

SOUTH AUSTRALIA

RETAIL SHOP LEASES REGULATIONS 1995

SUMMARY OF PROVISIONS

1. Citation
2. Commencement
3. Preliminary
4. Exclusions from application of Act
5. Disclosure statement
6. Minimum 5 year term
7. Warranty of fitness for purpose
- 7A. Certified exclusionary clause
8. Land tax—Exclusion
9. Notice of request—Current market rent
10. Trading hours—Prescribed procedure
11. Advisory Committee
12. Abandoned goods
13. Issues associated with Landlord and Tenant Act

SCHEDULE 1

Disclosure statement—regulation 5

SCHEDULE 2

Model certificate for exclusionary clause—regulation 7A

SCHEDULE 3

SCHEDULE 4

Regulation 9

SCHEDULE 5

APPENDIX

LEGISLATIVE HISTORY

REGULATIONS UNDER THE RETAIL AND COMMERCIAL LEASES ACT 1995

Retail Shop Leases Regulations 1995

being

No. 134 of 1995: *Gaz.* 29 June 1995, p. 3101¹

as varied by

No. 213 of 1996: *Gaz.* 12 September 1996, p. 1147²

No. 198 of 1997: *Gaz.* 4 September 1997, p. 630³

¹ Came into operation 30 June 1995: reg. 2.

² Came into operation 16 September 1996: reg. 2.

³ Came into operation 6 October 1997: reg. 2.

Note: Asterisks indicate repeal or deletion of text. For further explanation see Appendix.

Citation

1. These regulations may be cited as the *Retail Shop Leases Regulations 1995*.

Commencement

2. These regulations will come into operation on the day on which the *Retail Shop Leases Act 1995* comes into operation.

Preliminary

3. (1) In these regulations—

"the Act" means the *Retail Shop Leases Act 1995*.

(2) A *model form* prescribed by these regulations is provided in order to assist in the operation of the Act and is not binding in a particular case.

Exclusions from application of Act

4. (1) Pursuant to section 4(3) of the Act, the following are excluded from the application of the Act:

(a) the agreement dated 29 November 1988 between the Treasurer of South Australia and the Port Dock Railway Museum (South Australia) Incorporated appointing Port Dock Railway Museum (South Australia) Incorporated as the operator of Port Dock Railway Museum;

(b) any retail shop lease to which the Aboriginal Lands Trust is a party as lessor.

(2) Pursuant to section 4(3) of the Act, any retail shop lease between—

(a) the occupier of a hotel owned or partially owned by—

(i) The South Australian Brewing Company Limited; or

(ii) S.A. Brewing Holdings Limited; or

(iii) S.A.B. Properties Limited; or

(iv) a wholly owned subsidiary company of any of those companies,

as lessee; and

(b) the owners of the hotel, as lessor,

is excluded from the application of sections 12, 13, 19, 20, 31, 32 and 33 of the Act.

(3) Pursuant to section 4(3) of the Act, any retail shop lease where the premises to which the lease relates comprise licensed premises within the meaning of the *Liquor Licensing Act 1985* is excluded from the application of sections 18, and 43 to 46, of the Act.

(4) Pursuant to section 4(3) of the Act, any retail shop lease where the hours during which the premises to which the lease relates are open for business are fixed by or under the *Liquor Licensing Act 1985* is excluded from the application of section 61 of the Act.

Disclosure statement

5. For the purposes of section 12(3a) of the Act, a disclosure statement must be presented in the form set out in Schedule 1.

Minimum 5 year term

6. * * * * *

(2) Pursuant to section 20B(3)(f) of the Act, that section does not apply in the following additional cases:

- (a) if the lessor is a body corporate and the lessee (or lessees) have a controlling interest in the body corporate; or
- (b) if the lessor and the lessee are both bodies corporate and the same person (or persons) have a controlling interest in both bodies corporate; or
- (c) if the lessee is the lessor's spouse, parent, grandparent, step-parent, child, grandchild, step-child, brother or sister, or the spouse of the lessor's child, grandchild, step-child, brother or sister.

