



THE LAW SOCIETY
OF NEW SOUTH WALES

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8 December 2022

NSW Small Business Commissioner
4 Parramatta Square
12 Darcy Street
PARRAMATTA NSW 2150

By email: rla.review@smallbusiness.nsw.gov.au

Dear Commissioner,

Review of the *Retail Leases Act 1994*

The Law Society of NSW welcomes the opportunity to provide feedback on the review of the *Retail Leases Act 1994*. The Law Society's Property Law Committee has contributed to this submission.

Our responses to the questions raised in the Discussion Paper are provided in the attached comments table.

Any questions in relation to this letter should be directed to Gabrielle Lea, Policy Lawyer on (02) 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours sincerely,

Joanne van der Plaats
President

Encl.

Review of the *Retail Leases Act 1994* – Discussion paper
Law Society of NSW Comments

NO.	Discussion questions	Law Society comments
Objectives of the Act: Are they being met and do they remain appropriate?		
1.	Is the Act meeting its policy objective to foster good leasing practices and reducing disputes?	Yes, in our view, and subject to the specific matters raised in our responses, the <i>Retail Leases Act 1994</i> (“Act”) is meeting its policy objectives of fostering good leasing practices and reducing disputes. The Act also effectively deals with disputes through the existing mediation provisions and the determination of retail tenancy claims by the NSW Civil and Administrative Tribunal (NCAT).
2.	Are there any changes to the retail landscape or leasing practices that warrant updates or changes to the Act?	We note the significant impact of the COVID-19 pandemic on the retail landscape, which appears to have accelerated the growth of alternative retail models such as ‘click and collect’, online shopping apps, product showrooms and direct warehouse sales to the public. In our view, these emerging trends and the appropriate application of the Act to these new retail models should be carefully monitored and considered, but at this stage, we have no particular suggested changes to the Act.
3.	Should the Act aim to meet any additional policy objectives?	No, the existing policy objectives are sufficiently comprehensive. In terms of future legislative direction, in our view, any changes should be considered with a view to harmonising the Act with the equivalent legislation in other jurisdictions. Harmonisation would benefit lessors and lessees who operate in more than one jurisdiction by reducing the need to be cognisant of the particular variations in legislation across jurisdictions. It would also increase ease of compliance and reduce compliance costs. However, harmonisation should not be pursued for its own sake without due consideration of best practice.
Requirements of the Act: Are there opportunities to improve outcomes?		
1.	Are the current requirements of the Act effective at reducing disputes?	Generally, yes, although we make a number of suggestions for potential legislative changes in our responses which, in our view, would provide increased clarity and further reduce disputes.
2.	How could the Act be improved to reduce compliance costs, including by removing unnecessary requirements or adopting alternative approaches to achieve objectives?	We suggest compliance costs could be reduced by simplifying or streamlining the Lessor and Lessee Disclosure Statement (“Disclosure Statement”). A review of the Disclosure Statement was contemplated in prior statutory reviews of the Act, but not pursued. The current length and repetitive information contained in the Disclosure Statement means that it is time consuming to prepare, and, for the lessee, it may be difficult to distil the critical information given the amount of information provided. We also note that inaccuracies in the Lessor Disclosure Statement have a significant impact on the lessor, in that failure to disclose a particular outgoing means that the lessor cannot recover it under s 12A. In our view, it is appropriate that the content of the Disclosure Statement be carefully reviewed and streamlined.

