

## Your lease

(Retail Lease)

Whether you are a landlord or tenant, the terms of your lease can influence the flexibility, profitability and reputation of your business. There are a number of important factors to consider before signing on the dotted line, regardless of what position you are in.

Your lease will be governed by three main areas of law: The contract, legislation (eg. *Retail Leases Act 2003* (VIC)) and common law\*.

For a lease to be enforceable it must be in writing. Each clause should be considered carefully.

Below is a list of contractual clauses we recommend paying close attention to. We include an explanation of how they affect your rights as tenant or landlord.

There is a glossary<sup>\*1</sup> at the end of the document to assist you to understand your lease.

## Contractual Provisions

### Rent provisions

In addition to considering the starting rental, (which is normally set out in the schedule\*) you will need to pay attention to how often and in what manner rent is to be varied in later years. The methods of rent review include fixed or stated rent increases, increases in line with the Consumer Price Index or market rent\*.

### Outgoings

“Outgoings” include rates, taxes and other charges associated with occupying the premises. Some of these are determined by legislation, others are not. Make sure you are aware of who is paying what. If the landlord does not make known any outgoings payable by the tenant prior to the signing of the lease, the landlord may not be able to claim the outgoings, despite their existence in the contract.

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<sup>1</sup> Words in the glossary will be marked by \*

## Insurance

The issue of who meets the cost of insurance (and what cover is required) should be addressed in the lease. Before you sign, be aware of where this responsibility lies.

## Assignment\*

It is usual for a lease to require the consent of the landlord before it can be assigned. In most cases, the landlord has to consent to assignment; the purpose of this is for the landlord to satisfy itself that the new tenant is acceptable. For tenants this may result in the landlord having a right of veto over the sale of your business. On the flipside, for a landlord, this may mean that you have little or no control over what business occupies your premise if the lease is assigned. You should also be aware that it is common on transfer or assignment of a lease, for the transferring tenant (and guarantors) to continue to be bound to the obligations contained in the lease, despite the assignment. In other words, if the new tenant can't meet their obligations to the landlord then the former tenant may still be sued, potentially years later, regardless of whether there is any on-going connection to the new tenant. Check to see if your lease covers these scenarios. Some state Acts contain provisions which address this issue.

## Guarantee\*

Guarantees can be complex and have very serious consequences if not properly understood. Landlords should conduct research on the guarantor to determine that they are not bankrupt or have a bad credit history. If the tenant is a company, the Guarantor will be liable if the company goes under. Often, a bank guarantee for an agreed sum is used as security instead of a personal guarantee. An assignment of the lease will not assign the Guarantee, which is an independent contract.

## Permitted Use

The lease will state the way the premises can be used for the entirety of the lease. It is important that the landlord and tenant are both aware that if the lease is assigned in the future, the new tenant will have to abide by the permitted use originally stated in the lease or negotiate for a different permitted use to be inserted in the lease.

For example, if the lease permits operation of a financial services business, the new tenant would need to abide by this restriction or negotiate a new lease with the landlord.

## Options to renew

Options to renew can vary greatly. Legislation has simplified the negotiations somewhat by stating that a retail lease (in Victoria) must be for at least 5 years, unless approval is given by the Small Business Commissioner.

If flexibility is required, it is usually preferable to have a number of consecutive options to renew the lease rather than one long (or short) term option. It is worth noting that time is of the essence in exercising any option to renew the lease. In general, a failure to exercise that option within the prescribed timeframe means that the option to renew the lease will have been lost.

## Relocation

Where the premises are part of a large building or complex, the landlord may reserve the right to relocate the business, however they may also have agreed to compensate the costs the tenant may incur. Given the impact (and expense) relocation may have upon a tenant's business, it is important that both the landlord and tenant are aware of their rights under the contract. Some state Acts also address this issue.

## Alterations

It is common for landlords to require approval before any changes can be made to the premises. This might even extend to preventing a picture hook being placed on a wall. Where any works (including partitioning) are expected, it is desirable for the tenant to obtain approval from the landlord before entering into the lease. The lease should also be reviewed to ensure that there are not unnecessarily harsh "reinstatement" obligations requiring you to restore the premises to their original condition, even where the works (such as partitioning)

are done in a manner that enhances the value of the premises. Similarly, the landlord should approve the tenant's signage before they enter into the lease.

## Management fees

A landlord may wish to engage the services of a managing agent that may have a substantial cost. In some circumstances, this cost may then be passed onto the tenant. S49 of the *Retail Leases Act 2003* (Victoria) has more information – if in doubt, seek legal advice.

## Parking

Are parking places included in the description of the premises and, if so, is there an additional fee? Do the premises provide enough parking spaces for your needs? (Consider council bylaws here).

## Airconditioning

Who meets the cost of airconditioning – and applicable repairs? Tenants should ensure that they are not required to meet any capital expenditure in relation to heating or airconditioning as the costs can be substantial.

## Turnover rental

Some landlords seek information about turnover of a business. This can be to assess whether "turnover" rent should apply, or determine the success of the tenant – and as a result, their ability to meet rises in rental.

