



Legal Update

Amendments to The Retail Shop Leases Act Now Proclaimed

It's confirmed - changes to the Retail Shop Leases Act are to apply on and from 25 November 2016.

Some of the key changes to the Retail Shop Leases Act (Act) are summarised below:

1. Who the Act covers

Some leases and licences will no longer be covered by the Act, namely:

- premises larger than 1000sqm (regardless of who the tenant is),
- ATMs and vending machines,
- premises used to carry on a business by a lessee for a lessor as an employee or agent of the lessor;
- premises used for non-retail businesses which are located in a part of a retail shopping centre (eg. a particular floor, or a stand alone building in a centre's carpark) where the proportion (by area) of retail businesses is 25% or less. If more than 25% are retail, your non-retail business will still be caught.

A new definition of 'government leases' has been inserted (ie. leases to a local, state or federal government). For those leases, the lessee doesn't have to give a lessee disclosure or legal or financial advice report, and the landlord doesn't have to give the tenant notice under s46 relating to when the tenant's option window closes. Lessor disclosure must still be given.

2. When a lease is entered into

A lease is now regarded to have been 'entered into' on (and so lessor disclosure and draft Lease must be given before) the earliest of the date that the:

- Lease is signed by all the parties;
- the tenant takes possession of the shop under the lease; and
- the tenant first pays rent (other than a deposit paid to secure the lease) under the lease.

3. Changes to Disclosure

There are a number of changes to the Disclosure regime and its consequences:

- **Tenant can waive 7 day disclosure period** – provided the Landlord has actually given the tenant a Lessor Disclosure Statement, the tenant can then give a waiver notice and (if the

tenant isn't a major lessee) a legal advice report which specifically states that the tenant has taken advice about the meaning and effect of the waiver. Note though you still have to give the tenant the draft lease at least 7 days before the lease is entered into and this cannot be waived or shortened.

- **Disclosure now required when tenant exercises an option to renew.** A landlord must now give a tenant an updated Lessor Disclosure Statement within 7 days after the landlord receives notice by the tenant of exercise of an option. This obligation may be waived by the tenant – but only when the tenant gives notice of exercise of the option (not after). Once a current disclosure has been provided, the Tenant then has **14 days to withdraw the notice** of exercise of option.
- **Importantly:** If the Landlord fails to give the tenant an updated Lessor Disclosure Statement on time after notice of exercise of option, or if the updated Disclosure is defective, the tenant can terminate the lease within 6 months and claim compensation.
- **Defective disclosure has no defence.** The landlord's defence to a defective disclosure has been removed. The only way a landlord can challenge termination of a lease by a tenant for defective disclosure is to establish that the disclosure statement was not actually defective.
- **Tenant has a right to request an updated Lessor Disclosure** if the tenant wants to sublease or franchise. If asked, the landlord must provide this within 28 days but the tenant must pay the landlord's reasonable costs of preparing the updated Lessor Disclosure Statement
- **Timing for tenant to give a Lessee Disclosure has changed.** A tenant is now required to give a landlord a lessee disclosure statement at least 7 days before the tenant enters into the lease.
- **Disclosure on assignment.** When assigning a lease, the assignor must give the assignee an assignor disclosure statement and copy of the lease at least 7 days before the earlier of:
 - the day that the assignee enters into the sale contract for the business; and
 - the day that the lessor is asked to consent to the assignment.

The assignee can give the assignor a notice of waiver reducing the 7 day disclosure period from the Assignor.

The assignor must give a copy of its disclosure statement to the lessor on the day that the lessor is asked to consent to the assignment

The assignee can give a waiver notice reducing the landlord's 7 day disclosure period.

