

South Australia



ANNO QUINQUAGESIMO
ELIZABETHAE II REGINAE
A.D. 2001

**RETAIL AND COMMERCIAL LEASES (CASUAL MALL LICENCES)
AMENDMENT ACT 2001**

No. 63 of 2001

[Assented to 6 December 2001]

An Act to amend the Retail and Commercial Leases Act 1995.

SUMMARY OF PROVISIONS

- 1. Short title
- 2. Commencement
- 3. Insertion of s. 62A
62A. Casual mall licensing code
- 4. Insertion of Schedule

SCHEDULE

Casual Mall Licensing Code

- 1. Interpretation
- 2. Casual mall licence policy
- 3. Provision of information
- 4. Obligations of lessor relating to casual mall licence policy
- 5. Sightlines to shopfront
- 6. Competitors
- 7. Special events
- 8. Adjustment of outgoings
- 9. Rectification of certain breaches

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Retail and Commercial Leases (Casual Mall Licences) Amendment Act 2001*.

(2) The *Retail and Commercial Leases Act 1995* is referred to in this Act as "the principal Act".

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Insertion of s. 62A

3. The following section is inserted after section 62 of the principal Act:

Casual mall licensing code

62A. A lessor in respect of a retail shopping centre must comply with the provisions of the Casual Mall Licensing Code set out in the Schedule.

Insertion of Schedule

4. The following Schedule is inserted after section 82 of the principal Act:

SCHEDULE
Casual Mall Licensing Code

Interpretation

1. (1) In this Schedule, unless the contrary intention appears—

"adjacent lessee", in relation to a casual mall licence area, means a lessee of a retail shop that is in the same retail shopping centre and is situated in front of or immediately adjacent to the casual mall licence area;

"casual mall licence" means an agreement under which a person grants, or agrees to grant, to another person a right to occupy a designated part of a mall area for the purposes of the sale of goods or the supply of services to the public, where the total number of days the person is permitted to occupy the area does not exceed 180 days;

"casual mall licence area", in relation to a casual mall licence, means the part of the mall area in respect of which a person is granted a right of occupancy under the casual mall licence;

"casual mall licence plan"—see clause 2(2);

"casual mall licence policy"—see clause 2;

"centre court" means a part of a mall area designated as a centre court by the lessor in a casual mall licence policy in accordance with clause 2;

"common area" does not include parking areas, loading docks, plant rooms, customer service areas, stairways, escalators, travelators, lifts, lift wells, toilets, restrooms, seating areas, food courts, stage areas, entertainment areas, or lifestyle precincts;

"competitor"—see subclause (2);

"external competitor"—see subclause (3);

"internal competitor"—see subclause (4);

"mall area" means a part of the common area of a retail shopping centre accessible to the public that is bordered wholly or partly by the shopfronts of retail shops;

"non-specific outgoings" means outgoings to which section 34 applies;

"sales period" means a period not exceeding four weeks fixed from time to time by the lessor as a period during which the lessor promotes a sales event in the retail shopping centre;

"special event" means a community, cultural, arts, entertainment, recreational, sporting, promotional or other similar event that is to be held in the retail shopping centre over a limited period of time.

(2) For the purposes of this Schedule—

- (a) in the case of the sale of goods—a person is a **competitor** of another person if more than 50 per cent (on a floor area occupied by display basis) of the goods displayed for sale by the person are of the same general kind as more than 20 per cent (on a floor area occupied by display basis) of the goods displayed for sale by the other person;
- (b) in the case of the supply of services—a person is a **competitor** of another person if the person competes with the other person to a substantial extent.

(3) For the purposes of this Schedule, a person granted a casual mall licence is an **external competitor** of a lessee of a retail shop if the person is, in the business conducted in the casual mall licence area, a competitor of the lessee but is not a lessee of another retail shop in the same retail shopping centre.

(4) For the purposes of this Schedule, a person granted a casual mall licence is an **internal competitor** of a lessee of a retail shop if the person is, in the business conducted in the casual mall licence area, a competitor of the lessee and is a lessee of another retail shop in the same retail shopping centre.

Casual mall licence policy

2. (1) A lessor must not grant a casual mall licence in respect of a retail shopping centre unless the lessor has prepared a document that sets out the lessor's policy in respect of the granting of casual mall licences for the shopping centre (a "**casual mall licence policy**").

(2) The casual mall licence policy must include the following:

- (a) a floor plan (a "**casual mall licence plan**") that clearly shows—
 - (i) the mall areas within the shopping centre in respect of which casual mall licences may be granted, and the dimensions of those areas; and
 - (ii) the part of the mall area within the shopping centre designated as the centre court (if any), and the dimensions of that area;
- (b) the number of sales periods for the shopping centre in each accounting period;
- (c) a statement whether the lessor reserves the right to grant casual mall licences otherwise than in accordance with clauses 4, 5 and 6 in respect of special events in the shopping centre.

**Retail and Commercial Leases (Casual Mall Licences)
Amendment Act 2001**

No. 63 of 2001

(3) The following provisions apply to the designation of an area as a centre court in a casual mall licence policy:

- (a) only one part of the mall area of the shopping centre may be designated as a centre court at any one time;
- (b) the area designated as a centre court must not exceed 20 per cent of the total common area of the shopping centre.

