

Commercial Tenancy (Retail Shops) Agreements Act 1985

[Section 6A]

TENANT GUIDE

FOR NEW RETAIL SHOP LEASES FROM 1 JULY 1999

TO THE NEW TENANT (“LESSEE”)

Entering into a lease of retail shop premises for your business means you are entering into a contract that creates binding legal obligations between yourself and the Landlord (“Lessor”).

Before you enter into a lease, you should fully understand your obligations, liabilities and rights under the lease.

The *Commercial Tenancy (Retail Shops) Agreements Act 1985* (and its amendments) contains provisions regulating retail shop leases, many of which will over-ride any contrary provision in a lease.

A lease provision that is contrary to the provisions of the Act has no effect (“void”).

To make sure you understand your obligations, liabilities and rights before entering into the lease you should:

- ◆ carefully read this *Tenant Guide*;
- ◆ carefully read any *Disclosure Statement* provided by the landlord or the landlord’s agent;
- ◆ carefully read any written lease document;
- ◆ obtain independent advice.

This Tenant Guide is merely a guide intended to help you to understand some of your legal obligations under a retail shop lease and, in particular, to understand your rights under the Act. You should not rely on this Guide as a substitute for reading the documents and obtaining independent advice before signing any Offer to Lease, Agreement to Lease, or any other related documents.

ADVICE BEFORE ENTERING THE LEASE

The Act provides that your retail lease will “commence” either —

When you take possession of the keys to the shop premises; or

When you commence paying rent; or

When both parties sign the lease.

You should get independent advice before doing any of those things.

Experts in the fields of legal, financial, business, taxation and property matters will be able to help you make the decision to enter into a lease or an agreement to lease and the terms of the contract that should be negotiated.

For legal advice, you should consult a solicitor with experience in commercial property and preferably in retail shop leasing matters.

Industry advice is also available from experts in accounting and valuation as well as retail representative groups and tenant advocates. The Western Australian Government’s Small Business Development Corporation (SBDC) is also a source of guidance to prospective tenants.

You should understand the terms of the lease before signing it.

All elements in a lease agreement e.g. rent, term, options, outgoings and related costs such as documenting the lease need to be understood by you. These matters are open to negotiation with the Lessor but the basis of your agreement is subject to the provisions of the Act.

DISCLOSURE STATEMENT (s.6)

The Lessor must provide you with a “*Disclosure Statement*” before you enter a new retail shop lease.

You can terminate the lease at any time up to 60 days after the lease was “entered into” —

- ◆ if the *Disclosure Statement* is not given to you at least 7 days before the lease is “entered into”; or
- ◆ if the *Disclosure Statement* contains false or misleading information.

You can go to the State Administrative Tribunal and get an order for compensation for any pecuniary loss suffered as a result of —

- ◆ not being given a *Disclosure Statement*; or
- ◆ false or misleading information contained in a *Disclosure Statement*.

The *Disclosure Statement* is to be in a prescribed form (Regulation 4 Form 1) and is to contain all oral and written agreements and representations made by the Lessor or through his/her agent(s) in negotiations together with relevant information including but not limited to:—

- ◆ details of the Lessor’s property such as the total lettable area, tenancy mix and lettings, support services and management practices;
- ◆ details of the shop premises location, area and services together with the terms and conditions of the commercial tenancy such as asking rent, period of lease plus any options to extend the agreement and rent review periods and basis for the review;
- ◆ contributions to the landlord’s expenses (operating expenses); - the Lessor’s interest in the shopping centre or building; and - any additional charges payable by the Lessee such as shop fitout or contributions to marketing and sinking funds.

In turn, the Lessor may ask for details of your retailing experience and of your financial capacity to establish and trade profitably and professionally. This may involve you presenting a satisfactory business plan to the Lessor.

If you require any special fitout or services for your tenancy, you will certainly need to formally disclose these to the Lessor along with any other evidence to support your case.

The Lessor doesn’t have to lease the shop premises if it appears that a business will not add value to the property investment. Your disclosure, like the Lessor’s, must be correct and contain no misleading information. Otherwise, the Lessor could institute legal proceedings against you outside the provisions of the Act.

You should understand the “*Disclosure Statement*” before signing it.

In signing the *Disclosure Statement* you are acknowledging you understand the basis for the retail lease with the Lessor. It is vital that you satisfy yourself, through prior enquiry, particularly taking appropriate legal and expert advice on all relevant information regarding the retail shop and (where applicable) the shopping centre building and property.

TENANT GUIDE (s.6A)

A new retail shop lease must include this “*Tenant Guide*” at the front of the lease.

You can terminate the lease at any time up to 60 days after the lease was “entered into” if there was no “*Tenant Guide*” provided with the lease.

