



Small
Business
Commissioner



DISCUSSION PAPER: **Review of the *Retail Leases Act 1994***

Introduction

The NSW Government has requested the NSW Small Business Commissioner conduct a review of the *Retail Leases Act 1994* (the Act).

The Act was introduced in 1994 to foster good leasing practices in the retail industry.¹ The Act provides a regulatory framework to lessors and lessees (landlords and tenants) of a retail lease to optimise the leasing relationship.

The purpose of this discussion paper is to obtain feedback from stakeholders that engage with or are otherwise affected by the Act. Stakeholders are invited to comment on their experiences and any suggestions to improve the Act. This discussion paper includes questions for consideration; however, stakeholders are encouraged to provide feedback on any other matter that may be relevant to the terms of reference of this review.

There are two ways to have your say:

Make a submission: email your submission to rla.review@smallbusiness.nsw.gov.au or go to www.haveyoursay.nsw.gov.au/retail-leases/ to upload it

Complete the online survey: Go to www.haveyoursay.nsw.gov.au/retail-leases/

The deadline for submissions and completion of the survey is **5pm Friday 9 December 2022**



Terms of Reference: *Review of the NSW Retail Leases Act 1994*

The *Retail Leases Act 1994* (the Act) was introduced in 1994 to foster good leasing practices in the retail industry.

The review is to consider any matter or aspect of the Act that relates to the review's objectives. This may include, but is not limited to:

- Opportunities to improve outcomes by:
 - » Reducing red tape and compliance costs for retail tenants and landlords, while leaving appropriate matters to commercial negotiation or education rather than a reliance on legislative interpretation.
 - » Ensuring the Act is efficient and effective at meeting policy objectives, and to assess whether original policy objectives remain appropriate.
 - » Enhancing operational efficiency and legal certainty for stakeholders operating across jurisdictions.
 - » Clarifying and simplifying the Act to eliminate ambiguity and provide greater clarity on obligations and requirements.
 - » Reviewing the definition of "retail" and the scope of the jurisdiction.
 - » Aligning of key definitions and common terms and provisions to assist in simplifying standard retail lease agreements.
 - » Reviewing and considering disclosure requirements and lease registration requirements and timeframes.
 - » Identification of measures to promote the adoption of energy efficiency upgrades in retail and general commercial leases, noting capital costs and consumption charges over the life of a lease.
 - » Assessing the suitability of existing requirements such as those relating to outgoings, the appointment of specialist retail valuers, land tax recovery limits, and the administration and operation of bond payment and recovery processes.
 - » Bond processing and recovery arrangements.
- The interaction of the Act with other legislation such as the *Conveyancing Act 1919* (and regulations) and the *Strata Schemes Management Act 2015* (and regulations) and any amendments that may contribute to the efficiency, certainty, and clarity of commercial leasing transactions.
- The availability and accuracy of market information and consider measures that would improve transparency and availability of information.
- Other measures and concepts that may reduce potential disputes between landlords or tenants or allow for a better understanding of rights and obligations under the Act or under future lease agreements.

The review may make findings and recommendations to the NSW Government to improve the efficiency and effectiveness of the Act for all stakeholders.

The review will not consider:

- Valuation or commercial sums aligned with market rent settings.
- Operation of the *Retail and Other Commercial Leases (COVID-19) Regulation* applied during the COVID-19 pandemic.
- Operation of NSW Civil and Administrative Tribunal.
- Business and property insurance markets.
- Operational aspects related to the delivery of mediation services by the Registrar of the Act.

Context of the review

The Act sets out some ground rules for entering into a retail shop lease and was introduced in 1994 to foster good leasing practices in the retail industry.

Since its introduction, there have been several reviews and amendments to the Act.

The most recent significant amendments to the Act were made in 2017 to give effect to recommendations arising from a statutory review of the Act. Amendments were introduced to increase transparency and certainty in the NSW retail leasing sector, including by improving standards of conduct operational efficiency by simplifying key processes.²

The purpose of this review is to consider whether the Act continues to meet policy objectives and whether original policy objectives remain appropriate. The review provides an opportunity to consider the impact of changes in the retail landscape, leasing practices, as well as recent and ongoing experiences of lessors and lessees in the time since the previous review and amendments.

The review's terms of reference are broad, and it will consider:

- All aspects of the current Act (Parts 1-11 and Schedules 1-3).
- Whether original policy objectives remain appropriate.
- Potential opportunities to improve outcomes (including through amendments to the Act).
- Interaction of the Act with other related or overlapping legislation.

Improving certainty and reducing unnecessary administrative costs are primary objectives of the review.

The review will provide an evidence base to inform subsequent policy decisions, however further consultation and impact analysis will be required to give effect to any recommendations or findings resulting in proposed legislative amendments to the Act.