(4) If a lessor amends a casual mall licence policy, the lessor must—

- (a) give written notice of the amendment to the lessees of the shopping centre and the place and times at which a copy of the amended policy may be inspected; and
- (b) in the case of a lessee who may reasonably be considered to be affected by the amendment—provide a copy of the amended policy to the lessee; and
- (c) otherwise provide a copy of the amended policy to a lessee on request.

(5) An amendment to a casual mall licence policy does not take effect until 30 days after the lessees of the shopping centre have been notified in accordance with subclause (4)(a).

Provision of information

3. (1) A lessor must not grant a casual mall licence in respect of a retail shopping centre unless the lessor has given each person who is a lessee of a retail shop in the shopping centre the following information:

- (a) a copy of the casual mall licence policy in force in respect of the shopping centre; and
- (b) a copy of this Schedule; and
- (c) the person nominated by the lessor to deal with complaints about casual mall licences (whether described by name or the title of the person's position) and the person's contact details.

(2) The information required under subclause (1) must have been given to a person—

- (a) in the case of a person who has entered into a retail shop lease after the commencement of this Schedule—at the time the disclosure statement for the lease was provided to the person under Part 3; or
- (b) in any other case—not less than 14 days before the first granting of a casual mall licence in respect of the shopping centre after the commencement of this Schedule.

Obligations of lessor relating to casual mall licence policy

4. (1) A lessor must not grant a casual mall licence except in accordance with the casual mall licence policy as in force in respect of the retail shopping centre at the time the licence is granted.

(2) A lessor must not grant a casual mall licence in respect of an area that is not included in a casual mall licence plan as in force in respect of the retail shopping centre at the time the licence is granted.

(3) A lessor must not amend a casual mall licence policy except in accordance with this Schedule.

Sightlines to shopfront

5. (1) A lessor must ensure that the business conducted by the holder of a casual mall licence in respect of a retail shopping centre does not substantially interfere with the sightlines to a lessee's shopfront in the shopping centre.

(2) Subclause (1) does not apply in relation to a lessee if the lessor, before the grant of the casual mall licence, and after informing the lessee of the proposal to grant a licence that might result in interference of a kind referred to in subclause (1), obtained the written consent of the lessee to the grant of the licence.

Competitors

6. (1) A lessor must not grant a casual mall licence that results in the unreasonable introduction of an external competitor of an adjacent lessee.

(2) A lessor must not grant a casual mall licence that results in the unreasonable introduction of an internal competitor of an adjacent lessee unless—

- (a) the internal competitor is a lessee of a retail shop situated in the same retail precinct as the casual mall licence area, or if the shopping centre is not divided into precincts, in the vicinity of the casual mall licence area; or
- (b) the casual mall licence area is the area closest to the internal competitor's retail shop that is available for the casual mall licensing at the time the casual mall licence is granted; or
- (c) the term for which the casual mall licence is granted falls within a sales period fixed by the lessor in respect of the shopping centre, there having been no more than five previous sales periods in the preceding period of twelve months; or
- (d) the casual mall licence area is within the centre court of the shopping centre.

(3) Subclause (2) does not apply in relation to an adjacent lessee if the lessor, before the grant of the casual mall licence, and after informing the lessee of the proposal to grant a licence that will result in the introduction of an internal competitor of the lessee, obtained the written consent of the lessee to the grant of the licence.

(4) For the purposes of subclauses (1) and (2), the introduction of a competitor of an adjacent lessee is unreasonable if it has a significant adverse effect on the trading of the adjacent lessee in the adjacent lessee's retail shop.

(5) Subclause (4) is not to be taken as limiting the circumstances in which the introduction of a competitor of an adjacent lessee might be regarded as being unreasonable.

Special events

7. Clauses 4, 5, and 6 do not apply to casual mall licences granted in respect of a special event provided that the lessor—

- (a) reserved the right in the casual mall licence policy to grant casual mall licences otherwise than in accordance with those clauses; and
- (b) gave the lessees of the retail shopping centre not less than 24 hours written notice containing details of the special event and its duration.

Adjustment of outgoings

8. The lessor must, before making an adjustment after the end of an accounting period in accordance with the provision of a retail shop lease implied by section 33, reduce the total amount of the non-specific outgoings to which all lessees of retail shops in the retail shopping centre are liable to contribute in respect of the accounting period by an amount calculated in accordance with the following formula in relation to each casual mall licence granted by the lessor permitting trade in the casual mall licence area during the accounting period:

$$R = \frac{TO}{TLA \times TD} \times CMLD \times CMLA$$

where—

- R = the amount of the reduction;
- TO = the total amount of the non-specific outgoings to which all lessees of retail shops in the shopping centre are liable to contribute in respect of the accounting period;
- TLA = the total of the lettable areas of all the retail shops in the shopping centre in square metres;
- TD = the total number of days in the accounting period;
- CMLD = the number of days during which the person granted the casual mall licence was permitted to trade in the casual mall licence area during the accounting period;
- CMLA = the casual mall licence area in square metres.

Rectification of certain breaches

9. No proceedings are to be taken or continued against a lessor in respect of a breach of clause 5, 6 or 8 unless the lessor fails to rectify the breach as soon as reasonably practicable after being requested in writing to do so by a lessee who is directly affected by the breach.