

Amendments to the Retail Leases Act 1994 (NSW)

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Summary

The New South Wales government has passed the *Retail Leases Amendment (Review) Act 2017 (NSW)* ('Amending Act') which comes into effect on 1 July 2017.

The Amending Act introduces significant changes to the *Retail Leases Act 1994 (NSW)* ('RLA').

Overview

The Amending Act makes the following key changes:

- excludes leases of premises used for certain non-retail purposes;
- removes the requirement for a minimum term of five-years;
- grants tenants a right to compensation for termination because of a landlord's failure to provide an appropriate disclosure statement;
- requires landlords to accurately disclose and estimate outgoings in the disclosure statement;
- allows a landlord to include management fees charged by the landlord as part of the outgoings;
- allows disclosure statements to be amended by agreement or NCAT;
- specifies the timeframes for the return of signed leases and lodgement for registration;
- specifies time frames for the return of bank guarantees to tenants;

- prevents landlords from requiring online sales revenue information to be provided including revenue from turnover rent calculations, except in certain circumstances;
- prevents landlords from recovering mortgagee consent costs from tenants;
- allows landlords to require police and security checks from tenants in certain circumstances;
- clarifies the operation of the demolition provisions; and clarifies the procedure for tenants to seek landlord's consent to an assignment;
- allows landlords to refuse consent to an assignment for leases awarded by public tender where the assignee fails to meet the criteria;
- allows the Registrar to appoint a Specialist Retail Valuer;
- establishes an online rental bond service;
- introduces a penalty notice regime for offences;
- increases the jurisdictional limit of NCAT; and
- increases NCAT's powers to rectify a lease.

Background

The New South Wales government has passed the Amending Act which comes into effect on 1 July 2017.

The Act makes significant changes to the RLA which will impact both landlords and tenants in the negotiation and operation of retail leases regulated by the RLA.

In the second reading of the Bill it was stated that the purpose of the amendments was to:

- (a) increase transparency and certainty in the New South Wales retail leasing sector;
- (b) improve the standards of conduct between the parties to a retail lease; and
- (c) increase the operational efficiency of the RLA by simplifying its key processes.

Key Changes

Certain uses excluded

Excluded Uses

The Amending Act includes a new Schedule 1A excluding leases for the following non-retail uses:

- (d) Automatic teller machine;
- (e) Car parking (not being car parking provided as part of the business of a car park);
- (f) Children's ride machine;
- (g) Communication towers;
- (h) Digital display screens;
- (i) Display of signage (not including the use of premises from which signage is sold);
- (j) Internet booth (not being an internet cafe or similar use);
- (k) Private post boxes;
- (l) Public tables and seating;
- (m) Public telephone
- (n) Renewable energy generation;
- (o) Renewable energy storage batteries;
- (p) Self-storage units;
- (q) Storage of goods for use or sale in a retail shop (not including storage on premises from which goods are sold);

- (r) Storage lockers; and
- (s) Vending machine.

Office Towers

The Amending Act removes the exemption in section 5(d) of the RLA in relation to premises in office towers that form part of a retail shopping centre.

The explanatory notes to the Bill provide that the exception was unnecessary on the basis that an office tower above a retail shopping centre does not form part of the retail shopping centre.

Permanent Retail Market

The RLA will no longer apply to retail shops in a market unless the market is a "Permanent Retail Market".

A "Permanent Retail Market" is defined as "an assemblage of stalls, styled or described as a market, that are predominantly used for retail businesses and that operate in a building or other permanent structure the sole or dominant use of which (or of the part in which the market operates) is the operation of the market".

However, it is made clear that a stall in a permanent retail market is not regulated by the RLA unless it satisfies the definition of "retail shop" in section 3.

Agreement for Leases

The Amending Act now makes it clear that the RLA applies to agreement for leases in the same way as it applies to a lease.

The Amending Act provides that where a lease is entered into pursuant to an agreement for lease, a separate lessor's disclosure statement is not required.

Application to proposed tenants and landlords

The Amending Act provides that the RLA will apply to proposed tenants and landlords.

No minimum year term

The Amending Act removes the existing provision requiring a minimum term of five years.

Tenants will no longer be required to provide a section 16(3) certificate in respect of leases that have a term of less than 5 years.

The change is likely to be welcomed by both landlords and tenants as it will reduce costs and time.

Tenants will no longer need to engage a solicitor or conveyancer to obtain a section 16(3) certificate, while landlords will no longer be bound to a term of 5 years in circumstances where a shorter term was negotiated but a section 16(3) certificate was not obtained.

Compensation for termination in the first six months

In addition to the right to terminate a lease within the first six months, the Amending Act now gives the tenant a right to claim compensation where a landlord:

- (a) fails to provide a disclosure statement within seven days before the lease is entered into; or
- (b) provides a disclosure statement that is false, misleading or incomplete.

The compensation payable is the costs reasonably incurred by the tenant in entering into the lease, including expenditure in connection with the fitout of the premises.

Tenants will now be able to terminate a lease and have comfort that they will be compensated for their investment into the lease.

Outgoings and Limitation of Liability for payment of Outgoings

Under the Amending Act, a tenant will no longer be liable for outgoings unless the liability is disclosed in a lessor's disclosure statement.

The Amendment Act further provides that if the actual amount of an outgoing is greater than the amount estimated in the lessor's disclosure statement, unless there was a reasonable basis for the estimate, the tenant will only be liable to pay the lower estimated amount.

The amendment to the Act is to protect tenants from landlords seeking to recover outgoings that have not been disclosed.