NO.	Discussion questions	Law Society comments
3.	Are there any requirements or provisions of the Act which are unclear or overly complex?	<p>We make the following suggestions for amendments to the Act:</p> <ul style="list-style-type: none"> • Clarification is required in the Act as to the appropriate point in time for relevant considerations under s 39(1)(b). This subsection allows the lessor to withhold consent to the assignment of a retail shop lease if the proposed assignee has financial resources or retailing skills inferior to those of the proposed assignor. It is not clear if the comparison is to be made in relation to the assignor's financial position at the commencement of the lease, or at the time of the proposed assignment. • The reference to "retailing skills" in s 39(1)(b) also causes practical issues as it is difficult to objectively determine. • The operation of the relocation provisions under s 34A create practical difficulties. Lessees may choose the original leased premises based on location, exposure to foot traffic, particular surrounding shops (such as a supermarket), road frontage or the shape or nature of the premises. Problems can arise when a lessee is offered premises of a similar size without regard to other factors relevant in determining the original location. In our view, the relocation provisions should better reflect such factors. Another issue is determining the "reasonable costs" of relocation under s 34A(f). Consideration could be given to including in s 34A(f) the lessee's costs of the original fit out, appropriately depreciated. • Sections 39(2) and 40(3) operate so as not to preclude a lessor's right to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with consent to assignment of lease. Section 40 includes a note that "This section and section 39 do not prevent the lessor and a proposed assignee entering into a new lease of the retail shop as an alternative to an assignment of the existing lease." However, a consequence of entering into a new lease as an alternative to an assignment of the existing lease is that the lessor is prohibited from recovering the 'lease preparation costs' for the new lease under s 14(1). This is arguably inconsistent with the intention of ss 39(2) and 40(3), and the note contained in s 40. We suggest the Act be amended to provide for the lessor's recovery of a reasonable sum in respect of any legal or other expenses incurred in connection with the preparation, entry and registration of any new lease entered into by a lessor and proposed assignee as an alternative to an assignment of the existing lease.

NO.	Discussion questions	Law Society comments
4.	Are disclosure and registration requirements appropriate and how could they be improved?	<p data-bbox="819 236 1093 264"><u>Disclosure Statements</u></p> <p data-bbox="819 277 2051 306">In addition to streamlining the Disclosure Statement, as discussed under Question 2 above, we suggest:</p> <ul data-bbox="819 319 2092 660" style="list-style-type: none"> <li data-bbox="819 319 2092 475">• amending the requirement under s 11(1) that, at least seven days before a retail shop lease is entered into, the lessor must give the lessee a disclosure statement. In our view, the Act should be amended to enable a lessor and lessee to agree in writing to reduce the requirement to no less than three business days. Sometimes the parties preferred commencement date of the lease cannot be met due to this requirement. <li data-bbox="819 478 2092 660">• amending section 14(4), which requires the lessee to pay reasonable costs of lease preparation associated with amendments made to the lease at the lessee's request. We suggest the better reference point to be inserted in s 14(4)(c) is the due date for the return of the Lessee Disclosure Statement, not the actual date it is returned. It is the experience of some members that a lessee may delay in providing the Lessee Disclosure Statement, seeking to lengthen the period for requesting amendments, to avoid paying the lessor's legal costs associated with the requested amendments. <p data-bbox="819 673 969 702"><u>Registration</u></p> <ul data-bbox="819 715 2092 1248" style="list-style-type: none"> <li data-bbox="819 715 2092 960">• Leases may now only be registered electronically using the services provided by an Electronic Lodgment Network Operator ("ELNO"). The definition of 'lease preparation expenses' in s 3(1) does not include registration fees under the <i>Real Property Act 1900</i>, and such fees are recoverable by a lessor from the lessee under section 14. However, the fees charged by an ELNO to enable registration of a lease are not registration fees under the <i>Real Property Act 1900</i>. As the registration of a lease is primarily for the benefit of the lessee and the ELNO fee is very much part of registration costs, we suggest the definition of 'lease preparation expenses' in s 3 be amended to exclude fees charged by an ELNO to enable registration, enabling such fees to be recoverable from the lessee. <li data-bbox="819 963 2092 1082">• In relation to the current requirements to register certain leases under s 16(1), in our members' experience, a significant number of leases are not lodged for registration within three months as required. Although a penalty applies for non-compliance, enforcement action appears to be uncommon, and we suggest that this may be an area in which resources could be targeted to improve compliance. <li data-bbox="819 1085 2092 1248">• In our members' experience, significant non-compliance also occurs in relation to s 15(1), which requires the lessor to provide the lessee with an executed copy of the lease, within three months after the lease is returned to the lessor following its execution by the lessee. We suggest consideration be given to amending the Act to include a penalty, mirroring the approach in s 16(1), provided that resources are allocated for enforcement.