Warranty of fitness for purpose

7. (1) For the purposes of section 18(2) of the Act, the warranty referred to in section 18(1) of the Act is excluded if the lessor specifically draws to the attention of the lessee, at the time that a disclosure statement is given to the lessee under section 12 of the Act, a notice in the form of schedule 3.

(2) The notice referred to in subregulation (1)—

- (a) must be inserted in the disclosure statement immediately after that part of the statement that relates to other agreements or representations that may have been made in relation to the retail shop lease (*ie.*, if the form in the schedule of the Act is used for the disclosure statement, at the end of that form); and
- (b) must be printed in bold type.

Certified exclusionary clause

7A. For the purposes of section 20K(3) of the Act, the form set out in Schedule 2 is prescribed as a model form that a lawyer may use when providing a certificate for a certified exclusionary clause.

Land tax—Exclusion

8. For the purposes of subsection (3) of section 30 of the Act, 15 November 1990 is fixed for the purposes of that section.

Notice of request—Current market rent

9. For the purposes of subsection (1)(b) of section 36 of the Act, the form set out in schedule 4 is prescribed as a model form that a lessee may use when making a request under that section.

Trading hours—Prescribed procedure

10. For the purposes of subsection (1)(c) of section 61 of the Act, a ballot under that subsection must be conducted as follows:

- (a) the proposed core trading hours must be incorporated into a resolution to be put at a meeting of the persons who are entitled to vote on the matter (*see* section 61(2) of the Act);
- (b) the lessor and each lessee of a retail shop affected by the proposal must receive at least seven days notice of the meeting;
- (c) the notice must be in writing and must—
 - (i) state the time and place at which the meeting will be held; and
 - (ii) set out the text of the resolution that is to be put to the meeting;
- (d) a person who is entitled to vote at the meeting may, by written instrument, appoint another person to act as his or her proxy at the meeting;
- (e) the person or persons who are proposing the resolution must make up, and provide at the meeting, ballot papers for the purposes of the ballot;
- (f) the ballot papers must set out the text of the resolution and clearly indicate a place where a person who is voting may vote for, or against, the resolution;
- (g) the persons present at the relevant meeting must appoint one of their number to preside at the meeting and to conduct the ballot;
- (h) the person presiding at the meeting—
 - (i) may require that the ballot papers be altered or replaced before the ballot is conducted if he or she is dissatisfied with the form or content of the ballot papers, or otherwise considers that it is appropriate to take action under this provision; and
 - (ii) may decide any other question relevant to the conduct of the ballot;
- (i) each person who casts a vote in the ballot is entitled to scrutinise the counting of votes.

- Note: 1. The core trading hours must not exceed 65 hours a week.
- 2. Core trading hours must be approved by a majority of at least 75% of the votes cast at the ballot.
 - 3. Voting must be by secret ballot.
 - 4. In the ballot, the lessor is entitled to one vote and the lessee of each retail shop affected by the proposal is entitled to one vote in respect of that shop.

Advisory Committee

11. (1) For the purposes of section 73(2) of the Act, the *Retail Shop Leases Advisory Committee* will be constituted by the Minister after consultation with—

- (a) the Building Owners and Managers Association of Australia Ltd (South Australia); and
- (b) the Retail Traders Association of SA Inc; and
- (c) the Small Retailers Association of South Australia; and
- (d) the Newsagents Association of South Australia Ltd; and
- (e) Australian Small Business Association Ltd; and
- (f) Westfield Shopping Centre Management Co. (SA) Pty Ltd; and
- (g) the Commissioner.

(2) The Committee must meet at least twice a year.

Abandoned goods

12. For the purposes of section 76(3) of the Act, the notice set out in schedule 5 is prescribed.

Issues associated with Landlord and Tenant Act

13. (1) For the purposes of section 81(2)(a) of the Act, the following modifications to the *Landlord and Tenant Act 1936* (the "**former legislation**") are prescribed:

- (a) a reference to the Commercial Tribunal (including through the use of the definition "**the Tribunal**") is to be construed as a reference to the Civil (Consumer and Business) Division of the Magistrates Court;
- (b) section 56 of the former legislation will be taken to have been replaced by the following provision:

Substantial monetary claims

56. (1) An action involving a claim arising under or in respect of a commercial tenancy agreement to which this Part applies or a related guarantee should be commenced before the Magistrates Court.

