

Key changes to the Retail Leases Act for NSW

The **Retail Leases Amendment (Review) Bill 2017** was passed on 21 February 2017 which will amend the **Retail Leases Act 1994 (NSW)**. The commencement date is yet to be determined by Parliament but we have summarised how these changes will benefit retailers with stores in NSW below.

1. Tenants will no longer have to pay for undisclosed outgoings

It can be very unfair for a retailer when after the Lease is signed, a Landlord then charges for costs which were never disclosed. The amendments to the Act will now address this concern. as a Tenant will no longer be required to pay any amount to a Landlord in respect of any outgoing (including management fees) unless the liability to pay 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 charged and there was no reasonable basis for the estimate, then the liability of the Tenant is limited to the amount of the estimate. For example, if a Landlord estimates land tax of \$7,000 but charges the Tenant \$14,000 and there was no reasonable basis for the estimate of \$7,000, then the Tenant is only required to pay \$7,000.

If a Landlord fails to issue a Lessor's Disclosure Statement at all, this oversight may now mean that the Landlord cannot charge any outgoings at all to the Tenant for the life of the Lease.

This is a big step forward in ensuring that Tenants know what they are getting into before entering into the Lease and if things are not properly disclosed, then a Tenant will no longer have to pay for any such expenses.

2. Bank Guarantee to be returned within 2 months

A Landlord must now return a Bank Guarantee within two months after the Tenant completes performance of the obligations under the Lease, which secure the Bank Guarantee.

Previously, Tenants can be placed under financial hardship waiting for a Landlord to return a Bank Guarantee, particularly in cases where a Tenant is fitting out a new store elsewhere and has to provide a new security under the new Lease, but the prior Landlord delays in the return of the Bank Guarantee.

3. Compensation for Tenant who validly terminates in the first six months

If a Landlord fails to serve a Lessor's Disclosure Statement 7 days before the Lease is entered into or serves a Lessor's Disclosure Statement which is incomplete or materially false or misleading, the Tenant has the right to terminate the Lease within the first six months.

If a Tenant however elects to terminate the Lease in these circumstances, the Act did not state whether the Tenant could claim damages – in particular, the cost of one's fitout – which can be very expensive. A Tenant in this situation faced a dilemma, it could terminate, but would forgo its fitout and set up costs.

A Tenant can now claim compensation (including the cost of its fitout) if the Tenant terminates in the first six months on these grounds.

This amendment will assist Tenants who have been misled.

4. Registrar to appoint a Specialist Retail Valuer

At present, if the parties cannot agree on a valuer (where the Lease or Option Lease provides for a market rent review), then the parties are required to make Application to the NSW Civil & Administrative Tribunal (NCAT) request NCAT to appoint a Valuer. This process will now be

streamlined so the Valuer can be appointed instead by the Registrar (at the Office of the Small Business Commissioner) on application by a party.

This process should be easier and quicker for Retailers.

5. Copy of Executed Lease

The Landlord must now provide the Tenant with a copy of the signed Lease within three months after the Lease is returned to the Landlord. This period can be extended if there is delay by the mortgagee.

6. Compulsory Registration

Leases must now be lodged for registration within 3 months. This period can be extended if there is delay by the mortgagee.

Retailers sometimes under-estimate how important it is to have a Lease registered (in NSW). If a Lease is not registered and the Landlord defaults on its loan facilities and the bank takes possession of the Property, the bank may not be bound by the Lease, if it did not consent to the Lease. If the Lease had been registered, then the bank would have had to provide consent and acknowledge the Tenant's interest which is registered on title. Also, if a Lease is not registered and a third-party purchases the Property without knowledge of the Lease, the purchaser may similarly be able to disregard the Lease. However, if the Lease is registered on title, the purchaser takes its interest, subject to the Lease.

Thus compulsory registration in a timely manner is an important protection for Tenants.

7. Rental Bonds

The current system for lodging a security deposit under the NSW Retail Bond Scheme can be tedious. The bond must be lodged within 20 working days. Interest accrues on the bond.

The Act now allows for this to be replaced with an on line rental bond service, which should streamline this process.

Unfortunately, interest will no longer be paid on bonds lodged with the NSW Retail Bond Scheme.

8. Jurisdictional Limit

If one considers the costs of setting up a new retail shop, assuming a 150 sq m premises in a **shopping** centre, the fitout could cost \$300,000 and the gross rental for such space could be \$250,000 to \$300,000 per year plus GST, it is readily apparent that if there is a retail lease dispute, the damages can be quite substantial. NCAT however has only been able to determine disputes involving claims of up to \$400,000. The Act will be changed to allow NCAT to determine retail lease disputes involving claims for up to \$750,000.00 for lease entered into after the amendments commence. This is a welcome amendment, providing greater access to justice.

9. No minimum five year term

Section 16 has been removed from the Act. That is, there is no longer the requirement that a retail lease **must** be for a minimum term of five years.

10. Lessors Disclosure Statement

Lessor Disclosure Statement can be amended by agreement or by NCAT. The Lessor's Disclosure **Statement** can now be amended in writing both before and after the Lease is entered into either by the parties themselves or by NCAT.

11. No Mortgagees Consent Fees

It is **clarified** that a Landlord cannot charge a Tenant mortgagee consent fees.

12. Agreements for Lease

We have **always** held the view that the Act applied to Agreements for Lease and the Bill clarifies this.

13. Permanent Retail Market

The Act now can apply to a *Permanent Retail Market* which is defined as an assemblage of stalls, described as a market that are predominately used for retail businesses operating in a building or other **permanent** structure.

14. Applies to both proposed Tenants and Landlords

It has been **clarified** that the Act applies to proposed Tenants and proposed Landlords.

This may mean that if a Tenant pulls out of a deal and the signed Heads of Agreement provided that legal fees were payable because arguably there is no Retail Lease in place, this change may override such a claim.

15. Rectification

The powers of NCAT to vary the Lease have now been significantly expanded such that NCAT can rectify a Lease in **the** following circumstances:

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

16. Demolition

There is a minor amendment to the protection afforded by section 35 of the Act in relation to demolition such that it confirms that the Act applies whether the whole building or only part of the building is subject to demolition.

17. Online Sales

Revenue from online transactions are not to be included in turnover for the purposes of calculating percentage rent, except for transaction where goods and services are delivered or provided from or at the retail **shop** or where the transaction takes place whilst a customer is in the shop. A Landlord is prevented from seeking information regarding on line transactions, except for transactions where goods and services are delivered or provided from the premises or where the transaction takes place while the customer is in the store.

The above is a key point summary. Please note that whilst the Bill has been passed, the **commencement** date has not yet been determined and various transitional provisions will apply.

If you have any questions regarding these amendments, please do not hesitate to contact Anthony Herro at Herro Solicitors (www.herro.com.au) on (02) 9247 0100 or by email to anthony@herro.com.au.