

# **Eastern Suburbs Law Society Annual Conference**

**Lawyers Learning for Charity**

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**Retail Leases Update:**

**Presented by Mr Anthony Herro**

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## About the Author

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Anthony Herro is a specialist in retail and commercial leases.

Anthony is Principal Solicitor of Herro Solicitors, a boutique CBD law firm specialising in retail and commercial leases.

Anthony is an accredited Mediator holding national accreditation with LEADR & IAMA.

Anthony is a member of the Dispute Resolution Committee of the Law Society of New South Wales.

Anthony accepts instructions or acts as agent from other practitioners - particularly in difficult or complex retail lease matters.

If you have any questions regarding anything in the seminar or this paper, please feel free to telephone Anthony on (02) 9247 0100.

The *Retail Leases Amendment (Review) Bill 2017* was passed by the NSW Parliament on 21<sup>st</sup> February 2017.

The amendments came into effect on the 1<sup>st</sup> of July 2017 subject to transitional provisions. It is important to check the various transition provisions in relation to the relevant amendments.

# What are the key changes to the Retail Leases Act?

## 1. Jurisdictional Limit

- Jurisdictional limit of NCAT has increased to \$750,000 (previously \$400,000) (Section 73)

## 2. No minimum 5-year term

- Minimum 5-year term is removed from the Act. (Section 16)

## 3. Compulsory Registration

- Lease for a term of more than 3 years (or that is required by the Lease to be registered), the Landlord must lodge the Lease for registration within 3 months after the signed Lease is returned to the Landlord (new Section 16). Failure to register is an offence – 50 penalty points. (Currently one penalty unit is \$110).
- Question whether 50 penalty points is a sufficient deterrent.

## 4. Executed copy of Lease

- The Landlord must provide the Tenant with an execution copy of the Lease within 3 months after the Lease is returned to the Landlord/Landlord's Lawyer/Agent following execution by the Tenant (Section 15(1)).
- The 3 month period is to be extended for any delay attributed to the need to obtain consent from a head Landlord or mortgagee (being a delay not due to any failure of the Landlord to make reasonable efforts to obtain consent)(Section 15(2)).

## 5. Bank Guarantee to be returned within 2 months

- A Landlord must return a bank guarantee to the Tenant within 2 months after the Tenant completes performance of the obligations under the Lease that secure the bank guarantee (Section 16BA)

## **6. Compensation for Tenant who validly terminates in the first 6 months**

- Compensation is payable to a Tenant who terminates the Lease in the first 6 months pursuant to an existing right of the Tenant due to failure by the Landlord to provide a Lessor's Disclosure Statement or for providing an incomplete or false or misleading Lessor's Disclosure Statement, including expenditure by the Tenant in connection with the fitout of the retail shop. (Section 11(2A))

## **7. Lessor's Disclosure Statement can be amended by agreement or by NCAT**

- The Lessor's Disclosure Statement can be amended by agreement in writing (or by NCAT) both before and after the Lease is entered into and any amendment will take effect from the date specified in the agreement (which can be a date before the agreement was entered into). (Section 11(6) and Section 72AB).
- This overcomes the current concerns as to whether or not a Lessor should re-issue (and then have to wait a further 7 days) a new Lessor's Disclosure Statement where there has been an agreed change to the commercial terms.

## **8. Cannot charge Tenant Mortgagee's consent fees**

- It is my view that mortgagee's consent fees were prohibited under the prior Act.
- However, in practice, some parties still considered this not to be the case – thus the Act has been amended to specifically prohibit (by amending the definition of *lease preparation expenses*) a Landlord from charging a Tenant's expenses incurred in connection with obtaining the consent of a mortgage (Section 3).

## **9. Excludes certain non-retail uses from the Act**

- ATMS
- Vending machines
- Public telephones
- Children's rides
- Signage display
- Internet booths (not being an internet café or similar use)
- Private post boxes
- Storage of goods for use or sale in a retail shop (not including storage on premises from which goods are sold)
- Car parking (not being car parking provided as part of the business of a car park)

- Communications tower
- Digital display screens
- Display of signage (not including the use of premises from which signage is sold)
- Public tables and seating
- Self-storage units
- Storage lockers

A new Schedule 1A sets various usages which are excluded from the Act.

## **10. Limitation of liability for Tenant for undisclosed outgoings**

- A Tenant is not required to pay any amount to the Lessor in respect of any outgoings unless the liability to pay the amount was disclosed in the Lessor's Disclosure Statement.
- If the Lessor's Disclosure Statement provides an estimate and the estimate is less than the actual amount:
  - If there is no reasonable basis for the estimate, liability is limited to the estimate.
  - And if this occurs, any subsequent increase is to be reduced in the same proportion.
- The section does not apply to an outgoing in the nature of a tax, rate or levy that is imposed under an Act after the Lessor's Disclosure Statement is given and was not an outgoings of the Lessor when the Lessor's Disclosure Statement was given.
- The Tenant is entitled to recover from the Landlord any amount paid to the Landlord that the Tenant was not liable to pay because of this Section.
- Advertising/Promotion is not considered an outgoings for the purposes of this Section.

