

Update: 21 February 2013 Retail leasing – more intricacies



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Summary

The compliance obligations of the NSW *Retail Leases Act* are not simple or well understood. A recent case in the NSW Court of Appeal shows what can go wrong when a landlord does not follow the requirements closely.

What were the facts?

A tenant wanted to transfer its café lease. Under the Act, the landlord may request information about the new tenant's financial standing. Unless the existing tenant provides it, the landlord can withhold consent for the transfer.

The landlord requested:

1. 'Verifiable information regarding [the new tenant's] financial standing.'
2. 'A detailed proposal as to how [the new tenant] proposes to clear his current indebtedness.'
3. 'A statement regarding [the new tenant's] proposed strategies to avoid future indebtedness'.

What was the decision?

The Court of Appeal decided that the first request was too general and the second and third were unrelated to 'financial standing'.

This meant that there had been no valid request by the landlord and consequently the tenant was not obliged to provide anything.

In these circumstances, the Act deems the landlord to have consented to a transfer after 28 days, regardless of what it has said.

What is significant?

The landlord should have given more detail about the information it wanted.

The judgement refers to another case as an example of the detail required. There, the landlord had requested 'two years accounts, two years tax returns from the company and an asset and liability statement of the company and all directors verified by statutory declaration'.

How can Fleming Muntz help?

Retail leasing can be regarded as routine, and in many cases it is. However if transactions are complex or contentious, Fleming Muntz has experienced lawyers who can guide landlords and tenants through the Act's obligations.

Important fine print

This update is for general information only. It is not a complete guide to the area of law. Competent advice should be obtained before taking any action.

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