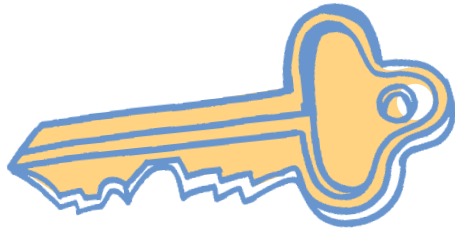




A Guide to
the Australian
Capital Territory

*Leases
(Commercial and
Retail) Act 2001*



leases

**commercial
and retail**

handbook



Australian Capital Territory Government



A Guide to the Australian Capital Territory

Leases (Commercial and Retail) Act 2001

leases commercial and retail handbook

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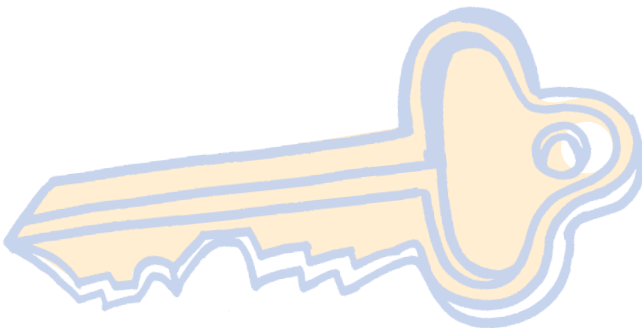
Introduction

The *Leases (Commercial and Retail) Act 2001* (referred to as the Act) comes into force in the Australian Capital Territory on 1 July 2002.

The Commercial and Retail handbook is designed as a guidebook for tenants and landlords as to their rights and responsibilities under the *Leases (Commercial and Retail) Act 2001*. The handbook is not a substitute for legal advice.

Prior to the commencement of the *Leases (Commercial and Retail) Act 2001*, commercial and retail leasing matters in the ACT were governed by the *Tenancy Tribunal Act 1994* and the Commercial and Retail Leases Code of Practice.

The *Leases (Commercial and Retail) Act 2001* consolidates the *Tenancy Tribunal Act 1994* and the Commercial and Retail Leases Code of Practice and transfers jurisdiction of commercial and retail matters from the Tenancy Tribunal to the ACT Magistrates Court.





The *Leases (Commercial and Retail) Act 2001*

Application of the Act

The Act applies to the following premises in the ACT:

- Retail premises with a lettable area of 1000sqm and less.
- Premises in the retail area of a shopping centre with a lettable area of 1000sqm and less.
- Small commercial premises that have a lettable area of 300sqm or less.
- Leased premises to either an incorporated association or an association eligible for incorporation where the premises are not used for residential purposes.
- Leased premises to an unincorporated charity where the premises are not used for residential purposes.
- Leased premises providing both business accommodation and secretarial services.
- Leased premises for a child care centre.
- Leased premises for a sports centre.
- Leased premises for an art gallery.
- Leased premises for a garden supply centre.
- Premises listed in the regulations.
- Leased premises that become part of a units plan and to any consequential new lease that contains essentially the same terms as the original lease.

The Act applies to a change of use lease at the time of the change of use.

The Act does not apply to the following leases:

- (a) Premises prescribed in the regulations.
- (b) Leases prescribed in the regulations.
- (c) Leases less than 6 months that are not continuous occupation leases.

A lease includes:

- (a) an agreement in writing or not,
 - for occupation exclusively or not,
 - for a fixed term, periodically or at will.
- (b) a sublease or licence.

A lease does not include:

- (a) An agreement for the use of a common area of a shopping centre.
- (b) A Territory lease.
- (c) A lease of vacant land.
- (d) A right to occupy land for building.

Lettable area is determined by:

- (a) A mutually agreed third party.
- (b) The Magistrates Court.
- (c) Someone appointed by the Magistrates Court.

Payment for the measurement of the lettable area is made by:

- (a) The lessor.
- (b) Equally by the lessor and tenant.
- (c) As determined by the Magistrates Court.

A change of use lease is a lease that was not applicable under the Act when entered but the permitted use of the premises changed by agreement during the lease term and makes the Act applicable to the lease.



Lease Disputes Under the Act

Disputes to which the Act applies are listed in the table under section 17 of the Act.

Disputes regarding leases no longer in force may be decided under the Act if the Act applies to it and if an application is made within 6 months of the dispute.

Conduct of Parties

Unconscionable Conduct

Parties negotiating a lease must not engage in unconscionable, harsh or oppressive conduct.

Unconscionable conduct includes:

- discrimination by a lessor against a tenant who intends, joins or forms an association concerned with the interests of tenants.
- a lessor compelling a tenant to join such an association.

The Magistrates Court in determining what is unconscionable conduct may consider any of the matters listed in section 22(2) of the Act.

Lease Costs

Each party bears their own costs for the preparation of a lease.

The party requiring registration of the lease pays the registration costs.

Lessor's costs include stamp duty and mortgage fees.

Acceptance of Lease Offer

Written acceptance of a lease offer is required within 7 days of acceptance.



The lessor is responsible for:

- assisting prompt registration of a lease after acceptance if the tenant requires registration.
- providing a copy of the lease to the tenant if signed by the tenant within 21 days of:
 - stamping at the office of the commissioner for revenue.
 - registering by the registrar-general.

Negotiations

The lessor must give the tenant a copy of the proposed lease early in negotiations unless the tenant agrees to give the lessor a copy of the proposed lease.

The lessor must tell the tenant in writing early in negotiations if the lease can't be extended if the lease is for less than 5 years and would be inconsistent with the head lease if extended.

Disclosure Statements—form, return and changes

In relation to proposed leases and options:

- the lessor must give the tenant a disclosure statement for the proposed lease at least 14 days before entering the lease.
 - in the case of an option, the tenant may request a disclosure statement from the lessor no earlier than 3 months before exercising the option and the lessor must provide the statement within 14 days of the request.
 - The tenant may vary or waive these time limits by giving the lessor a certificate signed by a lawyer stating the tenants intentions, but the tenant can not extend any of the stipulated time limits.
- A disclosure statement must:
- state the lessor's accounting period if not a financial year.

- contain an itemised list of outgoings for the first accounting period and an estimate of the amount the tenant is expected to contribute.

On receiving a disclosure statement, the tenant must note the date of receipt on the statement, sign and return it either with the signed copies of the lease or 3 months after entering the lease, which ever is the earlier time.

