

ASSIGNMENT OF LEASES

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Scope of Paper

This paper is limited to assignment of leases for commercial (as opposed to residential) properties and to an assignment of the Lessee's (as opposed to the Lessor's) interest in the lease. Also, given that roughly 9 out of 10 leases are subject to the *Retail and Commercial Leases Act* (SA) ("the Act"), this paper will focus on leases which are subject to the Act.

A. Preliminary matters to address upon receipt of instructions

1. Be clear for whom you are acting and about the lease with which you are dealing

1.1 Ascertain any common ownership

1.1.1 Of the three parties to a lease assignment (Landlord, Assignor and Assignee), ascertain if there is any common ownership between those three parties. Sometimes there is some common ownership as between the Landlord on the one hand and the Assignor on the other (as in an owner/occupier of commercial property), or between the Assignor and Assignee (for example a restructuring of or exiting from the business ownership).

1.1.2 If there is any common ownership, you must be clear for which party you are acting and make that clear to all concerned. For example, if there is common but not identical ownership between the Landlord and the Assignor, you must declare for which of those parties you are acting (you should not act for both), otherwise you leave yourself open to disputes and complaint due to lack of clarity of representation or conflict of interest.

1.1.3 Also, where no common ownership and the other parties are unrepresented, you must make it clear to the other parties that you do not, and cannot, act for them, otherwise that position can be easily confused.

1.2 Undertake searches

1.2.1 Search the land at the LTO - this will confirm the Landlord (registered proprietor) and whether it is a person, a company or a combination, whether the lease is registered and if so whether there are any lease transfers and/or extensions registered, and whether there are any relevant caveats.

1.2.2 Search the business name, if there is a sale of business involved.

1.2.3 Search all corporate entities to ascertain any common ownership and ensure registration status

1.2.4 These searches will provide you with essential information regarding the land, the lease and the parties including whether any of the parties are prevented from contracting and signing documents (unregistered corporation / bankrupt individuals or a corporate Assignee not incorporated as at nominated assignment date).

1.3 Don't act for two parties

1.3.1 Acting for both Assignor and Assignee, or for the Landlord and either of an Assignor or Assignee, is strongly recommended against, as is acting for both a Landlord and Tenant in the preparation of a lease – it is impossible (practically speaking) to properly represent both parties. Every clause, in every lease, can be worded a number of ways and so it is too hard to fully satisfy both, let alone one, party.

1.3.2 In addition, in relation to professional indemnity insurance for lawyers, you are at risk of a penalty excess being imposed if you act for two or more parties to a transaction where the parties interests may be in conflict.

1.4 Be clear on the scope of your brief

1.4.1 An assignment of lease transaction can range enormously in terms of the number of issues involved, from straight forward to very complex – and so with the potential for there to be a large number of issues, you need to be really clear, and it should be recorded in writing, as to the scope of your brief.

1.4.2 My office typically acts for Landlords and I refer to that scenario later in the paper.

1.4.3 Acting for an Assignee is potentially a particularly onerous brief, as your client is entering into (as opposed to exiting) a financial commitment and location commitment. For example, if the terms of the lease are not as anticipated by the Assignee and/or there are issues with the property, unless you have a record of excluding such issues from your brief, you may find yourself on the wrong end of a complaint.

2. The Retail and Commercial Leases Act

2.1 Does the Act apply?

2.1.1 It is critical to ascertain at the outset of your file, whether the Act applies to the relevant lease. This issue is beyond the scope of this paper. The Act is reasonably clear on this topic and there are numerous papers including some which may be accessed via B&As' website. I am aware that Peter Britten-Jones' paper today explored the issue of rent thresholds in this regard.

2.1.2 The most commonly encountered exceptions to the application of the Act are where the Tenant does not deal with the public from the lease premises or where the Tenant falls within a number of categories which the legislators considered did not require the protection of the Act.

2.1.3 Later in the paper I will touch on the situation of when an assignment of lease can result in a situation where arguably the Act applies to a lease prior to the assignment but not after, and vice versa.

