

TENANT'S RIGHTS IN THE RETAIL AND COMMERCIAL LEASES ACT (S.A.) – PART 2

To know whether the Act applies to your situation, please see our paper headed Part 1 that sets out the basic statutory rules that apply to every retail shop lease.

This Part 2 sets out the additional rules that apply as at July 2003 to a shop in a retail shopping centre.

To save space, we simplified some things, so for example in many cases a notice or request under the Act must be in writing.

Are you in a retail shopping centre?

A *retail shopping centre* means a cluster of premises in which:

- at least 5 of the premises are *retail shops* (see Part 1);
- the premises are all owned by the same person, or have (or would if leased have) the same lessor or the same head lessor, or comprise lots in the same community title plan or units in the same strata plan;
- the premises are in the 1 building or in 2 or more buildings that are either adjoining or separated only by common areas or other areas owned by the owner of the premises; and
- the cluster of premises is promoted as, or generally regarded as constituting, a shopping centre, shopping mall, shopping court or shopping arcade.

If the shop is in a retail shopping centre the following additional rules apply.

Before the lease is entered into (or renewed)

The lessor's *disclosure statement* (see Part 1) must contain additional disclosures.

Renewal or extension

The statutory rights we set out in Part 1 do not apply and instead you have a preferential right to an extension or renewal unless either:

- there is a fixed term of 6 months or less;

- the lease contains a *certified exclusionary clause* (see Part 1);
- yours is a sublease and the term is as long as the term of the head lease allows; or
- your lease is of a class excluded by the Regulations (some named premises, mostly in Adelaide).

There are several steps to your preferential right.

Step 1: If the lessor proposes to re-let the premises, and you want a renewal or extension, the lessor must prefer you over other possible lessees. The lessor must presume you want a renewal or extension, unless you notify the lessor otherwise within 12 months before the end of the term.

Exceptions:

- the lessor reasonably wants to change the tenancy mix in the centre;
- you have been guilty of a substantial breach or persistent breaches of the lease;
- the lessor requires vacant possession for demolition or substantial repairs or renovation;
- the lessor:
 - does not propose to re-let the premises for at least 6 months from the end of the term; and
 - requires vacant possession for the lessor's own purposes during that period (but not to carry on a business of the same kind as your business);
- the renewal or extension would substantially disadvantage the lessor; or
- your right of preference is excluded by the Regulations.

Step 2A: If you have a preferential right, the lessor must in the 12 months to 6 months before the end of the term, begin negotiations with you for a renewal or extension. In particular, before

agreeing to enter into a lease with another person, the lessor must:

- make you a written offer (open for at least 10 working days) to renew or extend on terms and conditions no less favourable to you than those of the proposed new lease; and
- provide you with a copy of the lease or proposed lease (as renewed or extended) and the disclosure statement required for it.

lessor must make that information available to you (for example, the cost of a count undertaken at the lessor's request to assess the vehicular or pedestrian traffic).

The negotiations are to continue until you reject an offer (or the offer lapses), or you discontinue negotiations. The negotiations are to be conducted in good faith.

Step 2B: If you don't have a preferential right, the lessor must in the 12 months to 6 months before the end of the term notify you of that fact and why there is no preferential right. If the term of the lease is 12 months or less, the above periods are reduced by one-half.

Step 3: If a lessor fails to negotiate under step 2A (or give you a notice under step 2B, if applicable) and you notify the lessor before the end of the term that you request an extension, the term is extended for 6 months after the lessor begins the required negotiations or 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 the lease is 12 months or less, the period of 6 months is reduced to 3 months.

Step 4: If a lessor fails to comply with the rules and you are prejudiced by the failure, you may apply to the Commissioner for mediation of the dispute (and if that fails the dispute may be referred to the court) or to the court for orders resolving the dispute (including orders to renew or extend the lease, or for a new lease, or for you to be paid compensation of up to 6 months' rent).

Turnover rent

If you must provide to the lessor information about your turnover, the lessor must keep the information confidential (with few exceptions).

Outgoings

The basic statutory rules about *outgoings* include a lessor's expenses of operating, repairing or maintaining the centre. Costs of advertising or promoting the centre are not outgoings for those purposes, however.

Statistical information: If you must pay an amount for outgoings to obtain statistical information, the

Non-specific outgoings: You are not obliged to contribute to an outgoing of the lessor not specifically benefiting any particular shop in the centre, unless your shop is one of the shops that benefit. If you must contribute, your contribution must take account of:

- the proportion the lettable area of your shop bears to the total lettable areas of all the retail shops that benefit from the outgoing (after allowing for the total lettable areas of any premises in the centre (such as office towers and entertainment annexes) that are leased or available for lease but are not retail shops); and
- any casual mall licence (see later) granted by the lessor.

