

INFORMATION FOR LANDLORDS

THE RETAIL LEASES ACT 2003

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If the business operated by the tenant from the premises is retail, the lease must comply with the Retail Leases Act 2003 (the Act). The Act regulates the obligations of the tenant and landlord for retail leases and includes an obligation on the landlord to provide the tenant with a disclosure statement and a copy of the proposed lease at least seven days before the commencement of the lease. The disclosure statement includes particulars of the lease such as rent, review of rent and outgoings. It is important that the landlord satisfies itself that the contents of the disclosure statement are correct. If a disclosure statement is not correct, is not given within the specified time, or is not given at all, the tenant or future tenants may have remedies against the landlord under the Act. The landlord should regularly review the outgoings estimated in the disclosure statement and if they change the landlord must provide an updated statement to the tenant.

The Act also sets out, amongst other things, the obligations of each party to the lease. The landlord should be aware of the following important provisions:

1. COPY OF LEASE

The landlord must provide to the person with whom the landlord are negotiating a copy of the proposed lease in writing as soon as the landlord enter into negotiations. The landlord will be liable for penalties under the Act if this is not done.

2. SECURITY DEPOSIT

The security deposit must be held by the landlord on behalf of the tenant in an interest-bearing account. The landlord must account to the tenant for interest earned on the deposit but the landlord are entitled to keep the interest and deal with it as money paid by the tenant to form part of the security deposit. For this reason and because a cash deposit can be lost to a higher ranking creditor should the tenant become insolvent, many landlords seek a bank guarantee in place of a cash deposit.

3. LAND TAX

The landlord cannot pass on the costs of land tax to the tenant.

4. LEGAL COSTS

The landlord cannot pass on the legal costs for negotiating and preparing the lease to the tenant.

AFTER EXCHANGE

Once contracts are exchanged we will administer your sale through to settlement.

5. REPAIRS AND MAINTENANCE

5.1. Landlord's maintenance obligations

The landlord are responsible for maintaining, in a condition consistent with the condition of the premises when the lease was entered into, the structure of, and fixtures in the premises, the plant and equipment at the premises and the appliances, fittings or fixtures provided under the lease relating to the gas, electricity, water, drainage or other services. The landlord are not responsible for such repairs if they arise out of misuse by the tenant or the tenant is entitled or required to remove the item requiring repair at the end of the lease.

5.2. Condition Report and PPSR

This provision places an increased emphasis on defining the condition of the premises at the time that the tenant entered into occupation. The landlord should inspect the condition of the premises and chattels the landlord own prior to the commencement of the lease. We recommend that a detailed condition report be prepared by the landlord (or the managing agent) at this time. Any defects should be noted now. The report should contain an asbestos assessment, cooling tower maintenance and essential safety measures records. The tenant should sign off on this report prior to taking possession of the premises.

The landlord should consider registering a security interest in relation to any chattels owned by the landlord at the premises (which are not fixed to the land) under the PPSR. This will give the Landlord protection should the tenant or the tenant's financier attempt to claim ownership of any such items. Fixtures to the land are protected as part of the land under the Land Registry.

A security interest could also potentially be registered under the PPSR for tenant's property which has been abandoned after the end of the lease.

5.3. Asbestos reporting

Given the landlord's maintenance obligations, we suggest that the landlord arrange for a structural engineer to inspect the premises to ascertain whether the structure is sound. A structural engineer should also be able to assess whether there may be asbestos in the building on the premises. Alternatively, a specialist asbestos firm should be considered. If there is asbestos present, the landlord will have ongoing obligations such as monitoring the levels.

5.4. Essential Safety Measures

There is a requirement on building owners in Victoria to maintain certain essential safety measures in a commercial building. Each year the owner of the building is required to prepare an annual essential services report on the building's essential safety measures. Examples of essential safety measures in are air-conditioning systems, emergency lifts and lighting, fire curtains and doors, emergency warning systems, fire detectors and alarm systems, fire extinguishers, mechanical ventilation, smoke alarms and sprinkler systems. When this requirement was first introduced, the annual report was only mandatory for a building built or altered after July 1994. information is easily accessible for a municipal building surveyor, or a chief officer of the fire brigade to randomly check compliance.

