

The *Retail Leases Act 2003*

Laws covering Retail Tenants and Landlords in Victoria

Retail Leases Act 2003

From 1 May 2003 the *Retail Leases Act 2003* is the main governing legislation for retail leasing in Victoria.

When leases under the *Retail Tenancies Act 1986* or the *Retail Tenancies Reform Act 1998* are renewed, they will also become subject to the *Retail Leases Act 2003*.

Coverage of the Act

The *Retail Leases Act 2003* does not apply to all premises or businesses. It applies to 'retail premises' but excludes some premises and businesses.

Meaning of retail premises

Retail leases legislation applies to a retail premises lease used for the sale or hire of goods by retail or the retail provision of services and where the occupancy cost is less than \$1 million per year. The occupancy cost of retail premises is the combined cost of rent and outgoings.

Exclusion from coverage of the Act

The *Retail Leases Act 2003* will not apply to:

- tenants that are in the business of wholesaling, manufacturing or storage
- retail tenants whose occupancy cost threshold exceeds \$1M per annum
- tenants that are listed corporations or subsidiaries of listed corporations
- leases for a term of less than one year, unless consecutively renewed
- premises or businesses as determined by the Minister.

Importance of retail leasing

A lease is an important document which impacts a business in a number of ways. It's also a legally binding document which holds the parties to its terms and conditions. Prospective tenants should ensure they understand all provisions of the lease they are about to enter and should obtain advice from an experienced solicitor before signing any documentation.

Entering into a lease

A lease is entered into or assigned when the tenant enters into possession of the premises with the consent of the landlord or starts paying rent or the lease or assignment is signed by all parties, whichever occurs first.

Disclosure – the importance of knowing the facts up-front

An important principle of the *Retail Leases Act 2003* is that the parties know what they are getting into before entering into the lease.

Before a lease is entered into or renewed, landlords must provide a disclosure statement to prospective tenants.

A disclosure statement details important aspects of the lease, such as rent, outgoings and other obligations. Prospective tenants should ensure they carefully examine the details of the disclosure statement; its contents can have a significant impact on the lease and the viability of the business.

Where there is a new lease for retail premises, at least 7 days before the lease is entered into, the landlord must give the tenant:

- a disclosure statement, and
- the completed proposed lease

Renewed leases

Where a tenant exercises an option to renew a lease, the landlord must give the tenant a disclosure statement 21 days before the end of the current lease.

Where a lease does not contain further options but the parties agree to renew the lease, the landlord must give the tenant a disclosure statement within 14 days of entering into the agreement for renewal.

Why it is important for landlords to provide a disclosure statement?

Where the landlord fails to provide a disclosure statement the tenant may:

- withhold rent, and is not liable to pay rent until disclosure statement is given, and
- terminate the lease.

Tenants may only exercise the right to withhold rent after giving the landlord written notice to say that they have not received the disclosure statement. This must be done no earlier than 7 days and no later than 90 days after the lease commenced. Tenants who have given such a notice may exercise the right to terminate the lease if they give the landlord written notice within 7 days after receiving the disclosure statement.

The tenant may also terminate where a completed copy of the lease was not given or the disclosure statement contains information that is misleading, false or materially incomplete.

Landlord obligation to provide a copy of lease and information brochure

New leases: A landlord or landlord's agent is required to provide the prospective tenant with a copy of the proposed lease and a copy of this information brochure as soon as negotiations are commenced, and failure to do so will be an offence.

Copy of signed lease

Within 28 days after the retail premises lease is signed by the tenant, the landlord must give the tenant a copy (which may be a photocopy) of the lease that has been signed by both the landlord and the tenant.

Leasing costs

Leases are important documents because they detail costs incurred by retail tenants. Rent is only a component of the total costs, and landlords will pass on most other costs to tenants. These will be detailed in the disclosure statement and shown as outgoings.

Under the *Retail Leases Act 2003*, landlords cannot pass on their land tax liability to tenants or their legal costs associated with preparation of the lease. However, if the landlord incurs costs in connection with the assignment of the lease, then the tenant may be liable to pay for these expenses.

Before signing a lease

A lease deals with many matters. A prospective tenant should ensure that its main features are acceptable. These include:

- the term of the lease and options to renew
- rent and the basis of rental reviews
- if the tenant must exercise an option before being advised of the rent for a further term
- outgoings or shared operating expenses
- obligations to repair/maintenance
- the disclosure statement
- permitted use
- assignment.

Unconscionable conduct

Part 9 of the *Retail Leases Act 2003* deals with unconscionable conduct. Landlords and tenants under a retail premises lease or proposed retail premises lease must not, in connection with the lease, engage in conduct that is, in all the circumstances, unconscionable.

Certain conduct is not unconscionable

Conduct is not to be deemed unconscionable merely because a person failed to enter or renew a lease, or if the person instituted proceedings or referred a matter to some form of alternative dispute resolution, or if the person did not agree to the conduct of an independent valuation of current market rent.