Providing or acknowledging a disclosure statement is not an offer to lease or a lease.

The lessor must provide written notice quickly to the tenant by the lessor on discovery of significant changes to the information in the disclosure statement.

The lessor must tell the tenant about this handbook as soon as possible after the change of use, during negotiations or no later than the time of entering the lease.

A party negotiating for a lease who makes a false or misleading representation may be liable to pay compensation for resulting damage.

Key Money

The Act prohibits the taking of key money by a lessor for:

- the grant of a lease;
- the extension of a lease under an option;
- the renewal of a lease;
- the consent to an assignment, sublease or mortgage of a lease;
- the assignment, sublease or mortgage of a lease; and

allows recovery of such money by the tenant without limiting other remedies.



Bonds and Guarantees

The maximum bond payable by a tenant is 3 months.

Advance payment of rent over three months is deemed to be bond.

Guarantees and indemnities are acceptable for performance of the tenant's obligations or bond.

Bonds must be held in trust in an interest bearing account for the tenant.

The lessor must account to the tenant for the interest, but may keep it as part of the bond.

Money owed to the lessor under the lease or not excluded by the Act are deductible from the bond.

Within 30 days of the end of the lease or vacating the premises the lessor must give the tenant the bond and interest earned minus any legitimate deductions if the lease has not been extended by an option.

Within 30 days of the end of the lease or vacating the premises the lessor must give the tenant the guarantee document if it doesn't form part of the lease, the obligations under it have been performed and the lease has not been extended by an option.

Rent—General

Rent Reviews

The Act does not permit discretionary rent reviews and a lease must state the date of the rent review.

Rent reviews are permitted once every twelve months after the first year with the following exceptions:

- A sublease provision allowing an increase in the rent of the headlease to pass to the subtenant.

- A provision that sets out rent increases by predetermined times and amounts.
- A provision allowing rent review due to GST.
- A provision allowing rent abatement.
- A provision for rent review on extending a lease by exercising an option.
- An adjustment to turnover rent once in the first year of the lease and thereafter annually or as agreed by the parties.

Rent Payment

Payment for rent is to be made after the handing over of possession of the premises and unless agreed, after any finish required under the lease is provided by the lessor.

Sometimes, the lease rent will be market rent if:

- the lease rent setting provision is discretionary and void.
- the lessor or tenant has given written notice to the other party of the void method of rent setting or review.
- the parties within 14 days can not agree on a new method acceptable under the Act.

Alternative dispute resolution may be used by the parties to agree on a method of rent setting or review.

Market Rent—Rent Reviews, Options and Renewals

Either party to a rent dispute may ask the Magistrates Court to refer the matter to mediation within 14 days of notifying the other party of the rent dispute.

The Magistrates Court if requested must consult with the parties and either appoint a valuer to determine the market rent or appoint a mediator.

A mediator must report a result to the court within 28 days of being referred the dispute and if the parties still can't agree then the court may appoint a valuer.

Valuation to Work Out Market Rent

A valuer appointed by the Court must report to Court within 28 days of the appointment.

The Magistrates Court must give the parties to the lease a copy of the report.

The report rent is deemed to be the lease rent if the parties do not agree to alternate rent within 14 days of receipt of the report.

Market rent must be worked out in accordance with Schedule 1 of the Act.

Valuers and Conflict of Interest

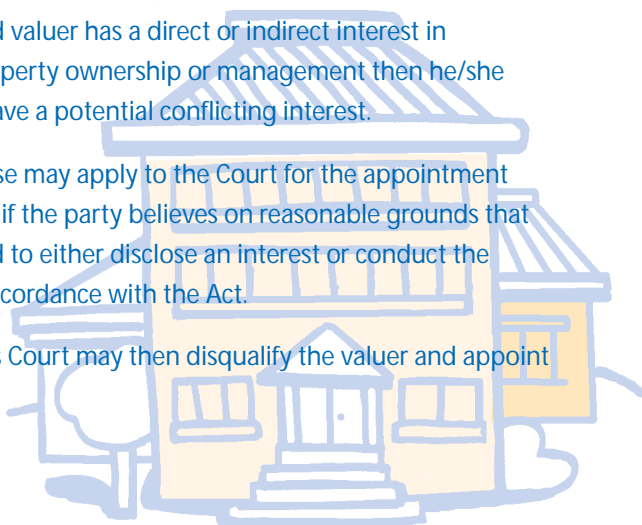
If a Court appointed valuer knows of any matter that could be a conflict of interest in working out the market rent then he/she must detail the conflict in writing to the Court within 5 days of appointment.

A party to a dispute may apply to the Court for the appointment of a new valuer within 14 days of being told of the conflict.

If the appointed valuer has a direct or indirect interest in commercial property ownership or management then he/she is deemed to have a potential conflicting interest.

A party to a lease may apply to the Court for the appointment of a new valuer if the party believes on reasonable grounds that the valuer failed to either disclose an interest or conduct the evaluation in accordance with the Act.

The Magistrates Court may then disqualify the valuer and appoint a new valuer.



Disclosure of Concessions and Valuation Costs

A lessor must give a valuer any information about any relevant concession the lessor has given to another tenant if asked unless the information is readily available to the valuer.

The cost for valuations are as per the Court's direction or otherwise equally between the parties.

Rent—Turnover Rent

A lessor may charge a combination of base and turnover rent.

In working out turnover rent under a lease the lessor or tenant must consider the tenant's turnover less listed items in section 64 of the Act.

Outgoings

Estimates, Expenditure Statements and Reports

A lease that requires the payment of outgoings by the tenant must provide for the lessor:

- to give the tenant an itemised estimate of the outgoings 1 month before the start of each of the lessor's accounting periods.
- to make a written expenditure statement available for examination by the tenant within 1 month from the end of the accounting period to which it relates.
- to give the tenant a written report by an auditor within 3 months after the end of the accounting period to which the report relates.

A report can relate to more than one tenant if each tenant can determine whether their outgoings were recoverable.

The report does not have to be prepared by an auditor if the outgoings are for:

- water, sewerage and drainage rates and charges
- other rates and statutory charges
- insurance
- a contribution to a corporation under the *Unit Titles Act 1970* for the three outgoings listed immediately above; and

the report is accompanied by documented evidence that the expenditure is for these outgoings.

