

CLAUSE NOTES

Retail Leases Act 2022

- Clause 1 This Act may be cited as the *Retail Leases Act 2022*.
- Clause 2 This Act commences on a day or days to be proclaimed.
- Clause 3 Provides the objects of the Act.
- Clause 4 This Act binds the Crown.
- Clause 5 Clarifies that the Act does not affect the common law regarding retail leases, to the extent it is not inconsistent with this Act.
- Clause 6 Provides for the interpretation of terms used in the Act, in particular (but not limited to): -
- Excluded premises – places deemed through regulation not to be retail premises for the purposes of the Act;
 - Key-Money – a benefit a tenant pays with no real consideration for the benefit.
 - Outgoings – certain expenses and fees of the landlord.
 - Retail premises – the building leased by the landlord for the tenant to conduct retail activities;
 - Retail shopping centre – a grouping of five or more retail premises, or a shopping mall, for which the Act provides specific provisions governing their lease and use.
- Clause 7 Provides the circumstances when a new retail lease is taken to be entered; noting that under s.56(9) of the Act a lease that is assigned is not creating a new retail lease.
- Clause 8 Provides types of leases that the Act does not apply to. The Act does not apply to:
- leases of premises that are more than 1000m².
 - leases where the premises was not a retail premise at the time of which the lease was entered into or renewed.
 - leases entered or renewed before the Act's commencement date.
 - leases of less than six months where the tenant does not have a right to renew that lease.
- There is a five-year transitional period:
- For new leases or renewals after the commencement date, this Act applies.

- For leases entered or renewed before the commencement date, the terms of the Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998, will continue to apply to those leases. However, five years after the commencement date, all leases within scope of the Act will be subject to this Act.

- Clause 9 Describes leases to which the Act applies including:
- New leases or renewals after the commencement date;
 - A lease of less than six months, if the tenant had been in possession for six months or more, and the lease is being continued or renewed;
 - Premises occupied before the commencement date, in anticipation of the signing of a lease on or after that date.
- Also clarifies that all leases within scope of the Act will be subject to this Act, five years after its commencement.
- Clause 10 Subject to the exclusions in sections 8 and 9, the Act applies to all retail premises, regardless of where the lease was entered or whether the lease purports to be governed by a law of another jurisdiction.
- Clause 11 Provides that provisions of this Act are to be read as if they are included as the clauses of each retail lease.
- Clause 12 Prohibits attempts to nullify or limit the provisions of the Act by “contracting out” by the parties, either in a retail lease or in another agreement.
- Clause 13 The Act’s provisions apply and prevail over any inconsistent clauses of a retail lease. Any inconsistency is void.
- Clause 14 The Director of Consumer Affairs and Fair Trading (the Director), a statutory officer appointed under the *Consumer Affairs Act 1988*, has responsibility for administration of the Act.
- Clause 15 Provides the functions and powers of the Director. This includes functions to publish information regarding retail leases, report to the Minister and enforcement of the Act.
- Clause 16 Provides that the Director may make and publish determinations on subject matters relating to retail leases. That includes a retail leases guide under s.21, or the format and content of disclosure statements.
- Clause 17 Provides the Director may make and publish determinations regarding time periods relating to retail leases.
- Clause 18 Provides that the Director may make and publish Codes of Practice relating to retail leases. Codes will then apply as subordinate legislation made under this Act.

- Clause 19 Provides that the Director may make and publish determinations specifically relating to the terms and conditions of retail leases. Determinations will then apply as subordinate legislation made under this Act.
- Clause 20 Provides that the Director may delegate their powers and functions under this Act.
- Clause 21 Provides that the Director is to publish a retail leases guide to explain the rights and duties of parties to a retail lease, and that guide will form part of the lease agreement documents provided by the landlord to a prospective tenant under s.23(2).
- Clause 22 Provides that during lease negotiations, or as part of an invitation to let premises, a prospective tenant has the right to be given a copy of the written lease agreement.
- Clause 23 A landlord is required to prepare and give detailed information, in a disclosure statement, to a prospective tenant.
- The Director will make a determination regarding the format and content of the statement. Details include
- The rent payable, with a copy of the lease, a copy of the retail leases guide, and any applicable Codes of Practice.
 - For shopping centres, additional details may need to be provided in the statement.
 - Statements must be as accurate as possible and not materially false or misleading.
- Clause 24 A landlord must ensure that a tenant is given a copy of the landlord's disclosure statement for a retail lease. This must be at least:
- a) 7 days before the retail lease is entered into by the tenant; and
 - b) 30 days before a tenant has exercised, or is entitled to exercise, an option to renew a retail lease granted under the retail lease.
- The statement is an important safeguard for both parties that essential information about the lease arrangements and premises is made available before a lease is signed. The tenant is to sign an acknowledgement that they have received the landlord's disclosure statement.
- Regulations may be made that require the tenant to give their disclosure statement to the landlord in prescribed circumstances. Where required, it is to be given seven days before a lease is entered into.
- Clause 25 For renewals of existing leases, the landlord only has to give an update to the details given in their previous disclosure statement.
- Clause 26 Failure of the landlord to give their disclosure statement to the tenant, or giving a statement that is false, misleading or materially incomplete, has important consequences.

