



## Retail leasing law changes: are you processes and precedents ready?

The *Retail Leases Amendment Act 2020* (the Act) received royal assent on 22 September 2020 and introduces some material changes to the obligations and rights of landlords and tenants of retail premises under the *Retail Leases Act 2003* (Vic) (the RLA) and the *Building Act 1993* (Vic). Provisions dealing with essential safety measures came into effect on 23 September 2020 and the balance of the Act will apply from 1 October.

### 3 steps to take now

Practitioners acting in retail premises lease transactions to which the Act applies should familiarise themselves with the changes and undertake the following three steps:

1. review procedures and precedents for advising on new and renewing leases and disclosure documentation to ensure compliance with the new requirements
2. update processes to reflect changes to timeframes for providing leases and disclosure statements to tenants (with lead times increased from 7 days to 14 days for new leases or decreased to three months for lease renewals)
3. update processes to reflect changes to timeframes for returning security deposits to tenants within 30 days of the lease ending; update procedures to ensure tenants are provided with written notice of any changes made to a lease during negotiations or on renewal of the lease — for example by providing a marked-up version and covering email summarising the changes.

### Summary of key changes

#### **Further disclosure obligations for proposed leases and increased lead time for providing lease and disclosure statements to tenants**

The timeframe for landlords to provide tenants with a copy of the proposed lease and disclosure statement has increased to at least 14 days (from 7 days) before commencement of the new lease. The proposed lease must now also include particulars of the tenant, the rent and the term of the proposed lease.

Importantly, leases will not commence until 14 days after the completed documents are given to the tenant.



## **Tenants to be notified of any changes to proposed leases**

If any changes are made to a proposed lease - either during the negotiation process, or on renewal of the lease — the landlord must notify tenants of the changes made.

Previously, a landlord was not required to do this if the lease was 'substantially in accordance with the earlier agreement for the lease' (see s17(7) of the RLA). However, the Act removes the word 'substantially' from the provision.

## **Penalties for failure to comply with disclosure obligations**

The Act introduces significant penalties for non-compliance with a landlord's disclosure obligation to notify tenants of changes made to a lease (which currently equates to a fine of \$41,305 for body corporates or \$8,261.50 for individuals).

## **Additional disclosure obligations and changed notice period for lease renewal process**

The Act introduces a three-month lead time (previously six to 12 months) for landlords to give tenants written notice of the last date that an option to renew the lease must be exercised. The notice must include the following information:

- a) the date by which an option to renew must be exercised
- b) the rent payable for the first 12 months of the renewed lease
- c) the availability of an early rent review under the Act
- d) the availability of a cooling off period under the Act
- e) any changes to the most recent disclosure statement provided to the tenant (other than changes in relation to the rent).

If the landlord fails to provide this information, the option period is extended to the date which is three months after the notice is given (previously six months). If the extended date is after the expiry of the lease, the lease will be extended until three months after the notice is provided, unless the parties otherwise agree.

## **Introduction of early market rent review process for tenants**

If a retail lease provides for a current market rent review upon renewal of the lease, the tenant may request an early rent review within 28 days after receiving the landlord's renewal notice.

The tenant must notify the landlord in writing as to whether the tenant exercises the option to renew the lease on or before the last date that the option to renew the lease may be exercised. If a valuer is appointed to determine the current market rent, the tenant will have 14 days after the date the tenant is notified of the valuer's rental determination.

If the tenant exercises the option to renew the lease, but the last date that the option may be exercised is extended until after the lease term ends, the term of the lease is extended on the same terms and

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conditions to that date, unless the landlord and tenant otherwise agree.

## **Introduction of cooling off rights for tenants**

If a tenant eligible for an early rent review exercises an option to renew a lease without requesting an early rent review, the tenant has a 14-day cooling off period to give written notice that they no longer wish to renew the lease.

## **Security deposits to be returned within 30 days**

Landlords must return a tenant's security deposit within 30 days of the end of the lease, provided the tenant has complied with its obligations under the lease, including any 'make good' obligations to restore the retail premises to an appropriate condition. Previously, deposits were required to be returned 'as soon as practicable.'

## **Landlords may recover costs of 'essential safety measures' from tenants by agreement in the lease**

The Act allows landlords to recover costs of repairing and maintaining 'essential safety measures' (e.g. smoke detectors, fire extinguishers, sprinklers, exit signs and annual safety inspections) as an outgoing (ESM Costs), by agreement in the lease.

The Act also amends s251 of the Building Act to prevent a tenant from recovering ESM Costs from a landlord if the tenant has agreed to pay those costs under its retail lease. However, the obligation for building safety remains that of the building owner.

The amendments are retrospective so that clauses in existing retail leases in place before 22 September 2020 which provide for ESM Costs to be passed onto tenants will be effective. However, landlords can only recover ESM Costs incurred after the Act commenced on 23 September 2020.

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