If the majority of tenants in the retail area of a shopping centre agree to waive the preparation of an auditor's report, then the lessor is not required to provide the report for any tenant in the shopping centre for:

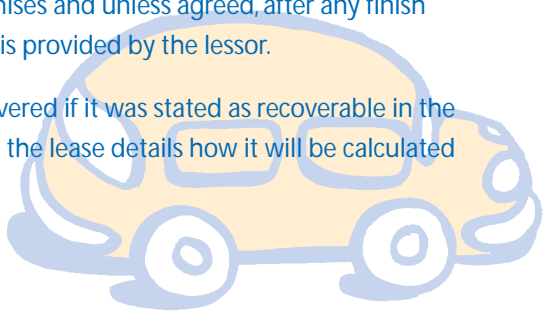
- the period agreed by the tenants; or
- if not agreed then for the accounting period in which the agreement was made and subsequent accounting periods until agreed otherwise by the majority of tenants.

The lease must also provide for the adjustment of under or over payment within 3 months after the contributions of outgoings, and ensure the adjustment is the difference between the amount paid by the tenant for the estimated expenditure and the amount spent by the lessor for recoverable outgoings.

Payment

Payment for outgoings is to be made after the handing over of possession of the premises and unless agreed, after any finish required under the lease is provided by the lessor.

An outgoing can be recovered if it was stated as recoverable in the disclosure statement and the lease details how it will be calculated and recovered.



Building Alterations and Related Matters

A lease must not limit a tenant's right of choice in employing people but may:

- specify reasonable minimum standards of competence and behaviour for people employed or working on the premises.
- prohibit work on named property of the lessor.
- require the compliance with an industrial award, industrial agreement, or enterprise agreement affecting the shopping centre containing the premises.

A lease provision is void if it requires the tenant to:

- pay or contribute to the cost of a finish, fixture, fitting equipment or service not present in the disclosure statement.
- pay an amount for the capital costs of the building containing the lease premises, premises in the retail area of a shopping centre, or any building within a shopping centre or area used in association with a building in a shopping centre.
- pay an amount for depreciation.

Demolition

A lease that provides for termination on demolition of the building containing the leased premises must include provisions:

- giving the tenant sufficient details of a genuine proposal to demolish within a reasonable time after termination.
- preventing termination unless:
 - the lessor has given the tenant 3 months notice of the intention to terminate where the lease is up to 1 year; or
 - in any other case the lessor has given the tenant 6 months notice of the intention to terminate.

- to pay the tenant reasonable compensation for any loss incurred due to termination before the end of the term of the lease even if the demolition does not proceed.

In calculating the compensation regard must be had to any concessions given to the tenant for the clause allowing termination on demolition.

Alterations and Refurbishments

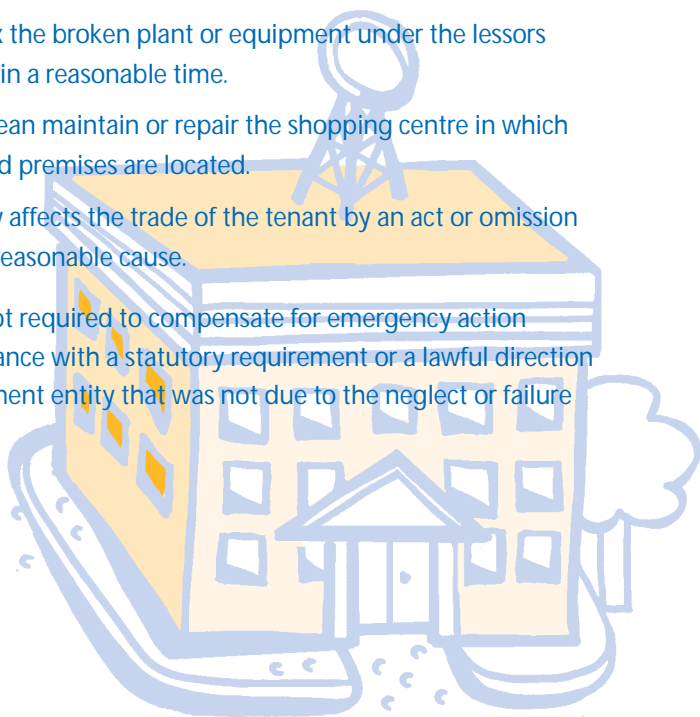
The lessor must tell the tenant of alterations or refurbishments that materially affect them in writing including details of the work and the measures to minimise the disturbance, 2 months before commencement of the work.

In the case of emergency work the notice given to the tenant must be reasonable in the circumstances.

The lessor is liable to the tenant for any loss or damage that is not nominal if the lessor:

- materially inhibits access by the tenant or customers to the premises.
- fails to fix the broken plant or equipment under the lessors care within a reasonable time.
- fails to clean maintain or repair the shopping centre in which the leased premises are located.
- adversely affects the trade of the tenant by an act or omission without reasonable cause.

A lessor is not required to compensate for emergency action or in compliance with a statutory requirement or a lawful direction of a government entity that was not due to the neglect or failure of the lessor.



Disputes about damaged premises may be referred to the Magistrates Court for a declaration as to whether the premises can or cannot be used for their normal purpose. The Act provides that premises can be used for their normal purpose if they can be used fully or partly for that purpose. A party to a lease may seek a declaration by application to the Court if the lessor and tenant have not agreed to the payment or reduced payment of rent or outgoings of money.

If a building containing leased premises or the leased premises are damaged, then the lessor must notify the tenant in writing within 2 months of the damage as to whether:

- the lessor considers repair to be impracticable and intends not to repair; or
- the lessor intends to repair or reinstate the premises within a stated time frame.

Termination and Compensation

The Act provides for a lessor or tenant to terminate a lease without paying compensation by giving 30 days notice to the tenant if the premises or building containing the premises have been damaged.

A lessor who fails to give a tenant notice regarding repair or who gives notice of an intention to repair damage and the tenant relies on that notice, is liable to compensate the tenant for loss or damage (other than nominal loss or damage) due to:

- failure to give notice.
- failure to repair within the stated period of the notice or a reasonable time after.

Parties to a lease may agree to termination of the lease after the premises or building containing the premises are damaged or destroyed.

Assignments, Subleases and Mortgages

A tenant must give a prospective assignee or subtenant a copy of the disclosure statement and any other relevant information regarding material changes to the statement of which the tenant is aware before asking a lessor to assign or sublet a lease.

