October 2020

LOOKING AFTER **LEASES**

AN LPLC PRACTICE RISK GUIDE

LPLC LEGAL PRACTITIONERS' LIABILITY COMMITTEE

lplc.com.au

CONTENTS

1. INTRODUCTION 3

2. DRAFTING ERRORS AND OMISSIONS IN THE LEASE 4

WRONG PARTIES 4
INCORRECTLY IDENTIFIED PREMISES 4
LEASE TERM V TERMS OF OFFER 5
RENT CALCULATIONS 5
RENT REVIEW CLAUSES 5
SIMPLE MISTAKES 7
OUR RECOMMENDATIONS 7

3. DIRECTORS' GUARANTEES 8

THE LIV LEASE AND DIRECTORS' GUARANTEES 9
OUR RECOMMENDATIONS 9

4. LAND TAX 9

LIV LEASE AND LAND TAX 10
OUR RECOMMENDATIONS 10

5. OPTIONS 10

FAILURE TO EXERCISE AN OPTION 10
CASE TO NOTE 11
OUR RECOMMENDATION 11

6. DISCLOSURE OBLIGATIONS 12

DISCLOSURE STATEMENTS 12
DISCLOSURE FOR NEW LEASES 13
DISCLOSURE FOR RENEWAL 13
DISCLOSURE FOR ASSIGNMENTS 14
CASE TO NOTE 14
OUR RECOMMENDATIONS 15

7. ASSIGNMENTS 15

CASE TO NOTE 16
OUR RECOMMENDATIONS 16

8. MORTGAGEE'S CONSENT 17

THE LIV LEASE AND THE MORTGAGEE'S CONSENT 17
OUR RECOMMENDATIONS 18

9. RE-ENTRY ISSUES 18

THE LIV LEASE AND RE-ENTRY NOTICES 18
OUR RECOMMENDATION 19

10. PPS ACT 19

11. LPLC TENANT'S PRACTITIONER CHECKLIST 19

12. LPLC LANDLORD'S PRACTITIONER CHECKLIST 22

13. APPENDIX ONE – RETAIL LEASES 26

APPLICATION OF THE RETAIL LEASES ACT 2003 (VIC) 26

MINIMUM TERM: SECTION 21 27

SECURITY DEPOSITS: SECTION 24 27

FIT-OUT 27

INTERFERENCES WITH TENANCY 27

RETAIL TENANCY DISPUTES (PART 10) 28

ESSENTIAL SAFETY MEASURES 28

MINISTERIAL DETERMINATIONS 28

1. INTRODUCTION

Looking after leases contains details of claims, relevant cases and legislation affecting commercial and retail leases[1]. It is designed to raise your awareness of common problems in commercial and retail lease transactions, and help you protect your practice against claims. There are checklists in each section and at the end to help you avoid the risky issues.

Lease claims are usually less than five per cent of the number and no more than 10 per cent by cost of claims each year. The majority of the claims involve mistakes in the drafting of the lease or poor communication about the effect of the lease.

There are some general steps practitioners should take when dealing with any leases.

Clear communication and written record

Ensure letters setting out the basic terms and conditions agreed are exchanged between the practitioners for the parties. Your client should see and confirm the content of your letters before they are sent. If there has been a misunderstanding between the parties, it can often be detected and resolved at this early stage.

If a drafting error does occur in the lease there is a prospect of having it rectified to accord with what was agreed in the correspondence. A written record, even a basic one, of what the parties have agreed has proved valuable to LPLC on many occasions.

Where the client's proposed course of conduct is commercially risky but they are determined to proceed, ensure they are fully informed about the risks they face and confirm that advice in writing.

In some circumstances, it may be necessary to recommend the client obtain accounting and financial advice, and even valuation advice. For example, where a client is buying real estate subject to a lease, they may wish to know if the rent being paid by the tenant is a market rent as this may influence their decision to purchase the property.

Review and attention to detail

Carefully check the version of the lease to be executed reflects the agreement between the parties and the client's instructions. Attention to detail in this area of law is essential.

This is not a comprehensive text on how to prepare a lease or advise on leasing, but rather a guide on how to avoid the hotspots where mistakes happen. Each chapter deals with a category of mistakes. Real claims examples are given along with commentary on why they occur, as well as recommendations for what to do to avoid them. There are detailed checklists for landlords' practitioners and tenants' practitioners at the end of the guide as well as more information about retail leases issues in the appendix.