(2) An action before the Magistrates Court that involves a monetary claim for \$10 000 or less will be taken to be a minor statutory proceeding under the *Magistrates Court Act 1991*.

(3) If an action before the Magistrates Court involves a monetary claim for an amount exceeding \$30 000, the Magistrates Court must on the application of a party to the proceeding refer the proceeding to the District Court.

6.

(4) If a proceeding is referred to the District Court, the Court has, in addition to the powers that it has apart from this section, the powers that the Magistrates Court has under this Part.

(5) In this section—

"Magistrates Court" means the Civil (Consumer and Business) Division of the Magistrates Court.;

- (c) sections 59, 60, 61 and 65 of the former legislation will be taken to have been repealed;
- (d) the following sections will be taken to be inserted after section 72 of the former legislation:

Unlawful threats

72A. A landlord or an agent of a landlord must not make threats to the effect that the landlord will not renew or extend the term of tenancy if the tenant exercises a right under this Act.

Penalty: Division 5 fine.

Vexatious acts

72B. A party to a commercial tenancy agreement must not, in connection with the exercise of a right or power under this Act or the agreement, engage in conduct that is, in all the circumstances, vexatious.

Penalty: Division 6 fine.

(2) Pursuant to section 81(3) of the Act, the following provisions of the Act apply to a retail shop lease entered into before the commencement of the Act:

- (a) section 12 (Lessee to be given disclosure statement);
- (b) section 13 (Lessee not required to pay undisclosed contributions);
- (c) section 19 (Security bond);
- (d) section 20 (Repayment of security);
- (da) section 31(2) (Estimates and explanations of outgoings to be provided by lessor);
- (e) section 52 (Statistical information to be made available to lessee);
- (f) section 61 (Trading hours);
- (g) Division 1 Part 9 (Mediation).

(3) Subregulations (1) and (2) do not affect any determination of core trading hours under the former legislation before the commencement of the Act and such a determination will have effect for the purposes of section 61 of the Act.

SCHEDULE 1

Disclosure statement—regulation 5

DISCLOSURE STATEMENT UNDER SECTION 12 OF RETAIL SHOP LEASES ACT 1995

INFORMATION FOR LESSEES

Please read the following information carefully.

What is a lease?

A lease is a very important document. It is a legally binding contract between the lessor (landlord) and the lessee (tenant). It set out the rights and obligations of the lessor and the lessee.

A document that binds the lessee to enter into a lease or to take a shop on lease for a renewed term should be treated as if it were the lease.

What should I look for in a lease?

The main features to consider are—

- the term of the lease;
- whether there is an option to renew or extend the lease (and the method of exercising any such option);
- the rent and the basis for rent reviews;
- the amounts that the lessee will have to pay in addition to rent *eg* fit out costs, maintenance and repair costs and shared operating expenses;
- the consequences of breaching a term of the lease.

Make sure you read the whole document and understand the obligations it will place on you, especially the extra charges in addition to rent that you will have to pay.

What information is the lessor required to give me?

The lessor must give you a copy of the proposed lease and this disclosure statement. The disclosure statement must contain the matters set out in section 12 of the *Retail Shop Leases Act 1995*.

What should I do before signing a lease or other binding document?

Do not sign until you understand exactly what your obligations under the lease will be.

Before signing a lease or other binding document, you should obtain independent legal and financial advice.

- You should discuss the lease (or any agreement for a lease) and the disclosure statement with your own lawyer or leasing adviser.
- You should seek advice about the financial commitments under the lease from your own accountant or recognised financial or business adviser.
- You should also seek advice from an association representing the interests of lessees.

Before signing a lease or other binding document, oral representations made by the lessor or the lessor's agent on which you have relied should be reduced to writing and signed by or on behalf of the lessor.

Before signing a lease or other binding document, the lessee should sign an acknowledgment of receipt of the disclosure statement.

