



Retail & Commercial Leasing Guide

Effective from 1 July 2020

INFORM | MEDiate | ADVOCATE



**Small Business
Commissioner**
SOUTH AUSTRALIA



This guide constitutes the information brochure referred to in section 11(2) of the *Retail and Commercial Leases Act 1995*

CONTENTS

The <i>Retail and Commercial Leases Act 1995</i>	2
Before You Sign The Lease	3
Lease Documentation	4
Lease Term	5
Option to renew	5
End of lease	6
Termination for a breach of the lease	7
Rent	8
Rent Review	8
Market Rent Review	8
Outgoings	8
Which other financial obligations can be passed on to the lessee?	9
Bond	9
Guarantees	9
Lease Registration Benefits	9
Registration of a lease that falls outside of the scope of the Act	9
Condition Of The Premises	10
Repairs and maintenance	10
Warranty of fitness for purpose	10
Permitted Use / Exclusivity	11
Assignment	11
Sub Leasing	13
Relocation	13
Demolition	14
Marketing plan for advertising and promotion	14
Exemptions	14
Dispute resolution	15
Checklist For Lessees	16
Checklist For Lessors	16
Glossary of Key Terms	17

MESSAGE FROM THE SMALL BUSINESS COMMISSIONER



Many businesses lease premises every year. For the business owner it can be an exciting time as they start or continue to develop their business venture. As with all financial commitments, it is essential to undertake a diligent approach to such a major legal commitment.

It is critical that you seek appropriate professional legal and financial advice as part of your consideration of entering into any lease or agreement to lease. It is now a legal requirement that lessees are provided with a copy of this guide when they are provided with a copy of a proposed lease.

This guide incorporates the amendments passed by the South Australian Parliament in December 2019.

The information in this booklet is provided as a guide to your rights and obligations under the *Retail and Commercial Leases Act 1995* (the Act), which governs most leases over retail shops and commercial leases where rent does not exceed \$400,000 per annum in South Australia. A copy of the legislation (Act and Regulations) can be found at www.legislation.sa.gov.au or www.sasbc.sa.gov.au.

While the Act sets out your key rights and obligations, most of the day-to-day matters that arise under your tenancy will be contained in the actual lease.

With the commencement of the Office of the Small Business Commissioner (OSBC) in March 2012, the Small Business Commissioner now administers the *Retail and Commercial Leases Act 1995*.

The Office has a number of key functions including Dispute Resolution, Industry Code development and enforcement, Information Services and Advocacy. Further information about the OSBC and the services available can be found at www.sasbc.sa.gov.au.

Apart from formal mediations, there is no cost to access the range of services offered by the OSBC. We also welcome any feedback on this publication or other services that the Office provides.

The Office invites any business to contact us and we will endeavour to provide the appropriate assistance within our legislative scope.

Contact us on 08 8303 2026 or
Toll Free on 1800 072 722,
via email at sasbc@gov.au or
via our website at www.sasbc.sa.gov.au.

A handwritten signature in black ink, appearing to read 'John Chapman'. The signature is fluid and cursive, with a long horizontal line extending to the right.

John Chapman
Small Business Commissioner



THE RETAIL AND COMMERCIAL LEASES ACT 1995 (“THE ACT”)

Most (but not all) commercial leases in South Australia are subject to the Act.

The Act regulates those leases to which it applies in a variety of ways.

Tip – Whether you are a lessor or a lessee, you should ensure you know whether or not the Act applies to the lease before the lease is signed.

Leases to which the Act applies are described in the Act as retail shop leases.

Your premises do not have to be “retail” or a “shop” to be a retail shop lease or subject to the Act. A retail shop lease includes any business premises which are used (even to a small extent) for the sale of goods to the public by retail, or the provision of services to the public, or are business premises to which the public is invited to negotiate for the supply of services. Accordingly, your lease may still be subject to the Act even if your premises are used for more than one purpose or if your premises include an office, a restaurant or cafe, a showroom or display yard, professional rooms or include other “non-retail” type premises. It is your use of the premises that determines whether or not your lease is subject to the Act.