Contributions to advertising: If you must pay an amount to the lessor towards advertising and promotion costs:

- and if a payment relates to an opening promotion, the lessor must, at least 2 months before that opening promotion, make available to you details of the proposed expenditure on that promotion;
- the lessor must, at least 2 months before the start of each *accounting period* (see Part 1), make available to you a marketing plan that details the lessor's proposed expenditure on advertising and promotion in that accounting period;
- the lessor must consider any proposals for change you make within 1 month after the marketing plan is made available to you;
- the lessor must within 3 months after the end of an accounting period give you an audited report that details all expenditure by the lessor in that accounting period for advertising or promotion costs to which you are required to contribute;
- an amount you pay for advertising or promotion costs of the lessor and which is not spent for that purpose must be carried forward by the lessor, to be applied towards future expenditure for that purpose.

Advertising of your business

You are not obliged to undertake advertising or promotion of your business (but the lease may oblige you to make a payment to the lessor for advertising and promotion costs of the lessor).

Lessor's alterations and refurbishment

The basic rules governing the lessor altering or refurbishing the building in a way likely to adversely affect your business, include an alteration or refurbishment of the centre.

Compensation for disturbance

The basic rules about a lessor being liable to compensate you for disturbance include where the lessor fails to clean, maintain or repair the centre (including common areas) as soon as reasonably practicable after being requested by you to do so.

Employment restriction

The lease may require you to comply with an industrial award or industrial agreement (such as a construction site agreement) affecting the centre.

Relocation

If the lease enables your business to be relocated:

- the lessor cannot require your relocation unless the lessor provides you with details of a proposed refurbishment, redevelopment or extension sufficient to indicate a genuine proposal that is to be carried out within a reasonably practicable time after the relocation and that cannot be carried out practicably without vacant possession of your shop;
- the lessor cannot require your relocation unless the lessor has given you at least 3 months notice (a *relocation notice*) that details an alternative shop to be made available to you;
- you are entitled to be offered a new lease of the alternative shop on the same terms and conditions (excluding rent) as your existing lease, except that the term of the new lease is to be for the remainder of the term of your existing lease (but these are the minimum entitlements and you could accept other arrangements offered by the lessor);

- within 1 month after you receive the relocation notice, you may terminate the lease by giving notice to the lessor, in which case the lease terminates 3 months after the relocation notice or as the parties may agree;
- if you do not give a notice of termination as above, you are taken to accept the offer of a lease unless the parties agree to a lease on some other terms;
- you are entitled to payment by the lessor of your reasonable costs of the relocation, including legal costs (but these are the minimum entitlements and you could agree to other arrangements about your relocation costs).

The Act does not prevent the parties negotiating a new lease for the purpose of the relocation.

Termination for inadequate sales

Your lease may not be terminated because you or your business fail to achieve a particular level of sales or turnover.

Geographical restrictions

A lease must not restrict you from carrying on business outside the centre, either during or after the lease. A lease may however prevent the use of the centre's name with a business carried on outside the centre.

Tenants' associations

A lease must not restrict you from joining, forming or taking part in an association to represent or protect the interests of lessees. You are entitled to be accompanied and represented by a member or officer of such an association when conducting negotiations with the lessor, but the member or officer must not be a lessee of another shop in the centre.

Trading hours

A lease may only regulate trading hours if:

- the shop is in an *enclosed shopping complex* (see below);
- the lease does not reduce the shop's permitted trading hours to less than 50 hours per week; and
- the core trading hours (when the shop must be open for business):

do not exceed 54 hours a week;

do not require any Sunday trading; and

are approved in a secret ballot of the lessees.

If you are obliged to be open during core trading hours, you are not obliged to contribute to the costs of operating the shopping complex outside core trading hours when your shop is not open.

You may apply to the lessor for exemption from the provisions of the lease regulating trading hours. The lessor must not unreasonably withhold the exemption (but it may be granted on reasonable conditions).

An *enclosed shopping complex* means a group of 3 or more retail shops under common ownership or management with a common area through which public access is obtained to all or some of the shops and which is locked to prevent public access through that area when those shops are closed for business.

None of these rules governing what a lease can require of trading hours apply if the shop's trading hours are fixed under the *Liquor Licensing Act*.

Strata units and community lot in retail shopping centres

If the shop is a strata unit or a community lot, the Act applies with necessary modifications (and also any modifications prescribed by Regulation) to requirements, limitations and restrictions imposed under the articles of the strata corporation or by-laws of the community corporation, as if part of the lease.

Casual Mall Licensing Code

A lessor must not grant a casual mall licence (a right for a business to occupy for up to 180 days a part of the public mall area):

- unless the lessor has given to every lessee:
 - a "casual mall licence policy" (in requisite form) of the lessor's policy for such licenses (subject to amendment in the future)
 - a copy of the Casual Mall Licensing Code (in the Act)

information about the lessor's nominee to deal with complaints about licences;

- except in accordance with the casual mall licence policy (which must contain a plan of where licences may be located);
- if the licensee's business substantially interferes with the sightlines to a lessee's shopfront (unless the lessee consents);
- if the licence results in the unreasonable introduction of an external competitor of an adjacent lessee;
- if the licence results in the unreasonable introduction of an internal competitor (another lessee in the same centre) of an adjacent lessee (with several exceptions);
- except special events (of limited duration) such as entertainment as the policy may allow.

A lessor is not liable for a breach of the rules about sightlines or competitors being introduced unless the lessor fails to rectify the breach as soon as reasonably practicable after being requested to do so by a lessee who is directly affected by the breach.

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