

South Australia

Retail and Commercial Leases Regulations 2010

under the *Retail and Commercial Leases Act 1995*

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Legislative history

1—Short title

These regulations may be cited as the *Retail and Commercial Leases Regulations 2010*.

2—Commencement

These regulations will come into operation on 1 September 2010.

3—Interpretation

In these regulations—

Act means the *Retail and Commercial Leases Act 1995*;

domestic partner means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

spouse—a person is the spouse of another if they are legally married.

4—Exclusions from application of Act

Pursuant to section 4(3) of the Act, a retail shop lease is excluded from the application of the Act if—

- (a) it is a lease of the whole or a part of the National Railway Museum, Lipson Street (South), Port Adelaide; or
- (b) the Aboriginal Lands Trust is the lessor; or
- (c) Distribution Lessor Corporation, Generation Lessor Corporation or Transmission Lessor Corporation is the lessor; or
- (d) the lessor is a body corporate and the lessee or lessees have a controlling interest in the body corporate; or
- (e) the lessor and the lessee are both bodies corporate and the same person or persons have a controlling interest in both bodies corporate.

5—Disclosure statement

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

6—Warranty of fitness for purpose—exclusion

For the purposes of section 18(2) of the Act, a notice of exclusion of warranty must—

- (a) be given in writing; and
- (b) be specifically drawn to the attention of the lessee at the time that the disclosure statement is given to the lessee.

7—Minimum 5 year term—exclusion

Pursuant to section 20B(3)(f) of the Act, a retail shop lease is excluded from the ambit of Part 4A Division 2 of the Act if—

- (a) the lessee is the lessor's spouse, domestic partner, parent, grandparent, step-parent, child, grandchild, step-child, brother or sister, or the spouse or domestic partner of the lessor's child, grandchild, step-child, brother or sister; or
- (b) the lessor is—
 - (i) an incorporated association within the meaning of the *Associations Incorporation Act 1985*; or
 - (ii) a body established on a non-profit basis for a purpose of a kind referred to in section 18(1) of that Act,

and the right of occupation granted under the lease is for less than an average of 15 hours in each week over the term of the lease.

8—Renewal of shopping centre lease—exclusion

Pursuant to section 20C(2)(d) of the Act, a retail shop lease is excluded from the ambit of Part 4A Division 3 of the Act if it is a lease of the whole or a part of premises known at the commencement of these regulations by the following descriptions:

- (a) heritage levels 1, 3, 4, 5, 7, 8 and 9 of Shell House, 170 North Terrace, Adelaide;
- (b) heritage levels 1, 3, 4, 5 and 7 of Goldsbrough House, 172 North Terrace, Adelaide;
- (c) levels 7 to 12 (inclusive) of Terrace Towers, 178 North Terrace, Adelaide;
- (d) Elizabeth House, Elizabeth City Centre, Elizabeth;
- (e) Sidney Chambers, Elizabeth City Centre, Elizabeth;
- (f) Raleigh Chambers, Elizabeth City Centre, Elizabeth;
- (g) Windsor Building, Elizabeth City Centre, Elizabeth;
- (h) levels 2 to 10 (inclusive) of Citi Centre Building, 145 Rundle Mall, Adelaide;
- (i) levels 1 to 10 (inclusive) of AON House, 63 Pirie Street, Adelaide;
- (j) levels 1 to 14 (inclusive) of Wyatt House, 115 Grenfell Street, Adelaide.

9—Land tax not to be recovered from lessee—exclusion

For the purposes of section 30(3) of the Act, 15 November 1990 is fixed (and, consequently, section 30 of the Act does not apply to a retail shop lease entered into before that date).

10—Assignor's disclosure statement

For the purposes of section 45A of the Act, an assignor's disclosure statement must be in the form of Form 2 set out in Schedule 1.

11—Trading hours—procedure for secret ballot

For the purposes of section 61(1)(c) of the Act, a secret ballot for the approval of core trading hours 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 10 days notice of the meeting;
- (c) the notice must—
 - (i) be in writing; and
 - (ii) state the time and place at which the meeting will be held; and
 - (iii) 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 1 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.