The Act will also not apply to those leases that are excluded by the Act including:

- Leases where the annual rent exceeds the threshold prescribed by the Act from time to time (the threshold is currently \$400,000 per annum exclusive of GST).
- Leases where the lessee is a public company as defined under the *Corporations Act 2001*, a subsidiary of a public company, a foreign company registered on an overseas stock exchange, an Authorised Deposit Taking Institution or a company authorised to carry on the business of insurance.
- Leases where the lessee is a Commonwealth, State or Local Government body, agency or instrumentality.
- The Lease is for a short term of one month or less.
- Some registered leases which may, when originally executed, exceed the rental threshold but later are captured by the Act.

This guide provides information and advice in respect of leases that are or will be subject to the Act. This information and advice does not apply in respect of those leases not subject to the Act.

Further legal advice should be obtained if there is any doubt over whether a particular lease or proposed lease is or is not subject to the Act.



BEFORE YOU SIGN THE LEASE

Leasing a business premises is a very large and complex commitment. It is extremely important that you take time to consider the suitability of the premises and the lease that will cover it.

Before you make any commitment, you should ensure that you have:

- Incorporated any representations made about the premises or how the lease will operate into the lease.
- Inspected the premises. It is advisable for the lessee and lessor to complete and sign a 'Condition Report' recording the condition of the premises, any fixtures, fittings and plant and equipment. This can include an assessment of the utilities provided and how they are metered.
- Received independent financial advice about your financial obligations under the lease.
- Received independent legal advice about the terms of the lease.
- Contacted your insurance broker/company to discuss and clarify your insurance obligations under the lease.
- Contacted the Local Council to ascertain that the business activity you wish to conduct is allowed under the zoning for the site. You could also ask what development plans the council may have or has received for the area. (refer page 11)

Tip – take good quality and comprehensive photos. As there is no standardised Condition Report, you should have one drawn up.

Tip – you should also clarify with Council whether there are any specific health or environmental requirements that you need to comply with.



LEASE DOCUMENTATION

A lessor must provide a draft or sample copy of a lease to any prospective lessee as soon as negotiations are entered into. The lease, subject to the Act, contains all the terms and conditions under which the premises are being leased.

If a lessee is offered an “Offer to Lease”, an “Agreement to Lease”, or any other document, with or without a draft copy of the lease, the lessee should proceed with caution as these documents can lead to the lessee being legally bound to accept a formal lease at a later date. The lessee should ensure that they do not, in any way, indicate that they accept the terms in these documents, or sign them, until after they have obtained independent legal advice.

The Act requires that the most recent version of this Retail and Commercial Lease Guide, which is available at www.sasbc.sa.gov.au or at the Small Business Centre, Chesser House, Level 4, 95 Grenfell Street, Adelaide SA 5000 be provided to the lessee at the same time as the lessee is provided with the draft or sample of the lease. In addition to the lease, the lessor must provide the lessee with a Disclosure Statement before the lease is entered into.

A Disclosure Statement details some of the most important aspects of the lease, including rent, rent reviews, schedule of outgoings, term of the lease, options to renew, lettable area, tenancy mix, permitted use and many other details. Penalties may apply to a landlord and/or agent who fails to provide a copy of the draft or sample lease and/or the disclosure statement and/or the Retail & Commercial Lease guide.

As with the lease, a lessee should seek legal advice as to the contents of a Disclosure Statement.



LEASE TERM

The Act provides that retail shop leases must be for a minimum of 5 years, including any options to renew. A lease can be for a head term of 5 years, or any combination that totals 5 years. For example a lease with a head term of 1 year, with two rights of renewal for 2 years each would be in accord with the Act, as the total term is 5 years. If this requirement is not satisfied, the Act will change the lease without either party's agreement.

There are some exceptions to this requirement, including that the:

- lease is a short fixed term lease of 6 months or less;
- lessee has already been in possession of the premises for at least 5 years; or
- lease contains a Certified Exclusionary Clause (see below).