A tenant who does not have a copy or access to a copy of the disclosure statement may ask the lessor for a copy and must receive it within 14 days.

A tenant after providing the prospective assignee or subtenant with a copy of the disclosure statement may ask the lessor in writing to agree to an assignment of the lease, a sublease for the premises by the tenant or a mortgage of the lease.

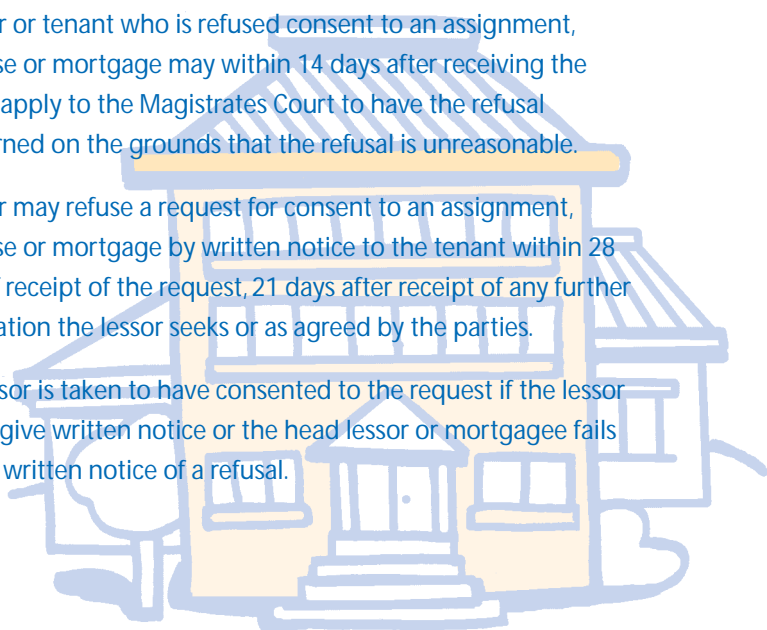
The lessor may within 14 days of receiving the request for agreement or as agreed by the parties, ask the tenant for further information as per section 96 of the Act.

A request that requires the consent of a mortgagee or head lessor must satisfy section 97 of the Act.

A lessor or tenant who is refused consent to an assignment, sublease or mortgage may within 14 days after receiving the refusal apply to the Magistrates Court to have the refusal overturned on the grounds that the refusal is unreasonable.

A lessor may refuse a request for consent to an assignment, sublease or mortgage by written notice to the tenant within 28 days of receipt of the request, 21 days after receipt of any further information the lessor seeks or as agreed by the parties.

The lessor is taken to have consented to the request if the lessor fails to give written notice or the head lessor or mortgagee fails to give written notice of a refusal.



A lessor may refuse consent to a sublease or assignment but must prove there is reasonable grounds to believe:

- the intended use of the premises will not be allowed under the lease.
- there is inadequate financial resources to run the business (including a proposed business) after considering all relevant financial information.
- the tenant cannot produce a current certificate of occupancy for the premises.
- the prospective assignee or subtenant lacks the skills to run the business.
- the business will not be compatible with other tenants.
- the tenant has not rectified a breach that the lessor has not waived.

A lessor may refuse consent to the mortgage of a lease on reasonable grounds for believing the tenant:

- is not financially sound.
- lacks the capacity to service the proposed loan.
- cannot meet the obligations under the mortgage.

A lessor may recover from a tenant, reasonable costs for legal or other expenses in deciding whether to consent to an assignment, sublease or mortgage and must make a written request to recover the costs within 6 months of giving or refusing consent.

Extension, Renewal and Termination of Leases

Extension

A lease that is for less than 5 years duration, can be extended to 5 years if the tenant:

- gives written notice to the lessor within 90 days before the end of the term of the lease; and
- asks the lessor to register the extended lease with the registrar-general; or
- lodges a caveat on the title of the land that contains the premises.

A lease cannot be extended if:

- the tenant received independent advice of the effect of section 104 of the Act prior to entering the lease; or
- the extension is inconsistent with the head lease or unlawful.

A lessor if asked to register the extended lease must take all reasonable steps to do so.

A lease that is extended has the same provisions as before the extension. This is subject to any:

- necessary change due to the extension;
- agreement between the lessor and tenant; or
- Magistrates Court order.

Independent advice means advice from a lawyer not acting or nominated by the lessor

Renewal

The tenant may in writing ask the lessor if the lessor intends to renew the lease if:

- the lease is for longer than a year and is due to end between 6 months and 1 year;
- in any other case the lease is due to end between 3 and 6 months.

The lessor must respond in writing within 1 month of receipt of a request telling the tenant whether or not the lease will be renewed.

Rules of Conduct for Shopping Centre Leases—Preferential Rights of Renewal

Section 108 of the Act deals with preferential rights of shopping centre tenants and applies to leases entered into after 1 July 2002.

The tenant has a preferential right to renew or extend the lease, therefore the lessor must allow the tenant to renew or extend the lease in preference to other possible tenants.

The lessor must presume the tenant wants to renew the lease unless the tenant gives written notification to not renew or extend 12 months before the end of the lease.

The lessor may offer to lease the premises to someone other than the tenant if it is more advantageous for the lessor than to renew or extend the lease.

The lessor is not obliged to prefer the tenant if:

- the lessor wants to change the tenancy mix in the shopping centre.
- the tenant has breached the lease substantially or persistently.
- the lessor does not intend to re-lease the premises within 6 months after the end of the lease and needs vacant possession for the lessor's own purposes other than carrying on a business like the tenant's business.

Section 108 does not apply if:

- a certified exclusionary clause excludes the application of Section 108 to a lease.
- the lease is a sublease and is as long as the head lease allows.
- the lease arises because the tenant holds over for 6 months or less after the end of an earlier lease with the lessor's consent.
- the lease is excluded by the regulations.

If the tenant has a preferential right to renew or extend, the lessor must begin to negotiate within 6 to 12 months of the end of the lease.

Before agreeing to enter a lease with someone else the lessor must:

- make a written offer to the tenant on terms as favourable as that to the other person; and
- provide the tenant with a copy of the proposed lease and disclosure statement.

If the lessor offers to renew the lease:

- the offer remains open for the period stated in the offer or until accepted; and
- the tenant must accept the offer in writing within the stated period or the offer lapses.