ACKNOWLEDGMENT OF RECEIPT OF DISCLOSURE STATEMENT

I received a disclosure statement under section 12 of the *Retail Shop Leases Act 1995*

on [date]

from [name of lessor]

relating to
..... [address/description of shop]

Date:

Lessee:

..... [name]

.....

..... [address]

..... [signature]

DISCLOSURE STATEMENT

Shop details

1. Shop to be leased:

.....
.....
[address and shop number]

2. Lettable area of shop: square metres

3. The shop may be used only for the following purposes:

.....
.....
.....

4. [tick one box]

- The shop is in a retail shopping centre within the meaning of the *Retail Shop Leases Act 1995*. See Appendix B for details.
- The shop is not in a retail shopping centre within the meaning of the *Retail Shop Leases Act 1995*.

Lessor details

5. [tick one box and fill in details if required]

- The lessor is the owner of the shop.
- The lessor leases the shop. The following rights and obligations of the lessor under the lessor's lease are relevant to the proposed lease:

.....
.....
.....

Term of lease and renewal or extension

NOTE: Part 4A of the *Retail Shop Leases Act 1995* contains provisions that govern the term and renewal of certain leases. In some circumstances, Division 3 of Part 4A provides a preferential right of renewal of a lease of a shop in a shopping centre entered into on or after 6 October 1997.

6. Term of lease: to

10.

7. *[tick one box and fill in details if required]*

- There is no right to renew or extend the term of the lease.
- The lessee has a right to renew or extend the term of the lease as follows:

.....

.....

.....

Lessee’s access to shop

8. The lessee will have access to the shop during the following hours that fall outside trading hours:

.....

9. The shop will be available for occupation by the lessee on:

.....

Legal consequences of breach of lease

10. The legal consequences of breach of a term of the lease are set out in the following clauses of the lease:

.....

The consequences of early termination of the lease by the lessee are as follows:

.....

.....

.....

The consequences of other breaches are as follows:

.....

.....

.....

[give brief descriptions]

Monetary obligations of lessee

11. The lessee’s obligations to pay rent, capital expenditure, outgoings and other monetary amounts are set out in Appendix A.

Date:

Lessor:

APPENDIX A: MONETARY OBLIGATIONS OF LESSEE

PART 1—RENT

- 1. The base rent payable for the shop under the lease is:
.....
[if a formula is used to calculate rent, insert the formula]

- 2. The base rent may be changed on the following basis:
.....
.....
.....
[insert description of rent review arrangements]

- 3. The following rent calculated on the following basis is also payable under the lease:
.....
.....
.....

PART 2—CAPITAL EXPENDITURE

[tick the appropriate box or boxes and include relevant attachments as required]

The lessee will be liable for the following kinds of capital expenditures:

- making good damage to the premises arising when the lessee is in possession or entitled to possession of the premises;
- fitting or refitting the shop—see attachment marked ". . ." for details *[sufficient details to enable the lessee to obtain an estimate of the likely cost of complying with the obligation must be disclosed]*;
- providing fixtures, plant or equipment—see attachment marked ". . ." for details *[sufficient details to enable the lessee to obtain an estimate of the likely cost of complying with the obligation must be disclosed]*;
- contributions to a sinking fund to cover major items of repair or maintenance—see attachment marked ". . ." for details *[reasonable details of the lessee's obligations must be disclosed]*.

PART 3—OUTGOINGS

1. The lessee will be liable to pay or reimburse the following categories of outgoings:

Category of outgoings	Estimate of lessee's annual liability
local government rates and charges	\$ per year
electricity	\$ per year
gas and oil	\$ per year
water and sewerage rates and charges	\$ per year
sewerage disposal and sullage	\$ per year
energy management systems	\$ per year
air conditioning/ventilation	\$ per year
building intelligence and emergency systems	\$ per year
fire protection	\$ per year
security	\$ per year
lifts and escalators	\$ per year
public address/music	\$ per year
signs	\$ per year
public telephones	\$ per year
insurance	\$ per year
pest control	\$ per year
uniforms	\$ per year
car parking	\$ per year
child minding	\$ per year
gardening	\$ per year
cleaning	\$ per year
audit fees	\$ per year
management costs	\$ per year
maintenance and repairs	\$ per year
other <i>[specify]</i>	\$ per year
.....	\$ per year
.....	\$ per year
Total	\$ per year

2. *[tick one box and fill in details if required]*

- The lessee is liable for the full amount of the outgoings.
- The lessee is liable for a proportion of the outgoings calculated according to the following formula:
.....
.....
.....