2.1.4 Also, even if you determine that the Act does not apply as a matter of law, you still need to read the lease, as often Tenant's legal advisor's will have negotiated for the

provisions of the Act to apply to the lease as a matter of contract, in which case you must advise accordingly.

2.2 Know the Act

Of all the leases which come through our office, around 9 out of 10 are subject to the application of the Act and so when acting in relation to an assignment of lease, familiarity with the provisions under the Act in relation to assignments and generally, is critical. Sections under the Act which relate specifically to lease assignments are Sections 43 to 45A.

2.3 When the Act does not apply

If the Act does not apply, generally speaking the lease contract terms will regulate the position in relation to an assignment and the position between the respective parties. Be aware of the certain provisions of the Landlord and Tenant Act which will apply and override the lease to the extent of any inconsistency. This is another issue beyond the scope of this paper.

3. Miscellaneous

3.1 Costs disclosure compliance – Make sure you are compliant! Not only because you want to be paid and avoid a dispute, but it turns your mind to fee estimates and scope of instructions, two key areas for dispute potential.

3.2 Who is liable for your fees?

If acting for a Landlord, generally the Tenant will be liable to pay the Landlord's legal costs pursuant to the terms of the lease. However you have no professional or contractual relationship with either the Assignor Tenant or Assignee Tenant and so you must make it clear to your Landlord client that he or she is ultimately liable for those fees, including if the matter/assignment does not proceed. Section 44(3) of the Act allows for the Landlord to recover legal costs from the Tenant.

If acting for the Assignor or Assignee, the matter of legal fees is more straight forward.

If there is a business sale agreement ("BSA") involved, that will usually record whether the Assignor or Assignee is to pay the Landlord's legal costs in relation to the lease assignment – for example, the REI BSA records that if not agreed otherwise, the Purchaser/Assignee shall pay such costs.

3.3 Business Sale Agreement

If there is a BSA and you are acting for the Landlord, you should request a copy of the BSA, even if such entitlement is not expressed in the lease and even though a stamped BSA is now not required in order to stamp lease assignment documents. This can be relevant / of interest to you as the Landlord's legal representative on a number of fronts, including to ensure that the Vendor is not purporting to sell any of the

Landlord's property, that there are no representations by the Vendor (Assignor) contrary to the terms of the lease and that the BSA parties are consistent with the parties in the lease assignment documents.

3.4 Stamp duty

Where there is a BSA involved, until 18 June 2015, a Deed of Assignment of lease and a Transfer of Lease would be stamped pursuant to the stamped BSA, however from 18 June last year BSAs no longer attract stamp duty. So all Deeds of Assignment of Lease and Transfer of Lease documents, regardless of whether they are attached to a BSA, are stampable as a conveyance of an interest in land. Usually there is no consideration involved in the assignment and so a minimum consideration of \$100 is applied which attracts \$1 stamp duty.

3.5 Share transfers in Tenant company

In most leases, the transfer of the majority of shares in the Tenant company will constitute a lease assignment such that the Landlord's prior consent is required to same, so if you are acting in a sale of business by way of share sale and purchaser, be sure to check the lease for this provision.

B. Substantive issues

1. Grounds on which the Landlord may withhold consent (S. 43)

1.1 Limited to four grounds – Strictly interpreted, the Landlord may not refuse consent on any grounds other than the four set out in Section 43, including for example there being outstanding breaches or the assignee company refusing to produce personal Director guarantees.

1.2 Most leases contain many conditions relating to the granting of consent – from a Landlord's perspective it is about linking those conditions to the issue of capacity to meet financial obligations. From a Tenant's perspective, it is about ensuring that the Landlord does not stray beyond the four criteria.

2. Procedure for obtaining consent (S. 45)

2.1 The procedure to follow is quite straight forward as set out in the Act so I don't propose to recite that here. I do note that the inclusion of a 42 day response period by the Landlord to an application for consent, seems a very long time and in my experience the turnaround is a lot quicker than that, particularly in the current market where tenants are difficult to attract. An overriding obligation on the Lessor is to act "expeditiously".