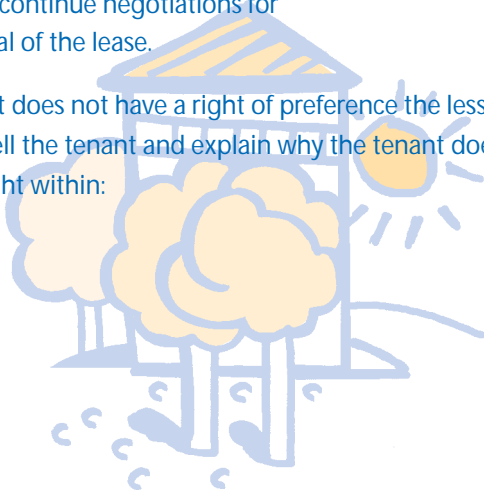
The acceptance period must be at least 10 days after the offer is made.

Negotiations must be conducted fairly and continue until:

- the tenant rejects the offer; or
- the offer lapses; or
- the tenant advises the lessor in writing that the tenant does not want to continue negotiations for a renewal of the lease.

If the tenant does not have a right of preference the lessor must in writing tell the tenant and explain why the tenant does not have the right within:

A certified exclusionary clause is a lease provision that is certified by an independent lawyer that he/she explained how excluding a section would effect the tenant and the tenant tells the lawyer the tenant is not acting under undue influence in agreeing to the exclusion



- 6 to 12 months before the end of the term of the lease.
- 3 to 6 months before the end of the term of the lease if the lease is 12 months or less.

If a lessor fails to comply with the rules of conduct at the end of a lease for shopping centre premises, a tenant may apply to the Magistrates Court to order the lessor to:

- renew or extend the lease.
- enter into a new lease with the tenant, on terms approved by the Court that do not prejudice the rights of a third party who has honestly acquired an interest in the premises.
- pay compensation up to 6 months rent under the lease to the tenant.

The Magistrates Court may make any order it considers appropriate.

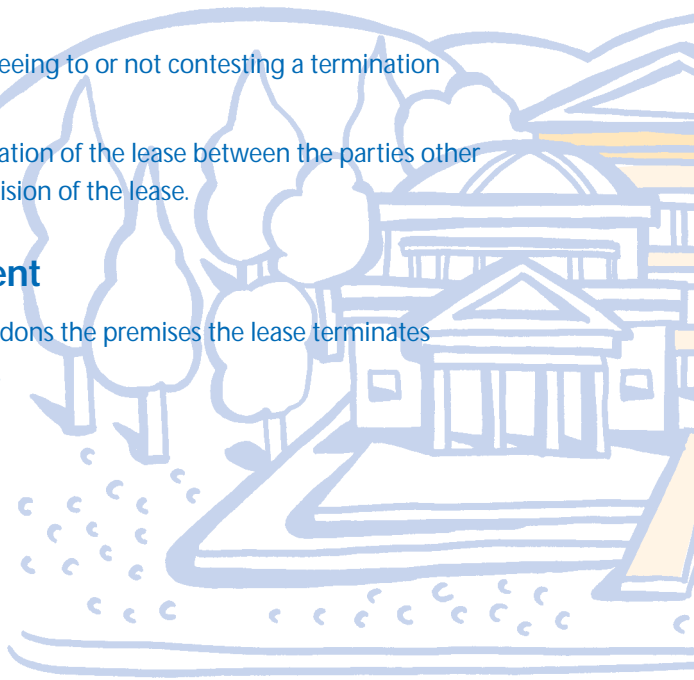
Termination Generally

Termination by the lessor or tenant does not affect a right, privilege or liability existing under the lease before its termination and unless the parties agree otherwise this is not affected by:

- the lessor not contesting a termination notice received from the tenant.
- the tenant agreeing to or not contesting a termination by the lessor.
- agreed termination of the lease between the parties other than by a provision of the lease.

Abandonment

If the tenant abandons the premises the lease terminates on abandonment.



If the tenant abandons the premises before the end of the lease, the lessor may apply to the Magistrates Court for an order for the lessor to recover possession and compensation for damages including reasonable costs for advertising the premises.

The lessor is not entitled to compensation for a loss that could have been avoided by the lessor.

The lessor may enter abandoned premises without a declaration if the lessor has such a right.

Termination by Tenant

The tenant may terminate a lease that the lessor intends to extend with one months written notice to the lessor either after the expiry date of the original lease or earlier as agreed by the lessor.

The tenant may terminate a lease within 3 months of entering the lease by giving the lessor 14 days written notice if the lessor:

- fails to provide a disclosure statement.
- provides a disclosure statement that is false or misleading in material information.
- omits material information from a disclosure statement.
- fails to tell the tenant of a material change in the disclosure statement.
- provides notice of a material change to the disclosure statement that omits or contains material information that the lessor should have known was false or misleading.

A lessor may contest the termination within 14 days of being served with the termination by application to the Magistrates Court.

A termination notice takes effect 15 days after service if a lessor does not contest the notice within 14 days of service.

Termination by Lessor

If the lessor has a right to terminate the lease, the lessor may give written notice of termination to the tenant.

The tenant may contest the termination within 14 days of receipt of the termination notice by application to the Magistrates Court or agree with the termination by written notice to the lessor.

If the tenant contests the termination by application to the Magistrates Court the termination does not have effect until it is confirmed by the Court on the day ordered.

If the tenant is in possession of the premises the lessor may enter the premises to recover possession only by court order, warrant or in accordance with the Act.

The Magistrates Court may confirm the termination, refuse to confirm the termination or suspend the order confirming the termination up to 21 days.

If the lessor has given the tenant a termination notice and conformed to the required procedures under the Act and the tenant has agreed or not contested the termination then the lessor may apply to the Magistrates Court for confirmation of the termination.

The Magistrates Court may confirm the termination by a termination order that allows a lessor to apply for a warrant for eviction if the tenant does not vacate the premises.

Retail Areas of Shopping Centres

The tenant is not required to supply periodic turnover figures to the lessor unless the lease provides that the rent is to be worked out by reference to turnover.

Any person who receives information must use it for the purpose given and not disclose it without the tenant's consent.

Advertising and Promotion Levy

If a new lease provides for the payment by a tenant for advertising and promotion costs to the lessor then the lessor must make available to the tenant a marketing plan with details of the proposed expenditure during the lessor's first accounting period.

