

SUMMARY OF KEY CHANGES - RETAIL SHOP LEASES AMENDMENT ACT 2016

Background

The *Retail Shop Leases Act 1994* (the Act) regulates retail leasing in Queensland through mandatory minimum lease standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.

On 25 May 2016, the *Retail Shop Leases Amendment Act 2016* was enacted to give effect to the outcomes of a consultative statutory review of the Act (2016 Amendments).

When do the 2016 changes come into effect?

The 2016 Amendments are proclaimed to commence on **25 November 2016** and will apply prospectively.

When a retail shop lease is 'entered into'

The 2016 Amendments clarify and update the definition of when a lease is taken to be entered into for the purposes of the Act.

Changes to coverage of the Act

The Act applies only to agreements that are a 'retail shop lease' within the meaning of the Act.

To reduce red tape for the Queensland retail sector, the 2016 Amendments exclude the following additional lease categories from the operation of the Act:

- retail shop leases with a floor area of more than 1000m²;
- leases of premises for the conduct of a retail business by a tenant who is the landlord's employee or agent; and
- leases of premises for a non-retail business purpose located on a level of a retail shopping centre or in a building that is part of a retail shopping centre where, on the date the lease is entered into, 25% or less of the total lettable area of the level or building is used for retail business purposes.

The 2016 Amendments also exclude certain procedural requirements where a State, the Commonwealth or a local government is a tenant of premises located in a retail shopping centre.

Preliminary disclosures about leases

The 2016 Amendments clarify and improve the pre-lease disclosure requirements in Part 5 of the Act.

Key changes are:

- allowing for waiver of disclosure periods by tenants and assignees who are not major lessees, and simplifying waiver for major lessees;
- a new mechanism for pre-lease disclosure to be given to sub-lessees and to franchisees. This disclosure is the responsibility of the sub-lessor or franchisor;
- a new requirement for a landlord to give a current lessor disclosure statement to a sitting tenant who exercises an option to renew the lease; and

- a new requirement (where a lease is being assigned in connection with the sale of a retail business) for the assignor to give the assignee an assignor disclosure statement and a copy of the current lease before the assignee enters into the business sale contract.

Turnover statements

The 2016 Amendments remove the requirements under the Act for a tenant (whose rent under the lease is calculated wholly or partly as a percentage of their business turnover) to give the landlord turnover certificates and audited turnover statements.

Current market rent review process

The 2016 Amendments clarify and streamline the current market rent review provisions under the Act, including the process and timeframes for parties' submissions to a specialist retail valuer.

Landlord's outgoings

The 2016 Amendments clarify and update the provisions dealing with landlord's outgoings in Part 6 Division 5 of the Act.

Key changes relating to landlord's outgoings are:

- section 38 of the Act (which sets out how a landlord must apportion liability for outgoings as between individual tenants of the shopping centre or building) is amended to exclude certain common areas when calculating the apportionment;
- a new requirement (for leases in a retail shopping centre) that:
 - the landlord's annual estimate of outgoings (to be apportioned to the tenant) must include a breakdown of the estimated fees to be paid by the tenant towards the administration costs of running the centre and any other fees to be paid to a centre management entity;
 - the landlord's audited annual statement of outgoings (apportioned to the tenant) must include the total management fees paid by the tenant, broken down into administration costs and payments to centre management;
- a tenant may withhold payment of the landlord's outgoings until the outgoings estimate or audited annual statement is given to them by the landlord.

Promotion and advertising amounts

The 2016 Amendments set out new requirements to improve transparency for tenants who are required under their lease to make payments to the landlord for promotion/advertising of a retail shopping centre (promotion amounts).

These new requirements are that the landlord must:

- before the start of each accounting period, make available to tenants a marketing plan detailing the proposed promotion spend for the period;
- carry forward unspent promotion amounts to be applied towards future centre promotion; and
- make available to tenants, within three months after the end of the accounting period, an audited annual statement of the landlord's expenditure for promotion amounts.

Implied compensation provisions

The 2016 Amendments clarify and update the provisions about compensation (payable by the landlord to the tenant) which are included in retail shop leases by Part 6 Division 7 of the Act.

Key changes to the compensation provisions are:

- a new requirement that a tenant (whose business is disturbed due to the landlord's action or omission of a type listed in section 43(1) of the Act) must give the landlord early written notice of the tenant's loss or damage resulting from the landlord's actions;
- a landlord is not liable to pay compensation to a tenant for action taken as a reasonable response to an emergency, or in compliance with a statutory duty (i.e. closure of a shopping centre due to flooding); and
- permitting a provision in a lease that limits the tenant's right to claim compensation from the landlord for certain disturbances to the tenant's business (subject to the landlord giving the tenant a specific notice detailing the disturbance before, and the disturbance occurring within one year from, the date the lease is entered into).

Liability for costs associated with lease

The 2016 Amendments include the following new provisions about liability for lease costs:

- the landlord is responsible for paying the legal and other expenses of obtaining their mortgagee's consent, and for the landlord's compliance with the Act; and
- a prospective tenant can be required to pay the landlord's reasonable and invoiced legal or other expenses of preparing a final lease where the tenant has given the landlord a written notice to prepare the final lease which the tenant does not then sign.

Implied relocation and demolition provisions

The 2016 Amendments:

- clarify the relocation provisions in Part 6 Division 9 of the Act. The relocation provisions are taken to be included in a retail shop lease that provides for the relocation of the tenant's business during the term of the lease; and
- amend the timeframe within which a tenant's termination notice must be given to the landlord under the demolition provisions.

Release of assignor and guarantor

The 2016 Amendments provide that, when an assignment of a retail shop lease is entered into and the assignor has complied with their disclosure obligation to the assignee under the Act, the assignor and the assignor's guarantors are released from any liability under the lease resulting from default by the assignee.

Refurbishment and refitting

The 2016 Amendments provide that a retail shop lease requiring the tenant to refurbish or refit the retail shop is void unless the lease gives general details of the nature, extent and timing of the requirement.

Trading hours

The 2016 Amendments replace and update existing section 53 of the Act, which voids a provision in a retail shop lease requiring a tenant to open for trade outside the core trading hours for the shopping centre. The amendments clarify that a provision of a lease that permits (rather than requires) the tenant to open the shop for trading outside the core trading hours for the centre is not void.

Disclaimer:

This information sheet is intended to provide retail tenants and landlords with an overview of key changes to the Act only. You should not rely on this publication as providing full or technical detail of the changes to the Act under the 2016 Amendments, including their legal meaning and effect.

Tenants and landlords should obtain independent legal advice on how the changes under the 2016 Amendments will impact their individual rights, obligations and liabilities.

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