[1] Residential leases, crown leases, caravan park site agreements and retirement village agreements are outside the scope of this guide.

2. DRAFTING ERRORS AND OMISSIONS IN THE LEASE

Attention to detail is crucial when drafting leases.

Claims continue to be caused by a failure to check that the lease about to be executed reflects the parties' agreement, the client's instructions and the drafters' intentions. Renewals and sub-leases are particularly vulnerable where the original lease is used as a precedent but negotiated new terms are not incorporated into the new lease.

The most common drafting errors in commercial documents occur in definitions, formulae and schedules. Leases are no exception.

WRONG PARTIES

The most basic mistake we see in leases is the wrong name of landlord or tenant, particularly where there are companies.

CLAIMS EXAMPLE

Wrong party named

As a leasehold interest is a legal estate, the grant needs to be made by the party entitled to the legal estate, namely the registered proprietor. We have seen claims where the landlord's practitioner used the wrong name for the landlord in the lease. The practitioner failed to do a title search of the property to confirm the correct name of the landlord. The problem for the tenant arose when the property was sold. The new owner wanted to redevelop the property and could argue the lease was not valid.

INCORRECTLY IDENTIFIED PREMISES

Not attaching a plan of the premises to the lease can result in misunderstandings and ambiguity particularly in relation to accessory lots such as car spaces.

Claims have arisen where:

- the plan attached to the sub-lease was not identical to the one attached to the head lease and the sub-tenant claimed the sub-lease was defective
- the practitioner failed to obtain an up-to-date plan and ensure the lease included the area intended by their client
- the description of the premises included a car park but there was no plan identifying exactly where the car park was located.

In some claims the lease included an area that was held by the landlord under a mere licence, typically, outdoor dining, car spaces or drinking areas. The right to use these areas was later contested by other parties and resulted in costly disputes. In some cases, the problem was detected only when the tenant attempted to assign the lease. As these areas are often integral to the value of the business it resulted in a loss for the tenant. The legal basis of the landlord's entitlement must be ascertained and correctly described in the lease.

LEASE TERM V TERMS OF OFFER

The terms of the lease do not match the agreement between the parties or terms of the offer to lease.

In one claim there was an understanding between the landlord and commercial tenant that the landlord would undertake an upgrade of lifts in the leased premises. This was not couched in sufficiently clear terms in the lease to create a positive obligation, enforceable by the tenant.

In another claim a third party's rights of access to the tenanted land was expressed in ambiguous terms, generating a dispute about the kind of access contemplated by the wording of the lease.

We have seen claims with incorrectly worded special conditions that apply for the duration of the lease instead of just the first term. Most commonly this is the rent-free period offered at the outset of the lease unwittingly carried over into a further term. Another example is the landlord's obligation to cover fit-out obligations. This can happen where the option is stated to be on the same terms as the original lease.

RENT CALCULATIONS

It is common for disputes to arise from incorrect calculations or figures for rental calculations. This can be as simple as the wrong dollar amount inserted or more complex mistakes such as untested mathematical formulae. In some claims the complicated formula for calculating rent was effective for the first years of the lease but had unintended results when applied post-renewal. Testing calculations will usually prevent this kind of error being introduced into the lease.

CLAIMS EXAMPLE

Forgetting the market rent

A practitioner acting for a landlord on the renewal of a lease inserted the rent amount for the current term in the schedule to the lease for the new term rather than inserting the market rent amount for the new term. The lease for the new term and a retail lease disclosure statement were given to the tenant. The disclosure statement included the correct amount for the new term which assisted in having the lease rectified.

RENT REVIEW CLAUSES

Rent reviews are also an area of mistake.

Claims concerning rent review typically involve a failure by the practitioner to:

- include the agreed rent review mechanism
- correctly draft the rent review clause
- properly document the rent review formula for any option(s)
- correctly advise how the rent review mechanism works,

Many of these mistakes could be avoided if the rent review formula was properly road tested before the lease was executed.