If the lessor fails to provide the information the tenant does not have to pay the amount and can recover any amount already paid.

In the case of other leases the accounting period referred to is after the lessor's first accounting period and the marketing plan with details of the proposed expenditure must be available 1 month before the accounting period starts.

If the payment is for an opening promotion then 1 month before the promotion, the lessor must make available the information about the promotion to the tenant.

If the lessor fails to substantially comply with the requirements the tenant is not liable for the costs and can recover any payment already made.

Any amounts levied but not spent must be kept by the lessor in a fund for the benefit of the tenants for future advertising and promotion of the shopping centre.

Non-Specific Outgoings

A tenant need only contribute to an outgoing that will benefit the tenant and is liable for an amount as calculated below:

$$\text{Cost of outgoing (\$)} \times \frac{\text{Lettable area of tenant's premises (sqm)}}{\text{Total lettable area of retail premises relating to the outgoing (sqm)}} = \text{tenant's contribution (\$)}$$

Redevelopment

The lessor must not redevelop the shopping centre without consulting with the tenants by:

- (1) holding a meeting about the redevelopment proposal before a final decision is made to redevelop; and
 - giving the tenants reasonable notice to attend; and
 - distributing a summary of the proposal before or during the meeting.
- (2) distributing a summary of the proposal before or during the meeting and seeking responses to it.

Relocation Clauses

A lease allowing a tenant to be relocated in the shopping centre must provide for the following:

- 3 months notice by the lessor to the tenant with an offer for alternative comparable premises (including premises not yet built), for the remaining duration of the lease, on equally favourable conditions as originally leased.
- A tenant may give the lessor written notice to terminate the lease within 1 month of receiving notice of the relocation which takes effect 3 months after receipt of the relocation notice unless the parties agree otherwise.
- If the tenant accepts the offer of the alternate premises the lessor must give the tenant a new lease in accordance with the offer, pay the relocation costs and reasonable compensation for loss or damage incurred in the relocation.
- In working out the reasonable compensation consideration must be given to any concession given to the tenant because of the relocation provision.

Relocation may only occur for repair, refurbishment, redevelopment or extension.

Relocation for proposed repairs, refurbishments, redevelopment or extension may occur if:

- the work cannot be done without vacant possession of the tenant's premises; and
- the lessor presents the tenant with a plan for the work; and
- the work is completed within a reasonable time after relocation of the tenant.

Trading Hours

The lessor cannot change the core trading hours of a shopping centre without written approval of the majority of tenants of the premises, but the initial fixing of the core trading hours in a new shopping centre is not considered a change.

A tenant may trade outside of core trading hours with the lessor's agreement but must meet the associated costs in proportion with the other tenants also trading outside the core trading hours.

Geographical Trading Restrictions

A lease provision is void if it:

- restricts or prevents a tenant from operating outside the shopping centre during or after the end of the lease.
- allows the lessor to terminate the lease because the tenant or business failed to achieve adequate or stated sales or turnover performance.

A lease provision can prevent the use of the name of a shopping centre outside the shopping centre.



Dispute Resolution

The Magistrates Court has jurisdiction to decide applications made under the Act. The ordinary jurisdictional limits of the Court do not apply to such applications.

An application by a tenant in relation to a rent increase must be made 28 days before the increase unless the Magistrates Court waives the requirement.

The Court may hear the application if made less than 28 days before the increase if:

- the application is late due to special circumstances; and
- to hear the application does not put the lessor in a less advantageous position than if the application had been made 28 days before the increase.

On receiving an application the Magistrates Court may hold a case management meeting to assess the likelihood of the parties resolving the dispute before proceeding to the hearing and to direct the hearing of the application on assessment.

If the Court considers it likely that the parties may resolve the dispute, the Court must promote settlement at the meeting, or refer the dispute to other dispute resolution methods, and adjourn the proceeding to a stated date and for a stated period to allow the parties to settle the dispute.

If the Court considers it unlikely that the parties will resolve the dispute, then the Court must give directions about how the proceeding will be conducted and facilitate hearing the dispute as quickly as possible and minimise costs for the parties.

The Court in hearings must act as quickly as possible and ensure as far as practicable that all relevant material is disclosed to the Court for deciding the dispute.

The Magistrates Court may decide its own procedures or adopt any procedures from the legislation listed in section 151 of the Act or refer a proceeding to the Supreme Court.

The Magistrates Court must give each party to a proceeding written notice of the terms of any order it makes at the end of a hearing within 14 days of making the order.

The Parties are to bear their own costs unless the Court orders otherwise.

A party to a proceeding may appeal to the Supreme Court within 28 days after notice is given or as allowed by the Supreme Court.

The Supreme Court may on an appeal order:

- an order affirming or setting aside the decision of the Magistrates Court;
- an order remitting the case to the Magistrates Court to be heard again, with or without further evidence and in accordance with directions from the Supreme Court.

Transitional Changes

Pre-existing Referrals

If a dispute was referred to the Tribunal registrar under the repealed Act but had not been disposed of by the tribunal, then the new Act applies to the dispute and any step taken under the repealed Act is taken to correspond with the new Act. This includes any evidence given.

A party to a lease may apply to the Magistrates Court to resolve a dispute under the Act if:

- immediately before the commencement day a party to a lease engaged in conduct that gave rise to a dispute under the repealed Act; and



- the matter had not been referred to the tribunal registrar; and
- the code applied to the lease and conduct at the time; and
- the party could not apply to the Magistrates Court at the time for resolution.

A decision of the tribunal is taken to have been a decision of the Magistrates Court under the Act.

If a lease is in force immediately before commencement day the lessor must tell the tenant about this handbook as soon as practicable after commencement day.

The Act applies to a lease immediately in force before commencement day to the extent to which the code applied to the lease at the time.



Alternative Dispute Resolution

The Act while not providing for mandatory mediation does allow the parties to seek to resolve any disputes through private negotiations and facilitates the alternative dispute resolution processes by referring mediators in circumstances where the parties decide to proceed in that manner.

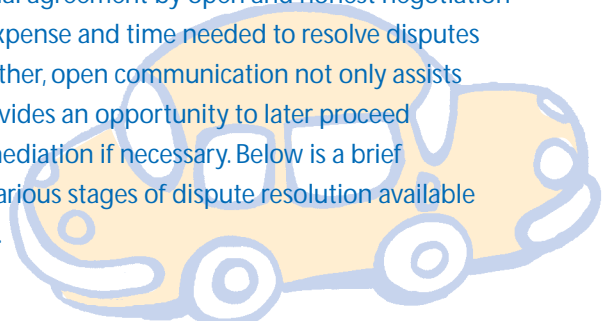
Parties are also able to provide for alternative dispute resolution within their own agreements and include mandatory mediation and arbitration clauses.