The Retail Leases Act

The Act prescribes disclosure requirements, prohibits certain practices that are contrary to good leasing practices, and defines standard requirements that apply to all retail leases. For leases within its jurisdiction, the Act provides for:

- pre-lease disclosure of all costs and liabilities under the lease
- prohibition on key money and lease preparation expenses being sought
- leases of three years or more to be registered
- an executed copy of the lease to be provided to a lessee
- cash security deposits to be deposited, held, and paid out by the Secretary
- a timeframe for the return of bank guarantees at the end of the lease
- provisions seeking capital costs or depreciation costs from the lessee to be void
- limits on sinking fund contributions and recovery of land tax
- limits and notice requirements for lessors seeking to make alterations or refurbishment
- a process for assignment of lease and severance of liability after assignment
- a procedure for obtaining a specialist retail valuation of the market rent of premises prior to the exercise of an option
- a requirement to participate in mediation and for the Registrar to certify the outcome prior to the determination of a claim in a tribunal or civil court.

Other legislation that regulates retail and commercial leasing includes the *Conveyancing Act 1919* and the *Real Property Act 1900*.

The NSW Small Business Commissioner is an independent statutory officer and is also the Registrar of Retail Tenancy Disputes for the purpose of the Act. Pursuant to Part 8, Division 2 of the Act, the NSW Small Business Commission assists lessors and lessees of shops to resolve disputes through mediation which includes preliminary assistance and procedural advice. The Registrar of Retail Tenancy Disputes is appointed by the Minister under s 64 of the Act with the functions conferred by s 65 that include reporting to the Minister on the operation of the Act, while not being subject to direction or control.

The Minister is responsible for review of the Act to ensure that the policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives.

How does the RLA support good leasing practices?

Processes before the lease

- Specifies what the lessor must disclose to the lessee
- Specifies processes for calculating market rent
- Requires cash bonds to be lodged with the Retail Bonds Scheme
- Requires the lessee to confirm and acknowledge the disclosures
- Requires leases over three years to be registered
- Both parties to have a co-signed copy of the lease

During the lease

- Restriction on lessors recovering certain costs and limits on the recovery of certain outgoings
- Processes for managing disturbances from the lease, such as relocation, demolition, alterations/refurbishment and damage to the premises
- Some restrictions on rent adjustments
- Transparency for certain types of information and confidentiality requirements for turnover data

If disputes arise

- Mediation function to resolve disputes

Processes for end of lease

- Opportunity for the lessee to assign, renew or extend
- Timeframes for the return of bank guarantees at the end of the lease
- Regime for giving notice at end the lease

Objectives of the Act: Are they being met and do they remain appropriate?

The Act was introduced to foster good leasing practices in the retail industry. The Act provides safeguards for both parties to the lease, and a dispute resolution mechanism to help parties resolve most of their disputes without having to go to court. Effective and fair retail lease practices are essential for developing thriving and successful retail businesses.

The Act aims to optimise relationship and balance risk between lessees and lessors of retail shop leases and reduce disputes. It seeks to ensure both lessors and lessees are clear about their rights and obligations before entering a retail lease.

Objectives and functions of the Act

The Act provides a regulatory framework for lessees and lessors of a retail lease to optimise the leasing relationship and balance the risk.

Some key functions of the Act include:

- Impose requirements at the transaction stage to enhance certainty and reduce risk of disputes.
- Support the transfer of a lease in a sale of business.
- Provide a procedure for obtaining a specialist retail valuation of the market rent of premises prior to the exercise of an option.
- Require participation in mediation prior to filing a claim in a tribunal or civil court.

The retail landscape and leasing practices may have changed since the Act was introduced and last updated. For example, new and innovative business models, such as developments in online retailing and faster delivery channels, may have changed the nature in which retailers and consumers engage with one another. While not all changes in the retail landscape and to leasing practices will have implications for the operation of the Act, it is important to consider the effect of any developments that do.

Lessons and new practices have also emerged as lessors and lessees have responded and adapted during the COVID-19 pandemic. While the review does not consider the operation of regulatory instruments that facilitated rent relief and negotiation arrangements during COVID-19, the experiences following the onset of COVID-19 may offer insights as to how well the Act is meeting policy objectives (for example, if lessors and lessees faced similar circumstances in the future).

The terms of reference for this review provide for an assessment of whether the original policy objectives remain appropriate. This review will consider the scope and intent of the Act. The review will consider opportunities to improve outcomes, including in areas currently unaddressed by the Act, if they are beneficial and appropriately balance the interests of lessors and lessees.

Discussion questions

1. Is the Act meeting its policy objective to foster good leasing practices and reducing disputes?
2. Are there any changes to the retail landscape or leasing practices that warrant updates or changes to the Act?
3. Should the Act aim to meet any additional policy objectives?

