

Retail Leases - Update

13th March 2006

Further amendments have been made to the Retail Leases Act ("the Act") and took effect on 1 January 2006. This update summarises those important amendments.

Retail Businesses

The description of specific businesses affected by the Act has been expanded with more precision. The description now includes specialty shops such as bakeries, travel agents and balloon shops which previously were not specifically listed.

Security Bond Scheme

A Retail Bond Scheme has been introduced which is similar to the Residential Bond Scheme.

If a landlord accepts cash as a Security Deposit, then the landlord must deposit the money with the New South Wales Government Retail Bond Scheme within twenty (20) business days of the later of:-

- the date the bond is received and
- the date of commencement of the Lease.

Any cash deposits held by a landlord, before these amendments, must be lodged with the Rental Bond Scheme by 1 April 2006.

Landlords and agents must ensure that any bonds are lodged. If a landlord or an agent does not lodge the bond then substantial fines can be imposed immediately.

The payment of rent in advance does not comprise a Security Deposit.

Minimum Five Year Term

Previously, a Lease for a term of less than six months was not automatically deemed by the Act to be a lease for a term of five years.

A new Section 6A provides that the continued possession by a tenant for more than twelve months entitles the tenant to convert the Lease to a term of five years which starts from the date of first occupation of the premises by the tenant.

A holding over by the tenant at the end of the Lease will not give the tenant the right to extend the Lease to five years if both the landlord and the tenant have the discretion during that period to end the Lease.

Certificates of Waiver (Section 16(3) Certificate)

If this Certificate is provided on behalf of a tenant, the term is not deemed to be five (5) years. This Certificate may now be provided within the first six months of the Lease and no longer has to be provided before commencement of the Lease.

Rent Review for Extended Term

If a Retail Lease is deemed to be extended to a term of five years, the landlord may now increase the rent during the extended period provided that the increase does not exceed the CPI increase.



This provision only applies if there is no provision in the Lease providing for the variation of rent during the additional period.

What does the Landlord have to Provide at the Commencement of the Lease?

– Retail Tenancy Guide

The landlord must now provide the publication known as the Retail Tenancy Guide when negotiations are entered into. This guide is available on line at www.retail.nsw.gov.au.

– Tenant's Disclosure Statements

A Disclosure Statement must still be issued seven days before the Lease is entered into. The form of the Disclosure Statement has been changed to require the disclosure of a lot more information by the landlord.

– Statement of Management Fees

For premises in a retail shopping centre, the landlord must give the tenant a Statement of management fees. This statement must show the fees paid by the tenant for the administration costs of running the centre and management fees. It must also show cleaning costs broken down into the costs of consumables and other costs.

– Lease

The landlord must still provide a copy of the proposed Lease seven days before the Lease is entered into.

Right to Withhold Payment of Outgoings

The tenant may now request the landlord for an estimate of outgoings and if the landlord doesn't provide this estimate within twenty-eight days, the tenant may withhold payment of outgoings.

The tenant is not obliged to pay outgoings until twenty-eight days after the landlord provides the estimate of outgoings.

Fit-outs

The maximum amount payable by the tenant for a fit-out must be agreed before entering into the Lease.

For retail shopping centres, the tenant must be issued with a Tenancy Fit-Out Statement which complies with the Act.

Assignment

The landlord may now obtain a Security Deposit or a Guarantee from the new tenant when a Lease is assigned.

The landlord will be deemed to have consented to the Assignment of a Lease if the landlord fails to give the tenant consent within twenty-eight days after receiving the request for the assignment.

Negotiations for Renewal to Extension of Lease

A landlord cannot advertise new premises for lease unless the tenant has vacated the premises or the landlord has offered the existing tenant a renewal or extension of the Lease.

Who is Liable to Pay Lease Preparation Costs?

Amendments took effect on 1 July 2005 which provided that landlords could no longer oblige a tenant to pay legal costs for the preparation or renewal of a Lease except in limited circumstances. These limited circumstances included an entitlement to a reasonable sum for legal costs for amending an issued Lease when the amendment was specifically requested by the tenant.

The Act provides that an amendment does not include any of the following:-

- Inserting or varying particulars of the tenant, the rent or the term, or
- Remedy of a failure by or on behalf of the landlord to include or omit a term that was agreed at the time between the tenant and the landlord, or
- Communication before the landlord had issued a Disclosure Statement.

A landlord may recover registration costs and stamp duty.