Within 6 months after the lease is entered into, the tenant may elect to terminate the lease and give notice of that decision to the landlord.

However, within 14 days of that notice, the landlord may lodge a notice of objection with the tenant as to why they should not be able to terminate. Grounds of objection are that the landlord had acted honestly or the tenant's business position was not affected by the statement's inaccuracy. The tenant has 14 days to decide whether to accept or reject the landlord's notice of objection.

Clause 27 Making false or misleading statements or representations during the lease negotiations, by either the landlord or the tenant, can give rise to claims for compensation for any loss or damage suffered.

The giving of a landlord's disclosure statement to a prospective tenant under a retail lease, is taken to be the making of a representation by the landlord to the tenant as to accuracy of the information contained in their disclosure statement.

Clause 28 A tenant is not liable for the landlord's costs of creating a lease agreement, including paying legal fees. However, if the tenant requests alterations of the lease documents, the landlord may charge the tenant for the specific costs of making those changes.

Clause 29 The Act does not regulate the amount of security deposit payable by the tenant to the landlord. The parties may negotiate for a security deposit.

If a retail lease does provide for a security deposit, the amount and type of security must be specified in the lease.

The Act provides that a range of types of security may be requested. That may include a guarantee from an authorised deposit taking institution. However, a landlord must not require more than one type of security deposit for the same retail lease.

Security is held in trust. The landlord may retain the interest earned and treat it as part of the security deposit. This means the landlord must return the interest, along with the deposit, on completion of the lease. Alternatively, they may use the interest earned as part of the security deposit if the tenant has breached their obligations under the lease.

Non-refundable security deposits are prohibited, as that will be treated as asking for "key money".

Clause 30 Security deposits are to be released by the landlord, provided that a tenant has performed all of their obligations under a lease. If they have done so, then a landlord cannot keep the deposit.

Deposits must be released within 60 days of their agreement to return it.

Clause 31 Retail leases must be written and signed by the parties to the lease. This rule also applies to amendments of leases. This is to ensure transparency and clarity of the information in a lease.

Clause 32 A landlord must provide a tenant with a signed copy of the lease within 60 days of signing. It can be in an electronic form.

Clause 33 Provides that a term of a lease requiring the tenant to pay for certain items including maintenance, finishes, fixtures, fittings, equipment or services, is void and unenforceable, if that expense or charge was not disclosed in the landlord's disclosure statement.

Clause 34 Key-money is a benefit a tenant provides with no real consideration for the benefit. Seeking key-money is prohibited and such provisions in a lease are void.

Clause 35 A tenant is not liable to pay the landlord's outgoings (lease expenses) unless:

- the landlord's disclosure statement also states that the tenant has liability to pay outgoings, and
- the lease provides details of their nature, and an estimate or basis upon which they may be calculated.

If both parties share payment of an amount for outgoings, details of the proportion of the parties must be detailed, and how the landlord may recover the outgoing from the tenant.

The Act provides that certain outgoing expenses are not recoverable from the tenant, including (but not limited to) capital expenditure, depreciation of the premises and contributions to a sinking fund.

Clause 36 A landlord must give a tenant a written estimate of outgoings, to which the tenant is liable to contribute under the lease, that itemises those outgoings:

(a) before the lease is entered into; and

(b) in respect of each of the landlord's accounting periods during the term of the lease, at least one month before the start of that accounting period.

A landlord must also prepare a written statement of outgoings that details all expenditure by the landlord, in each of the landlord's accounting periods during the term of the lease, in respect of which the tenant is liable to contribute.

The tenant is required to pay the outgoings within 30 days of receiving the written statement.

Clause 37 A tenant may request in writing, the landlord appoint an auditor for the purposes of providing to the tenant a report, for an accounting period specified in the request, which audits either the outgoings estimate, or the written statement of outgoings.