You can go to the State Administrative Tribunal and get an order for compensation for any pecuniary loss suffered as a result of not being given a “*Tenant Guide*”.

PREMISES COVERED BY THE ACT (s.3)

Generally

- The Act covers a retail shop where the premises are being used wholly or predominantly for a business involving the sale of goods by retail. However other premises trading in a retail shopping centre (where there are 5 or more retail shops) are also covered by the Act.
- The Act and its requirements only apply to retail shop leases when the shops have a retail floor area that does not exceed 1 000m².

A prospective retail tenant should establish the area under the lease and have this surveyed (if none is available) as early as possible in the agreement – especially in preparation for a net rent lease.

Specifically

Certain types of specified business are also covered including drycleaning, hairdressing, beauty therapy, shoe repair and video stores and some petrol station agreements.

If you are not sure whether your business is covered by the Act, get advice.

TERM OF THE RETAIL SHOP LEASE (s.13)

Minimum of 5 years

If you are entering a new retail shop lease for the first time, the Act provides you with a right to a minimum of a 5 year lease to help you establish and develop your business. This can be a combination of term and options to extend your lease to the 5 year period (Regulation 6 Form 3).

Can be longer... or shorter

The tenure you negotiate can be greater than 5 years. Under some circumstances, you can also agree with the Lessor to a term shorter than 5 years but this must be your decision. (The approval of the State Administrative Tribunal should be sought in these circumstances). It would be prudent to take expert advice on the implications for your business if you do not take up the Act's 5 years' tenancy right.

Fixed period

A lease is for a fixed period.

At the end of the lease...

At the end of the current term and your use of any options, the Lessor does not have to renew the agreement and the Lessee has no further rights to occupy the premises. All outstanding obligations under the lease should have been satisfied at this time. After the expiry of the lease agreement your continued occupancy of the premises will be at the Lessor's sole discretion. This interim period may be on a month to month basis.

Options in the lease

It is in your commercial interests to ensure that any options you hold to extend your occupancy are recorded by you allowing a sufficient lead time to exercise the option by the date set out in the terms of the lease. That option will lapse unless you inform the Lessor that you wish to renew your lease (exercising your option) in the manner and timeframe as set out in the lease document.

STRUCTURING YOUR LEASE

Assume you won't be able to renew

You should not rely on a new lease being entered into at the end of the lease period.

Therefore you should:

- ◆ Base your cashflows on the assumption that the lease will probably not be renewed.
- ◆ Adopt a prudent business practice, which amortises the costs of your business, and the cost of the goodwill, if you purchased the business, over the period of the lease.
- ◆ Recognise the worth or value of the goodwill of your retail business is directly related to the tenure you hold. The balance of the current lease term and any options are prime factors that the market will assess in determining the goodwill attached to your business.
- ◆ Decide on the level of profit that you expect to achieve over the period of the lease.

Does the lease include redevelopment or relocation clauses?

Commercial and retail property investments need to be constantly promoted. This can involve redevelopment of premises with works by the Lessor that can significantly impact on your retail business. To safeguard your interests you will need to carefully consider any redevelopment or relocation clause in the proposed lease. If you agree to such a clause you should negotiate to ensure that your retail business will not be in any worse situation as a result of the Lessor's capital works initiatives. This clause could provide you with a commitment from the Lessor for a new shop in the redevelopment. This could also provide for a new location and rental levels comparable with your current position.

Compensation issues also need to be specified in cases where your trade will be affected due to a less favourable shop location or higher rental structure or no new shop can be provided for your business.

Can the Act help?

The Act empowers the State Administrative Tribunal to consider special circumstances in approving redevelopment and relocation applications by the Lessor. The interests of both Lessee and Lessor are considered in these cases but may not meet all your requirements that you could have negotiated earlier in establishing the lease terms and conditions.

RENT REVIEW (s.11)

Only use one method of review at a time

If you have agreed to a review of your shop rental, then at each review time a single basis of rent review is to apply. For example, this single basis to be specified in the *Disclosure Statement* (Regulation 4 Form 1) can include, but is not limited to:

- ◆ Market Rent.
- ◆ Consumer Price Index (CPI).
- ◆ Percentage increase.
- ◆ An agreed formula or combination, eg. CPI + 10%.

The lease, however, cannot give the Lessor the right to choose the greatest return from a range of rent types at any one review.

Can use a different method next time

The types of review may vary over the life of the lease, for example Year 1 CPI, Year 2 Market rent, Year 3 a fixed increase then a higher rate if turnover exceeds an agreed level, Year 4 Market rent, Year 5 CPI + a percentage increase.