## Repairs

Legislation states that the landlord must maintain the property consistent with its condition at the commencement of the lease. However the landlord may pass on costs to the tenant if they are specified as recoverable in the lease or legislation, or the tenant may pass on costs to the landlord. For example, if the tenant damages the premises, the landlord may seek to repair the damage and bill the tenant.

Know your rights in this area as it has the potential to become messy.

## Reinstatement

Accidents do happen - contingency plans are necessary. If the premises are destroyed, perhaps by fire, then you would presumably wish either for the premises to be rebuilt quickly or to be able to end the lease and establish the business in other premises.

It is usual for leases to provide that rent will abate (that is, be suspended) but many leases are poorly expressed (from the perspective of a tenant) and allow the landlord an extended period of time to make any decision to rebuild. While you would of course be free to relocate to temporary premises, you may have no certainty as to whether the lease will “revive” for an extended period of time.

## Mortgages

In Victoria, a mortgagee\* is only bound by a lease if it has consented or is aware of that lease. If the mortgagee has not consented to the lease and later enters into possession of the premises then it may have the right to evict you. This is one reason why Holley Nethercote strongly recommends that tenants undertake a property search\* before entering into the lease. If you exercise an option to renew a lease you are entering into a new lease and require fresh consent of the mortgagee.

## Planning

Most leases do not refer to the planning or zoning where the premise is located. There are various and at times inconsistent planning provisions, even for properties that are relatively near one another. In one instance, a lease was entered into for a three story building which had one car park. This was permitted by the applicable Council because of the unusual use of the premises. Later, once the unusual use ended, the tenant could neither use nor transfer the lease. You should therefore give consideration to obtaining a planning search to ensure that you can conduct your business at the premises.

## The Signing!

There are a number of documents the landlord must supply during the negotiation stage. These include:

A. a copy of the lease

- B. information brochure produced by the Small Business Commissioner; and  
C. a disclosure statement

(for retail leases)

The lease must be in writing and signed.

Following this, the tenant is entitled to receive a copy of the executed lease.

## Registration of the lease

In Victoria it is not common practice for leases to be registered. However, the Small Business Commissioner must be notified of the details of the lease.

In NSW, the Retail Tenancy Unit recommends registering a retail lease that exists for more than three years. In QLD, this is a requirement.

## Breach Provisions

It is important that you read your lease carefully, to be aware of what constitutes a breach. In Victoria, the landlord must give a tenant a breach of lease notice and 14 days to rectify the breach. Notice is not required for non- payment of rent. If the breach continues and a dispute arises, it can be heard by the Victorian Civil and Administrative Tribunal.

## Legislation

*Retail Leases Act 2003 (Vic)*

*Retail Leases Act 1994 (NSW)*

*Retail Shop Leases Act 1994 (QLD)*

*Retail and Commercial Leases Act 1995 (SA)*

*Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)*

*Leases (Commercial and Retail) Act 2001 (A.C.T)*

*Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (TAS)*

*Business Tenancies (Fair Dealings) Act (NT)*

For simplicity, we have referenced the Victorian legislation in this document. Each state has their own retail lease legislation, and consequently, obligations of landlords and tenants differ depending on which state the lease is in. Most states also have handbooks that landlords and tenants can use to guide them through the lease process. We would recommend seeking legal advice if there is any ambiguity as to whether the act applies to your lease.

### *Other legislation and rights*

One of the most litigated pieces of legislation in Australia is the *Competition and Consumer Act 2010 (Cth)*. In particular, section 18 of the *Australian Consumer Law* prohibits misleading and deceptive conduct and this has often been used in the context of commercial leases. It is critical that any representations are documented, as it is often difficult to establish the existence of a misrepresentation in negotiations when there is no letter or email supporting the claim.

Similarly, Holley Nethercote recommends that any defects in the premises or plant and equipment provided with the premises should be recorded in writing before you enter into the lease.

You should carefully consider taxation issues, particularly in the context of “incentives” sometimes offered by landlords.

## Conclusion

Careful attention to the wording of your lease can save you money, time and stress. There are a number of important obligations that arise out of leases. Understanding them is crucial. If you are unsure of your obligations, we recommend seeking legal advice. It is not surprising that with your lease, prevention is better than the cure.

## Glossary

**Assignment** (of lease): Transferring your lease to another lessee\*/tenant. Eg. You sell your business two years into a five year lease. You need to assign your lease to the purchaser of your business if they wish to operate in the same premises.

**Common Law:** Decisions by the courts that impact how contracts and legislation are interpreted.

**Guarantee:** A contract where a person (often a Director) answers for the debt or default of another (often a company).

**Lessor:** The Landlord, who ‘owns’ the premise.

**Lessee:** The tenant, who leases/rents the premise.

**Market Rent:** The amount of rent the property would be likely to obtain if put on the market.

**Mortgagee:** Person/corporation providing the mortgage money. (eg. A bank)

**Property Search:** A search usually undertaken by a law firm that provides information about the property including whether the property is under a mortgage.

**Schedule:** Part of your lease, usually at the end, which outlines specific details of the lease such as rent.