Alternative dispute resolution methods allow disputing parties to resolve problems amongst themselves before or instead of proceeding to the more financially and emotionally onerous litigation stage.

The advantage of the alternative dispute resolution process is the opportunity for parties to determine a solution.

Processes Before Litigation

It is better to attempt to identify conflicting interests and resolve them through mutual agreement by open and honest negotiation so as to avoid the expense and time needed to resolve disputes by adjudication. Further, open communication not only assists negotiation but provides an opportunity to later proceed to facilitation and mediation if necessary. Below is a brief description of the various stages of dispute resolution available to disputing parties.



Negotiation

Negotiation is probably the easiest and most used method of dispute resolution and involves open and honest communication between the parties to reach mutually agreeable compromises. It allows the parties to focus on their issues in dispute, explore a variety of solutions, seek advice if necessary and settle on a solution amongst themselves. The process and outcome is determined by the parties and the costs of the process itself are minimal or none.

Facilitation

Facilitation is a process whereby parties usually comprising of groups identify disputed issues and negotiate resolutions with the assistance of an independent and neutral third party (the facilitator). The facilitator does not give advice or determine an outcome for the parties. A conference between the parties is scheduled and the facilitator proceeds to assist the parties achieve their mutually agreed outcomes according to an agenda which they set. Costs would include venue and facilitator fees.

Mediation

Mediation involves an independent, trained and neutral third party (the mediator) assisting the disputing parties to reach a mutually agreed solution based on compromise. The mediator listens to both parties independently and then assists them to identify their common grounds for negotiation. The mediator does not give advice or determine an outcome for the parties. The process is confidential and the outcome is not legally binding unless the parties formally agree. The costs include venue and mediator fees that are usually borne equally by the parties.

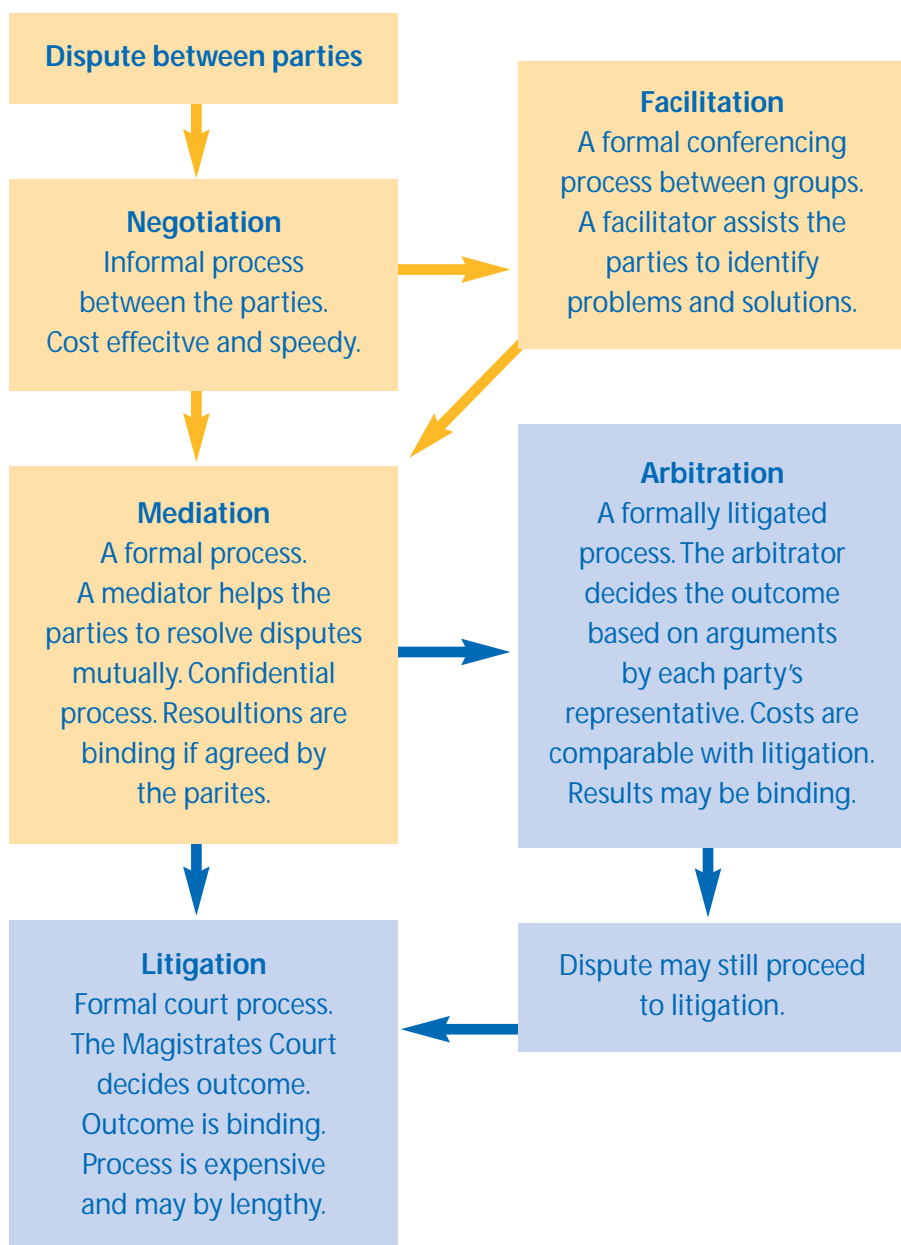
Arbitration

The arbitration process closely resembles the litigation process. Parties to a dispute have legal representatives who present their case before an arbitrator in an arbitration hearing. The arbitrator

is a specialised independent third party who hears the case and makes a determination that may be binding or non-binding on the parties. The costs are similar to that of litigation.

Footnote: Sourdin, Tania, *Alternative Dispute Resolution*, Law Book Company, Sydney, 2002.