## **11. Expanded definition of outgoings**

- Management fees are included in the definition of outgoings.
- Outgoings includes "fees charged by the Lessor for services provided by the Lessor in connection with the management, operation, maintenance or repair of the retail shop building or land" (Section 3A)

## **12. Clarification regarding application of the Act to agreements for lease.**

- Previously, it was my view that the Act did apply to *agreements for lease*, due to the fact that the definition of “retail shop lease” uses the words “a person grants or agrees to grant”.
- The words “agrees to grant” have been removed, and a separate section (Section 3B) specifically states that the Act does apply to *agreements for lease* and that the obligation to provide a Lessor’s Disclosure Statement arises at the time of the *agreement for lease* and that a further Lessor’s Disclosure Statement is not required or permitted in relation to the resulting lease.

### **13. Exemption in relation to stalls in market but applies to permanent retail markets**

- A *permanent retail market* is an assemblage of stalls, styled or 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 stall also satisfies the definition of *retail shop*. (Section 6B).
- The Act will not apply to a stall in a market, unless the market is a *permanent retail market*. (Section 6B(1)).
- The Act will permit regulations including a mandatory code of conduct for permanent retail markets. (Section 6B(4)).

### **14. Applies to proposed Lessee and Lessor**

- The Act clarifies that the provisions of the Act apply to proposed Landlords and Tenants (Section 3(2))

### **15. Removal of exemption for premises in an office tower that forms part of a retail shopping centre**

- This clarification will overcome the anomaly that previously existed where for example, a restaurant is an office tower which is located above a shopping centre, arguably is exempt for the provisions of the Act, notwithstanding it is a usage set out in Schedule 1 – so that the intention is that the Act should apply – but in such an example, the specific shop falls both within the exclusion and within the inclusion provisions. This amendment will overcome this problem.

## **16. Lease can require police and security checks on persons who can be employed in a retail shop, provided approval of the Registrar is obtained.**

- A retail shop can 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 in the particular case (Section 37).

## **17. Penalty Notices**

- An authorised officer may issue a penalty notice to a person who appears to the officer that the person has committed an penalty notice offence. (Section 83A)
- A *penalty notice offence* is an offence under the Act or regulations that is prescribed by the regulations as a penalty notice offence.
- The *Fines Act 1996* applies to a *penalty notice*.
- Under such Act, if a person issued with a penalty notices does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.

## **18. Rectification**

- Previously NCAT could only rectify a lease with the consent of the parties.
- Section 72AB (b) to (d) will now allow NCAT to rectify a lease:
  - If the Tribunal is satisfied that the order is necessary to correct an error or omission;
  - 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;
  - If the Tribunal is satisfied that the order is necessary to give effect to the actual disclosure of information between the parties.

## **19. Registrar to appoint Specialist Retail Valuers to determine market rent views**

- The Registrar may appoint Specialist Retail Valuers on application under the Act.

## **20. Demolition**

- Clarifies that the protection to Tenants afforded by the Act applies to proposed demolition of the building *or any part of the building*. (Section 35)
- The Lease cannot be terminated by the Landlord unless the proposed demolition cannot be carried out practicably without vacant possession of the shop (new Section 35(1)(a1)). Previously this position was reflected in the definition of *demolition*.
- In my view, the Act should have gone further to require reasonable compensation for demolition as this is becoming a more frequent event faced by retailers who did not anticipate that the demolition clause would be triggered.

## **21. Consent to assignment**

- Improved drafting of Section 41.
- Clarifies that the Landlord must provide an updated Lessor's Disclosure Statement within 14 days of request (Section 41(c))
- If the Landlord fails to do so, whereas previously this requirement could be ignored, now the Tenant must provide a Lessor's Disclosure Statement completed by the Tenant to the best of the Tenant's knowledge (but with information as to current outgoings).

## **22. Online Transactions**

- Revenue from online transactions are not to be included in turnover for the purposes of determination of rent, except for 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 (section 20).
- The Act will prevent the Tenant from having to provide the Landlord with information about online transactions, except for 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 (section 47).

## **23. Assignment – Where Lease was awarded by public tender**

- A further ground for refusal to Consent to Assignment has been added, namely where a retail shop lease has been awarded by public tender and the Assignee fails to meet any criteria of that tender (section 34(1)(d)).

## **24. Rental Bond**

- The Act provides for an online rental bond service to be provided by Secretary (section 16WA).
- After mediation of a bond dispute, the Secretary must pay out the bond in conformity with the resulting agreement on receipt of a certificate or a notice in writing in a form approved by the Secretary that is signed by the parties and sets out the terms of the resulting agreement.
- That is, a notice signed by the parties is sufficient, rather than the Secretary having to wait for a certificate to be issued.
- The requirement to pay interest on security deposits has been removed.

Anthony Herro  
26 August 2017.