

# Retail Shop Leases Amendment Bill

## The good, the bad and the ugly

The *Retail Shop Leases Amendment Bill 2014* will more than likely go before Parliament some time this year. Here are some of the highlights and lowlights for landlords:

### The good

1. Despite the ongoing requirement that retail landlords provide a disclosure statement and a copy of the draft lease to a potential tenant at least seven days before the tenant enters into the lease, the amendments allow a landlord to side-step this requirement. The tenant will be able to provide a waiver notice and a legal advice certificate, which confirms that a lawyer has provided advice to the tenant as to the legal meaning and effect of the waiver notice.
2. The same concession will apply in relation to any obligation by the landlord to provide the disclosure statement to assignees of any retail shop lease.
3. Where a franchisor intends to allow a franchisee to occupy the premises, the franchisor must provide a disclosure statement to the franchisee and may ask the landlord for that disclosure statement. The landlord must provide the disclosure statement within 28 days, but it can charge the franchisor any costs attributable to preparing such a disclosure statement and delivering same.
4. Where a shopping centre lot contains a number of discrete buildings, if any one of those buildings does not contain any retail premises, that building will **not** be (or be a part of) a retail shopping centre for the purpose of the Act. For example, a standalone medical centre on a shopping centre lot will not be subject to the provisions of the *Retail Shop Leases Act 1994*.
5. The compensation provisions contained in section 43 have been amended so that a tenant now has an affirmative obligation to notify a landlord of loss and damage allegedly caused by an interference with the tenant's trade as soon as possible after that loss or damage occurs. Unfortunately, the provision does not go as far as saying that the tenant will be deprived of its claim for damages if it fails to give this timely notice – the bill merely provides that the delay is a consideration to be taken into account when determining the amount of compensation to which a tenant may be entitled. However, it is foreseen that delayed notice could result in the tenant's claim for damages being reduced considerably where its recalcitrance has prevented the landlord from being aware of the alleged loss and being able to take steps to rectify it early. This amendment should curtail ambit claims for compensation first raised in response to landlord's claims for unpaid rental charges.
6. Where a landlord is aware of an event that will likely impact on the tenant's trading from the premises during the first year of the lease term, the landlord is permitted to include a term in the lease which limits the tenant's entitlement to damages for interference with trade during that period. As such, the landlord can lawfully limit the damages of the tenant to zero. However, the landlord must provide substantial details of the alleged event at the time that the lease is entered into – a generic statement that the landlord may conduct works in the future will be insufficient to allow the landlord to limit the damages and any provision in the lease seeking to do so will be void and unenforceable.

7. A landlord will be entitled to charge a tenant for the cost of preparing a retail shop lease if the final lease is sent to the tenant for signing and the tenant subsequently decides not to sign the lease. This is a clear divergence from the existing position – which is that a landlord may not charge for its professional fees in preparing a retail shop lease. If the Bill is passed, a provision should be added to expression of interest letters to reflect the ability of the landlord to recover these costs from the tenant.

### **The bad**

1. Where an option is exercised under a lease, the landlord will have an obligation to deliver a disclosure statement to the tenant. If the tenant is dissatisfied with the content of the disclosure statement for whatever reason, the tenant may, within 14 days of receiving the disclosure statement, give notice to the landlord that it withdraws the exercise of the option. If the landlord does not provide the disclosure statement in time, the tenant's ability to terminate will not commence until it is actually received. If it is never received, it is foreseen that the tenant may be entitled to terminate at any time up to the new lease being signed.
2. A tenant will be entitled to withhold payment of all outgoings in respect of a tenancy unless and until the landlord provides:
  - (a) the outgoings estimate required by the Act; and
  - (b) the audited annual statement of outgoings required by the Act.
3. For the purpose of the sections relating to misleading conduct by landlords, the Act is presently drafted in such a way that assignees of leases cannot avail themselves of the remedies arising out of alleged misleading conduct by a landlord. The Bill seeks to resolve this issue by confirming that the provisions will now apply to Assignees.

### **The ugly**

1. The Bill proposes that landlords no longer be able to recover from the tenant the landlord's costs of obtaining mortgagee consent. This will cause landlords significant loss where the usual practice presently is to seek payment of the costs charged by mortgagees to provide their consent to any lease.
2. At present, if an assignor and assignee of a lease do not comply strictly with the requirements of the Act in respect of disclosure statements and the provision of draft documents, the assignor cannot rely on section 50A of the Act to avoid future liability under the lease. Further, the manner in which that section is presently drafted does not provide for the release of guarantors simultaneously with the release of assignors. Therefore, even if the assignor was released by the assignment, the landlord could still seek to recover payment from the assignor's guarantor if the present tenant fell into arrears. The Bill seeks to confirm the release of the tenant, without it having to jump through the disclosure hoops, and also seeks to confirm the simultaneous release of any guarantor. This will limit the landlord's ability to recover debts where the present tenant is found to be impecunious.
3. Many leases contain refurbishment clauses which generally require a tenant to refurbish the premises at some time during the lease term. Most such terms do not go into any great detail as to what is required. The new provisions will require leases to fully particularise what refurbishment works must be conducted by a tenant and when. This will be difficult in most circumstances, unless the landlord has a crystal ball or puts every possible permutation of outcomes into the lease to ensure that all bases are covered.

If you have any queries regarding the eventual application of the Bill or have any enquiries concerning retail shop leases generally, please do not hesitate to contact me at [rob@anderssens.com.au](mailto:rob@anderssens.com.au) or on (07) 3234 3130.



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