4. **Release of tenant and Guarantor on assignment.** Both a tenant and its guarantors will be automatically released in the event of an assignment of the lease provided the existing tenant has complied with the disclosure obligations and the disclosure given is not a defective statement. To be defective, it must be incomplete in a material particular, or contain information that is false or misleading in a material particular. It doesn't matter that the Landlord or the new tenant has not met their disclosure obligations – the release will still apply.
5. **Timing for option exercise extended where early market review.** If the tenant triggers an early market rent review before exercising its option, the last day for exercising the option is automatically extended to 21 days after the market rent is agreed or determined.
6. **Outgoings changes.** The following changes apply:
 - Outgoings will now specifically exclude any excess paid on by a landlord in relation to

insurance claims.

- For retail shopping centres (ie. buildings with more than 5 retail shops), outgoing estimates and audited statements must now breakdown management fees into admin costs to run the centre and other fees paid to the manager of the centre.
- A tenant can now legally withhold payment of outgoing estimates if the landlord fails to give outgoing estimates or audited outgoing, until such time as they are actually given.
- Certain common areas are now excluded for the purposes of calculating total area of the Centre for apportioning outgoing. These are:
 - Information, entertainment, community or leisure facilities
 - Telecommunications equipment
 - ATMs
 - Vending machines
 - Advertising displays
 - Seating, tables and other furniture
 - Trade out areas
 - Storage; and
 - Parking.

7. **Costs not recoverable.** A landlord can no longer require a tenant to pay the landlord's mortgagee consent costs, or any costs of complying with the Act.
8. **Legal costs for unsigned lease might be recoverable.** However if a tenant fails to sign the final version lease after the lease has been agreed and the tenant has asked for an execution copy of the lease, the landlord can require the tenant to pay the landlord's reasonable legal and other expenses incurred.
9. **Promotions funds and marketing levies.** For tenants who are required to contribute to promotions funds, the landlord must make available a marketing plan as well as audited statements of lessor's expenditure, and unspent promotions funds must now be carried forward to the next accounting period.
10. **Compensation rights do apply to tenants on hold over.** The compensation rights are clarified to now include a tenant who is holding over under an expired lease.
11. **Compensation changes:** The following provisions have been included:
 - **Landlord can limit compensation in first year.** If a disturbance is anticipated within the first year of a lease, the landlord can now insert a provision in the lease limiting the compensation payable in relation to that specific event – certain rules relate to the level of detail to be provided and how the landlord has arrived at that limit. A general clause advising of potential disturbance is not enough.
 - **Tenants to give notice of claim.** Tenants claiming compensation for disturbance must now give the landlord notice of the loss or damage asap after it is suffered. The tenant's failure to give notice doesn't disentitle them to compensation but will be a determining factor when assessing quantum.
 - **No liability for emergency or compliance.** Landlords are no longer liable to pay compensation for loss or damage if the landlord takes action as a reasonable response to an emergency or in compliance with any duty imposed by law or any relevant authority.
12. **Relocation means any reason for relocation.** The relocation provisions of the Act now apply regardless of the reason for the relocation. If in a retail shopping centre, the landlord can only relocate to another area within the same centre. If the tenant doesn't want to relocate, the tenant

can still terminate the lease but now has to give at least one months' notice (instead of 7 days).

13. **Refurbishment must be detailed.** Refurbishment clauses in leases are now void unless the clause states in detail the nature, extent and timing of the refurbishment that is required.
14. **Effect of provision contravening the Act.** Many of the monetary penalties of the Act have been omitted and in lieu the relevant obligation which contravenes the Act is now simply void.

The transitional rules – that is, at what point the new provisions apply to existing leases – is complex and confusing. In general, the Act will apply to all leases entered into or renewed at any time. But there are some sections of the Act that won't apply in certain circumstances depending on the nature of the lease and when it was entered into or renewed. If in doubt, please consult us for a closer examination of the transitional rules in relation to your particular lease.

If you would like further advice on the impact of the changes on any of your leases, please do not hesitate to contact [Alison Fleming](#) or [Paul McHugh](#).

September 2016

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Thompson McNichol Lawyers

Suite 5, 32 Aerodrome Road | PO Box 552 | Maroochydore | QLD | 4558
E mail@tml.com.au | P 07 5443 1566 | F 07 5443 7196 | W tml.com.au

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