12—Retail Shop Leases Advisory Committee

- (1) For the purposes of section 73(2) of the Act, the Retail Shop Leases Advisory Committee will be comprised of persons nominated at the invitation of the Commissioner by each of the following bodies:
 - (a) Property Council of Australia Limited;
 - (b) Australian Retailers Association - South Australia Division;
 - (c) State Retailers Association of South Australia Incorporated;
 - (d) Shopping Centre Council of Australia Limited;
 - (e) Newsagents Association of South Australia Pty Ltd;
 - (f) Australian Small Business Association Incorporated;
 - (g) Westfield Shopping Centre Management Co. (SA) Pty Ltd.
- (2) The Committee will meet at least once each year.

13—Abandoned goods notice

For the purposes of section 76(3) of the Act, a notice of the storage of goods must be in a form that includes—

- (a) a general description of the goods; and
- (b) details sufficient to identify the retail shop at which the goods were left; and
- (c) the date of termination of the lease; and
- (d) a statement that the goods will be sold if not reclaimed by the payment of reasonable costs as required under section 76 of the Act within the 60 day period referred to in that section; and
- (e) a statement of how the goods may be reclaimed.

14—Modification of Landlord and Tenant Act

- (1) For the purposes of section 81(2)(a) of the Act, the following modifications to Part 4 of 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:

56—Substantial monetary claims

- (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 \$12 000 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 \$40 000, the Magistrates Court must on the application of a party to the proceeding refer the proceeding to the District Court.
 - (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 have been inserted after section 72 of the former legislation:

72A—Unlawful threats

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.

72B—Vexatious acts

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 (Certain obligations to be void);
 - (c) section 19 (Security bond);
 - (d) section 20 (Repayment of security);
 - (e) section 31(2) (Estimates and explanations of outgoings to be provided by lessor);
 - (f) section 52 (Statistical information to be made available to lessee);
 - (g) section 61 (Trading hours);
 - (h) Part 9 Division 1 (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—Form of disclosure statements

Form 1—Disclosure statement under section 12 of *Retail and Commercial 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 sets 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.

If the lease is a sublease, you should seek information about the lessor's rights and obligations under the head lease that are relevant to the lease of the shop.

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 and Commercial 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.

1—Details of shop

Address: *[Provide sufficient details to identify the shop.]*

Lettable area: *[Specify in square metres.]*

The shop may only be used for: *[Specify the permitted uses.]*

2—Term of lease

Term of lease:

3—Renewal or extension of lease

[Tick 1 box.]

- There is no right to renew or extend the term of the lease.
- The lease gives a right to renew or extend the term of the lease as follows:
[Insert details.]

4—Access to shop

Hours during which the lessee will have access to the shop outside trading hours:
Date on which the shop will be available for occupation:

5—Monetary obligations

The lessee's obligations to pay rent, to pay or reimburse outgoings, to make or reimburse capital expenditure and any other monetary obligations imposed on the lessee are set out in Appendix A.

6—Retail shopping centre details

[Tick 1 box.]

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

7—Consequences of breach

The legal consequences of early termination of the lease by the lessee as set out in [insert clause numbers or other identification of relevant components of lease] of the lease are as follows:

[Insert brief description.]

The legal consequences of other breaches as set out in [insert clause numbers or other identification of relevant components of lease] of the lease are as follows:

[Insert brief description.]

8—Warnings

Oral representations made by the lessor or the lessor's agent on which the lessee has relied should be reduced to writing and signed by or on behalf of the lessor before the lessee enters into the lease.

The lessee should obtain independent legal and financial advice before entering into the lease.

Date:

Signature of lessor:

Name:

Address:

Acknowledgment of receipt

I acknowledge receipt of this disclosure statement including:

[Tick 1 or more boxes as applicable.]