If a lease contains a Certified Exclusionary Clause, the Act requires that a solicitor (who is not acting for the lessor) or the Small Business Commissioner provide a certificate which certifies that they have explained to the lessee that the lessee would, but for this certificate, be bound to a minimum 5 year term. The solicitor or Small Business Commissioner must also certify that they have received credible assurances from the lessee, that the lessee, was not acting under any coercion or undue influence in consenting to the inclusion of this clause into the lease. A fee will apply for the issue of a certificate.

Option to Renew

If a lease contains an option to renew, both parties, but particularly the lessee, need to be aware of what the lease provides in relation to when and how an option can be exercised. If a lessee does not exercise the option within the timeline and manner stipulated in the lease, the lessor may not be obliged to renew it.

If the option to renew is to be done at current market rent, then the lessee can request an early determination of the market rent. The lessee must make this request in writing during the period that starts 6 months before and ends 2 months before the last day on which the option may be exercised under the lease. For example, if the option is due to be exercised by 1 January, the lessee must make the request no earlier than 1 July and no later than 31 October.

The market rent is to be determined under the same requirements outlined under Market Rent Review on page 8.

Tip – both parties should note these dates in their calendars as a prompt for when they should begin the renewal process.



End of Lease

The Act prescribes rules that must be followed when a lease is due to expire.

Lessees in a shopping centre have a preferential right of renewal when their lease expires. The legislation sets out the rules that govern the granting of the preferential right. Unless the lessee notifies the lessor in writing 12 months before the lease is due to expire, that they do not want to renew or extend, the lessor must presume that the lessee wants to exercise their preferential right. Therefore the lessor must begin negotiations with the lessee for a renewal or extension of the lease between 6 to 12 months before the lease is due to expire.

There are some exceptions to this, including:

- the lease is a short term lease for a fixed term of 6 months or less;
- the lease contains a Certified Exclusionary Clause (refer page 5);
- the lessor reasonably wants to change the tenancy mix; or
- the lessor requires vacant possession of the premises for demolition, or substantial repairs or renovation.

If a lessee does not have a right of renewal, the lessor must, at least 6 months (but not more than 12 months) before the end of the lease, give the lessee written notice of this and also give reasons to explain why the lessee does not have a preferential right of renewal.

For retail shop leases that are not in a shopping centre, and do not have any further right to renew or extend the lease, the lessor must give the lessee notice in writing stating whether or not they are offering a renewal of the lease. The notice must be given not less than 6 months or more than 12 months before the lease is due to expire.

For example, if the lease is due to expire on 31 December, the notice must be given sometime between 1 January and 30 June preceding the expiry.

Tip – you should record these dates in your calendar so you do not overlook it.



Termination for a breach of the lease

Most leases permit the lessor to terminate the lease when there is a breach by the lessee. Landlords are usually required to serve prior notice (usually 14 days) of the breach so that the lessee has an opportunity to remedy the breach before the lease is terminated. The lessor may not always have to serve notice for non-payment of rent before taking action to gain re-entry to the premises.

Termination of the Lease can have severe consequences for the lessee and in most cases will include:

- The lessor re-entering the premises, closing the lessee's business and changing the locks of the premises;
- The lessee being liable to the lessor for all of the arrears then owing, all of the lessor's costs (including the costs of re-letting the premises), interest plus all of the rent and other amounts payable under the lease for the remaining term of the lease; and
- The lessor calling on any bond or bank guarantee provided by the lessee, or pursuing any personal guarantors.

In addition, the closure of the lessee's business can result in the lessee not being able to meet legal obligations to other third parties such as banks, suppliers and customers. Accordingly, not complying with the lease can have long lasting consequences to the financial standing, credit history and reputation of a lessee.

Tip – lessee - it is imperative you understand your lease, in particular your financial obligations throughout the term of the lease, and that you plan/budget to ensure such financial obligations are met.

Tip – lessee - if it seems likely that you are going to fall behind with your rent payments, you should contact the lessor or their agent as soon as possible to try to negotiate a solution and avoid a breach notice that may subsequently lead to re-entry by the lessor.

