

# INFORMATION FOR A TENANT

## ENTERING A RETAIL LEASE

### 1. THE RETAIL LEASES ACT 2003

If the business operated from the premises by a tenant 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. The Act sets out, amongst other things, the obligations of each party to the lease.

There is no specific definition under the Act of a retail lease or retail premises. Courts have found that a retail premises is a premises which is predominantly used for retail sales and provision of retail services to members of the general public.

### 2. DISCLOSURE STATEMENT

The landlord must 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 tenant satisfy themselves 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 may have remedies against the landlord under the Act.

### 3. COPY OF PROPOSED LEASE IN WRITING

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

### 4. SMALL BUSINESS COMMISSIONER INFORMATION BROCHURE

In addition to the proposed lease and disclosure statement, the Landlord is required to give you a copy of the information brochure published by the Small Business Commissioner regarding retail leases.

### 5. SECURITY DEPOSIT

The security deposit must be held by the landlord on the tenant's behalf in an interest-bearing account. The landlord must account to the tenant for interest earned on the deposit but the landlord is entitled to keep the interest and deal with it as money paid by the tenant to form part of the security deposit.

Landlords often ask for a security deposit to be provided in the form of a bank guarantee.

### 6. LAND TAX

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

### 7. LEGAL COSTS OF ENTERING INTO LEASE

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

### 8. LANDLORD MAINTENANCE AND REPAIR OBLIGATIONS

The landlord is responsible for maintaining:

- 8.1. the structure of the premises;
- 8.2. fixtures in the premises;
- 8.3. plant and equipment at the premises; and
- 8.4. appliances, fittings or fixtures provided under the lease relating to the gas, electricity, water, drainage or other services,

in a condition consistent with the condition of the premises when the lease was entered into. However, the landlord is 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 at the end of the lease.

It is therefore important to define the condition of the premises when the tenant first enters into occupation. The tenant and the landlord should inspect the condition of the premises and chattels owned by the landlord prior to the commencement of the lease, and prepare (or have the managing agent prepare) a detailed condition report. The report should contain:

- 8.5. an asbestos assessment;
- 8.6. cooling tower maintenance records and risk management plan (if applicable);
- 8.7. essential safety measures records; and
- 8.8. notation of any existing defects in the premises.

The tenant and the landlord should sign off on the report prior to taking possession of the premises.

# PROPERTY LAW

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

Victorian Building Regulations require the owner to keep a current copy of the building's occupancy permit (if applicable) together with an annual safety measures report in the building. All essential safety measures reports, records of maintenance checks, services and repair work to the building must also be kept on the premises so this information is easily accessible for a municipal building surveyor, or a chief officer of the fire brigade to randomly check compliance.

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.

## 10. TENANT 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.

The tenant will also likely have repair obligations under the lease, usually to keep the premises in good repair at least to the condition the premises was in at the commencement of the lease. The tenant's maintenance and repair obligations with also include, without limitation, maintenance and repair of its installations and any damage caused by the tenant.

## 11. OUTGOINGS ESTIMATES AND STATEMENTS

### 11.1. Estimates of Outgoings

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. The outgoings the landlord can charge will be defined in the lease but are subject to the Act. For example, the landlord cannot pass on the costs of structural repairs and sinking fund costs if the land has an owners corporation (amongst other things).

### 11.2. Statements of Outgoings

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 than GST, water, sewerage and drainage rates and charges, municipal council rates and charges and insurance and the statement is accompanied by copies of the assessments, invoices and proof of the expenditure.

### 11.3. Outgoings for repairs

The ability for the landlord to pass on the cost of maintenance and repair are heavily restricted under section 52 of the Act. Unless maintenance and repair is required because of the tenant's misuse or the tenant may remove the item (to be maintained or repaired) at the end of the lease, the landlord will be responsible.

# PROPERTY LAW

## 12. 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.

## 13. LANDLORD NOTICES AT THE END OF THE TERM

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 is not required to provide this written notice if the tenant has notified the landlord that the tenant wishes to exercise the option beforehand. If the tenant wishes to renew the lease, it must ensure that it has remedied any default under the lease and that it has not persistently defaulted under the lease.

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 the tenant written notice offering the tenant a renewal of the lease on the terms specified in the notice or informing the tenant that it does not propose to offer a renewal of the lease.