No “ratchet” clauses

In a rent review your rent can not be held above the current market level (via a ratchet clause) such that the rent can never fall or go below a fixed level. The lease must allow your rent to rise or fall to a level supported by market evidence.

The role of the Act and the State Administrative Tribunal

In a market rent review, the Act provides that both parties can:

- (i) initiate the market rent review process,
- (ii) appoint a single licensed valuer to determine the new rental, or
- (iii) each appoint a valuer to represent their interests.

In the case of disagreement the new rent may be referred to the State Administrative Tribunal for determination.

Until both parties agree to the new rent level or the Tribunal determines the new rent, the current rent will continue to apply. Once the higher or lower rent is agreed, adjustments will be backdated to the review date. The rate of repayment between the parties can be varied at the Tribunal’s discretion if the Tribunal has determined the rent.

RENT BASED ON TURNOVER (s.7 & s.8)

Steps needed to base the rent on turnover

The Act provides that if you have agreed to a rent based on the turnover of your business then that agreement must be based on an agreed formula and must be formalised in writing on a prescribed form (Regulation 5 Form 2).

The Act also recognises the confidentiality of such figures to a retail business and limits the release and use of this information strictly in accordance with your agreement with the Lessor.

CONTRIBUTION TO LANDLORD EXPENSES (s.12)

Only “operating” expenses not “capital” expenses

The landlord’s expenses are described in the Act as operating expenses. Leases can also refer to them as “outgoings or variable outgoings”. They are costs in operating, repairing, or maintaining the Lessor’s premises including any building common areas. Typically these costs are the rates and taxes, cleaning, airconditioning, security, insurances and other valid expenses of running the property. No capital expenditures (eg asset replacement) are recoverable operating expenses.

Operating expenses and their payment are to be set out in the *Disclosure Statement* (Regulation 4 Form 1) and the budget attached to the lease provided by the Lessor.

You can not be asked to pay management fees — these are costs to the Lessor that are not recoverable from retail tenants.

Contributions are negotiable, but not to exceed your “relevant proportion”

Your contributions to landlord expenses are negotiable. Whilst you may agree to a different form of contribution, the Act provides that the upper limit of the operating expenses that you can be reasonably asked to contribute to is your relevant proportion.

This share at the start of the accounting year is represented by the area of your shop’s retail floor area in relation to the total lettable area of the shopping centre or cluster of shops.

$$\text{i.e.: } \frac{\text{retail floor area in shop}}{\text{total lettable area}} = \text{relevant proportion}$$

The State Administrative Tribunal can decide on any disagreements in these matters and in certain circumstances can vary the relevant proportion during the year.

Other expenses directly attributable to your business (called “referable” expenses) for example, specialised cleaning incurred by only a few tenants, are subject to the relevant proportion limit of the shops incurring those costs.

NOTE: Rental agreements are generally —

- ◆ on a “net” basis (rent plus a contribution to operating expenses);
or
- ◆ on a “gross” basis (an all inclusive payment for all your shop occupancy costs); or
- ◆ another similar version.

You should seek expert advice as to the basis that best suits your business operations.

Audit and accounting standards – Lessors obligations

The Lessor is obliged to comply with audit and accounting standards and timetables for preparing budgets, providing end of financial year expenditure statements and distributing audit costs particularly on net rental agreements.

Lessor to provide estimates and statements

In “net” lease arrangements, the Act provides that you will not have to pay a contribution to the Lessor’s operating expenses until one month after the Lessor provides you with an annual estimate of expenditure for each operating expense.

The Lessor is also required to supply you with an audited operating expenses statement within 3 months after the previous accounting period has ended. If this is not done you do not have to contribute to the Lessor’s operating expenses until you have received the audited statement.

SINKING FUNDS (s.12A)

Act protects your contributions

If your retail shop is in a shopping centre and you have agreed to contribute to a fund for major repair and maintenance works, your contributions are protected under the Act. These moneys are subject to accounting and audit provisions with no funds being able to be expended on capital works. These are the rightful responsibility of the Lessor and would include the construction of new extensions and the replacement of major plant and equipment.

OTHER FUNDS AND RESERVES (s.12B)

Other contributions are also protected

The Act also extends protection to any other funds and reserves that you agree to contribute to for specific or marketing or promotion purposes. Again the Lessor is required to properly account for the collection administration, expenditure and auditing of these funds.

HOURS OF OPERATION (s.12C)

Your opening hours are flexible

A provision in a retail shop lease which requires you to open your premises at specified hours or times is invalid (void) under the Act.

As you have the discretion to open (or close) your business at times of your choice the Lessor can not refuse to renew your lease because of your actions. If in the future you believe this to be the reason that your lease was not renewed you may apply in writing to the State Administrative Tribunal for compensation.