However from the 14 June 2009 it is mandatory for all commercial, industrial and public buildings, no matter when constructed.

5.5. Cooling Towers

If there is a cooling tower in the building, it must be registered with the Building Commission of Victoria. Under the legislation, the owner of the building must also maintain the cooling tower and must ensure that a risk management plan is prepared and implemented for a cooling tower system. The responsibility for maintenance cannot be passed onto the tenant, however the other obligations can be passed on.

5.6. Outgoings for Essential Safety Measures

There has been a recent decision of the Victorian Civil and Administrative Tribunal which provides that a landlord of premises cannot pass on the obligation to pay for the landlord's essential services compliance costs, so the tenant may argue the landlord has no entitlement to pass these costs on if the landlord tries to claim them as outgoings. It is possible that for any provision in the lease in relation to the recovery of these costs, the tenant will argue that this provision is unenforceable.

PROPERTY LAW

6. TENANT'S REPAIRS

The tenant may arrange for urgent repairs of those items listed in paragraph 5 above if the fault or damage has a substantial effect on the tenant's business and the tenant is unable to get the landlord to carry out the repairs despite making reasonable steps to do so. The landlord must reimburse the tenant for the reasonable costs of the repairs.

7. ANNUAL OUTGOINGS ESTIMATES

The landlord must give the tenant a written estimate of outgoings before the lease is entered into and at least one month before the start of each of the landlord's accounting periods. The tenant will not be liable to contribute to any outgoing until an estimate is given.

8. ANNUAL OUTGOINGS STATEMENTS

The Act requires written statements detailing all expenditure by the landlord on account of outgoings to which the tenant is liable to contribute. This statement must be made available to the tenant at least once in relation to expenditure during each of the landlord's accounting periods during the term of the lease and the landlord must give the statement to the tenant within 3 months after the end of the accounting period to which it relates. The statement must be prepared in accordance with the relevant principles and disclosure requirements of the applicable accounting standards made

by the Australian Accounting Standards Board. The statements also need to be accompanied by an auditor's report unless they only relate to outgoings for GST, water, sewerage and drainage rates and charges, municipal council rates and charges, insurance and the statement is accompanied by copies of those assessments or invoices and proof of the expenditure.

9. MINIMUM FIVE YEAR TERM

The Act requires that the term of the lease, including any further term or terms provided by way of an option, must be at least five years.

If a retail lease has an initial term and further terms of less than five years, it will be contrary to the provisions of the Act and the landlord will be required to obtain a certification of the Small Business Commissioner regarding the waiver by the tenant of the five year term. This certification can only be obtained at the tenant's request. If this certification is not obtained, the term of the lease is automatically extended by the period that is necessary to ensure the lease is for a minimum of five years in duration.

10. LESS THAN 1 YEAR TERM

The five year term requirement does not apply if a lease has a term of less than one year. This is because the Act does not apply to a retail premises lease for a term of less than one year. However, if the tenant continues in possession of the premises for more than one year, including because of a renewal of the lease, the Act will apply. The landlord must then comply with the provisions of the Act from the date that the tenant has continuously been in possession of the premises for one year.

11. END OF LEASE NOTIFICATIONS BY LANDLORD

If the lease contains an option exercisable by the tenant to renew the lease for a further term, the landlord must notify the tenant in writing of the date after which the option is no longer exercisable at least 6 months and no more than 12 months before that date. The landlord are not required to provide this written notice to the tenant if the tenant has exercised the option beforehand.

If the lease does not contain an option to renew the lease for a further term the landlord must, at least 6 months but no more than 12 months before the lease term ends, give written notice to the tenant offering the tenant a renewal of the lease on the terms specified in the notice or inform the tenant that the landlord do not propose to offer the tenant a renewal of the lease.