3. *[tick one box and fill in details if required]*

- The amount the lessee is required to pay towards outgoings does not include a margin of profit for the lessor.
- The amount the lessee is required to pay towards outgoings includes a margin of profit for the lessor as follows:
.....
.....
.....
[the percentage profit or the basis on which the profit is to be calculated must be disclosed]

PART 4—OTHER MONETARY OBLIGATIONS

[tick one box and fill in details if required]

- The lessee will not be liable for any other kinds of monetary obligations.
- The lessee will also be liable for the following kinds of monetary obligations:
.....
.....
.....
[the lessor must provide, if possible, an estimate of the annual cost of complying with those obligations]

APPENDIX B—RETAIL SHOPPING CENTRE DETAILS

[include this Appendix only if the shop is in a retail shopping centre within the meaning of the Retail Shop Leases Act 1995]

NOTE—The renewal of certain leases entered into on or after 6 October 1997 is governed by Part 4A Division 3 of the Retail Shop Leases Act 1995.

Shopping centre details

1. Name of shopping centre:
.....
2. Address of shopping centre:
.....
.....
3. Total number of shops in shopping centre:
4. Total lettable area of shops in shopping centre:
..... square metres
5. Core trading hours:

Parking facilities at shopping centre

6. Number of parking bays for customers of shop:
- Number of parking bays for lessee and lessee's employees:

Facilities and services provided by lessor

7. The lessor provides facilities and services of the following kinds:
.....
.....
.....

Proposed changes to shopping centre

8. *[tick one box and fill in details if required]*

- No changes to the shopping centre are proposed.
- It is proposed to make changes to the shopping centre of the following kinds:

.....
.....
.....

[include changes to centre and surrounding roads; attach details or details of where to obtain further information; if a development application is to be lodged, include details of when and with whom it is to be lodged]

Tenant mix

9. The current tenant mix is shown on the attached floor plan marked ". . .".

[show tenancies and common areas on plan]

10. *[tick one box and fill in details if required]*

- No changes to the current tenant mix are proposed.
- It is proposed to change the current tenant mix as follows:

.....
.....
.....

11. In any event, the tenant mix may be changed or further changed through the following process:

.....
.....
.....

12. *[tick one box]*

- The lessee is assured that the current tenant mix will not be altered to the lessee's disadvantage by the introduction of a competitor.
- The lessor is not prepared to give the lessee an assurance that the current tenant mix will not be altered to the lessee's disadvantage by the introduction of a competitor.

Tenant association

13. *[tick one box and attach details if required]*

- There is no tenant association for the centre.
- The attachment marked ". . ." gives details of the nature of the tenant association for the centre, the voting rights of members and the contributions payable by members.

Advertisement etc of shopping centre

14. *[tick one box and fill in details if required]*

- Contributions are not required towards the costs of advertising and promoting the shopping centre.
- The following is an estimate of the annual contributions that are or may be required towards the costs of advertising and promoting the shopping centre:

.....
.....
.....

SCHEDULE 2

Model certificate for exclusionary clause—regulation 7A

CERTIFIED EXCLUSIONARY CLAUSE UNDER SECTION 20K(3) OF RETAIL SHOP LEASES ACT 1995

1. This certificate is given in relation to the following clause of this lease:

Exclusionary clause:

.....
.....

[identify by clause number or description]

The clause excludes the statutory rights of security of tenure conferred by Part 4A of the *Retail Shop Leases Act 1995*.

The lease is of the following premises:

.....
..... *[address or description]*

The lessor is:

..... *[name]*

The prospective lessee(s) is/are:

..... *[name(s)]*

.....
..... *[address(es)]*

2. I do not act for the lessor.

3. I have, at the request of the prospective lessee(s), explained the effect of the exclusionary clause and how Part 4A of the *Retail Shop Leases Act 1995* would apply in relation to the lease if the lease did not include that clause.