Tip – lessee - if you fall into arrears under your lease, or anticipate falling into arrears, or if you receive a default notice from your lessor or if your lease is terminated, you should immediately seek advice with a view to resolving the matter as promptly as possible.

RENT

The initial rent under a lease is commonly referred to as base rent. The Act does not regulate what the base rent should be. The base rent payable under a lease is negotiated between the lessor and lessee.

A lessee can consult other lessees in the same complex, lessees in neighbouring premises, land agents, commercial valuers, conveyancers or private lease negotiators to help determine what would be a fair rent for the premises. **Neither the OSBC, nor any government agency, can assist with this.**

Rent Review

Most leases will provide that the rent can be reviewed on a regular basis, usually every 12 months.

The lease will also stipulate the method that is to be used for a rent review. Some common methods are:

- A set percentage increase;
- Consumer Price Index (CPI) - There are many measures of the CPI. The lease should detail which CPI measure is to be used;
- Market Review; and
- Any other agreed formulae or method.

The types of review can vary over the life of the lease. However the lease cannot allow the lessor to choose between two methods and select the one that gives the greatest return – for example, the lease cannot state that the increase is to be CPI or 5% whichever is the greatest.

Market Rent Review

There is no set time for when a market review of the rent can be undertaken. A market review is usually undertaken when exercising an option to renew (refer page 5). However a market review does not have to be undertaken if the parties can agree on what the new rent should be.

The Act provides that if rent is to be changed to reflect the current market rent, it must be done on the basis that the premises are unoccupied and the value of the lessee's goodwill and fixtures and fittings is to be excluded in any assessment.

If the parties cannot agree on a new market rent, the Act provides that the rent will be determined by a valuation carried out by a person appointed by the parties. If the parties cannot agree on who this should be, they can apply to the Australian Property Institute which will appoint an independent valuer to undertake the assessment. The costs of this are to be shared equally between the parties.

Outgoings

The Disclosure Statement (refer page 4) must list all the outgoing that the lessee is liable for and explain the basis under which they are to be apportioned. Examples of outgoing include council rates, water charges, utilities, insurance, pest control, cleaning, emergency services levy, management fees and audit fees.

A common, but not exclusive, measure used as the means of apportioning outgoing to lessees is the lettable area of the premises. For example, if you are leasing 100 sqm and the total lettable area for the complex is 1000 sqm, you would be liable for 10% of the outgoing.

Tip – you should discuss the composition of, and the basis for, the apportionment of outgoing with your advisor.

The amount allocated to each outgoing is to be the estimated budget for each outgoing for the current accounting period (usually the financial or calendar year). Apart from including this information in the initial Disclosure Statement (when the lease is entered into), the lessor must provide this estimate of outgoing at least one month before each accounting period.

Within 3 months after the end of each accounting period, the lessor must give the lessee a report that shows all expenditure for the outgoing that the lessee is liable for. This report must be prepared by a registered company auditor. However the report does not have to be audited if the lessee is only liable for water and sewerage rates and charges, local government rates and charges, and insurance. However the report must then be accompanied by receipts for this expenditure.

Under a retail shop lease, land tax cannot be charged to a lessee, however, the lessor can incorporate it in setting the rent for the premises.

Which other financial obligations can be passed on to the lessee?

In addition to rent and outgoings, lease preparation costs - only 50% of the costs incurred by the lessor, can be passed on to a lessee.

Tip – be aware that there is no set figure for what this could cost. When you begin negotiations, you should ask how much this is likely to be and incorporate this into the terms of the lease.

Bond

A lessor can request that the lessee pay a security bond of up to three months' rent. The bond must be lodged with the OSBC. A lessor must lodge the bond within 7 days of receiving the payment. A registered agent must lodge the bond within 28 days of receiving the payment. The payment must be lodged with a Retail and Commercial Lodgement of Security Bond Form, signed by both parties. Only original signatures will be accepted.

At the end of the tenancy, a claim can be made for the bond by either or both parties. If both parties agree on who should receive the bond, they can lodge a Retail and Commercial Security Bond Refund Form with the OSBC. If the parties cannot agree, either party can lodge the refund form and the OSBC will attempt to negotiate a settlement between the parties. If an agreement cannot be reached the matter will be referred to the Magistrates Court for a determination.