- Appendix A—Monetary obligations under lease
- Appendix B—Retail shopping centre details
- Attachment—Shop fitting or refitting obligations

- Attachment—Fixtures, plant or equipment obligations
- Attachment—Sinking fund obligations
- Attachment—Proposed changes to shopping centre
- Attachment—Current tenant mix
- Attachment—Proposed changes to current tenant mix
- Attachment—Details of tenant association

Date:

Signature:

Name:

Address:

Appendix A—Monetary obligations under lease

Part 1—Rent

1—Base rent

The base rent payable for the shop is or is calculated as follows:

[Insert amount or formula.]

2—Basis on which base rent may be changed

The base rent may be changed on the following basis:

[Insert description of rent review arrangements.]

3—Other rent

Other rent payable for the shop is or is calculated as follows:

[Insert amount or formula.]

Part 2—Capital expenditure

4—Permissible obligations (section 13 of *Retail and Commercial Leases Act 1995*)

The lessee will be liable for capital expenditure as follows:

[Tick 1 or more boxes as applicable.]

- to pay or reimburse the cost of making good damage to the premises arising when the lessee is in possession or entitled to possession of the premises
- to fit or refit the shop as set out in the attachment marked "Shop fitting or refitting obligations"
[The attachment must include sufficient details to enable the lessee to obtain an estimate of the likely cost of complying with the obligation.]
- to provide fixtures, plant or equipment as set out in the attachment marked "Fixtures, plant or equipment obligations"
[The attachment must include sufficient details to enable the lessee to obtain an estimate of the likely cost of complying with the obligation.]

- to contribute to a sinking fund to cover major items of repair or maintenance as set out in the attachment marked "Sinking fund obligations"
[The attachment must include reasonable details of the lessee's obligations.]

Part 3—Outgoings

5—Categories and estimate of annual liability

The lessee will be liable to pay or reimburse outgoings as follows:

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

[Tick 1 box.]

- 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:

[If different according to category, provide category and formula in each case.]

6—Margin of profit

[Tick 1 box.]

- 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:
[Provide the percentage profit or the basis on which the profit is to be calculated.]

Part 4—Other monetary obligations

7—Other

[Tick 1 box.]

- 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:
[Provide details of other kinds of monetary obligations and, if possible, an estimate of the annual cost of complying with those obligations.]

Appendix B—Retail shopping centre details

1—Shopping centre details

Name of shopping centre:

Address of shopping centre:

2—Number of shops and lettable area

Total number of shops in shopping centre:

Total lettable area of shops in shopping centre:

3—Parking facilities at shopping centre

Number of parking bays for customers of shop:

Number of parking bays for lessee and lessee's employees:

4—Facilities and services provided by lessor

The lessor provides the following facilities and services:

[Describe nature of facilities and services.]

5—Proposed changes to shopping centre

[Tick 1 box.]

- No changes to the shopping centre are proposed.
- It is proposed to make changes to the shopping centre as follows:

[Describe the nature of the changes including any changes to the buildings, parking and surrounding roads and, if a development application is to be lodged, details of when and with whom it is to be lodged. Attach details (in attachment marked "Proposed changes to shopping centre") or include details of where to obtain further information.]

6—Core trading hours

Core trading hours:

7—Current tenant mix and any proposed changes

The current tenant mix is shown on the attachment marked "Current tenant mix" comprised of a floor plan showing tenancies and common areas.

[Tick 1 box.]

- No changes to the current tenant mix are proposed.
- It is proposed to change the current tenant mix as follows:
[Describe changes or show on attachment marked "Proposed changes to current tenant mix".]

The lease may contain provisions governing the process for changes to the tenant mix.

8—Introduction of competitor

[Tick 1 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.

9—Tenant association

[Tick 1 box.]

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

10—Advertisement etc of shopping centre

[Tick 1 box.]

- 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:
[Insert estimate.]

Form 2—Assignor's disclosure statement under section 45A of *Retail and Commercial Leases Act 1995*

1—Details of lessor

Name of lessor:

Contact details:

2—Details of shop for which lease is to be assigned

Address: *[Provide sufficient details to identify the shop.]*

3—Lessor's disclosure statement

[Tick 1 box.]