NO.	Discussion questions	Law Society comments
5.	Are there any deficiencies in the current approach to defining a retail lease and is the scope of the Act's jurisdiction appropriate?	<p><u>Definition of retail shop</u></p> <p>The Act defines a retail shop by reference to the area of the premises, the location of the premises within a shopping centre or its inclusion in a list of prescribed businesses. In our view, this approach lacks flexibility in adapting to changes in the nature of the retail market. There is merit in considering a more general definition, such as currently applies in Victoria, and excluding certain types of activities.¹ We note that the Victorian Court of Appeal decision in <i>IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd</i> [2017] VSCA 178 interpreted the <i>Retail Leases Act 2003 (Vic)</i> to confirm that any premises used for supplying commercial services to other businesses are covered by that Act.</p> <p><u>Exclusion of ancillary rights from the operation of the lease</u></p> <p>In 2017, s 5 of the NSW Act was amended to include s 5(d) and Schedule 1A, such that the Act does not apply to premises used only for any one or more of the purposes listed in Schedule 1A (Excluded uses). The list of excluded uses includes:</p> <ul style="list-style-type: none"> • car parking (if not provided as part of the business of a car park); • display of signage (not including the use of premises from which signage is sold); and • storage of goods for use or sale in a retail shop (not including storage on premises from which goods are sold). <p>Section 79 of the Act provides that if a retail shop lease applies to a retail shop as well as to other separate or adjoining premises that are not a retail shop, the Act applies to the lease only to the extent that the lease is a lease of a retail shop. It is quite common for a retail shop lease to include provisions conferring ancillary rights in the form of licences to use defined areas outside the retail shop for the purpose of car parking or display of signage and storage, for separate licence fees. When the definition of 'premises', sections 5 and 79 are read together, the Act does not appear to apply to those ancillary rights notwithstanding that they arise from a retail shop lease and are provided in conjunction with operating a retail business. This may have the effect of limiting the protections, dispute resolution procedures and the jurisdiction of the tribunal conferred by the Act with respect to these ancillary rights. We suggest amending the Act to include clarification that the Act applies to premises used for car parking, signage or storage when those rights are conferred under a retail shop lease or used in conjunction with operating a retail business.</p>
6.	Can user experiences with bond processing and recovery arrangements be improved?	We suggest that the timeframe for lodgment of the bond by the lessor under s 16C(2) be reduced to within seven days of receipt. In our view, the current timeframe of 20 business days is unnecessarily lengthy.
7.	What are the emerging stakeholder needs, not currently addressed by the Act?	While we have no suggestions regarding currently emerging stakeholder needs, as discussed above, the growth of alternative retail models and the appropriate application of the Act to these new retail models should be carefully monitored and considered.

¹ Section 4 of the *Retail Leases Act 2003 (Vic)*.

NO.	Discussion questions	Law Society comments
8.	Are there opportunities to both simplify the Act and in doing so provide greater certainty for lessees and lessors?	<p>As noted in the Law Society's submission on the draft Retail Leases Regulation 2022, we suggest that consideration be given to relocating Schedule 1A Excluded Uses to the new Retail Leases Regulation so that the same legislative instrument contains both the list of retail shop businesses and excluded uses. Consideration could also be given to relocating the Disclosure Statements to the Regulation, particularly if they are to be revised as suggested.</p> <p>Our recent submission on the draft Retail Leases Regulation 2022 also suggested consideration be given to prescribing the retail tenancy guide under s 9(1)(b)(ii).</p>
Legislative context: Does the Act operate well with other legislation?		
1.	Are there any areas where the operation of the Act does not operate well with other legislation?	No, not in our view. We acknowledge that there are particular complexities that arise in retail leases of premises in a strata scheme, however those complexities similarly arise in non-retail leases and any reforms contemplated in that regard should not be limited to retail leases.