

CHANGES TO THE RETAIL LEASES ACT 1994 (NSW)

CLIENT UPDATE

The *Retail Leases Act 1994* (NSW) (**RLA**) regulates retail leasing relationships in New South Wales. The intention of the legislation is to ensure fair and efficient dealings between parties to retail leases.

The RLA has been the subject of reviews in 2004, 2008 and 2011, with amendments to the legislation made in 2005 and 2006 to improve the functioning of the Act, including the creation of a retail bond scheme, improved processes for assignments of lease, access to information and an expansion of the Act to include more leases. The proposed amendments to the RLA in 2011 (which included mandatory lease registration, clarification of the assignment process and new conditions relating to recovery of outgoings and fit out costs) did not proceed, partly due to a State election and a change in government at the time the Bill was drafted.

The current changes to the legislation are the result of the Registrar and the Office of the NSW Small Business Commissioner identifying a number of problems in the administration of the RLA.

On 1 July 2017, changes to the RLA will take effect under the *Retail Leases Amendment (Review) Act 2017* (NSW) (**RLA Changes**). The RLA Changes extend to leases entered into, and disclosure statements given, before **1 July 2017** (subject to the below).

WHAT HAS CHANGED FAVOURING LANDLORDS?

The main areas of change favouring landlords are summarised as follows:

a. varying a disclosure statement: a landlord's disclosure statement may be varied by agreement in writing by the parties (instead of the parties having to re issue and reset the date the disclosure statement was given).

In practice, if this arises from an agreed amendment to the lease, the parties would agree to make the corresponding variation to the disclosure statement.

b. disclosure statement for agreements for lease and subsequent lease: the RLA has always applied to agreements for leases as well as leases. However, disclosure statements are now only to be given for the agreement for lease and **must not** be given for the resulting lease.

c. excluded leases: there is a new list of the type of leases to which the RLA does not apply (for example, ATMs and vending machines) and the legislation has clarified that the RLA does not apply to a stall in a market unless it is a permanent retail market.

d. section 16 certificates redundant: the minimum 5 year lease term has been abolished and, accordingly, section 16 certificates are no longer required.

The provisions giving effect to the minimum 5 year term continue to apply to a lease entered into before 1 July 2017.

e. management and service fees: landlords are now specifically permitted to pass on management and service fees as an outgoing.

f. withholding consent to assignment of leases granted by public tender: if a lease has been awarded by public tender, the landlord may, from 1 July 2017, withhold consent to assignment if the assignee fails to meet any criteria of the tender.

g. signing/registration turnaround times extended: the turnaround for returning a signed lease or lodging a lease for registration has been extended to 3 months (previously 1 month) from when the tenant returns the signed lease. This is further extended to take into account any necessary delays with obtaining mortgagee consent or, if the lease is to be registered, requirements under the *Real Property Act 1900* (NSW) beyond the control of the landlord. Failure to comply is a new offence carrying 50 penalty units.

WHAT HAS CHANGED FAVOURING TENANTS?

The main areas of change favouring tenants are summarised as follows:

- h. compensation for late (etc) disclosure statements:** tenants have a new right to compensation if they terminate a lease on the grounds of a late or materially false or misleading disclosure statement. This new provision applies to terminations of a lease after 1 July 2017 (including leases entered into before 1 July 2017).
- i. undisclosed outgoings:** tenants do not have to pay items of outgoings if the liability to pay them were not disclosed in the disclosure statement (other than new taxes, rates or levies imposed after the disclosure statement was given). This new provision does not apply to a lease entered into before 1 July 2017.
- j. underestimated outgoings:** outgoings items are capped to their underestimated amount (and any increases to be capped proportionately) if there was no reasonable basis for the estimate. Landlords should keep records to support the reasonable basis in the event tenants challenges an item of outgoings. This new provision does not apply to a lease entered into before 1 July 2017.
- k. return of bank guarantees:** a landlord must return a tenant's bank guarantee 2 months after the tenant complies with its obligations (subject to any pending dispute).

Failure to comply is a new offence carrying 50 penalty units and tenants have a new right to compensation. This requirement only applies to bank guarantees given for leases entered into from 1 July 2017.
- l. mortgagee consent costs:** it has been clarified that mortgagee consent costs cannot be passed on to tenants.
- m. online sales turnover can only include locally generated online sales:** turnover statements and rent can only include online sale turnover for items either collected at the shop or ordered from the shop. This applies to a determination of rent or a component of rent made after 1 July 2017.
- n. turnover rent generally:** the RLA does not impose additional obligations on the collection and use of tenant's turnover data from sales and occupancy costs.

This has been addressed through a voluntary code of conduct, *Retail Code of Industry Practice – The Reporting of Sales and Occupancy Costs*, which has been negotiated by industry to address information asymmetry. Signatories to the code (namely the Australian Retailers Association, the National Retail Association, the Pharmacy Guild of Australia and the Shopping Centre Council of Australia) represent parties to retail leases inside large shopping centres.
- o. assignment procedure:** the mandatory procedure for assignment is largely unchanged, however, the landlord has to now provide the assignor with an updated disclosure statement 14 days after a request.
- p. demolition:** the restriction on the landlord's termination right for demolition has been expanded by the broadening of the definition of 'demolition' to apply to any repair, renovation or reconstruction (regardless of whether it is 'substantial') and to demolition of the part of the building of which the shop forms part (rather than the entire building).

The landlord can only terminate under a demolition clause if the proposed 'demolition' cannot be carried out practicably without vacant possession of the premises.
- q. screening tenants' employees and contractors:** If a landlord wants to require police and security checks and clearances for employees or other persons doing work for the tenant (such as contractors), it must include in the lease a provision which has been pre approved by the Registrar of Retail Tenancy Disputes.

WHAT HAS CHANGED BUT HAS A NEUTRAL IMPACT?

r. **disclosure statement content:** the content of parts of the disclosure statement has been updated. The required content applies to disclosure statements given after 1 July 2017.

s. **valuation of market rent:** specialist retail valuers (who determine market rent) will, instead of being appointed by the Tribunal, be appointed through an administrative process with the NSW Small Business Commissioner.

When making an appeal, the Registrar must choose from lists provided by a wider group of valuer industry bodies (Australia Property Institute Limited (NSW Division), Royal Institute of Chartered Surveyors, Australian Valuers Institute and Real Estate Institute of New South Wales Limited).

t. **security bonds:** the Retail Bond Scheme provisions have been amended to:

- + transition the Scheme to a digital platform in 2017 (however landlords cannot compel a tenant to use the digital platform, which is a new offence carrying 50 penalty units);
- + to remove entitlement to interest earned on the bond (after 1 July 2017);
- + minor procedural amendments in relation to stopping the payment of a bond during a period in which a decision can be appealed; and
- + further procedural requirements to paying out a bond following an agreement made at mediation and to make minor and consequential drafting amendments.

u. **new Tribunal powers to order lease and disclosure statement rectification:** the Tribunal can order rectification of the lease or disclosure statement or that a disclosure statement given by the landlord was deemed to have been given in compliance with the RLA before the lease was entered into.

The orders can only be made with consent, to correct an error or omission, if necessary to give effect to the parties' intentions when the lease was entered into or if necessary to give effect to the actual disclosure of information between the parties.

v. **Tribunal jurisdictional limit:** the monetary limit for claims to the Civil and Administrative Tribunal has increased from \$400,000 to \$750,000. The increased monetary limit only applies to claims for leases entered into from 1 July 2017.



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