

A retail lease is a contract that entitles a business owner to operate his/her retail business from rented premises. It is a legally binding contract between the landlord and the tenant that sets out all of the terms and conditions on which the business owner is entitled to occupy the premises, including a complete statement of the obligations imposed on the landlord and tenant alike.

Most small businesses in Victoria operate from rented retail premises. It is essential that a business owner understands his/her rights and obligations under the lease.

Where a prospective business owner is considering purchasing a business, the lease of the premises he/she proposes to occupy must be treated with high priority in the course of analyzing the information relating to the business prior to deciding whether to go ahead with a proposed purchase.

Retail premises

Retail premises include any premises used for the sale or hire of goods by retail or the retail provision of services. Any lease of premises which meets this description will be governed by specific retail leasing legislation.

Clients should note that a lease will not be regulated by retail leasing legislation if the main use of the premises is residential, farming, manufacturing, wholesaling or storage. Leases of premises used for these purposes are still commercial leases but are not governed by any one single piece of legislation..

Retail leasing legislation in Victoria

Depending on when they were entered into, leases in Victoria may be subject to the Retail Tenancies Act 1986 or the Retail Tenancies Reform Act 1998 or the Retail Leases Act 2003 or the common law.

The Retail Tenancies Act 1986 applies to leases commenced before 1 July 1998 and the Retail Tenancies Reform Act 1998 applies to leases commenced on or after 1 July 1998, but before 1 May 2003.

When leases under these Acts are renewed, they will become subject to the Retail Leases Act 2003.

The Retail Leases Act 2003 commenced operation on 1 May 2003. Key provisions of the Act that deliver major benefits to retail tenants include:

- tenants must be offered a minimum of five years occupancy.
- small businesses are protected from unconscionable conduct in their retail tenancy dealings, including rent negotiations, fit-out costs and misuse of turnover figure protection.
- landlords are prohibited from including their land tax liability in outgoings, which are recoverable from the tenant.

Application of retail tenancy legislation

The Retail Leases Act 2003 will not apply (even though the premises are used for the sale or hire of goods by retail or the retail provision of services) to:

- retail tenants whose occupancy costs exceed the threshold of \$1,000,000 per annum (the occupancy cost of retail premises is the combined cost of rent and outgoings)
- tenants which are listed corporations or subsidiaries of listed corporations
- leases for a term of less than one year
- businesses or premises as determined by the Minister.

Before signing a lease

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

- the term of the lease and options to renew
- rent and the basis of rental reviews
- outgoings or shared operating expenses
- obligations for repairs/maintenance
- lease preparation expenses
- assignment.

The term of the lease and options to renew

The term of the lease usually refers to the length of the lease. An option to renew is a provision of a lease effectively giving tenants an opportunity to continue the lease for another specified term if they desire.

When leases are being negotiated, the terms and options to renew are particularly important provisions for the viability of a business.

Generally, the longer the lease, the better. Prospective tenants should negotiate a term that gives them enough time to realise their business objectives.

Rent and the basis of rental reviews

All leases require rent to be paid (this is the main exchange for the privilege of operating a business from the premises) and include a clause stipulating that at a determined interval the rent will be reviewed and adjusted (usually an upward increase). The time and formula for this review-taking place need to be set out in the lease.

The basis or formula on which a rent review is to be made must be one that is outlined in the Retail Leases Act 2003.

Outgoings or shared operating expenses

In addition to rent, retail premises tenants usually pay outgoings. Outgoing amounts will vary from premises to premises. Outgoing costs are usually the expenses directly attributable to the operation, maintenance or repair of the building in which the retail premises is located. They also include rates, taxes, levies, body corporate fees, premiums or charges payable by the landlord.

Where outgoing costs are onerous, they can affect the financial viability of a business. Prospective tenants should ensure they are fully aware of outgoing costs associated with a lease before signing any binding documentation. (Outgoing costs are detailed in the landlord's Disclosure Statement, discussed below.)

Most outgoings are borne by tenants but can be negotiated with the landlord. A tenant is not liable for a landlord's land tax assessment.

Obligations for repairs/maintenance

Landlords and tenants should be clear about their respective obligations to repair and maintain parts of the premises.

Under the Act, landlords are responsible for maintaining the following in good repair:

- the structure of, or fixture in, the retail premises
- plant or equipment at the retail premises
- the appliances, fittings or fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.

Landlords are not responsible for maintaining those things in good repair if the need to repair arises out of misuse by the tenant or where the tenant is entitled or required to remove the thing at the end of the lease.

Lease preparation expenses

A tenant does not have to pay the landlord's legal or other expenses in relation to the preparation of the retail premises lease (the lease, the disclosure statement and other associated legal documents) or in relation to complying with retail tenancies legislation.

However, if the landlord incurs costs in connection with the assignment of the lease or any proposed sub letting similarly the tenant will be liable for the landlord's legal fees and other like expenses, which arise, and of any default by the tenant then the tenant may be liable to pay for these expenses.

The disclosure statement

Landlords are required to provide a prospective tenant with a disclosure statement at least seven days before entering into a retail premises lease.

The disclosure statement sets out important information such as tenancy details, rent details and outgoing charges payable by the tenant.

A prospective tenant should carefully examine all information in the disclosure statement before the lease is signed.

Assignment

Assignment of a lease is the transferring of a lease from one tenant to another. Assignment of a lease is usually performed at the request of existing tenants at the time of selling or passing their business to another party.

Kelly and Chapman will help you

If you are a tenant or landlord or about to become one, or the other and need advice or preparation of necessary documents to enter into a retail or any other commercial lease – contact Mr Vujnovic of our office today on (03) 9557 2915 or by email mv@kellyandchapman.com.au or visit our website at www.kellyandchapman.com.au.

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