

TENANT'S RIGHTS IN THE RETAIL AND COMMERCIAL LEASES ACT (S.A.) – PART 1

If the Act applies to your lease, do you know your statutory rights?

This paper looks at your statutory rights as a tenant as at July 2003. To save space, we simplified some things, so for example in many cases a notice or request under the Act must be in writing.

If your retail shop is in a *retail shopping centre* (a cluster with at least 5 retail shops under 1 owner), also read our paper headed Part 2, for additional rules.

Does the Act apply?

The Act applies to a retail shop lease.

A *retail shop* is business premises:

- at which goods are sold to the public by retail; or
- at which services are provided to the public, or to which the public is invited to negotiate for the supply of services; or
- of a kind included by the Regulations and not excluded by the Regulations (both nil now).

A *retail shop lease* is an agreement (express or implied, oral or in writing) under which a person (the *lessor*) grants or agrees to grant to another person (the *lessee*) for value a right to occupy a retail shop for carrying on a business. It can be a true legal lease, or merely a licence to occupy.

However, the Act does not apply if either:

- the rent exceeds \$250,000 per annum;
- the lease is for 1 month or less;
- the right of occupation arises under an agreement for the sale and purchase of premises, under a mortgage or under a scheme under which a group of adjacent premises is owned by a company and the premises are let by the company to persons with a controlling interest in the company;

- you are a public company (or its subsidiary), financial institution, an insurance company or the government; or
- the Regulations exclude that class of retail shop leases (very few).

If the Act applies, a lease is void to any extent inconsistent with the Act. The Minister or Magistrates Court may grant an exemption from any of the Act.

Premises licensed under the *Liquor Licensing Act* are excluded from a few specific protections.

Before the lease is entered into (or renewed)

The lessor must make available to you the form of proposed lease, as soon as you enter into negotiations for the lease.

The lessor must give you a *disclosure statement* (in requisite form) before the lease is entered into, or renewed. If a disclosure statement is not given, or is defective, the Court may make remedial orders, including for unwinding the lease or for compensation to be paid.

Preparatory costs

Your liability for the lessor's legal or other expenses in the preparation, stamping and registration of the lease is limited to stamp duty, government registration fees and 50% of the other preparatory costs. You need not pay these costs until given a copy of any account given to the lessor for the costs.

Premiums (key money) are prohibited

A lessor must not seek a premium (in money or benefits):

- to grant the lease (with exceptions, such as a security bond and rent in advance);
- to extend the lease (with similar exceptions);
- to renew the lease (with similar exceptions); or
- to consent to your assigning the lease (with exception of reasonable and substantiated

legal or other expenses the lessor may incur in connection with a consent).

Executed copy of the lease

If the lease is not to be registered, the lessor must give you an executed copy of the stamped lease within 1 month after stamping.

If the lease is to be registered, the lessor must lodge the lease for registration within 1 month after stamping, and give you an executed copy of the stamped and registered lease within 1 month after registration.

Warranty of fitness for purpose

The lessor warrants that the premises will, for the duration of the lease, be structurally suitable for carrying on a particular business of a kind you notified the lessor before entering into the lease, unless the lessor excludes that warranty in the requisite manner and form, before you execute the lease.

Security bond

You are not obliged to provide more than 1 security bond equal to 4 weeks' rent (ignoring any rent free period or other concessional rent). If after 2 years the rent has increased, the lessor may require a top up of the security bond so as to equal 4 weeks' rent at then current rates. You are entitled to a receipt for any security bond you pay.

You may take to court a dispute between the parties as to whether you should receive back all or some of the security bond.

Minimum 5 year term

You are entitled to a term of at least 5 years (assuming any right or option of renewal or extension that exists when the lease is entered into will in fact be exercised). If the term falls short, the Act extends the lease to the 5 years minimum.

Exceptions:

- there is a fixed term of 6 months or less;
- you are holding over after the end of your earlier lease, and the holding over does not exceed 6 months;

- the lease contains a *certified exclusionary clause* (a certificate signed by your lawyer that they explained your statutory rights and you appeared to be giving a waiver freely);
- you have already been in possession of the shop for at least 5 years;
- yours is a sublease and the term is as long as the term of the head lease allows; or
- your lease is excluded by the Regulations (only a few, but notably a lease between family members).

Renewal or extension

If you are not in a retail shopping centre (see Part 2) and do not have a right or option to renew or extend, the lessor must in the 12 months to 6 months before the end of the term either:

- offer you (for at least 1 month) a renewal or extension; or
- inform you that the lessor does not propose to offer a renewal or extension.

In default, if before the end of the term you request an extension, the term is extended until 6 months after the lessor gives you the required notice. During that temporary extension, you may terminate the lease on at least 1 month's notice.