3. Liability of Assignor post assignment and Assignor Disclosure Statements where sale of business (S. 45A)
 - 3.1 At common law
 - 3.1.1 If the lease is silent regarding the assignor's liability following an assignment then the Assignor is not released on assignment unless the Landlord expressly agrees to same.
 - 3.1.2 Under some leases the Assignor remains liable also for any lease term extended after the date of assignment . If the Act does not apply and you act for the Assignor, it is critical that the Assignor understands this position and you attempt to negotiate a release at some definitive point.
 - 3.2 Under the Act
 - 3.2.1 This Section came into operation on 4 February 2002, but applies to all leases including those entered into before that date.
 - 3.2.2 In general terms, it restricts the liability of the Assignor under the lease, and any guarantor of the Assignor, to the period which expires at the earliest of 2 years from the date of assignment, lease expiry and the day before any lease extension.
 - 3.2.3 If the assignment of lease is in respect of premises from which an ongoing business is to continue, then for the Assignor to attract the abovementioned liability limitation, the Assignor must provide an Assignor's Disclosure Statement to both the proposed Assignee (before requesting the consent of the Landlord to the proposed assignment) and to the Landlord (at the time the request for consent is made). If the Assignor does not do this, or an Assignor's Disclosure Statement contains information that at the time it was provided was materially false or misleading, then the abovementioned liability limitation shall not apply.
 - 3.3 Disclosure Statement where sale of business
 - 3.3.1 A new form of Assignor's Disclosure Statement was introduced effective 1 September 2010, however the contents did not change. The disclosures are reasonably self-explanatory, however I make the following observations.
 - 3.3.2 It is critical for the Assignor to comply strictly with this Disclosure Statement requirement, in order to gain the limited liability period afforded by the Act following the assignment. The Assignor should make all due enquiry in relation to the disclosures rather than rely solely on his or her own knowledge.
 - 3.3.3 While Section 45A does not oblige the Assignor to provide the Assignee with a copy of the Lessor's Disclosure Statement and details of any changes (the Assignor's Disclosure Statement simply requires the Assignor to tick a box as to whether that has been complied with), the implication is there to comply with that request and so I would strongly recommend it be carried out by the Assignor (and pursuant to the Section 45(b) requirement).

3.3.4 The reference to “guarantor” in the Section is not defined in the Act, so query if it includes a Bank.

3.3.5 The Sections reads that liability ceases in respect of “any obligations or liabilities under the lease on or after the relevant date” – query if the Assignor remains liable for obligations which arise before the relevant date but which have not been performed as at the relevant date – presumably the Assignor would remain so liable.

3.4 Arrears and outstanding breaches

3.4.1 If acting for a Landlord, while strictly you cannot withhold consent due to there being arrears or outstanding breaches, certainly you can make it well known to prospective Assignees that there are arrears and/or outstanding breaches and that the Assignee will be responsible for same. This is another reason as a landlord to always issue you tenant with a formal notice of breach. As then the assignor is obligated to disclose same under this process.

3.4.2 If acting for an Assignee, not only would you want a statement from the Assignor regarding this issue, you should also go direct to the Landlord or the Landlord’s property manager for a statement on same, upon which statement you would seek to rely against any claim by the Landlord.

3.4.3 The Deed of Assignment should contain the appropriate indemnities to protect your client.

3.4.3.1 The Landlord being indemnified by the Assignor in relation to the Assignee’s performance.

3.4.3.2 The Assignor being indemnified by the Assignee in relation to obligations arising under the lease on or after the date of assignment.

3.4.3.3 The Assignee being indemnified by the Assignor in relation to obligations arising under the lease prior to the date of assignment.

4. Security of Tenure (for the Assignee)

4.1 Security of tenure is critical to achieve and maintain.

4.1.1 If the lease is already registered, ensure that any lease transfers which have taken place are also registered so that you can register the current transfer.

4.1.2 Similarly that any lease extensions have been registered, keeping in mind that if an extension has not been registered within 2 months of expiry of the Lease term or extended term then the extension cannot be registered and you should explore other options to secure registration for your Assignee client.

