

## **Information Sheet**

# **Assignment of a Retail Premises Lease**

### **What is assignment?**

The purpose of this information sheet is to assist understanding of provisions of the *Retail Leases Act 2003* (the Act) that impact on the rights and obligations of landlords and tenants in relation to the assignment of a retail premises lease under the Act. These Guidelines only relate to the assignment of a retail premises lease under the Act.

An assignment of a lease is a transfer of all the rights and obligations of the current tenant to a new tenant. An assignment is evidenced by a document signed and agreed to by the landlord, the current tenant, the new tenant and possibly a new guarantor, and is usually in connection with a sale of a business.

### **When a lease is assigned**

Section 7 of the Act states, in part, that a lease is assigned when:

- the new tenant enters into possession of the premises with the consent of the landlord; or
- the new tenant begins to pay rent for the premises; or
- the assignment document is signed by all of the parties.

### **Effect of assignment of lease**

Section 8 of the Act states that an assignment of a retail premises lease is taken to be a continuation of that lease and not the entering into of a new lease.

### **Liability for costs associated with the assignment**

Section 51 of the Act states that a landlord cannot recover the landlord's expenses in connection with a new lease but this does not prevent a landlord from claiming the reasonable legal or other expenses incurred by the landlord in connection with an assignment of the lease, including investigating a proposed assignee or sub-tenant and obtaining any necessary consents to the assignment.

Section 23 of the Act states that key-money is prohibited, but key-money does not include recovering from the tenant: costs which the landlord reasonably incurred in connection with a proposed assignment, investigating a proposed assignee of the lease and obtaining any necessary consents to the assignment.

## **When the landlord can withhold consent to an assignment**

Section 60 of the Act states that a landlord is only entitled to withhold consent to the assignment if:

- the proposed assignee would change the permitted use; or
- that the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease; or
- the tenant has not complied with reasonable assignment provisions of the lease; or
- in the case of an ongoing business, the tenant has not provided the proposed assignee with business records for the previous 3 years or such shorter period as the proposed assignor has carried on business at the retail premises.

What is reasonable or unreasonable will depend on the circumstances. For example, it is reasonable for a landlord to seek to prevent its premises being used in an undesirable way or by an undesirable tenant or assignee, or the landlord may be entitled to request more security from the proposed assignee if the landlord considers that the proposed assignee does not have sufficient financial resources to meet the obligations under the lease.

## **Procedure for obtaining consent to assignment**

Section 61 of the Act outlines the procedure for obtaining consent to an assignment of retail lease.

### **Step 1**

For the purpose of complying with section 61(3) of the Act (Step 2), the tenant may ask the landlord to give the tenant a disclosure statement that is current from a specified date that is within 3 months before the statement is given and, if the landlord does not give the tenant such a statement within 14 days—

- (a) the tenant is not required to comply with that subsection; and
- (b) the landlord is guilty of an offence and liable to a fine not exceeding 10 penalty units (see section 61(5) of the Act).

### **Step 2**

Before requesting the landlord's consent, the tenant must give the proposed assignee—

- (a) a copy of any disclosure statement given to the tenant concerning the lease; and
- (b) details of any changes of which the tenant is aware, or could reasonably be expected to be aware, that have affected the information in the disclosure statement since it was given to the tenant.

Penalty: 10 penalty units  
(see section 61(3) of the Act)

### **Step 3**

A request for the landlord's consent to an assignment of the lease must be in writing and the tenant must provide the landlord with such information as the landlord reasonably requires about the financial resources and business experience of the proposed assignee. (see section 61(2) of the Act).

### **Step 4**

The landlord must deal expeditiously with a request for consent and is taken to have consented to the assignment if—

- (a) the tenant has complied with section 61 of the Act; and
- (b) the landlord has not, within 28 days after the request was made, given written notice to the tenant consenting or withholding consent.

(see section 61(6) of the Act).

### **Step 5**

If the assignment is in connection with the lease of retail premises that will continue to be used for the carrying on of an ongoing business, the tenant must give the landlord and the proposed assignee a disclosure statement in the form prescribed by the regulations (but the layout of the statement need not be the same as the prescribed disclosure statement). (see section 61(5A) of the Act).

Once the tenant has made its request in writing under section 61(2) of the Act, the landlord may request further information about the financial resources or business experience of the proposed assignee. If the landlord reasonably considers that the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the retail premises lease, it may refuse consent to the assignment (see section 60(1)(b) of the Act).

The Act does not say who is responsible for preparing the deed of assignment. However, the landlord may pass on the costs of preparing those documents (see section 51(2) of the Act).

## **Protection of assignors and guarantors**

Section 62 of the Act states that:

- (1) This section applies if—
  - (a) a tenant gives a landlord and proposed assignee a copy of a disclosure statement in accordance with section 61(5A); and
  - (b) the disclosure statement does not contain any information that is false, misleading or materially incomplete.
  
- (2) None of the following persons are liable to perform any obligations under the lease or to pay to the landlord any money in respect of amounts payable by the proposed assignee—
  - (a) the tenant;
  - (b) a guarantor or covenantor of the tenant.

Note: the Act has been amended so reference to section 61(4) of the Act in section 62 of the Act now reads as referring to section 61(5A) of the Act.

A tenant's disclosure statement may not comply with section 61(5A) of the Act if, for example:

- further representations made by the landlord to the tenant were omitted;
- due to some malfunction a line of significant text dropped out;
- the circumstances in which it was given may render it to be false or misleading and;
- is misleading if it would lead to an error of judgement.

However it will not be false, misleading or materially incomplete if it contains a trivial error.

If section 61(5A) of the Act has been complied with, the assignor and its guarantors will be protected from liability for the new tenant's breaches, regardless of the wording of the lease or the deed of assignment. This protection applies where the assignment is in connection with a lease of retail premises that will continue to be used for the carrying on of an ongoing business.

The assignor and its guarantors are protected by section 62 of the Act only when and if the assignment becomes effective.

## **How to resolve a dispute**

The Office of the Victorian Small Business Commissioner (VSBC) offers a dispute resolution service to assist parties to resolve business disputes. A dispute can be referred to the VSBC by submitting an application which summarises the issues and the parties involved.

The Commissioner appoints an officer to consider the application, contact the parties and, through preliminary assistance, seeks to resolve the dispute. There is no cost to the parties for this service. If the dispute cannot be resolved at this stage, the parties are invited to attend mediation. Mediation involves a meeting between the parties in dispute and an independent mediator who will attempt to assist the parties to reach an agreement about the dispute. When all parties agree to mediation, the Commissioner appoints a mediator and the VSBC, arranges the date, time and venue. The mediation can be in regional Victoria if it is more convenient for the parties. Mediation costs only \$195 per party per session and usually takes 3-4 hours.

The mediation is confidential; however, any settlement agreement may be taken to the Victorian Civil and Administrative Tribunal (VCAT) or an appropriate Court for enforcement, if necessary.

Each party pays their own costs at VCAT. However, where a party refuses to take part in mediation under the *Retail Leases Act 2003*, VCAT has the power to order that party to pay the costs of the other party.

Further information, including the cost of mediation can be found on the VSBC's website at [www.vsbcc.vic.gov.au](http://www.vsbcc.vic.gov.au)

### **Further Information**

Contact the Office of the Victorian Small Business Commissioner

Call **13 VSBC (13 8722)**

TTY **(03) 9651 7596**

Or visit: [www.vsbcc.vic.gov.au](http://www.vsbcc.vic.gov.au)

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