If the term of a lease is 12 months or less, the above rules apply as if the above periods of 12 months and 6 months were reduced by one-half.

The lessor must not make threats to dissuade you from exercising a right or option to renew or extend, or exercising statutory rights to renew or extend.

Base rent

Base rent means rent, or that component of rent, that comprises a specified amount (though the amount may change). Whereas *turnover rent* is referenced to your turnover.

A lease must not change base rent less than 12 months after the lease is entered into, nor change base rent less than 12 months after any previous change to that rent, but base rent may change by a specified amount or specified percentage (say in line with the CPI). This rule, for example, prevents an increase to current market rent more than once in 12 months. It does not prevent the rent to increase by \$100 every 6 months. Nor

does it prevent the rent being increased to current market rent after 12 months and then to be increased by 2% every 6 months after that.

A lease may not:

- allow one party to decide which of 2 or more methods of calculating a change to base rent is to apply on a particular occasion;
- provide for a method of calculating a change to the base rent but allow one party to decide whether the base rent is to be changed in accordance with that method on a particular occasion; or
- provide for base rent to change on a particular occasion in accordance with whichever of 2 or more methods of calculating the change would result in the higher or highest rent.

If a lease provides for a change to base rent in a way that may result in a decrease of rent (for example, a provision for a change to current market rent), the lease may not prevent (or enable the lessor or any other person to prevent) the decrease.

Current market rent

If the lease provides for rent to be changed to current market rent:

- the *current market rent* is the rent that, having regard to the lease and other relevant matters, would be reasonably expected for the shop if it were unoccupied and offered for renting for the use to which the shop may be put under the lease;
- the value of goodwill created by your occupation and the value of your fixtures and fittings are ignored;
- if the parties do not otherwise agree, the rent is decided by a valuer who must give detailed reasons and whose costs are borne equally by the parties.

If the lease provides an option to renew or extend at current market rent:

- the same rules as above apply;
- you may request a determination of the current market rent in the 6 to 2 months

before the option expires, unless the parties have already agreed what that rent is to be. If the term of the lease is 12 months or less, these periods of 6 and 2 months are shortened to 3 months and 30 days respectively;

- if you make that request, the option cannot expire until 21 days after the determination of rent is made and notified to you or the last day of the term of the lease, whichever is the earlier;
- the parties are to pay the costs of the determination of current market rent in equal shares, but if you decide not to exercise the option to renew you must reimburse the lessor's share of the costs (so you bear all the costs).

Turnover rent

Turnover includes gross takings, gross receipts, gross income and similar concepts.

If any of the rent is calculated by reference to your turnover:

- certain amounts must be excluded or subtracted in the calculation; and
- underpayments or overpayments of rent (resulting from actual turnover differing from projected turnover) must be adjusted within 1 month after you request the lessor for an adjustment and provide information the lessor reasonably requires to make the adjustment. You may request an adjustment only once in the first 12 months of the term and thereafter only at intervals of not less than 12 months following the first request for an adjustment. The parties can agree to more frequent adjustments.

You are not obliged to provide the lessor with information about your turnover unless some of your rent is referenced to your turnover.

Outgoings

Outgoings means a lessor's expenses of operating, repairing or maintaining the shop:

- including rates, taxes, levies, premiums or charges payable by the lessor; and
- excluding outgoings (such as telephone, energy, excess water) directly proportional to the level of your consumption or use and

for which you are required to reimburse the lessor under the lease.

You are not obliged to pay land tax or to reimburse the lessor for the payment of land tax. However, the lessor's liability for land tax may be taken into account in the assessment of rent.

You are not obliged to pay an amount to the lessor for outgoings except in accordance with provisions of the lease that specify:

- the outgoings that are to be recoverable;
- how the amount of the outgoings will be determined and how they will be apportioned to you; and
- how the outgoings, or a part of them, may be recovered by the lessor from you.

The expression "outgoings to which the lessee contributes" refers to outgoings in respect of which the lessee is liable under the lease to make a payment to the lessor. Costs associated with the advertising or promotion of a shop, or of a business carried on there, are not outgoings for these purposes.

The lessor must give you an estimate of the outgoings to which you contribute:

- using the item descriptions used in the disclosure statement;
- for each accounting period, the first estimate before the lease is entered into and thereafter at least 1 month before the commencement of the accounting period concerned.

An *accounting period* means a period fixed as an accounting period in the lease. A financial year would be usual.

The lessor must at your request give you information and explanations that you may reasonably require about:

- expenditure on outgoings to which you are required to contribute; and
- the basis on which your contribution to the outgoings is determined.

The lessor must, within 3 months after each accounting period, give you an auditor's report (in requisite form) of all expenditure by the lessor in the accounting period towards which you are required to contribute. The report need not be

audited if it does not relate to outgoings other than water and sewerage rates and charges, local government rates and charges, and insurance so long as the report is accompanied by copies of receipts for all expenditure.