These changes to the RLA will mean that landlords will have to take greater care in:

- (a) ensuring that the outgoings intended to be recovered are properly disclosed in the lessor's disclosure statement; and
- (b) keeping records to justify the outgoing estimated that are disclosed.

Inclusion of certain fees as part of Outgoings

The Amending Act also revises the definition of "Outgoings" to extend to fees charged by a landlord for services provided by the landlord in connection with the *"management, operation, maintenance or repair of the retail shop, building or land"*.

While this would be celebrated by landlords, they must ensure that such fees are properly disclosed.

Amending Disclosure Statements

Under the Amending Act, a lessor's disclosure statement may be amended by agreement in writing before or after the lease is entered into or by NCAT.

The change alleviates practical issues particularly for a landlord's disclosure obligation where circumstances or commercial terms have changed. A landlord will no longer be required to consider issuing a new lessor's disclosure statements where there are changes to the commercial terms after a disclosure statement was served.

Copy of Executed Lease

The RLA will now imply a provision into a retail shop lease to the effect that a landlord must provide the tenant with an executed copy of the lease within 3 months after the lease is signed and returned by the tenant.

The three month period can be extended if there are delays in obtaining mortgagee's or head lessor's consent, subject to the landlord making reasonable efforts to obtain such consent.

Compulsory Registration

For retail shop leases with a term of more than 3 years (including any option terms) or where the parties have agreed for a lease to be registered, the RLA will now require landlords to lodge the lease for registration within 3 months after the lease is signed and returned by the tenant.

The three month period can be extended if there are delays in obtaining mortgagee's or head lessor's consent, subject to the landlord making reasonable efforts to obtain such consent.

Bank Guarantee

The RLA will now require a landlord to return a bank guarantee to the tenant within 2 months after the tenant completes performance of its obligations under the lease to secure the bank guarantee.

The amendments have been drafted in such a way that landlords can hold on to the bank guarantee until a tenant has completed its make good and any other post expiry obligations.

Internet Sales

The Amending Act prohibits landlords from requiring online sales revenue information to be provided, except for goods delivered from the premises or where the centre or the transaction takes place while the customer is in the Premises.

The RLA no longer permits landlords to charge turnover rent in respect of such revenue unless the exception referred to above applies.

Mortgagee's Consent Fees

While the RLA prohibited landlords from recovering lease preparation costs, it was not clear whether such costs included the mortgagee's consent fee.

The Amending Act now clarifies that the mortgagee's consent fee is part of the lease preparation costs and it's not recoverable from a tenant.

Police and Security Checks

In addition to the employment restrictions in section 37 of the RLA, the Amending Act provides that a landlord may require police or security checks and clearances for tenant's employees and contractors, subject to including a provision in the lease and obtaining the written approval of the Registrar of the Retail Tenancy Disputes.

Demolition

The Amending Act clarifies the position that the protection under section 35 of the RLA in relation to demolition will apply to a demolition of a part of the building.

Consent Assignment

The Amending Act has simplified the drafting around the procedure for obtaining consent to assignment under the RLA.

While the amendments do not materially change the procedure, the obligation is now on a tenant to provide the proposed assignee with an updated lessor's disclosure statement.

A landlord is required to provide a tenant with an updated lessor's disclosure statement within 14 days of a request. Previously under the RLA, if a landlord failed to provide this, a tenant would not need to provide an updated lessor's disclosure statement to the assignee.

Now, if the landlord fails to provide an updated lessor's disclosure statement, the tenant must provide a lessor's disclosure statement, completed to the best of the tenant's knowledge (with information as to current outgoings in place of information as to the estimated outgoings.)

Refusal of Consent

The Amending Act will allow a landlord to refuse consent to an assignment if a retail shop has been awarded by a public tender and the assignee fails to meet the required criteria.

Registrar to appoint a Special Retail Valuer

Where a landlord and a tenant cannot agree on a Specialist Retail Valuer, the Registrar for Retail Tenancy Disputes can now appoint a Specialist Retail Valuer.

Previously under the RLA, the parties would need to make an application to NCAT.

Rental Bond

The Amending Act now allows for an online rental bond service to be established. This will make the process for depositing and withdrawing security deposits more efficient.

Penalty Notices

There will be a new regime allowing for the issue of penalty notices for offences against the RLA.

This will operate similar to driving offences. A person can either pay the fine and have no further liability for the offence or have the matter heard in court.

Increase in NCAT's Jurisdictional Limit.

Under the Amending Act, NCAT may now determine retail lease disputes involving claims up to \$750,000 (increased from \$400,000.00). The intention of the amendment is to provide greater access to justice.

Rectification

NCAT's powers to amend and vary a lease have been significantly expanded. Under the amendments, NCAT can now amend a Lease where:

- (a) NCAT is satisfied that the order is necessary to correct an error or admissions;
- (b) NCAT is satisfied that the order is necessary to give effect to the intention of the parties when the Lease was entered into or;
- (c) NCAT is satisfied that the order is necessary to give effect to the actual disclosure of information between the parties.

Previously under the RLA, NCAT could only rectify a lease with the consent of both parties which often caused practical difficulties.

Implications

The RLA was introduced more than 20 years ago to help level the playing field between tenants and landlords and these latest amendments take a further step in continuing to achieve this goal.

Tenants will certainly benefit from the increased protections afforded by the amendments.

Landlords will also welcome many of the changes which now give greater clarity and certainly in respect of ambiguities and practical issues that have previously emerged under the RLA. However, it will be important for landlords to adjust their processes to accommodate some of the amendments being introduced.

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