

Changes to the Retail Leases Act 1994 (NSW)



On 1 March 2017 the *Retail Leases Amendment (Review) Act 2017 No 2* (NSW) (“**amending legislation**”) received Royal Assent. These significant amendments to the *Retail Leases Act 1994* (NSW) (“**Act**”) will commence on 1 July 2017.

The amending legislation will introduce key reforms which will impact both lessors and lessees of retail premises in New South Wales. According to the NSW Parliament, the purpose of the amending legislation is to increase transparency and certainty of leases, to introduce or improve fair protections for businesses, and to increase operational efficiency by simplifying certain processes.

Key changes

Some key changes include the following:

- **Act to apply to Agreements to Lease** it has now been clarified that the Act applies to agreements for lease of retail premises. The lessor must provide the lessee with a disclosure statement 7 days before an agreement for lease is entered into. When a lease is entered

into as a result of the agreement for lease, the lessor does not need to issue a separate disclosure statement.

- **No minimum 5 year term** – the requirement that a retail lease must be for a minimum term of 5 years will be removed.
- **No undisclosed outgoings** – the lessee’s liability to pay outgoings will be limited to the outgoings disclosed in the disclosure statement. If an estimate of outgoings is specified in the disclosure statement and the actual amount payable is greater, then the lessee is only liable to pay the estimated amount unless the lessor can prove that there was a reasonable basis for the estimate being disclosed.
- **Outgoings - management fees permitted** - the replaced definition of outgoings specifically allows a lessor to include as outgoings, fees charged by the lessor in relation to the management, operation, maintenance or repair of the premises, building or land. The Act will now expressly include ‘*management fees*’ in outgoings.
- **Excluded usages** Schedule 1A of the Act now specifically excludes certain uses including but not limited to ATM’s, vending machines, internet booths, public telephones, children’s ride machines, signage displays, private post boxes, communication towers and storage licences.
- **Exclusions from turnover rent** – revenue from online transactions will be excluded from turnover rent except where goods or services are delivered or provided from or at the retail shop or if the transaction takes place while the customer is at the retail shop.
- **Disclosure Statements**
 - **Lessor’s Disclosure Statement** - the lessee will have a right to recover compensation from the lessor (being costs the lessee reasonably incurred in entering the lease including fitout costs) if the lessee terminates the lease during the first 6 months of the term if the disclosure statement is materially false, misleading or incomplete.

A lessor’s disclosure statement can now be amended before and after the lease is entered into by agreement in writing. The amendments take effect from the date of the agreement in writing.

The Act also provides for a new prescribed form of disclosure statement.

- **Lessee’s Disclosure Statement** – the Act requires the lessee to provide the lessor with a lessee’s disclosure statement no later than 7 days after receiving the lessor’s disclosure statement.
- **Demolition clarified**– the definition of ‘*demolition*’ will become comprehensive in that it will be amended to ‘*Demolition includes repair, renovation and reconstruction*’. The definition will not require the repair, renovation or reconstruction to be ‘*substantial*’.

The Act will now clarify that the demolition provisions will apply if *part* of a building is to be demolished.

Termination by a lessor will only be permissible if the proposed demolition requires, and cannot be carried out without vacant possession of the retail shop.

- **Market stalls** the Act will now clarify that market stalls are excluded from the Act unless the market stall is a permanent retail market.
- **Registration** – leases for a term of more than 3 years (including the option term) must now be registered by the lessor within 3 months after the executed lease is returned to the lessor.
- **Copy of lease** –the lessor must provide the lessee with an executed copy of the lease within 3 months of it being returned to the lessor. This timeframe can be extended if there is a delay in obtaining mortgagee’s consent, provided the delay is not caused by the lessor failing to make reasonable efforts in obtaining the consent.
- **Mortgagee’s consent fees** – the Act will now specifically provide that a lessor cannot recover mortgagee’s consent fees from the lessee.
- **Return of bank guarantees** – lessors are now required to return any bank guarantee to the lessee within 2 months after the lessee completes its obligations under the lease unless the bank guarantee has expired or been cancelled.
- **Consent to assignment** – the lessor can refuse consent to an assignment of lease if where a lease has been awarded by public tender and the proposed assignee fails to meet any criteria of the tender.
- **Impact on the franchising process**

Franchising and leasing are intertwined – premises from which to operate are usually leased, and in such cases, the Act applies, and has significant implications for both franchisor and franchisee,

Where a franchisee occupies under a direct lease from a 3rd party lessor, the Act, and the amending legislation, will directly affect the franchisee.

In the case of the franchisor holding the direct lease, the Act provides a bundle of benefits and burdens for the franchisor. The franchisor, as lessee, will obtain all the benefits the Act confers on a lessee as well as other consequences such no 5 year minimum term. But at the same time, the sub-lease or licence which must necessarily permit the business to operate, casts the franchisor as lessor (to the franchisee) and imposes a raft of obligations, including:

- disclosure statements, and obligation to pay compensation where the franchisee (as lessee) terminates the sub-lease/licence due to non-issue or irregularities in the disclosure statement;
- limitations on the recovery of outgoings under the sub-lease/licence, unless explicitly disclosed in the disclosure statement;
- obligations imposed under the head-lease which the Act may not permit to be passed on to the franchisee under the sub-lease/licence either at all, or in only part or in the same time frame.

In addition, the franchisor is continuously faced with the tensions between concurrently applicable, but not always aligned, regulatory schemes as franchisor under the franchising code and as lessor under the retail legislation.

Franchisors wearing both franchisor and lessor hats must continuously be *en garde* and should not delay seeking a protective legal risks audit or specific advice when issues arise.

Should you require any further information or have any questions about the reforms, please contact the author.



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