- The assignor has not provided the assignee with a copy of the lessor's disclosure statement in respect of the lease, together with details of any changes to the information contained in the disclosure statement since the statement was given.
- The assignor has provided the assignee with a copy of the lessor's disclosure statement in respect of the lease, together with details of any changes to the information contained in the disclosure statement since the statement was given.

4—Outstanding notices in respect of lease

[Tick 1 box.]

- There are no outstanding notices in respect of the lease.
- There are the following outstanding notices in respect of the lease:

Name of person giving notice:

Date of notice:

Details of notice:

5—Outstanding notices from any authority in respect of shop

[Tick 1 box.]

- There are no outstanding notices from any authority in respect of the retail shop.
- There are the following outstanding notices from an authority in respect of the retail shop:

Authority giving notice:

Date of notice:

Details of notice:

6—Encumbrances on lease

[Tick 1 box.]

- There are no encumbrances on the lease.

- There are the following encumbrances on the lease:

Name of holder of encumbrance:

Nature of encumbrance:

[Tick 1 box.]

- The encumbrance is to be discharged or satisfied prior to assignment of the lease.
- The encumbrance is not to be discharged or satisfied prior to assignment of the lease.

7—Encumbrances on, and third party interests in, fixtures and fittings within retail shop

[Tick 1 box.]

- There are no encumbrances on, or interests of a third party in, any fixtures or fittings within the retail shop.
- There are the following encumbrances on, or interests of a third party in, any fixtures or fittings within the retail shop:

Name of holder of encumbrance or interest:

Details of fixtures or fittings affected:

Nature of encumbrance or interest:

[Tick 1 box.]

- All encumbrances and interests are to be discharged or satisfied prior to assignment of the lease.
- The following encumbrances or interests are not to be discharged or satisfied prior to assignment of the lease:
[Insert details.]

8—Rent concessions or other benefits

[Tick 1 box.]

- The lessor has not conferred any rent concessions or other benefits on the assignor during the term of the lease.
- The lessor has conferred the following rent concessions or other benefits on the assignor during the term of the lease:
[Insert details.]

9—Annual sales figures

The total (aggregate) annual sales figures in respect of the retail shop during the past 3 years (or such lesser period as the lease has been in operation) are as follows:

[Insert details.]

10—Other information as to trading performance

The following further information has been provided by the assignor to the assignee as to the trading performance of the retail shop during the past 3 years (or such lesser period as the lease has been in operation):

[Insert details.]

Date:

Signature of assignor:

Name:

Address:

Acknowledgment of receipt

I acknowledge receipt of this disclosure statement.

Date:

Signature of assignee:

Name:

Address:

Schedule 2—Revocation and transitional provision

Part 1—Revocation of *Retail and Commercial Leases Regulations 1995*

1—Revocation

The *Retail and Commercial Leases Regulations 1995* are revoked.

Part 2—Transitional provision

2—Transitional provision

A disclosure statement given under section 12 or section 45A of the Act before 1 December 2010 that is presented in the form required by the revoked *Retail and Commercial Leases Regulations 1995* will be taken to be presented in the form required by these regulations.

Legislative history

Notes

- Variations of this version that are uncommenced are not incorporated into the text.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or www.legislation.sa.gov.au.

Principal regulations and variations

New entries appear in bold.

| Year | No | Reference | Commencement |
|------|-----|--------------------------------|---------------|
| 2010 | 199 | <i>Gazette 26.8.2010 p4584</i> | 1.9.2010: r 2 |
| 2010 | 200 | <i>Gazette 26.8.2010 p4599</i> | 4.4.2011: r 2 |

Provisions varied

New entries appear in bold.

| Provision | How varied | Commencement |
|-----------|----------------------------------------|---------------------------|
| r 4 | | |
| r 4(1) | inserted by 200/2010 r 4 | 4.4.2011—not incorporated |
| r 4(2) | r 4 redesignated as r 4(2) by 200/2010 | 4.4.2011—not incorporated |