4. The prospective lessee(s) has/have given me apparently credible assurances that the prospective lessee(s) was/were not acting under coercion or undue influence in requesting or consenting to the inclusion of the clause in the lease.

Lawyer signing certificate: *[full name]*

.....
..... *[address]*

Date: Signature:

18.

SCHEDULE 3

**IMPORTANT NOTICE
EXCLUSION OF WARRANTY OF FITNESS FOR PURPOSE**

Retail Shop Leases Act 1995: Section 18
Retail Shop Leases Regulations 1995: Regulation 7

THE LESSOR DOES NOT WARRANT THAT THE PREMISES THAT YOU ARE ABOUT TO LEASE WILL, FOR THE DURATION OF YOUR LEASE, BE STRUCTURALLY SUITABLE FOR THE TYPE OF BUSINESS THAT YOU INTEND TO CARRY ON.

SCHEDULE 4
Regulation 9

Model form

RETAIL SHOP LEASES ACT 1995: SECTION 36(1)(b)

NOTICE OF REQUEST

To:
(Name of lessor)

Re: Premises at
.....
.....
(Address of retail shop)

PURSUANT to section 36(1) of the *Retail Shop Leases Act 1995*, I hereby request that you determine the current market rent that will apply if the retail shop lease for the premises specified above is renewed or extended under an option contained in that lease.

.....
(Signature of lessee)
/ /
(Full name).
Address of lessee:.....
.....
.....

Note: This request must be made within the period that begins six months before and ends two months before the last day on which the relevant option may be exercised under the lease unless the term of the lease is 12 months or less, in which case the periods referred to above are shortened to three months and 30 days respectively.

Current market rent will be determined under section 35 of the *Retail Shop Leases Act 1995*. You may be liable to pay for certain costs associated with the determination of the rent.

SCHEDULE 5

RETAIL SHOP LEASES ACT 1995: SECTION 76

RETAIL SHOP LEASES REGULATIONS 1995

NOTICE BY LESSOR OF STORAGE OF GOODS

To:
(Name of person to whom notice is addressed¹)

of:
.....
.....

Re: Goods left at shop premises at the following address:
.....
.....
.....

Details of relevant lease:

- 1. Name of lessee:
- 2. Date of lease:
- 3. Date of termination:

On the day of the retail lease described above terminated. The following goods were left
on the premises:
.....
.....

(Specify goods, other than perishable foodstuffs or goods
below a certain value—see section 76(1)(a) of the Act)

These goods have been stored in a safe place and manner.

If you are entitled to possession of the goods, you may reclaim the goods by paying to me the reasonable costs of their removal and storage.

21.

If the goods are not reclaimed on or before the day of (being 60 days after the day on which I removed and stored the goods), the goods will be sold by public auction. I will then retain from the proceeds of sale various costs and amounts owed to me.²

.....
(Signature of lessor)
 / /

.....
.....

.....
(Address of lessor)

Notes:

1. This notice must be sent to—

- (a) if the lessee has left a forwarding address—the lessee; and
- (b) if another person has, to the knowledge of the lessor, an interest in the goods and the person's name and address are known to, or reasonably ascertainable by, the lessor—that person.

(Notice of the storage of the goods must also be published in a newspaper circulating generally throughout the State.)

2. These costs and amounts are—

- (a) the reasonable costs of removing, storing and selling the goods; and
- (b) any amounts owed to the lessor under the lease.

(The balance must be paid to the owner or, if his or her identity are not known to, and are not reasonable ascertainable by, the lessor, to the Commissioner for Consumer Affairs.)

APPENDIX

LEGISLATIVE HISTORY

Regulation 5:	substituted by 198, 1997, reg. 3
Regulation 6(1):	revoked by 198, 1997, reg. 4(a)
Regulation 6(2):	varied by 198, 1997, reg. 4(b)
Regulation 7A:	inserted by 198, 1997, reg. 5
Regulation 13(2):	varied by 213, 1996, reg. 3; 198, 1997, reg. 6
Schedules 1 and 2:	substituted by 198, 1997, reg. 7