

Information Sheet

Security Deposits

What is a security deposit?

A security deposit (or bond) is an amount of money paid by a tenant to a landlord before entering a retail premises. It provides some level of protection for the landlord if the tenant fails to meet their obligations under the lease. Section 24 of the *Retail Leases Act 2003* (the Act) outlines what is required of the landlord and tenant with regard to security deposits.

Is it required?

A landlord does not have to ask a tenant for a security deposit. Some landlords will seek surety for a tenant's performance by way of asking for increased rent in advance as a bank guarantee. It is common, however, for leases to require a security deposit before a tenant is given access to the premises.

How much should the security deposit be?

The security deposit requested by a landlord may vary depending on a range of factors - there is no minimum or maximum amount. Landlords and tenants should negotiate a mutually agreeable amount

Where does the security deposit go?

The security deposit must be held by the landlord on behalf of the tenant in an interest-bearing account. There is no bond authority that retains the bond (as there is with residential tenancies).

There is no special type of bank account required to hold a tenant's security deposit. Some banks are developing or have developed special products for the purposes of holding security deposits, however most banks can usually accommodate the landlord's requests with mainstream banking products. Landlords should discuss their needs with their bank or credit union.

Who keeps the interest?

The landlord must account to the tenant for interest earned on the deposit, and the landlord is to keep the interest and deal with it as money paid by the tenant to the landlord to *form part of the security deposit*. This means that the interest generated by the security deposit is to be passed on to the tenant as with the initial payment, provided the tenant complies with their obligations under the lease.

What happens at the end of the lease?

At the end of a retail premises lease, if a tenant has performed all of their obligations under the lease, the tenant is entitled to the return of the security deposit. Section 24 of the Act provides that this should occur as soon as is practicable after the lease ends.

What happens to a security deposit when a lease is assigned?

Sometimes when a **lease is assigned** (transferred), the:

1. **incoming tenant** pays a security deposit to the **landlord**; and
2. **landlord** pays the **outgoing tenant** their security deposit with any interest that has accrued.

Alternatively, if the outgoing tenant is also **selling their business** to the incoming tenant, the parties may agree that:

1. as part of the **contract of sale**, the **outgoing tenant** will leave their security deposit with the **landlord** so that the **incoming tenant** does not have to pay this. The security deposit will then become the possession of the **incoming tenant**.

It is important that all of the above are discussed and agreed to **in writing** by the **outgoing tenant**, the **incoming tenant** and the **landlord** to avoid any confusion in the future. Landlords and tenants should consider obtaining their own legal advice concerning their specific situation.

What happens to a security deposit or a bank guarantee when a premises is sold?

If a retail premises is sold by the landlord, a retail lease will generally state:

1. the **outgoing landlord** must transfer any security **deposit** held under the lease to the **incoming landlord**, with interest; or
2. if there is a **bank guarantee**, the **tenant** provides a **replacement guarantee** in exchange for the existing guarantee if requested by the landlord. Depending on the terms of the lease, the outgoing landlord may be required to pay the reasonable fees charged by the ADI for the issue of the replacement guarantee.

It is in the tenant's interest to ensure that written evidence of the transfer of the security deposit is provided to it.

What happens to a security deposit or a bank guarantee when a landlord changes real estate agents?

If the deposit is held by the agent for the landlord, the outgoing agent should transfer the deposit plus accrued interest to the incoming agent, and provide written confirmation to the tenant. On advice that a new agent has been appointed, a tenant should immediately seek confirmation of security deposit transfer if not already provided. In the case of a bank guarantee in favour of the landlord, the tenant should confirm details of the guarantee with the incoming agent.

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

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

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