STANDARD TRADING HOURS AND THE COSTS OF OPERATION

Your retail business will be responsible for a share (limited to the “relevant proportion”) of agreed operating expenses arising from trading within standard trading hours.

NOTE: “Standard Trading Hours” are prescribed as —

(a) 8.00 a.m. to 6.00 p.m. Monday, Tuesday, Wednesday and Friday;

(b) 8.00 a.m. to 9.00 p.m. Thursday; and

(c) 8.00 a.m. to 5.00 p.m. Saturday.

(see regulation 5A.)

If your retail shop is enclosed in a shopping centre then for practical reasons the opening and closing times (core hours) for the centre may be less than the standard trading hours. These matters will need to be clarified in disclosure by the Lessor.

If you do not open outside standard trading hours, you can not be required to make a contribution to the expenses related to the extended hours.

If you open outside the standard trading hours, you will be charged a contribution to the expenses related to the extended hours. These are referable expenses and are limited to the relevant proportion of those shops which open during the extended hours.

ASSIGNMENT AND SUB-LEASING (s.10)

Your responsibilities if you sell or sub-lease your business

If you choose to sell your business during the term of your lease, you (as the Assignor) and any guarantor to your lease can not be held liable for the performance of the ingoing tenant (the Assignee) or for any moneys including any rent owed by the ingoing tenant from the assignment date.

The Lessor can not withhold consent to an assignment, except on reasonable grounds. The Lessor may however recoup reasonable expenses in investigating the proposed assignee for your lease.

You are entitled to assume the Lessor’s approval to the assignment if you have not received a reply within 28 days after seeking that approval in writing.

If you choose to sub-lease part of your premises you will be required to seek the Lessors approval and also provide a *Tenant Guide* and *Disclosure Statement* to your Lessee. The sub-lease will not exclude you from your existing liabilities to the Lessor.

VOID CLAUSES (s.15)

Lease provisions and other oral and written agreements cannot include clauses that are contrary to any provision in the Act.

In addition, the lease or other side agreements or oral agreements can not —

- ◆ require you to pay key money (s.9), which is any moneys or other benefits in addition to rent paid to the Lessor or others for the right to lease retail shop premises.
- ◆ require you to disclose your turnover figures to the Lessor unless you agree on turnover as a basis for your rent assessment (s.7) and have completed Regulation 5 Form 2;
- ◆ prevent you from choosing to disclose the rent you have agreed to third parties (s.11) such as other retail tenants or their Valuers; or
- ◆ require you to contribute to any fund that applies those moneys to capital expenditures (s.12) such as new building works in shopping centres.

Some clauses may appear to create or limit aspects of the lease in an unfair or “unfriendly” way. If you are uncomfortable with the effect of any clauses in the lease, seek expert advice.

COMPENSATION BY LANDLORD (s.14)

The Act provides that, for shopping centre properties, the Lessor can not adversely affect your retail business trading in a retail shopping centre through action or inaction in:

- ◆ inhibiting your access and that of customers to your shop premises;
- ◆ disrupting trading conditions causing loss of profits to your business; or
- ◆ not properly repairing, maintaining or cleaning the shopping centre premises or common areas.

You should keep in mind the type and quality of services provided by the Lessor in relation to your contributions and those of all tenants in the centre. A Merchants Association can assist in coordinating the interests of all retail tenants to ensure the quality of management, cleaning and other property services support your retail businesses.

Only after your written request and a reasonable time has been given to the Lessor to correct the problems should you take your grievance to the State Administrative Tribunal. To support a claim, you need to demonstrate to the Tribunal that your business sales, gross profits, expenses and net profits have been adversely affected by the Lessor.

DISPUTES BETWEEN THE LESSEE (TENANT) AND LESSOR (LANDLORD)

The Act may be able to help...

If you cannot resolve a dispute over any aspect of your retail shop lease with the Lessor or through the Lessors property agents, the Act authorises the State Administrative Tribunal to deal with these disputes as “a question arising”. Either the lessee or the lessor may initiate this action with the Tribunal by making an application to the Tribunal and paying the appropriate fee. A matter or question may be dealt with through a compulsory conference or mediation process under the *State Administrative Tribunal Act 2004*.

Advice in such matters can be obtained from solicitors with property experience, the SBDC, industry sources, tenant advocates and retail representative groups.

To avoid disputes, get everything in writing

To reduce the possibility of a dispute, before entering a lease you should obtain confirmation in writing of any oral representations made during the negotiations. These representations should be included in the *Disclosure Statement* and might include:

- ◆ customer traffic numbers;
- ◆ exclusive rights to sell product lines;
- ◆ other tenancies as competitors;
- ◆ the existence and continuance of major tenants in the centre, and
- ◆ marketing support by the Lessor and related costs.