The forms are available at www.sasbc.sa.gov.au.

Tip – do not sign a blank refund form.

Guarantees

A lessor can request a guarantee as security under the lease. There is no limit to the value of the guarantee, but it is common practice for bank guarantees to be set at the equivalent of one to six months rent. Lessors must return a bank guarantee within 2 months after the tenant has fulfilled any obligations required at the end of the lease.

Tip – as there is no legislated limit, you should negotiate on the amount of the guarantee as well as the conditions for its release at the end of the tenancy and incorporate this in your lease

terms. The guarantee may be a bank guarantee, security bond, personal and/or director's guarantee.

Lease Registration Benefits

As the lessee, you will be responsible for the cost of registering a lease. It is not a compulsory requirement to register a lease. However it is advisable for a lessee to have their lease registered as it protects their leasehold interest in the property if the premises are sold.

If a lease is to be registered, the lessor must lodge the lease for registration within one month after the lease is returned to the lessor or the lessor's lawyer or agent following its execution by the lessee (if it is agreed that the lease will be registered) and provide a copy of the registered lease to the lessee within one month after it is returned following registration.

Tip – your legal adviser or conveyancer can tell you what the estimated cost would be.

Registration of a lease that falls outside the scope of the Act

A lessor may decide to protect a lease that falls outside of the rental threshold when the lease is entered into by lodging the lease for registration within 3 months after both parties have executed the lease and providing written notice to the lessee within 1 month of lodgement. The lease shall remain outside the Act regardless of any increase to the threshold that would bring the lease within the scope of the Act. Any renewal of the registered lease is also protected provided that the renewal is registered no later than 2 months after the date the lease would expire if not renewed and the lessor provides written notice to the lessee within 1 month of lodgement.

CONDITION OF THE PREMISES

Repairs and Maintenance

Most commercial leases do not require the lessor to provide or maintain premises in any particular standard or condition, nor do they require the lessor to undertake ongoing repairs or maintenance (including repairs or maintenance to building services such as plumbing, drainage or airconditioning). While the Act implies a statutory warranty from the lessor that the premises are suitable, in the majority of cases the lessor is able to exclude such warranty. Most leases will in fact make the lessee responsible for the condition, repair and maintenance of the premises.

Tip – lessee - before you sign any document or take possession of any premises you should have the premises properly inspected to ensure (amongst other things):

- the premises are suitable for your use of them;
- the premises are structurally suitable and sound;
- building services are in suitable and working order; and
- the premises comply with relevant legislation and building standards, particularly those that apply to your intended use of them.

The lease and Disclosure Statement should be comprehensively reviewed before the lease is entered into so that you are aware of the obligations imposed upon you in respect of cleaning, maintenance and repairs to the premises. Just because the lease says a particular repair or maintenance obligation is not a lessee responsibility does not mean that it is a lessor responsibility. The lessee should assume the lessor will not do anything that the lease does not say the lessor must do.

The Act prohibits a lease requiring a lessee to incur “capital expenditure” unless such expenditure is disclosed in the Disclosure Statement and is of the sort permitted by the Act.

Seek professional advice if the lease does not clearly set out who is responsible for particular maintenance or repair obligations, or if you have any concerns about the condition of the premises you are leasing.

Tip – many lease disputes arise over whether a lessee caused damage to the premises or whether the premises were damaged before the lease began.

It is prudent for the lessor and the lessee to jointly inspect the premises before the lease commences and to document/photograph any pre-existing damage.

Warranty of Fitness for Purpose

The Act provides that if, prior to entering into the lease, the lessee notifies the lessor of the business activity they propose to undertake in the premises, the lease is taken to include a warranty that the premises will be structurally suitable for that purpose. However the warranty can be excluded if, before the lease is executed, the lessor gives notice of the exclusion in the manner required by regulation.