- 4.1.3 Even if the lease not registered, acting for the Assignee ensure that you have the Assignor execute a Transfer of Lease in case the Assignee wishes to register in the future.
- 4.1.4 Registration will obviously secure your client's tenure against a purchaser of the land and in the event of the Landlord defaulting under its mortgage and the mortgagee taking possession.
- 4.1.5 Also check the lease for the entitlement of the Landlord to terminate the lease, be it for redevelopment or on other grounds.
- 4.1.6 Attempt to secure some more tenure in the form of options to renew. If your client's business relies to a large extent on passing trade and/or goodwill in location, then tenure is critical to the value of your client's business and therefore its saleability.

5. Security of performance by Assignor/Assignee (acting for the Landlord)

- 5.1 In respect of an Assignee - You need to be clear on the scope of your brief, especially if there is no property manager on behalf of the Landlord, on this issue of security of performance by the Assignee. Is the Landlord relying on you vetting the quality of the Assignee in terms of capacity and ability to perform under the lease? Is the Assignor to be released from the date of assignment? What guarantees (bank and/or personal) and/or security bond are to be secured and or replaced? Are there any arrears and/or outstanding breaches to be addressed before proceeding with consent and or an assignment? If the Assignee has not already been approved by a property manager, you should consider undertaking a Dun & Bradstreet type search in respect of the proposed Assignee. If there are any guarantees of the Assignor who are for whatever reason continuing as a guarantor, you should prepare fresh guarantees for them to sign in case of any prejudice to the existing guarantee as a result of the assignment process.
- 5.2 In respect of an Assignor - Be clear that there is no release of the Assignor and Assignor's Guarantors. Do not release any Assignor Bank Guarantee until you secure the Assignee's replacement Bank Guarantee.

6. Application of the Act – Change of position following assignment

- 6.1 The Act is silent - The Act does not express whether, during the continuance of the lease, the Act will apply and cease to apply at different times.
- 6.2 When it may occur – In respect of an assignment, this may occur in a number of ways.
 - 6.2.1 The Assignee using the lease premises in a different way to the Assignor, for example the Assignor dealt with the public from the premises (within the definition of “retail shop” in Section 3(1) of the Act) but the Assignee does not so deal with the public from the premises, or vice versa, which changes are within the permitted use under the lease.

6.2.2 The Assignor was a public company or one of the other several lessees which do not attract the application and protection of the Act (refer Section 4(2) of the Act) and the Assignee is not, or vice versa.

6.3 The issues to address

6.3.1 Issues which may arise as a result of there (arguably) being a change in the position regarding the application of the Act include:

6.3.2 The recoverability of land tax from a Tenant which is prohibited by the Act.

6.3.3 The validity of certain rent review methods prohibited by the Act.

6.3.4 The application of limited liability to the Assignor afforded by the Act.

6.3.5 In an assignment transaction, as opposed to a new lease transaction, there may not be any opportunity to improve your client's position as a result of such a change, but it's a case of being aware of the issue, making your client aware of the issue and if possible seeking to protect or improve your client's position. Your client may hold some leverage in the transaction which affords you the opportunity to improve or protect your client's position.

6.4 The case law

The only case of which I'm aware on point, is a Victorian Supreme Court case in the year 2000 which held that a proprietary company which became a public company during the term of the lease, resulted in the Lessee losing the protection of the Act given public companies were exempt from the application of the Victorian legislation.



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RETAIL AND COMMERCIAL LEASES ACT 1995 - SECT 43

43—Grounds on which consent to assignment can be withheld

(1) The lessor is entitled to withhold consent to the assignment of a retail shop lease in any of the following circumstances (and is not entitled to withhold that consent in any other circumstances):

- (a) if the proposed assignee proposes to change the use to which the shop is put; or
- (b) if the proposed assignee is unlikely to be able to meet the financial obligations of the lessee under the lease; or
- (c) if the proposed assignee's retailing skills are inferior to those of the assignor; or
- (d) if the lessee has not complied with procedural requirements for obtaining the lessor's consent¹.

