

Information brochure

The *Retail Leases Act 2003*

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

It must be provided to a tenant or prospective tenant as soon as negotiations on a lease are entered into, together with a copy of the proposed lease in writing.

The *Retail Leases Act 2003*

The *Retail Leases Act 2003* commenced on 1 May 2003 and 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 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' as defined in the Act but excludes some premises and businesses.

Meaning of 'retail premises'

The *Retail Leases Act 2003* applies to a retail premises lease used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services.

Exclusion from coverage of the Act

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

- tenants in premises that are not used, or to be used, wholly or predominantly for the sale or hire of goods by retail or the retail provision of services
- retail tenants whose occupancy cost (the combined cost of rent and outgoings) exceeds \$1M per annum
- tenants that are listed corporations or subsidiaries of listed corporations
- leases for a term of less than one year (note the Act may apply to a tenant being in continuous possession for more than one year)
- premises or businesses as determined by the Minister.

Importance of your lease

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 a solicitor experienced in leasing law 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 option(s) 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 is it 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 the disclosure statement is given, and
- terminate the lease.

A tenant may only exercise the right to withhold rent after giving the landlord written notice 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 the lease where a completed copy of the lease was not given to the tenant or the disclosure statement contains information that is misleading, false or materially incomplete.

Landlord's 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 lease negotiations are commenced. A failure to do so is 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 which will be incurred by tenants. Rent is only a component of the total costs, however 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 or sub-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
- the dates of exercise of any option(s) for further lease terms and associated rent increases
- outgoings or shared operating expenses
- obligations to repair/maintain
- 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 includes provisions relating to protection for tenants against relocation, demolition and damaged premises.

Appointment of Specialist Retail Valuers to Determine Rent Disputes

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

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 the 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 the tenant obtains a certificate from the Victorian Small Business Commission waiving their right to a 5-year initial term and gives the certificate to the landlord).

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
- 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 Commission
- landlord can only charge outgoings where the tenant has been given an estimate of those outgoings before the lease is entered into (in the landlord's disclosure statement) and at least one month before each of the landlord's accounting periods during the term of the lease.
- 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
- landlord must provide a disclosure statement where tenant exercises an option or lease is renewed
- landlord can only refuse an assignment of lease in limited circumstances
- tenant must follow procedure in the *Retail Leases Act 2003* for obtaining consent for assignment from landlord.

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 Victorian Small Business Commission website www.sbc.vic.gov.au

Victorian Small Business Commission

The Victorian Small Business Commission is dedicated to promoting a competitive and fair environment for retail tenants and landlords.

The Victorian Small Business Commission:

- assists in resolving disputes between landlords and tenants through mediation or other forms of alternative dispute resolution
- 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
- delivers education programs.

Dispute resolution

An important principle of dispute resolution under the *Retail Leases Act 2003* is that a retail tenancy dispute must first be referred to the Commission before it can proceed to the Victorian Civil and Administrative Tribunal (VCAT). An exception to this requirement is that disputes about rent alone or applications for injunctive relief do not need to be first referred to the Commission.

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

Further Information

Victorian Small Business Commission

Telephone 13VSBC (138 722)

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

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Important Disclaimer

This publication provides general advice only and is not a legal advice about the operation of the *Retail Leases Act 2003*.

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 a solicitor experienced in leasing law**. 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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