PERMITTED USE / EXCLUSIVITY

The permitted use clause in a lease describes the business and associated activities that can be undertaken on the premises. In addition to checking with the local council (refer page 3), a lessee should consider what future plans they have for the business and whether the permitted use allows for this, for example:

- For a hair salon, is the activity limited to hair treatments, or can the lessee subsequently expand to include beauty treatments?
- For a dog grooming business, can the lessee subsequently sell pet food and accessories?
- For a food outlet, can the lessee change or expand the menu at will?

The description in the permitted use clause does not mean that the lessee has exclusive rights to carry on that particular type of business or associated activity in the shopping centre or group of shops. This is a separate issue and needs to be discussed between the parties. Any arrangement struck around exclusivity should be incorporated into the lease.

ASSIGNMENT

If a lessee (assignor) wants to sell their business, relocate their business, or cease operating, it is common practice to have their lease assigned (transferred) to a new lessee (assignee). Another option, particularly if the lease is close to the end of the term, is for the new lessee and lessor to enter into a new lease. However the lessor is not under any obligation to agree to this.

Under the Act, both the lessor and lessee have obligations to fulfil before an assignment can happen.

The assignor (the current lessee) must provide the assignee (the proposed new lessee) with a copy of the Disclosure Statement provided to them by the lessor. If the assignment relates to an ongoing business, the assignor should, to obtain the benefit of the assignor's release from

liability set out below, provide the assignee and the lessor with an assignor's Disclosure Statement which contains all the information required by regulation.

The lessor can also withhold consent if the proposed assignee:

- wishes to change the permitted use for the premises;
- is unlikely to be able to meet their financial obligations under the lease;
- has retailing skills are inferior to those of the assignor; or
- if the lessee has not complied with procedural requirements for obtaining the lessor's consent.

If the lessor withholds consent, they must give the lessee a written statement detailing the reasons for this.

However a lessor must deal with a request for consent expeditiously and is deemed to have given consent, if they have not responded within 42 days after the request was made.

Provided all procedural requirements under the Act have been complied with, an assignor's liability following the assignment of a lease is limited to:

- 2 years after the lease was assigned; or
 - the date that the lease expires; or
 - the date on which the lease may subsequently be renewed or extended,
- whichever occurs first.

The lessee is usually liable for the lessor's reasonable expenses (including legal fees) incurred in the granting of the consent to assign the lease.



SUB LEASING

A lessor, under the Act, can reserve the right to refuse consent to granting a sublease.

However, if a lease allows for subleasing, both parties must ensure they follow the process outlined in the lease.

Under a sublease arrangement the sublessor's (formerly the lessee) obligations under the existing lease remain unchanged. In addition the sublessor incurs the same obligations that their lessor has to them, including the obligation to provide a draft lease and Disclosure Statement (refer page 4).

Tip – both parties should ensure that they seek independent legal advice to clarify these responsibilities and prepare the documentation necessary to give effect to the sublease arrangement.

RELOCATION

A retail shop lease in a retail shopping centre can contain a relocation clause which allows the lessor to relocate the tenant to other premises.

If a lease contains such a clause the following rules apply:

- the lessor must provide the lessee with sufficient information that shows there is a genuine proposal to refurbish, redevelop, or extend the premises and that the proposed works cannot be carried out practicably without vacant possession of the premises;
- the lessor must give the lessee 3 months notice in writing, that also includes details of the alternative premises being offered;
- the lessee must be offered a new lease on the same terms and conditions (excluding rent), for the remainder of the term; and
- within one month of receiving the relocation notice, the lessee can terminate the lease by giving written notice to the lessor and the lease is therefore terminated 3 months after the relocation notice.

Tip – at the lease negotiation stage, a lessee should discuss with the lessor whether there are any plans to refurbish, redevelop or extend the premises, and if so when.

This information should be written into the lease and Disclosure Statement.



DEMOLITION

A retail shop lease can contain a demolition clause which allows the lessor to terminate the lease if the premises are to be demolished.

If a retail shop lease allows the lessor to terminate the lease on these grounds the following rules apply:

- the lessor must give the lessee sufficient information that shows that there is a genuine proposal to demolish the building within a reasonably practicable time after the lease is terminated;
- the termination notice must be in writing and gives at least 6 months notice; and
- during this time, the lessee can terminate by giving at least 7 days notice in writing.