The landlord must appoint an auditor to prepare an outgoings report and provide it to the parties. The report's determination of the accuracy of outgoings estimate or statement will decide which party pays the costs of the audit.

- Clause 38 A lease usually specifies from when the rent and other expenses must be paid by the tenant. However, if no such term is included, the Act then provides that the tenant does not have to pay until they have entered possession or the landlord has fitted out the premises as required by the lease.
- Clause 39 Clarifies that unless otherwise specified, rent and outgoings in a lease are taken to be exclusive of the Goods and Services Tax (GST). This accords with industry practice of all amounts being expressed as exclusive of GST.
- Clause 40 A retail lease must specify the amount, basis or formula that is used to calculate or determine the rent payable by the tenant under the retail lease. The Act provides for a range of formulas that are acceptable; a combination of formulas is also acceptable. Lease terms that aim to prevent rent reductions (“Ratchet Clauses”) are unlawful, except for the use of certain formulas, such as a fixed percentage, which means that the rent will increase by a fixed amount (such as 2%) every year on the anniversary of the lease commencement date.
- Clause 41 Provides for when the rent may be reviewed (such as the basis or formula that is to be used to calculate it). A retail lease may provide for a review of the rent to be made using different bases or formulae during the term of the retail lease, but each review must be made using only one basis or formula. This prevents the landlord changing the formula too often as trading conditions change. As a general rule, a retail lease must not provide for a review of the rent to be made more frequently than once in each 12-month period after the first anniversary of the commencement of the lease. There are some exceptions to this rule, such as during the very first 12 months of a lease.
- Clause 42 Provides provisions regarding leases where the current market rent is required to be calculated or reviewed. For example, in a free and open market, the rent that would reasonably be expected to be paid for the relevant retail premises. If the parties cannot agree on a rent amount, a specialist retail valuer will be appointed to determine a valuation of the current market rent for the premises.
- Clause 43 For a current market rent valuation performed under Clause 42, if there is a dispute, either party may apply to the Director for a review by an independent specialist valuer. The parties to a retail lease are to pay in equal shares the costs of a review of a valuation.
- Clause 44 A lease which includes an option to renew, is to specify the period for which the renewed lease is to apply. Provides the time before the lease expires, before which the tenant is to exercise that option, and the landlord is to state the proposed market rent to apply from the commencement of the new lease period.

The tenant then has to decide whether to exercise that option with the stated rent, or to negotiate another rent amount before the renewal. If parties cannot agree on market rent, an independent valuation under s.42 may be performed.

A landlord may refuse to grant a new lease if the tenant does not exercise the option by the required date.

Clause 45 If a lease determines rent by business turnover, it must specify how the rent is to be determined.

For the purposes of calculating turnover rent, certain matters are excluded, including refunds of goods or laybys, or sale of the tenant's fixtures and fittings after their use in the business premises.

A landlord may require that the turnover figures provided by a tenant be audited.

A landlord is to keep confidential the turnover figures provided by a tenant.

Clause 46 A tenant and a landlord may agree in writing on a special rent, in addition to any other rent, to cover the cost of fit-out, fixtures, fittings and equipment installed or provided by the landlord at the landlord's expense.

Clause 47 Provides for how a base rent is to be calculated.

Clause 48 A tenant is entitled to quiet enjoyment during the lease. Disturbances to a retail tenancy at the landlord's request may include building alterations, refurbishments or significant repairs. Tenants must be given prior notice of at least 60 days of the landlord's intention regarding disturbances, unless in the event of an emergency, in which case a maximum period of notice that is reasonably practicable must be given.

Routine maintenance or the routine repairs of premises, are not regarded as a disturbance under this provision.

Clause 49 A landlord is liable to pay to a tenant reasonable compensation for loss or damage suffered by the tenant because the landlord or a person acting on the landlord's behalf has affected their business during a disturbance. For example, new building works in a shopping centre may mean that customers could not easily access the tenant's premises and that affected the tenant's trading position.

Clause 50 Where the retail premises are damaged (from whatever cause) and are unfit for retail use or occupation, the tenant does not have to pay rent or outgoings while those premises are unusable for retail business purposes or are inaccessible.

If the damaged premises still allow reduced retail trade, the rent and outgoings payable by the tenant are to be proportionately reduced during the period while the leased premises are affected by that damage.

If the landlord fails to repair the damage within a reasonable time, the tenant may give their notice to terminate the lease.