(2) If the lessor withholds consent to the assignment of a retail shop lease, the lessor must give the lessee a written statement of the grounds on which consent is withheld.

Note—

1 See section 45.

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RETAIL AND COMMERCIAL LEASES ACT 1995 - SECT 45

45—Procedure for obtaining consent to assignment

A retail shop lease is taken to include the following provisions:

(a) a request for the lessor's consent to an assignment of the lease must be made in writing and the lessee must provide the lessor with information the lessor reasonably requires about the use to which the proposed assignee proposes to put the shop and the financial standing and business experience of the proposed assignee;

(b) before requesting the consent of the lessor to a proposed assignment of the lease, the lessee must furnish the proposed assignee with a copy of any disclosure statement given to the lessee in respect of the lease, together with details of any changes that have occurred in respect of the information contained in that disclosure statement since it was given to the lessee (being changes of which the lessee is aware or could reasonably be expected to be aware);

(c) for the purpose of enabling the lessee to comply with paragraph (b), the lessee is entitled to request the lessor to provide the lessee with a copy of the disclosure statement concerned and, if the lessor is unable or unwilling to comply with such a request within 14 days after it is made, paragraph (b) does not apply to the lessee;

(d) the lessor must deal expeditiously with a request for consent and is taken to have consented to the assignment if the lessee has complied with paragraphs (a) and (b) and the lessor has not within 42 days after the request was made given notice in writing to the lessee either consenting or withholding consent.

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RETAIL AND COMMERCIAL LEASES ACT 1995 - SECT 45A

45A—Liability of lessee following assignment of lease

(1) Subject to subsection (4), notwithstanding the provisions of a retail shop lease or of any other agreement (whether being a lease or agreement made before or after the commencement of this section), if the lessee assigns the retail shop lease, the lessee, and any guarantor of the lessee, will not be subject to any obligations or liabilities under the lease on or after the relevant date.

(2) Nothing in subsection (1) relieves the lessee, or a guarantor of the lessee, of any obligations or liabilities accrued in respect of the retail shop lease prior to the relevant date.

(3) In this section—

"relevant date" means—

- (a) the second anniversary of the date on which the lease was assigned; or
- (b) the date on which the lease expires; or
- (c) if the lease is renewed or extended after the assignment, the date on which the renewal or extension commences,

whichever first occurs.

(4) Subsection (1) does not apply to the assignment of a retail shop lease in respect of a retail shop that is to continue as an ongoing business if—

(a) the assignor did not provide a disclosure statement (an "assignor's disclosure statement") containing the information referred to in subsection (5)—

(i) to the proposed assignee, before requesting the consent of the lessor to the proposed assignment of the lease; and

(ii) to the lessor, at the time the request for consent to the proposed assignment is made by the lessee; or

(b) an assignor's disclosure statement provided to the proposed assignee and the lessor contained information that at the time it was provided was materially false or misleading.

(5) The assignor's disclosure statement is a written document (in the form prescribed by the regulations) stating—

(a) whether the assignor has provided the assignee with 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); and

(b) whether there are any outstanding notices in respect of the lease and, if so, the details

of any such notices; and

(c) whether there are any outstanding notices from any authority in respect of the retail shop and, if so, the details of any such notices; and

(d) whether there are any encumbrances on the lease and, if so, the details of any such encumbrances; and

(e) whether there are any encumbrances on, or whether any third party has an interest in, any fixtures and fittings within the retail shop and, if so, the details of any such encumbrances or interest; and

(f) whether the lessor has conferred any rent concessions or other benefits on the assignor during the term of the lease and, if so, the details of any such concessions or benefits; and

(g) the total (aggregate) annual sales figures in respect of the retail shop for the past three years, or such lesser period as the lease has been in operation; and

(h) details of any other information the assignor has provided to the assignee as to the trading performance of the retail shop during the past three years or for such lesser period as the lease has been in operation; and

(i) any other matters prescribed by the regulations.

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: