

Retail Leases Amendment Bill 2012 (Vic)

Cutting out the red tape for retail lessors & tightening the negotiation process

Stephen Teale & Madeleine Whiteaker | November 2012 | Corporate & Commercial

Commission reviews of the Office of the Small Business Commissioner have resulted in the passing of the Retail Leases Amendment Bill 2012, which aims to reduce burdensome bureaucratic requirements for Retail Lessors. Regulation of the negotiation process will also be tightened under the new Act once assented to, which all retail lessors should be aware of.

Who does this impact?

Victorian Retail lessors.

What action should be taken?

Retail lessors should be aware that their notification obligations will change; and some obligations of landlords now expressly extend to prospective landlords and their agents. Retail lessors should review their procedures during negotiation stages to ensure compliance with the *Retail Leases Act 2003* (Vic) (**the Act**).

Background

Under the soon to be superseded section 25 of the Act retail lessors were required to notify the Small Business Commissioner of particulars of any retail lease or renewal of lease within 14 days.

The Bill came in response to a recommendation by the Victorian Competition and Efficiency Commission and a review by the Productivity Commission and major reviews of the Office of the Small Business Commissioner. The review found that the soon to be repealed section 25 is now redundant, given the register of particulars is incomplete and inaccurate and the Small Business Commissioner has a superior ability to contact retail lessors and tenants via means such as the internet. In effect, section 25 has been acknowledged as “an unnecessary regulation that, as it currently operates, burdens business”.¹

The Minister for Innovation, Services and Small Business also proposed amendments to sections 15, 17, and 23 of the Act. As drafted under the Act which will be amended, these sections were arguably unclear in terms of their application, to not only landlords and tenants, but to prospective landlords and tenants, and agents acting on behalf of landlords.

Retail Leases Amendment Bill 2012

Once the Act is amended –

1. Section 25 of the Act will be repealed and retail lessors will no longer have to notify the Small Business Commissioner of particulars of a retail lease within 14 days of signing. Consequently, the Commissioner will no longer maintain the register of retail lease information under sections 84(1)(g) and 84(1)(1A).
2. In relation to prospective landlords and their agents -
 - a) Section 15 provides that at the negotiation stage, prospective landlords of retail premises must provide a copy of the proposed lease to the tenant in writing and the Commissioner's information brochure;
 - b) Section 17 provides that a disclosure statement must be provided by the landlord to the tenant before entering a lease (and is clarified to include prospective landlords and tenants); and
 - c) Section 23 provides that seeking and accepting key money is prohibited.

These obligations are now also extended categorically to apply to persons acting on behalf of a landlord or prospective landlords, such as agents. As failure to comply with these sections may lead to termination of the lease, the importance of compliance with these procedural requirements is highlighted by the Bill.

Previously, it was unclear due to the wording of the sections whether these obligations applied to prospective landlords. The definition of landlord under the Act is "a person who under the lease is entitled to the rent payable for the premises...". It was an issue that this wording made these sections useless or at least limited their use.

Implications for Lessors

Retail lessors stand to benefit from reduced notification obligations.

While prospective retail lessors would now clearly be within the purview of proposed sections 15, 17 and 23, it is also noted that their agents would also be expressly obligated to comply with the obligations under those sections.

Non-compliance with those sections may have the consequence of fines for non-compliance, the tenant may have a right to terminate the lease and there is the possibility that the tenant could sue for damages suffered by reason of the breach. Additionally, the risk arises that the lessor's rights under any agreement may be forgone, if for example there is no written lease; as they may have insufficient evidence to prosecute their case.

The amendments to the Act indicate that Parliament intends to make these obligations of lessors and their agents express. It is therefore essential that retail lessors ensure their processes, especially during negotiation stages, are in compliance with the legislative regime, should it be adopted.

¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 12 September 2012, 4122 (Louise Asher).

For more information,
please contact:



Stephen Teale
Partner
T: 03 8600 5008
M: 0419 374 728
stephen.teale@turkslegal.com.au



Madeleine Whiteaker
Lawyer
T: 03 8600 5037
M: 0417 406 164
madeleine.whiteaker@turkslegal.com.au

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