tenant on the basis that the shopping centre or building is to be substantially

Snapshot

- The Retail Leases Amendment (Review) Bill 2017 was passed by NSW Parliament on 21 February 2017. It amends the *Retail Leases Act 1994* (NSW).
- A tenant will no longer be liable for outgoing which are not fully disclosed in the Lessor's Disclosure Statement.
- The minimum five-year term for retail leases has been abolished.
- NCAT will now have jurisdiction to determine retail lease disputes up to the value of \$750,000 (the current limit is only \$400,000).

renovated once the development consent is obtained, and later the tenant can rely on s 16 to extend the lease term and seek a significant surrender sum from the landlord to resolve the dispute.

Compulsory registration

Whilst s 53 of *Real Property Act* states that a lease for a term of three years or more must be in 'approved form' – there is no legislative requirement in NSW that a lease must be registered.

The Act will now require that leases for a term of more than three years (or that are required by the lease to be registered) must be registered by the landlord within three months after the lease signed by the tenant is returned to the landlord, and can be extended due to the delay in attainment of mortgagee or head landlord consent, provided the landlord has taken reasonable steps to obtain such consent.

If a lease is not registered and the mortgagee takes possession of the property and did not consent to the lease, then the mortgagee does not have to recognise the lease. (If the lease had been registered, registration could not have occurred without mortgagee's consent).

If there is an innocent third-party purchaser who was unaware of the terms of the lease, the purchaser similarly may be entitled to disregard the lease, if the lease was not registered.

Thus, this amendment to the Act will provide greater protection for tenants, particularly if they are not aware of the risks in failing to register a lease.

Executed copy of lease

A landlord must provide a tenant with an executed copy of the lease within three months after the lease is returned to the landlord (or its solicitor or agent) following execution by the tenant. There is a proviso if the delay is attributable to the need to obtain consent from the head lessor or mortgagee, provided the landlord has taken all reasonable steps to seek such consent.

Bank guarantee to be returned within two months

The Act will now require a landlord to return a bank guarantee to the tenant within two months after the tenant completes performance of obligations under the lease to secure the bank guarantee.

Compensation for tenant who validly terminates in first six months

If a landlord fails to serve a Lessor's Disclosure Statement within seven days before the lease is entered into or if the Lessor's Disclosure Statement is materially false, misleading or incomplete, the tenant can terminate the lease within the first six months (s 11(2)).

The Act will now provide that in addition to the right of termination, the tenant has a right to claim compensation in such circumstances including expenditure by the tenant in connection with the fit out of the retail shop (new s 11(2A)).

Prior to this clarification, a tenant may be reluctant to trigger this termination right



due to uncertainty regarding any claim for its setting up costs.

Lessor's Disclosure Statement can be amended by agreement or by NCAT

A Lessor's Disclosure Statement will now be able to be amended by agreement in writing both before and after the lease is entered into and the amendment will take effect from the date specified. Currently, there can be difficulties for a landlord if the commercial terms change after the Lessor's Disclosure Statement has been served. In such cases, a landlord faces a dilemma about whether or not it should re-issue a new Lessor's Disclosure Statement – to address the changes in commercial terms and to avoid giving rise to an argument that the Lessor's Disclosure Statement was materially false, misleading or incomplete. However, if a Lessor's Disclosure Statement is re-issued but the landlord is unable to provide service seven days before the lease is entered into, then such failure allows the tenant to terminate the lease within six months. Alternatively, if one doesn't correct a change in the commercial terms, it could be arguable that the Lessor's Disclosure Statement is materially false and the same right of termination arises.

These amendments now address these practical concerns as the parties can amend the Lessor's Disclosure Statement in writing and this can occur before or after the lease is entered into.

Mortgagees consent fees

In practice, there still exists some confusion as to whether a landlord can charge mortgagee consent fees. My view is that such fees are prohibited by virtue of ss 14 and 24A of the Act. The amendments remove any ambiguity and clarify mortgagee consent fees are prohibited by amending the definition of 'lease preparation expenses' to include mortgagees consent fees (new s 3).

New schedule 1A

A new schedule 1A has been inserted into the Act specifically excluding certain usages-namely ATMs, vending machines, public telephones, children's rides, signage display, internet booths (not being an Internet cafe or similar use), private post-boxes, storage of goods for use or sale in a retail shop (not including storage on premises from which the goods are sold), car parking (not being car parking provided as part of the business of a car

park), communications towers, digital display screens, displays of signage (not including the use of premises from which the signage is sold), public tables and seating, self-storage units and storage lockers.

Limitation of liability for undisclosed outgoings

One of the most significant amendments is that a tenant is not required to pay any amount to the landlord in respect of any outgoings unless the liability was disclosed in the Lessor's Disclosure Statement.

Further, if an estimate is provided in the Lessor's Disclosure Statement and the estimate is less than the actual amount and there was no reasonable basis for the estimate, then the liability is limited to the estimate. For example, if the Lessor's Disclosure Statement discloses that the tenant is required to pay land tax which is estimated to be \$7,000 and in fact the landlord invoices the tenant for land tax of \$14,000 (and there was no reasonable basis for disclosing \$7,000), then the landlord is limited to claiming only \$7,000 from the tenant.