Benefit of unconscionable conduct provisions

Unconscionable conduct provisions of the *Retail Leases Act 2003* protect tenants against grossly unfair conduct by landlords such as unwillingness to negotiate and use of unfair tactics.

One of the factors to be considered in whether a landlord has acted unconscionably is if a landlord has unreasonably used turnover information in rent negotiation. The Act also improves provisions relating to protection for tenants against relocation, demolition and damaged premises.

Appointment of a Specialist Retail Valuer

If a tenant exercises an option for a further term under the lease, there may be a disagreement between a landlord and tenant regarding rent for the renewed term. If the landlord and tenant fail to agree on the appointment of their own valuer to determine the rent, they can request that the Small Business Commissioner appoint a Specialist Retail Valuer to determine the rent under the *Retail Leases Act 2003* (the landlord and the tenant are to pay the costs of the valuation equally).

Notification of Lease Details by Landlord

Landlords have an obligation to notify the Small Business Commissioner with details of the lease within 14 days after a retail premises lease is signed by all of the parties to it, or renewed.

A *Notification of Lease Details* form is available at the Office of the Victorian Small Business Commissioner website www.sbc.vic.gov.au

Checklist

Before entering into a new lease:

- landlord or agent must provide a copy of the lease and information brochure at negotiation stage
- lease must be in writing
- landlord must provide a copy of disclosure statement to tenant at least 7 days prior to entering into a lease
- if disclosure statement not given, tenant can withhold rent, provided the tenant notifies landlord within 90 days
- if disclosure statement not given (or is misleading/false), the tenant can terminate the lease within 28 days (although the landlord can object)
- if tenant is later given disclosure statement, they can terminate within 7 days of receipt
- minimum 5-year term for lease (unless tenant gets Small Business Commissioner certificate waiving right to 5-year initial term).

After entering into the lease:

- landlord must give tenant a copy of lease 28 days (or other period of time to which the parties have agreed) after it is entered into
- landlords have an obligation to notify the Small Business Commissioner with the details of the lease within 14 days after a retail premises lease is signed by all of the parties to it or renewed
- if the landlord and tenant cannot agree on maximum fit-out, it is to be determined by an independent quantity surveyor nominated by the Small Business Commissioner
- landlord can only charge outgoings where the tenant has been given an estimate of those outgoings before the lease is entered into (usually in the landlord's disclosure statement) and in respect of each of the landlord's accounting periods during the term of the lease, at least one month before the start of that period.
- rent can be based fully or partly on turnover, but the lease must specify how rent is to be determined. Rent reviews must be based on one of the methods detailed in the Act
- landlords must provide disclosure statement where tenant exercises an option or lease is renewed
- landlord cannot refuse an assignment of lease unless under certain situations
- tenant must follow procedure for obtaining consent for assignment from landlord.

Throughout the life of the lease

Tenants and landlords should not act unconscionably or in breach of their lease in their dealings with one another. The Office of the Victorian Small Business Commissioner will promote informed decision-making, and undertake investigations and mediation for disputes between landlords and tenants.

Ministerial Determinations

Since the introduction of the *Retail Leases Act 2003*, a number of premises and tenants have been excluded from the coverage of the Act through ministerial determinations.

The determinations are available at the Office of the Victorian Small Business Commissioner website www.sbc.vic.gov.au

Office of the Victorian Small Business Commissioner

The Office of the Victorian Small Business Commissioner is dedicated to promoting a competitive and fair environment for retail tenants and landlords.

The Small Business Commissioner:

- undertakes investigations and mediation for disputes between landlords and tenants
- provides information and guidelines to tenants and landlords on retail leasing
- issues certificates for the purpose of waiving the 5-year initial term provisions for leases
- maintains a register of retail leases
- undertakes education programs.

Dispute resolution

A key function of the Small Business Commissioner is to facilitate, by mediation or another form of alternative dispute resolution, retail tenancy disputes.

An important principle of dispute resolution under the *Retail Leases Act 2003* is that a retail tenancy dispute must first be referred to the Commissioner before it can proceed to the Victorian Civil and Administrative Tribunal (VCAT). Exceptions to this include applications for injunctions or disputes solely about rent.

A Referral of Retail Tenancy Dispute form is on the website.

Further Information

Contact the Office of the Victorian Small Business Commissioner

Call **13 22 15** (local call) or Toll Free **1800 136 034**

Investigations queries 03 9651 9316

TTY 03 9651 7596

Or visit website: www.sbc.vic.gov.au

Please Note

This brochure constitutes the important information brochure about retail leases published by the Small Business Commissioner for the purposes of section 15 of the *Retail Leases Act 2003*.

Important Disclaimer

Leasing law is complex, and it is vital that anyone proposing to enter into a lease or vary a lease or who is experiencing difficulties with other parties in relation to a lease, **obtain professional advice from an experienced lawyer**. The Small Business Commissioner expressly disclaims all and any liability to any person in respect of anything and of consequence of anything done or omitted to be done by any person in reliance, whether whole or partial, upon the whole or any part of the contents of this brochure.

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