Dispute Resolution Process





Information Sources

The *Leases (Commercial and Retail) Act 2001*, *Leases (Commercial and Retail) Regulations* and other legislation may be obtained from the following website: www.legislation.act.gov.au

The handbook may be obtained from:

Office of Fair Trading
Second Floor
GIO House
City Walk
CANBERRA CITY

The handbook may also be obtained in electronic form from the following website:

www.fairtrading.act.gov.au/OFT/Leases/leases.htm

Information on dispute resolution may be obtained from:

The National Dispute Resolution Advisory Council at

NADRAC Secretariat
Robert Garran Offices
BARTON ACT 2600
Ph (02) **6250 6272**
Fax (02) **6250 5911**
E-mail: nadrac@ag.gov.au
[http://law.gov.au/aghome/advisory/nadrac\(old\)/nadrac.htm](http://law.gov.au/aghome/advisory/nadrac(old)/nadrac.htm)



Ancillary Information

The *Leases (Commercial and Retail) Act 2001* ("the new Act") replaces the *Tenancy Tribunal Act 1994* and the Commercial and Retail Leases Code of Practice in regulating commercial and retail leases in the ACT.

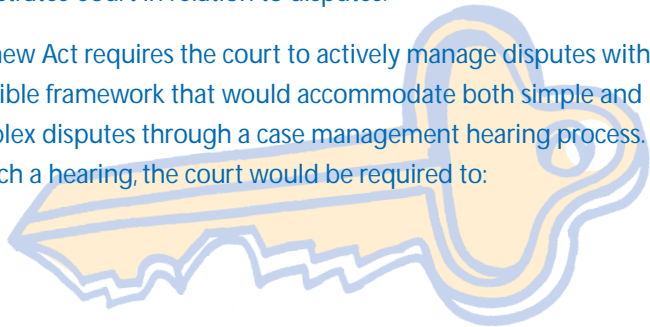
While consolidating the *Tenancy Tribunal Act 1994* ("the Tenancy Tribunal Act") and the Commercial and Retail Leases Code of Practice ("the Code"), the new Act transfers jurisdiction with respect to commercial and retail tenancy matters from the Tenancy Tribunal to the ACT Magistrates Court.

The new Act makes comprehensive provision for the regulation of the relationships between lessors and tenants of commercial and retail premises in the ACT. The key reforms of the new Act are as follows.

Dispute Resolution

The new Act provides that the ordinary processes in the *Magistrates Court (Civil Jurisdiction) Act 1982* would apply to disputes. The new Act clearly sets out the jurisdiction of the Magistrates Court in relation to disputes.

The new Act requires the court to actively manage disputes within a flexible framework that would accommodate both simple and complex disputes through a case management hearing process. At such a hearing, the court would be required to:



- assess the likelihood of the parties resolving issues in question before hearing and assisting or encouraging parties to do so by the most appropriate method (eg, by promoting early dispute resolution—including, but not limited to, mediation, conciliation, facilitation, early neutral evaluation and arbitration); and
- where settlement seems unlikely, give directions concerning the manner in which the proceedings will be pursued which, in the opinion of the court, will enable costs to be reduced and will help to achieve a prompt hearing of the matters in issue between the parties to the proceedings.

This approach has the flexibility to enable a sensitive response to the dispute resolution requirements of each dispute. Additionally, it will require the court to encourage the resolution of disputes by non-litigious means.

Conduct of the Parties

The new Act prohibits conduct that is unconscionable or harsh and oppressive. The opportunity has been taken in setting out the grounds the Court may consider when determining whether or not the parties have engaged in unconscionable conduct to make it clear that both parties are capable of engaging in unconscionable conduct.

Negotiation of Leases

The new Act confirms the requirement of lessors to provide tenants with a disclosure statement within specified time limits. Provision is also made for the publication of this handbook to be approved by the Commissioner of Fair Trading to assist lessors and tenants in their understanding of the legislation.

Bonds, Guarantees, Rent and Outgoings

More comprehensive provision is made with respect to bonds, including the manner of holding bond moneys and deductions

which can be made from such moneys. The new Act also contains streamlined provisions relating to the determination of market rent in cases of rent reviews and lease renewals, where the parties cannot agree on the amount of rent. The new Act also makes it clear what outgoings may be recovered from a tenant.

Alterations and Other Interference

The new Act includes new provisions dealing with damaged premises, including the circumstances as to the kind of damage which may give rise to the right to terminate the lease.

Assignments, Subleases and Mortgages

New provisions deal with the need for consent to be obtained from the lessor's mortgagee or head lessor in relation to a proposed assignment by a tenant.

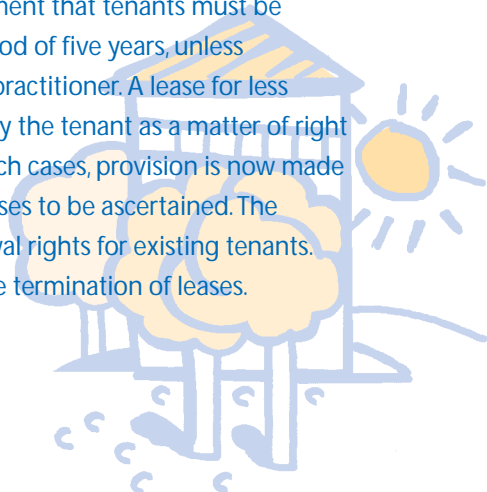
Provision has also been included allowing a lessor to withhold consent to a proposed assignment but only if to do so is reasonable in all the circumstances.

Lease Provisions

The new Act provides for the application of standard lease provisions in certain circumstances.

Extension, Renewal and Termination of Leases

The new Act confirms the requirement that tenants must be offered a lease for a minimum period of five years, unless independently advised by a legal practitioner. A lease for less than five years may be extended by the tenant as a matter of right in certain circumstances and, in such cases, provision is now made for the terms of such extended leases to be ascertained. The Act provides for preferential renewal rights for existing tenants. It makes detailed provisions for the termination of leases.



Additional Requirements for Premises in Retail Areas of Shopping Centres

The new Act requires lessors to consult with a majority of tenants or their representative body, in relation to a substantial redevelopment proposal for a shopping centre or part of a shopping centre.

Revised Definitions

A new approach has been taken to the delineation between retail and commercial premises and between premises which do and do not fall within a shopping centre.

Transitional Provisions

The new Act contains savings and transitional provisions to cover matters before the Tenancy Tribunal which are part heard or in the process of mediation.



ACT DEPARTMENT OF JUSTICE
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