Tip – at the lease negotiation stage, a lessee can discuss with the lessor whether they have any plans to demolish and if so, when.

This information should be written into the lease and Disclosure Statement.

MARKETING PLAN FOR ADVERTISING & PROMOTION

(applies to shopping centre leases only)

Retail shop leases in a shopping centre cannot require a lessee to undertake advertising or promotion of their business. However a lessee can be required to contribute to a marketing plan for advertising and promoting the centre.

If the lease does provide for this, the following rules apply:

- the lessor must, at least 2 months before the start of each accounting period of the lessor, make available to the lessee, a detailed marketing plan including the proposed expenditure; and
- within 3 months after the end of each accounting period, the lessor must provide a written report that details all expenditure for advertising and promotion. This report must be prepared by a registered company auditor.

EXEMPTIONS

The Act provides for the Magistrates Court, responsible Minister or the Small Business Commissioner to provide the parties to a lease with an exemption to part, or all, of the Act where appropriate and reasonable.



DISPUTE RESOLUTION

The Office of the Small Business Commissioner will deal with each enquiry or dispute in a methodical approach. The key phases of this will be:

Initial assistance

The Commissioner and the office staff will look at each issue and provide services designed to resolve the conflict or dispute at that stage. Information will be provided such as responsibilities under relevant legislation, for example the *Retail and Commercial Leases Act 1995*. When a dispute is lodged an officer within the OSBC will be assigned to handle that case and assist in the resolution of the dispute. The Small Business Commissioner or his delegate will make contact with the other party or parties to request preliminary information when necessary.

If the dispute can be resolved at any of the early stages, the aim is to do so.

There is no cost for this service.

Pre-mediation

Once the necessary information is provided by each party, staff within the Office will discuss options with each party to try to resolve the dispute. All parties will be encouraged to act in good faith during any discussions or negotiations. The aim at this stage is to reach an outcome that is satisfactory for all parties and resolve the dispute in a timely manner. Any settlement that is reached by this process will be documented and be legally enforceable.

There is no cost for this service.

Formal mediation

An option that may be put to the parties is to attempt to resolve the dispute through the use of an independent external professional mediator. The panel of mediators was set up by an open tender process and an appropriate mediator will be assigned by the Small Business Commissioner to assist the parties to resolve the dispute.

When parties agree to mediation then the Small Business Commissioner will organise a suitable venue, time and date agreeable to the parties. Note that mediations will be confidential to the parties. Any settlement that is reached by this process will be legally enforceable. If required an additional mediation could be arranged if parties wished that to occur. Parties are still able to take a matter to the Court system if they so desire.

There is currently no cost for this service.

CHECKLIST FOR LESSEES

- It is very important to seek legal and financial advice prior to signing a lease as it is a significant commitment.
- Ensure the property is suitable/appropriate for conducting your business for the duration of the lease and that the lease contains a description of what the premises can be used for.
- Obtain a copy of the lease and read thoroughly. Highlight any parts which are unclear and seek advice from a lawyer or solicitor.
- Understand who is responsible for maintenance and repairs of the building and infrastructure, plant and equipment, air conditioner etc.
- Obtain a copy of this Retail and Commercial Leasing Guide.
- Obtain a copy of the Disclosure Statement and fully understand what costs you will be liable for in regard to outgoings.
- Consider whether or not you want to register your lease with Land Services SA.
- Ensure that rent payable is clearly displayed in the lease.
- Ensure the area to be leased is clearly defined in the lease documents.
- Be aware of requirements to pay a security bond or bank guarantee.
- Ensure you are aware of what you need to do to renew your lease.
- Do not take possession of the premises until the lease had been prepared and signed.
- Ensure the lease either; provides a head-term (plus rights of renewal if applicable) of at least 5 years; or excludes the five year term requirement and you as the lessee have provided a certificate prepared by a lawyer or the Small Business Commissioner.