- Clause 51 A landlord may need the tenant to relocate as they want to redevelop their premises. However, a landlord cannot require a tenant to be relocated, or offer a new lease of alternative retail premises, unless the landlord has given the tenant a notice of the relocation or offer (called a "relocation notice").
- That notice must contain details regarding the relocation (such as when to vacate the premises and the relocation duration) and what is alternative premises that the landlord will provide.
- The notice must be given to the tenant at least three months before the relocation day specified in the notice.
- A landlord is to pay a tenant's reasonable costs of relocation including (but not limited to) costs incurred by the tenant in dismantling fittings, equipment or services.
- Clause 52 A provision of a retail lease is void to the extent that it has the effect of preventing or restricting a tenant from carrying on their business outside of a retail shopping centre.
- Clause 53 A provision of a retail lease is void to the extent that it has the effect of preventing or restricting a tenant from joining, forming or taking part in the activities of an association to represent or protect the interests of tenants (for example, in a shopping centre).
- Clause 54 A provision of a retail lease is void to the extent that it limits or has the effect of limiting a tenant's right to employ persons of the tenant's own choosing. There are exceptions such as for minimum competence standards of contractors or persons employed at the premises.
- Clause 55 Certain provisions of a lease are void if they require a tenant to indemnify the landlord against certain legal claims or civil actions, for a matter that the landlord would otherwise be liable, and not the tenant.
- As indemnities allocate risks between the landlord and tenant, limitations need to be placed where a risk is beyond the tenant's control.
- Examples could be civil claims made against the landlord for damage, loss, injury or death to a third party, caused by the acts of the landlord, or it was a matter within their control.
- Clause 56 A tenant may request the landlord to assign their retail lease to another person to take over the business on the leased premises and all their obligations under the lease.
- A written response by the landlord has to be given within 28 days.
- The tenant must give the prospective assignee details about the lease, including a copy of the landlord's disclosure statement and the charges for which they will become responsible.
- Clause 57 Provides the grounds on which the landlord may refuse their consent to an assignment, for example, the proposed assignee proposed to use the retail premises in a way that is not permitted under the retail lease.

The landlord may recover costs from the tenant, reasonably incurred in giving their consent to an assignment request.

Clause 58 The assignor giving up the lease (e.g. the existing tenant) is able to pass on their obligations under the lease to the proposed assignee (new occupant of the leased premises). The assignor and any guarantor are released from further legal responsibility for compliance with the lease, and do not have to pay to the landlord any money in respect of amounts payable by a proposed assignee.

Clause 59 This section only applies if a retail lease does contain an option to renew or to extend the lease (with or without a rent review).

A retail lease that does not provide for an ultimate expiry date to renew or extend the lease, with or without a rent review, expires in accordance with the provisions of that retail lease.

If, after a retail lease has expired, the parties to the retail lease wish to enter into a new retail lease, the new lease is subject to the provisions of this Act as if the lease were being entered into for the first time.

Clause 60 This section only applies if a retail lease does not have an option to renew the lease for a further term.

In that case, a landlord must, at least four months but no more than six months before the expiry of a retail lease, give written notice to the tenant:

- offering the tenant a renewal or extension of the retail lease on the terms (including terms as to rent) and conditions specified in the notice; or
- informing the tenant that the landlord does not propose to offer the tenant a renewal or extension of the retail lease.

Clause 61 Preserves rights of parties to terminate a lease at any time through written agreement. The tenant must then vacate the premises and leave them in the condition agreed by the parties.

Clause 62 Clarifies that the specific provisions of Part 9 of the Act apply only to leases of retail premises in a retail shopping centre, as defined in s.6 of the Act.

Clause 63 If a lease in a shopping centre imposes core trading hours during which all shops must be open for business, then those hours must be specified by the landlord's lease.

A landlord cannot unilaterally change the core hours. A majority of the tenants must agree to a change.

A tenant may want to trade outside of the core hours and the landlord may agree to that special arrangement, on condition that the tenant contributes to any consequential costs, such as extra shopping centre security.

Clause 64 If a lease in a shopping centre imposes advertising, marketing or promotional requirements, the expenditure must be detailed by the landlord in the lease and their disclosure statement. If not specified, the tenant does not have to

contribute towards those costs. Any contribution that is unspent at the end of a promotional period must be carried forward and used for the same purpose during the next promotion.

At the end of a lease, there is an adjustment of the expenditure made by the landlord on promotions, to take into account any under or overpayments by the tenant.

Clause 65 Termination of a lease on the basis of the tenant not achieving a sales or turnover target is unlawful.

