



Précis Paper

Recent Amendments to the Retail Leases Act 1994

A thorough overview of the changes to the NSW Retail Lease Law under the Retail Leases Amendment (Review) Act 2017 (NSW).

Discussion Includes

- The powers, jurisdiction and role of NCAT
- Registration and assignment of leases
- Disclosure statements, their requirements and their consequences
- Clarifications for demolition clauses, exclusions and turnover based rent
- Security bonds and the elimination of the 5-year minimum lease
- Ongoing areas of concern for the balance of power between landlords and tenants

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Recent Amendments to the Retail Leases Act 1994

1. In this edition of BenchTV, Anthony Herro (Solicitor, Sydney) and David Leamey (Solicitor, Sydney) discuss the current statutory scheme governing retail leases in light of the changes under the Retail Leases Amendment (Review) Act 2017 (NSW) ('the amendments').

Highlighting Key Changes

2. Three major changes to the *Retail Leases Act 1994* ('the act') include,

- The increase in NCAT's jurisdictional limit,
- The requirement to disclose an outgoing in the lessor's disclosure statement, without which, an entitlement for the tenant to pay does not arise,
- The tenant's right to claim all of their fit-out costs, upon validly terminating the lease within the first 6 months.

These changes come into effect on 1 July, along with other modifications such as new forms and the end of the 5-year minimum term.

Jurisdictional Limit

3. The jurisdictional limit of the Tribunal will be raised from \$400 000 to \$750 000 to more accurately reflect the quantum of money in retail lease disputes. This will allow more cases to be dealt with by the Tribunal, which is more equipped to provide fairness and efficiency. The Tribunal proscribes compulsory mediation, which resolves 90% of cases. The presumption that each party pays its own costs [with caveats] is a fairer starting point than the court's loser pays presumption. The amendments start on 1 July, however, there are transitional provisions that depend upon the commencement date of the lease.

Appointment of a specialist valuer

4. Currently, the Tribunal will, upon application, appoint a valuer where the parties have reached an impasse. Under the amendments The Registrar [Office of Small Business Commissioner] will relieve NCAT of this procedural matter. The development of an online process will provide an opportunity to expand the base and expertise of the valuers.

Registration of leases

5. Currently, there is no requirement for the registration of five-year retail leases. s53 *Real Property Act 1900* only requires the lease to be in an approved form whilst s42 concerns leases of less than three years. Currently, the act only requires a time frame for leases upon registration. Unregistered leases are vulnerable to uninformed third party purchasers, or unconsenting mortgagees who may disregard the lease. The amendments require registration within three months and the tenants to receive a signed copy of the lease. This provision carries a penalty of up to 50 penalty units. This will provide Torrens title protection to the lease and greater transparency in the market as landlords often use ancillary documents to hide the terms and conditions of their leases. Landlords undertaking all reasonable endeavours to obtain the relevant mortgagee, or head lessor's consent can apply for an extension.

Disclosure Statements

Compensation

6. Under the current act, a lessor's disclosure statement must be served 7 days before a lease is entered into. Failure to do so gives rise to a tenant's right to terminate the lease within the first 6 months. However due to the costs of fit-outs this right is rarely invoked. Although there may be recourse to remedies under unconscionable conduct or pre lease misrepresentation, the position of the tenant is currently unclear.

7. However, under the amendments if a disclosure statement was not received, was materially misleading or was incomplete, there arises a right to claim for the reasonable costs of entering into a lease, including fit-out costs. There is a defence to the right of rescission if the disclosure statement was materially misleading or incomplete but the tenant is in the same position it would have otherwise been, and the landlord has acted reasonably and honestly.

All disclosure requirements are subject to considerations of reasonableness.

Correct preparation

8. The disclosure statement is a critical document for both parties in retail leasing. In practise the documents are often inadequate. This includes failure to properly serve documents, the lessor omitting incentives or the lessee failing to record the representations made to them. The appeal panel decision, of *Armstrong Jones Management Pty Ltd v Saies – Bond and Associates Pty Ltd* (RLD) [2007] NSW ADTAP 47 emphasised the importance of preparing these documents correctly to protect the respective interests of each party.