Agreement for Lease

It is submitted that the existing Act applies to *Agreements for Lease* such that a landlord is required to serve a Lessor's Disclosure Statement seven days before an *Agreement for Lease* is entered into because the definition of *retail shop lease* includes any agreement under which a person grants or agrees to grant ... a right of occupation.

In practice, however, it can be a very costly mistake for a landlord's solicitor to forget to serve the Lessor's Disclosure Statement seven days before the *Agreement for Lease* is entered into. Failure to do so gives rise to a right of termination within the first six months exercisable at the discretion of the tenant.

The latest amendments confirm this by including a specific provision stating that the Act applies to *Agreement for Lease* and does not apply with respect to the resulting lease (new s 3B).

Permanent retail markets

The Act can now apply to what is defined as a *permanent retail market*, being an assemblage of stalls described as a market, that are predominantly used for retail businesses and operate in a building or other permanent structure the sole or dominant use of which is the operation of a market, provided the store also satisfies a definition of *retail shop* (new s 6B).

Applies to proposed lessees and lessors

The Bill now clarifies that the Act applies to proposed tenants and landlords (new s 3(2)). This may mean that a landlord cannot recover legal fees where the tenant withdraws from a deal, notwithstanding that the parties have signed Heads of Agreement permitting the landlord to charge legal fees if the tenant does not proceed. This may seem contrary to s 14 of the Act which prohibits a landlord from charging *lease preparation fees*, however some landlords argue that if the tenant does not proceed, then a retail lease does not come into existence and hence the provisions of s 14 do not apply. As the Act will now regulate proposed tenants and proposed landlords, this argument may no longer hold and legal costs may be prohibited in such circumstances.

Office tower that forms part of a retail shopping centre

There currently is an anomaly in the Act. If a restaurant, which falls within schedule 1 of the Act is in an office tower that forms part of a retail shopping centre, does the Act apply? On the one hand, it does apply because it is a usage that is set out in schedule 1 but on the other hand there is a specific exemption in the Act in relation to any premises in an office tower that forms part of a shopping centre (s 5(d)). The anomaly has now been addressed by the removal of the exception.

Police and security checks

A retail shop can now impose restrictions requiring police and security checks for persons employed in the shop but this restriction is only permissible with the approval of the Registrar (new s 37(a1)).

Penalty notices

An authorised officer can issue a penalty notice to a person who appears to the officer to have committed a *penalty notice offence*. If a person is issued with a penalty notice and does not wish the matter to be determined by the Court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence (new s 83A). The procedure is similar in operation to a parking or speeding fine.

Rectification

Currently NCAT only has the power to rectify the lease with consent of both parties. This can create great difficulties because if rectification is to the detriment

of one party, then that party would probably not wish to provide its consent. This dilemma is now overcome as NCAT will have the power to rectify a lease in the following circumstances:

- i. if the tribunal is satisfied that the order is necessary to correct an error or omission;
- ii. if the tribunal is satisfied that the order is necessary to give effect to the intention of the parties when the lease was entered into; or
- iii. if the tribunal is satisfied that the order is necessary to give effect to the actual disclosure of information between the parties.

Whilst at first glance this may not appear to be a significant change, it is suggested that these expanded powers may permit NCAT to make orders taking into account the intention of the parties and the accurate disclosure of information.

Registrar to appoint Specialist Retail Valuers

Currently, if there is to be a market review determined by an independent valuer, the parties must make an application to NCAT to appoint the valuer. In future, this

process will be streamlined so that the valuer can be appointed by application to the Registrar of Retail Tenancy Disputes.

Demolition

It is clarified that a requirement that the Act imposes in relation to demolition of a building, equally applies to demolition to any part of the building (s 35).

Consent to assignment

In seeking consent to assignment, now the tenant is required to prepare its own Updated Lessor's Disclosure Statement (completed to the best of the tenant's knowledge) if the landlord fails to provide an Update Disclosure Statement within 14 days after written request from the tenant. Previously if the landlord failed to provide a Lessor's Disclosure Statement within 14 days after written request, the tenant was relieved of the obligation to provide an Updated Disclosure Statement to the assignee.

Online transactions

Revenue from online transactions is not to be included in turnover for the purposes of the determination of rent except for those transactions where goods or services are delivered or provided from or

at the retail shop, or where the transaction takes place while the customer is in the retail shop (new s 47).

The amendments will also prevent the tenant from having to provide the landlord with information about online transactions, except those transactions where goods or services are delivered or provided from the retail premises, or where the transaction takes place while the customer is in the shop.

Assignment where lease was awarded by tender

A landlord can now refuse consent to assignment if a retail shop has been awarded by public tender and the assignee fails to meet any tender criteria.

Rental bond

The Act now permits the Secretary to establish an online rental bond service which should streamline the process for depositing and withdrawing security deposits.

Please note that it is important to refer to the legislation again once it is in force, in order to determine when particular amendments are to apply. **LSJ**