CHECKLIST FOR LESSORS

- Consider legal and financial advice when preparing a lease document to ensure it complies with the relevant legislation.
- Conduct appropriate enquiries to ensure the new tenant has the financial capacity to pay rent as agreed.
- Provide a copy of this Retail and Commercial Leasing Guide. Provide full details to the new tenant of all outgoings associated with the lease (Disclosure Statement).
- Consider either a security bond or guarantee.
- Consider outlining responsibilities of certain maintenance and repair items ie air conditioning, roof, structural problems.
- If your lease specifically excludes a Warranty of Fitness for Purpose, you must specifically draw this to the attention of the lessee at the time of production of the Disclosure Statement.
- Clarify and outline specific termination clauses and/or rights of both parties, including the process of breach of agreement and what this will mean for both parties.
- If the lease is to be registered, you must provide the lessee with a copy of the lease within 1 month after it has been registered and returned to you.
- Do not hand-over possession of the premises until the lease has been prepared and agreed.
- Ensure the lease either; provides a head-term (plus rights of renewal if applicable) of at least 5 years; or excludes the five year term requirement and the lessee has provided a certificate prepared by a lawyer or the Small Business Commissioner.

Remember: A lease is a legally binding document between two parties and arises from consent on both sides being reached.

GLOSSARY OF KEY TERMS

Certified Exclusionary Clause

Is a clause of a retail shop lease which requires a certificate signed by a legal representative who does not act for the lessor or the Small Business Commissioner, and who endorses the lease stating that, at the request of the lessee, the provisions of the lease have been explained and that credible assurances have been given by the lessee that they have not been coerced or placed under undue influence to accept the inclusion of a provision. This mostly relates to the term of the lease (usually being less than 5 years).

Disclosure Statement

A written statement containing information relating to the premises, use of the premises, term of lease, tenant mix, all associated costs involved with the lease (often referred to as “outgoings”) and consequences of breaching the lease. Information contained in this document must not be false or misleading.

Lease

A binding legal document between two parties. A lease must be provided to a potential lessee at the negotiating stage by the lessor.

Lessee

Person who has the right to occupy premises as permitted to do so by the lessor.

Lessor

Person who grants permission for a lessee to occupy premises.

OSBC

The Office of the Small Business Commissioner which has been established (in relation to the Act) to:

- administer the Act;
- assist parties who have a complaint/dispute with another party in regard to the Act;
- facilitate a mediation service for disputing parties;
- provide information relating to the Act; and
- manage security bonds.

Note – The OSBC does not provide legal and/or financial advice.

Party

The persons involved in a lease.

Preferential Right of Renewal

If the premises are to be re-leased and an existing lessee wants to renew or extend the lease, the lessor must give preference to the existing lessee over others. The lessor is to presume that the lessee is seeking to renew or extend the lease unless the lessee has notified the lessor in writing within 12 months prior to the expiration of the lease. A few clauses surround the lessor not having to grant preferential right including if the tenancy mix is to alter, the existing lessee is guilty of a substantial breach(es), the lessor requires vacant possession, renewal of the lease would substantially disadvantage the lessor or if the lessee’s right of preference is excluded by regulation. **These rights only apply to a lease in a retail shopping centre.**

Retail Shop

Business premises where:

- goods are sold to the public by retail; or
- where services are provided to the public, or the public are invited to negotiate for supply of services; or
- classified by regulation as premises to which the Act applies.

Retail Shopping Centre

A group of premises whereby at least 5 are retail shops, that they are all owned by the same person, are located in the same building or other buildings which are adjoined or separated by common areas and that the area is generally promoted as a shopping centre, mall, court or arcade.



CONTACT US

Chesser House,
Level 4, 95 Grenfell Street
Adelaide SA 5000

GPO Box 1264,
Adelaide SA 5001

Toll Free 1800 072 722

P 08 8303 2026

F 08 8303 0943

E sasbc@sa.gov.au

W www.sasbc.sa.gov.au



Produced by the South Australian Government
For full disclaimer visit our website www.sasbc.sa.gov.au
Copyright February 2021



**Small Business
Commissioner**

SOUTH AUSTRALIA