Amendment

9. Currently if you serve a disclosure statement and the terms of the agreement change, there may be a conflict between needing to have served the document 7 days before the lease is entered into, and ensuring its contents are not misleading. Furthermore, the Tribunal can only rectify the lease with the consent of both parties. In practise the Tribunal is powerless in situations of dispute. This was evident in *Toga Pty Limited v Perpetual Nominees Limited and CFS Managed Property Limited* [2012] NSWADT 80 where the Tribunal was unauthorised to amend the defective drafting of the lease. The court instead relied on the doctrine of fidelity of bargain to rectify the agreement.

10. Under the amending, s72AB, the Tribunal can rectify the documents if,

- a) the order is made with the consent of the parties, or
- b) the Tribunal is satisfied that the order is necessary to correct an error or omission, or
- c) the Tribunal is satisfied that the order is necessary to give effect to the intention of the parties when the lease was entered into, or
- d) the Tribunal is satisfied that the order is necessary to give effect to the actual disclosure of information between the parties.

This will allow the Tribunal to look beyond what is in the written lease document to what the parties were led to believe. These changes will be used in litigation to allow the Tribunal to see more broadly what was disclosed and what was intended. It is a step towards increasing fairness in lease agreements.

Outgoings

11. It is advised that practitioners get involved earlier with clients along with real estate agents, to fully understand and communicate the effect of the amendments. The amendments prioritise transparency in disclosure statements, putting significant onus on the person preparing them. If a disclosure statement does not disclose an outgoing, the tenant does not have to pay it. This is a significant departure from the current provisions whereby the misleading nature of the omission would have to be argued. Disclosures will now also extend to include management fees.

12. The amendments carry significant consequences in relation to omitted outgoings. Thus, solicitors and landlords must take greater care to eliminate errors in disclosure agreements and to ensure that they have the proper authority to sign them.

Demolition Clause

13. There have been issues with landlords exploiting the demolition clause. The amendments clarify that a partial refurbishment triggers the protections under the act. However, the compensation remains calculated on the depreciated value of the written value of the respective fixtures. A claim for loss of profits is not available. Although it is important to have flexibility in

long-term leases, the amendments seem inadequate to promote fairness for tenants against whom the demolition clauses are invoked. It is important for solicitors to ensure clients understand that a demolition clause essentially creates a six-month rolling lease and how it can be triggered and to what effect. On sale of business, it is important to remind clients how to exercise an option when it arises.

Assignment

14. For assignment, the landlord can withhold consent on the following grounds [with the exception of airside services],

1. Change in permitted use
2. If incoming assignee has inferior retailing skills
3. If incoming assignee has inferior financial resources

For retail leases, there is an additional requirement. Consent may now also be withheld if the lease went to public tender and the assignee does not reasonably satisfy the criteria for that tender. This is followed by further protections and procedures including the requirement to provide a disclosure statement to the assignee.

15. Currently, it is unclear if the disclosure statement is required to be the original or an updated version. If the landlord does not provide it within 14 days there is no requirement to serve it on the assignee. The amendments clarify that the disclosure statement should be the updated version and that the outgoing tenant is responsible for the provision of a disclosure statement to the incoming tenant regardless of the landlord's provision or lack thereof. The amendment affords greater protection to the incoming tenant.

Exclusions

16. The amendment clarifies excludes uses in schedule 1A. It is important for solicitors to give due regard to the wider ambit provided by the amendment, i.e. the inclusion of shops in an office tower.

17. Schedule 1 in the new act excludes market stalls unless they operate in a permanent retail market. It may be difficult for practitioners to determine when this delineation will be made in practise, especially in relation to the permanence of the structure in which the market must operate.

Security bonds

18. The efforts by The Office of Small Business Commissioner to develop an online scheme will positively streamline the process for security bonds. However, as of 1 July, interest will no longer be paid on deposited bonds.

19. Bonds are returned upon agreement between the parties and thus issues have arisen where clients are unable to get their bonds back due to a dispute. Clients can be significantly disadvantaged when landlords have inappropriately withheld bank guarantees. This is addressed by the amendments, which require bank guarantees to be returned within two months of the end of the lease.

Rent based on turnover and online sales

20. The amendments clarify that a landlord cannot claim turnover rent from online sales or require information about online sales. This is unless the sale is connected to the premises such as the product was delivered from the premises, or the sale originated there.

Agreement to lease

21. There has been some confusion in the market over whether an agreement to lease is caught by the act. The amendments clarify that it is, and that if the lessor's disclosure statement is not served within 7 days of entering into an agreement for lease then the 6 month right of rescission arises. It does not apply to a lease pursuant to the agreement to lease, which would repeat the obligation to serve a disclosure.