Requirements of the Act: Are there opportunities to improve outcomes?

This review is an opportunity to consider whether the specific requirements of the Act remain appropriate. The Act sets out the ground rules of parties to a retail shop lease. It contains a regulatory framework to support clear and transparent leases. Examples include existing requirements relating to outgoing, the appointment of specialist retail valuers, land tax recovery limits, and the administration and operation of bond payment and recovery processes.

Opportunities to improve outcomes include but are not limited to:

- **Reducing red tape, compliance costs and disputes** - Balancing the costs and benefits of red tape and compliance costs requirements is essential to achieving effective regulation and reducing disputes. Prescriptive requirements may be unnecessarily costly if they create challenges to comply without sufficient associated benefits. In some instances, there may be alternative approaches to achieve policy objectives with reduced impact, such as education, business support networks, and quality advice

Regulatory frameworks also require supporting mechanisms, such as information and guidance, to reduce complexity and assist stakeholder to understand legislative requirements. Measures that improve the transparency and availability of information or reduce potential disputes between lessors and lessees may also improve understandings of rights and obligations and reduce red tape and compliance costs.

- **Assessing, simplifying and clarifying obligations** - Clear obligations and requirements are essential for driving positive interactions between lessors and lessees. Ambiguous or vague rights and obligations are less likely to achieve objectives if they are not properly understood by stakeholders, which may increase the risk of a potential dispute. There may be opportunities to increase and clarify obligations and requirements by better aligning key definitions and common terms, or by making more explicit drafting of existing requirements to ensure they clearly convey what is required.

Addressing interactions with other legislation and improving digital solutions may also improve understandings of obligations, simplify required processes and reduce the risk of dispute.

- **Reviewing and considering disclosure requirements** - The Act specifies disclosure requirements and lease registration requirements and timeframes. While these intend to deliver good practices, there may be unintended outcomes or difficulties that arise from these requirements. There may be ways to improve these requirements and timeframes to better achieve objectives, and be less restrictive, burdensome, and time-consuming.
- **Redefining retail and scope of the jurisdiction** - The Act applies only to retail shops of 1,000 square metres or less, with retail shops defined as those operating with a shopping centre or of a business type listed in Schedule 1 of the Act. The nature of retail has changed since the commencement of the Act in 1994. Key trends include ecommerce and the emergence of new types of retail businesses as people have sought out new types of products, services, and experiences. It may be timely to reconsider whether the current approach to defining retail lease and its current scope remains appropriate.
- **Improving bond processing and recovery arrangements** - Bond processing and recovery arrangements are a key component of the Act. In November 2021 the administration of retail security bond deposits and payments were transferred to NSW Fair Trading. This transfer has created a single, whole-of-government digital platform for bond services that aims to streamline operations and offer a better customer experience. However, there may be ways that these processes and recovery arrangements can continue to be improved.
- **Addressing emerging and unaddressed needs** - There may also be opportunities to improve outcomes by considering areas where the Act is producing unintended consequences, or otherwise failing to meet the needs of stakeholders. For example, inconsistent requirements can create challenges for stakeholders who operate across jurisdictions, while the inability to enforce lease terms which relate to the recovery of capital costs³ may discourage the adoption of energy efficiency upgrades in circumstances where they are co-funded, by agreement, between the lessor and lessee.

Discussion questions

1. Are the current requirements of the Act effective at reducing disputes?
2. How could the Act be improved to reduce compliance costs, including by removing unnecessary requirements or adopting alternative approaches to achieve objectives?
3. Are there any requirements or provisions of the Act which are unclear or overly complex?
4. Are disclosure and registration requirements appropriate and how could they be improved?
5. Are there any deficiencies in the current approach to defining a retail lease and is the scope of the Act's jurisdiction appropriate?
6. Can user experiences with bond processing and recovery arrangements be improved?
7. What are the emerging stakeholder needs, not currently addressed by the Act?
8. Are there opportunities to both simplify the Act and in doing so provide greater certainty for lessees and lessors?

Legislative context: Does the Act operate well with other legislation?

To be effective, the Act needs to operate well with other legislation. Currently the Act operates with the *Conveyancing Act 1919* (and regulations) and the *Strata Schemes Management Act 2015* (and regulations).

Interactions with other legislation should support efficient, certain and clear commercial leasing transactions between the lessee and lessor. Any amendments to the Act need to consider how changes will impact interactions with other Acts, with the aim of delivering the best outcomes for lessee and lessor.

There may also be opportunities to improve the Act's interactions with other legislation more broadly, including legislation that might be specific to certain types of retail.

Discussion questions

1. Are there any areas where the operation of the Act does not operate well with other legislation?