Retail leases

The statutory regulation of rent review clauses under the *Retail Leases Act 2003* (Vic) (the Retail Leases Act) and its predecessors[2] has been a perennial source of claims. In the past, claims arose because of threshold failures – practitioners failing to appreciate the client's premises were retail premises and therefore preparing a void rent review clause. Practitioners are now better at identifying retail premises and determining when the Retail Leases Act applies, but we still see drafting mistakes with clauses that are ambiguous or breach the rules governing rent review in the Retail Leases Act.

The Retail Leases Act prohibits clauses that purport to say the rent review must exceed or be not less than the rent payable before the review, known as an underpinning or ratchet clause.

Section 35 of the Retail Leases Act provides that only one of the following rent review options may be used at any one time:

- a fixed percentage
- an independently published index of prices or wages
- a fixed annual amount
- the current market rent of the retail premises
- another basis or formula prescribed by the regulations.

Section 35(3) provides that any review clause other than types in the first three options above is void to the extent that it attempts to limit or prevent a reduction in rent.

Commercial leases

Since 2007 the Law Institute of Victoria copyright lease no longer has an underpinning clause. This means there is no 'floor' in the current standard form so rent may fall. Claims have arisen when practitioners failed to realise that the standard lease did not have an underpinning clause and make the necessary amendments or at least advise their landlord clients that a market rent review may result in a drop in rent. There is no prohibition on 'floor' or 'ratchet' clauses in commercial leases so you should always address the issue of underpinning with your landlord clients.

Traps when setting market rent

Some leases have clauses that deem a tenant to have accepted the market rent amount offered by the landlord. This sort of clause usually obliges the tenant to give written notice objecting to the amount offered by the landlord, within a certain period, say 14 days.

The practice of 'deeming' a tenant to have accepted (and therefore agreed to) the landlord's market rent figure was considered and rejected in *Figgins Holdings Pty Ltd v Williamson Place Pty Ltd [2010] VCAT 243*.

This means the process outlined in section 37 of the Retail Leases Act must be followed where there is no 'agreement' between the landlord and tenant, and the rent is to be determined by a specialist retail valuer. The valuer to be appointed is by agreement, or failing agreement, as appointed by the Small Business Commissioner.

---

[2] Prior to the *Retail Leases Act 2003* (Vic) under the *Retail Tenancies Act 1986* (Vic) and the *Retail Tenancies Reform Act 1998* (Vic).

The application of a market rent review process in clause 11 was considered in the case of *Dagles Trading Pty Ltd v Skamper Pty Ltd (Retail Tenancies) [2006] VCAT 1220*.

Clause 12.2.2 of the Law Institute of Victoria copyright lease of real estate specifies that the renewed lease has a starting rent determined in accordance with clause 11. Clause 11 specifies a market rent review process.

SIMPLE MISTAKES

Consequential changes

Cross references within a lease to a non-existent clause or to the wrong clause can have catastrophic results for the interpretation of the lease. In one claim, an additional clause added very late in the negotiations changed the numbering of clauses. This affected a cross reference within another clause, resulting in a changed rent review clause with dire results for the landlord.

Outgoings

In claims concerning leases, a common error is the omission of outgoings such as owners' corporation fees. One claim arose where the practitioner incorrectly excluded insurance from the list of outgoings payable by the tenant. In another claim, a drafting error resulted in an obligation being imposed on the landlord to pay for security at the premises. This obligation should have been imposed on the tenant.

OUR RECOMMENDATIONS

- ❑ Obtain a title search to identify the landlord.
- ❑ confirm the area of the premises and compare this to the area on any plan.
- ❑ Double check any plan to ensure the correct plan has been attached to the lease. This should be done as close to the Consider the need to attach a plan to the lease identifying the premises and any accessory lots such as car spaces.
- ❑ Have the client execution of the lease as possible.
- ❑ Double check any rent amounts and/or calculations.
- ❑ Be careful when using precedent lease documents, lease documents from other files or previous lease documents for the same premises. Consider whether there are any unusual special conditions which should not be included in the new lease.
- ❑ Ensure special one-off terms contained in the original lease are not inadvertently drawn into further terms of the lease. Option clauses should specifically exclude the first term only conditions from future leases.
- ❑ Check any cross-referencing remains valid where a lease is amended.
- ❑ Ensure you receive specific instructions about the outgoings payable, make sure the lease expressly refers to the applicable outgoings and whether they are payable by the tenant or landlord.
- ❑ Get someone other than the person who drafted the lease to check that the figures convey the meaning intended by both parties as well as check the percentages and formulae.
- ❑ Ensure you obtain specific instructions from the client as to how the rent is to be determined and/or adjusted for each and every year of each and every term, not just the first term.