Level playing field

22. This is a difficult landscape in which to negotiate amendments. Although this is a big step forward, the imbalance of power, particularly in large shopping centres persists. This is especially evident in the case of individual shop owners who in trying to recuperate their costs are in a weak position to negotiate changing lease terms after the most common five-year arrangement concludes.

23. There is a big distinction between strip landlords and shopping centres. In the former the market competition levels out the balance of power between the landlord and the tenant, whilst in the latter, the shopping centre's monopoly decreases transparency and consumer power.

24. The amendments do not adequately address the need to disclose the real lease terms that may be in hidden documents, which marry to the lease. This distorted view is at odds with the transparency in other areas such as the NSW property market and does not facilitate fairness.

The five-year minimum

25. The amendments are claimed to reduce red tape. They eliminate the 5-year minimum under s16 of the act, which can otherwise only be circumvented via the certificate [s16 (3)].

26. S16 had positive and negative consequences for the balance of power between landlords and tenants. It offered protection to tenants recuperating their costs through certainty of tenure. However it also risked landlords being unfairly burdened with conditions that were designed and intended for shorter leases.

27. This change ultimately reflects an attempt to better protect the intention of the parties and transparency. However, more change is needed to create fairer conditions especially in light of the monopolistic nature of shopping centres.

28. There is inadequate recognition of the number of retailers going into liquidation. There is inadequate information and guidance to foster a supportive environment and temper the harshness of commercial attitudes. This is at odds with the protection afforded in other areas such as Employment Law.

Ongoing areas to address

Right of last refusal

29. When the landlord fails to provide 6 months notice, the tenant can serve notice on the landlord for a six-month extension. There were discussions about including a right of last refusal for landlords.

Variations amongst the states

30. Variation among the states' retail lease legislation persists. Although harmonised rules would provide greater consistency, Mr Herro advises preference should be given to addressing more prominent concerns such as facilitating greater fairness and cooperation. Although the Voluntary Code [*Retail Code of Industry Practice*] addresses these issues, inadequate information exists on how it is comprised or operates.

31. Overall these amendments are commended for a step in the right direction, yet further changes are still required to ensure the balance of power between landlords and tenants exists in a framework that provides 'a fair go'.

BIOGRAPHY

Anthony Herro

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Anthony Herro is Principal Solicitor at Herro Solicitors and is one of Sydney's leading retail lease lawyers. He acts for clients in drafting, advising and negotiating leases and in resolving lease disputes. He possesses an in depth knowledge of Retail Leases Legislation across all States and Territories in Australia (including the Retail Leases Act) and in property law in relation to leases. Anthony is regularly invited to present at seminars for lawyers and other professionals on retail leasing including seminars for the Australian Property Institute (API), Legalwise Seminars, LexisNexis, the New South Wales State Legal Conference, the College of Law (Continuing Professional Education) the Eastern Suburbs Law Society, the Inner West Law Society, Television Education Network and VOSS Events. Anthony is President of Eurella Community Services (www.eurella.org.au), Secretary of the St Thomas More Society (www.stms.org.au) and a member of the Alternative Dispute Resolution Committee of the Law Society of NSW.

David Leamey

Solicitor, Sydney

David Leamey was admitted as a Solicitor in 1996 and was called to the NSW bar in 2006. In 2009 he left the bar and again became a Solicitor. He incorporated a practice as McKenzie Leamey before resuming as a sole practitioner. His primary practice is in Criminal, Family, Conveyancing, Leasing and Defamation

BIBLIOGRAPHY

Cases

Armstrong Jones Management Pty Ltd v Saies – Bond and Associates Pty Ltd (RLD) [2007] NSW ADTAP 47

Toga Pty Limited v Perpetual Nominees Limited and CFS Managed Property Limited [2012] NSWADT 80

Legislation

Retail Leases Act 1994 (NSW).

Retail Leases Amendment (Review) Act 2017 (NSW).

Real Property Act 1900 (NSW).

Retail Code of Industry Practice

[Signatories include: the Australian Retailers Association, the National Retail Association, the Pharmacy Guild of Australia and the Shopping Centre Council of Australia. Enquiries about the code should be directed to the code's signatories named above.]