Clause 66 Provides a general rule that a landlord or a tenant who suffers loss or damage as a result of the unconscionable conduct of another person in contravention of sections 67 or 68 may apply to a prescribed body or person, to recover the amount of their loss or damage.

Clause 67 Provides that a landlord must not, in connection with a retail lease, engage in conduct that is, in all the circumstances, unconscionable.

A prescribed body may take into account matters relevant to deciding whether a landlord has contravened this section.

Clause 68 Provides that a tenant must not, in connection with a retail lease, engage in conduct that is, in all the circumstances, unconscionable.

A prescribed body may take into account matters relevant to deciding whether a tenant has contravened this section.

Clause 69 Provides that a party to a retail lease must not, in connection with the lease, engage in conduct that is misleading or deceptive to another party to the lease or that is likely to mislead or deceive another party to the lease.

A prescribed body may take into account matters relevant to deciding whether a party has contravened this section.

A party who has suffered as a result of the misleading or deceptive conduct of another person, may apply to recover compensation for their loss or damage.

Clause 70 Defines certain words or phrases used in this Part.

Clarifies that the Part has application to: -

- A person who is a party to a retail lease;
- Former retail leases;
- A person who was formerly a party to a retail lease;
- A person who is or was a guarantor or covenantor under a retail lease, or under a former retail lease.

Clause 71 Clarifies that even if a retail lease provides for or requires specific alternative dispute resolution procedures, parties to a retail lease may still use the dispute resolution arrangements that are contained in this Act.

Clause 72 Defines what is a "retail tenancy dispute" for the purposes of this Act.

The types of disputes referred to in Part 10 of the Act, concerning unconscionable conduct or misleading or deceptive conduct, are excluded from this Part, as they are conduct that is not appropriate to mediate.

- Clause 73 The Director is to provide for the appointment of mediators who have appropriate qualifications and experience for the role of resolving retail tenancy disputes.
- Clause 74 Parties to a retail lease are initially required to attempt to resolve any retail tenancy dispute themselves through their direct negotiations.
If those negotiations fail, either party may then apply to the Director for mediation of the dispute. The mediation process will then attempt to negotiate a mutually acceptable resolution.
- Clause 75 Provides for the details of an application for mediation, to be conducted by the Director or a person on their behalf.
There is a restriction of a maximum of three years after the matter in dispute arose, during which a party may apply for mediation of that disputed matter.
- Clause 76 The Director is to decide whether to accept or refuse an application for mediation.
If refused under sub-clause (4), there is a right of review of that decision under sub-clause (5) to the Magistrates Court (Administrative Appeals Division).
If accepted, the Director is to make the necessary arrangements, including appointing a mediator and advising the parties of a hearing date of the disputed matter.
- Clause 77 Generally, parties to mediation will conduct their own case. However, they may be represented by a legal practitioner, or an agent (such as a valuer, or an expert on leases) if the mediator agrees to their attendance.
- Clause 78 Mediation is private.
- Clause 79 The mediation expenses are determined by the mediator. Those costs are paid by the parties. They may agree on each paying a proportion, but if they cannot agree, then costs are paid equally.
- Clause 80 Parties to mediation have 20 days to reach an agreement on the resolution of a retail tenancy dispute.
If mediation results in an agreed outcome, that is put in writing and signed by the parties. The mediator will then give a copy of the agreement to the Director.
- Clause 81 If mediation fails to reach an agreed outcome, the mediator must inform the Director. Either party may then refer the dispute to a prescribed body or person. That may include a court or a similar body that can hear and determine disputes.

- Clause 82 The Act creates various offences. The regulations will prescribe the offences that are infringement offences for which an infringement notice may be served on the offender, and the specific infringement penalty amount.
- Clause 83 Proceedings for an offence against the Act must be commenced within two years from the date when evidence of any alleged offence first came to the Director's attention.
- Clause 84 Certain persons acting in good faith in the exercise of a power of function under the Act are given protection against civil or criminal actions. They include the Director, authorised persons, valuers or mediators.
- Clause 85 The Governor may make regulations for the purposes of this Act in relation to retail leases, retail premises and businesses that may engage in retail trade. The regulations may exempt certain persons, businesses, or premises from the operation of the Act. The regulations may adopt retail industry codes, guidelines or similar documents.
- Clause 86 The Minister for Workplace Safety and Consumer Affairs has responsibility for this Act.
- Clause 87 The legislation specified in Schedule 1 is rescinded, being the Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998.