Within 3 months after each accounting period, the parties must adjust for any underpayment or overpayment by you for outgoings by comparing the total outgoings for which you contributed (that is, the estimated total outgoing during the accounting period) and the total amount actually expended by the lessor for those outgoings during that period as shown in the auditor's report, but taking into account only expenditure properly and reasonably incurred by the lessor. The adjustment ignores any contribution by you towards, and expenditure by the lessor for, repairs and maintenance covered by a sinking fund (see next).

Sinking fund for major repairs and maintenance

If the lease provides for a sinking fund for major items of repair or maintenance:

- you are not required to contribute unless reasonable details of your obligation were in the disclosure statement;
- an amount you pay towards the lessor's outgoings for those items must be paid into the sinking fund;
- the lessor must hold the sinking fund in an interest bearing account;
- amounts you paid for the sinking fund, and the net interest on the sinking fund, must be applied by the lessor only for payment of outgoings for which the sinking fund was established;
- the lessor is liable to contribute to the sinking fund any deficiency attributable to a failure by the lessor or a predecessor in title of the lessor to comply with the above rule. This means a purchaser of the premises from the lessor should ensure that the sinking fund has been properly maintained by the vendor, because the purchaser will be liable for any shortfall.

Capital expenditure

You are not obliged to make or reimburse capital expenditure, except to make good damage arising when you were entitled to possession, or to

contribute to a sinking fund (above) or to contribute fit out (below).

You are not obliged to compensate the lessor for depreciation of the retail shop attributable to ordinary wear and tear, but depreciation may be taken into account in the calculation of base rent.

Lessee's fitout

You may be obliged to fit or refit the shop, or to provide fixtures, plant and equipment only if the disclosure statement discloses the obligation and contains sufficient details for you to be able to estimate the cost.

Lessor's fitout

If you are obliged to pay rent when you commence possession of the shop and under the lease the lessor is obliged to provide finishes, fixtures, fittings, equipment or services before you enter into possession:

- you are not liable to pay rent, or any other amount (such as for outgoings), for any period before the lessor has substantially complied with the lessor's fitout obligations; and
- the lessor may not deny you possession merely because the lessor has not complied with the lessor's fitout obligations (unless the premises are unsafe).

Lessor's alterations and refurbishment

The lessor must not alter or refurbish the building in a way likely to adversely affect your business unless:

- the lessor notifies you at least 1 month before it is commenced; or
- the alteration or refurbishment is due to an emergency and the lessor gives you the maximum period of notice that is reasonably practicable.

The above does not apply to routine maintenance or repairs.

Compensation for disturbance

The lessor is liable to compensate you for loss or damage you suffer as a result of the lessor either:

- inhibiting your access to the shop in a substantial manner;
- taking action that would inhibit or alter, to a substantial extent, the flow of customers to the shop;
- unreasonably taking action that causes significant disruption of, or has a significant adverse effect on, your trading in the shop;
- failing to take all reasonable steps to prevent or put a stop to anything attributable to causes within the lessor's control that causes significant disruption of, or which has a significant adverse effect on, your trading in the shop; or
- failing to rectify any breakdown of plant or equipment under the lessor's care or maintenance

and the lessor does not rectify the matter as soon as reasonably practicable after being requested by you to do so.

This rule does not apply to action taken by the lessor as a reasonable response to an emergency situation, or to comply with a statutory duty or a government requirement.

A lease may prevent or limit a claim for compensation for a particular occurrence, if the likelihood of the occurrence was specifically drawn to your attention before the lease was entered into. A disclosure statement is an appropriate means of doing that.

Demolition

In the Act *demolition* includes a substantial repair, renovation or reconstruction of the building that cannot be carried out practicably without vacant possession of the shop.

If the lease provides for termination of the lease because of proposed demolition of the building of which the shop forms part:

- the lease cannot be terminated for that reason until the lessor provides you with details of the proposed demolition sufficient to indicate a genuine proposal to demolish that building within a reasonably practicable time after the lease is to be terminated;
- the lease cannot be terminated by the lessor for that reason without at least 6 months notice of termination;

- if that notice of termination is given, you may terminate the lease by giving the lessor not less than 7 days notice of termination at any time within 6 months before the termination date notified by the lessor.

If the lease is for a term of 12 months or less, these periods of 6 months are both shortened to 3 months.

If a lease is terminated for this reason and demolition of the building is not carried out within a reasonably practicable time after the termination date notified by the lessor, the lessor is liable to pay you compensation for damage you suffer as a result of the early termination of the lease, unless the lessor establishes that at the time notice of termination was given by the lessor there was a genuine proposal to demolish the premises within that time.

Damaged premises

If the shop (or the building of which the shop forms part) is damaged:

- you are not liable to pay rent, or any amount payable to the lessor for outgoings or other charges, that is attributable to a period during which the shop cannot be used under the lease or is inaccessible due to that damage;
- though the shop is still useable under the lease but its useability is diminished due to the damage, your liability for rent and for outgoings attributable to a period during which useability is diminished is reduced in proportion to the reduction in useability caused by the damage;
- and if the lessor notifies you that the lessor considers that the damage is such as to make its repair impracticable or undesirable, either party may terminate the lease on at least 7 days notice and no compensation is payable for that termination;
- and if the lessor fails to repair the damage within a reasonable time after you request the lessor to do so, you may terminate the lease on at least 7 days notice.

The above rules do not affect a right of the lessor to recover damages from you in respect of damage or destruction to which the above paragraphs apply. Nor are you relieved of the obligation to pay rent if the damage results from

your wrongful act or negligence (or that of your employee or agent) unless the lessor is insured against loss of rent and you contribute to the insurance premium.

A lease must not limit a liability of a party to pay compensation to the other party for damage to the shop or the building of which the shop forms part.

The parties may in any event agree to terminate the lease if the shop (or the building of which it forms part) is damaged or destroyed.

Employment restriction

A lease must not limit your right to employ persons of your own choosing, though it may specify minimum standards of behaviour for persons employed in the shop.

Assignment

There are several steps to you assigning the lease.

Step 1: Before requesting the lessor's consent to a proposed assignment of the lease, you must give the assignee:

- a copy of any disclosure statement given to you for the lease; and
- details of any changes in the information in that disclosure statement since it was given to you (being changes of which you are aware or could reasonably be expected to be aware).

These rules will not apply if you request the lessor to provide you with a copy of the disclosure statement and the lessor is unable or unwilling to comply with your request within 14 days.

Step 2: Your request for the lessor's consent to an assignment must be in writing and you must provide the lessor with information the lessor reasonably requires about the use to which the assignee proposes to put the shop and the financial standing and business experience of the assignee.

Step 3: The lessor must deal expeditiously with a request for consent and is taken to have consented if you complied with steps 1 and 2 and the lessor has not within 42 days after your request notified you either consenting or withholding consent.

Step 4: The lessor may withhold consent only if either:

- the assignee proposes to change the use to which the shop is put;
- the assignee is unlikely to be able to meet the financial obligations of the lessee under the lease;
- the assignee's retailing skills are inferior to yours; or
- you have not complied with procedural requirements for obtaining the lessor's consent.

If the lessor withholds consent, the lessor must give reasons.

Step 5: The lessor and a proposed assignee may in any case agree to enter into a new lease of the shop, instead of proceeding with the assignment.

Step 6: Subject to an exception (see below), if you assign the lease, you and any guarantor of you will not be subject to any future obligations or liabilities under the lease on or after the relevant date, being the earliest of:

- the second anniversary of the assignment;
- the date the lease expires; or
- if the lease is renewed or extended after the assignment, the date the renewal or extension commences.

The exception is an assignment of a lease for a shop that is to continue as an ongoing business if:

- you did not provide an *assignor's disclosure statement* (in requisite form) to the assignee (before requesting the lessor's consent to the assignment) and to the lessor (at the time your request for consent to the assignment is made); or
- your assignor's disclosure statement was materially false or misleading.

The Act does not relieve you or your guarantor of any obligations accrued under the lease prior to the relevant date.

Sublease or mortgage

A lease may allow the lessor to refuse consent:

- to the grant of a sublease, licence or concession for the whole or a part of the shop;

- to you parting with possession of the whole or a part of the shop;
- to you mortgaging or otherwise charging or encumbering your interest in the lease.

Mediation of disputes

A party (or former party) may apply to the Commissioner for Consumer Affairs for mediation of a dispute related to the lease or your occupation of the shop. If a dispute is first taken to the court, the court may refer the dispute to the Commissioner for mediation. Admissions or statements made in the mediation are not admissible in evidence before a court.

Vexatious conduct

A party must not, in connection with the exercise of a right or power under the Act or the lease, engage in conduct that is, in all the circumstances, vexatious.

Abandoned goods

If the lease terminates or is terminated, and goods are left on the premises:

- the lessor may after 2 days remove and dispose of any perishable foodstuffs, or goods not worth storage and sale;
- otherwise the lessor must store the goods for at least 60 days, within 7 days notify you (and any third party known to have an interest in the goods) and publish a notice in a newspaper circulating generally throughout the State.

A person entitled to possession of stored goods may reclaim them on paying the lessor's reasonable costs. If stored goods are not reclaimed within the 60 day period, the lessor must have the goods sold by public auction, may then recoup the lessor's reasonable costs from the sale proceeds and pay the balance to the former owner of the goods (or, in default, to the Commissioner).

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