- ❑ Consider including a table in the schedule to the lease setting out the rent payable over the whole period of the lease.
- ❑ Highlight to the client any unusual rent provisions.
- ❑ Where the *Retail Leases Act 2003* (Vic) (the Retail Leases Act) applies:
    - in accordance with section 39, specify:
        - the outgoings that are recoverable
        - how the outgoings will be determined and apportioned (ensure the method is consistent with the Retail Leases Regulations 2013 (the Regulations))
        - how the outgoings are to be recovered.
    - make the lease definition of outgoings conform to the definition in the Act: section 3
    - exclude recovery of prohibited items such as undisclosed fit-out costs, capital costs, depreciation, contribution to sinking funds, interest on borrowings, head lease rents and land tax: sections 20, 41-45 and 50
    - adopt the correct method of apportionment by multiplying the total amount of the outgoing by the relevant fraction as set out in the Regulations: regulation 9
    - be conscious of the limitations on recovery of management fees: section 49
    - ensure the provisions concerning statements of estimated and actual outgoings conform to sections 46, 47 and 48
    - be aware that for premises located within shopping centres, operating expenses need to benefit a tenant's premises before the tenant may be required to contribute: section 40.

Refer to Appendix One for further details about retail leases.

3. DIRECTORS' GUARANTEES

Where a tenant is a company, directors' guarantees can protect the landlord's position so in the event of a default, the client can look further than a two-dollar company for recovery.

Claims concerning directors' guarantees occur when practitioners acting for landlords:

- fail to advise their client of the desirability of obtaining the guarantees
- forget to obtain the guarantees at all, having never prepared them
- prepare the guarantees, send them out to the tenant or the tenant's practitioners but never receive the executed guarantees back.
- sight the directors' signatures next to the company seal on the lease and believe that the guarantees have been executed
- overlook the need to obtain fresh guarantees on the exercise of an option under an existing lease.

THE LIV LEASE AND DIRECTORS' GUARANTEES

Clause 15.2.2 of the Law Institute of Victoria copyright lease states that the liability of the guarantor is not affected by the failure of any guarantor to sign 'this document'. This seems to be intended to address the situation where two or more persons are named as guarantor but not all of them sign, with the result that only those who do sign are liable.

The execution page states that the guarantor agrees to be bound by the guarantor's obligations set out in the lease. However, the execution page does not contain any sub-heading providing for execution by the guarantor. Provision must be made for execution by all named as guarantor.

It is essential that the guarantor sign specifically in his or her capacity as guarantor. Clause 15.2.2 would not render the guarantee enforceable against a guarantor who has not signed.

OUR RECOMMENDATIONS

When acting for the landlord leasing or assigning property to a company

- ❑ Advise about the need to obtain director's guarantees.
- ❑ Add directors guarantee clauses to your precedent lease.
- ❑ Add directors guarantees to your workflow checklists to ensure they are not overlooked.

4. LAND TAX

Section 50 of the Retail Leases Act prohibits the recovery of land tax from the tenant. However, claims can still arise involving non-retail leases, usually where the practitioner fails to determine the basis on which land tax is payable or communicate it to their client.

CLAIMS EXAMPLES:

Tenant's complaint

The lease provided that land tax was payable to the landlord but failed to provide it was payable on a single holding basis. The tenant's practitioner was either unaware that the wording meant land tax would be payable on a multiple holding basis or failed to draw the client's attention to liability for the tax on a multiple holding basis.

Landlord's complaint

The landlord complained it had not been advised about the basis upon which land tax was calculated when a new lease was granted. The lease provided for the land tax payable by the tenant to the landlord to be calculated on a single holding basis whereas the landlord claimed it wanted it to be calculated on a multiple holding basis.

LIV LEASE AND LAND TAX

Practitioners need to be aware that the Law Institute of Victoria copyright lease of real estate provides for land tax to be included as part of the outgoings paid by the tenant, calculated on a single holding basis unless the Retail Leases Act applies.

Land tax may be recovered by the landlord on retail leases that predate July 2003 but section 121(2) of the Retail Leases Act outlines the procedures to be complied with.

OUR RECOMMENDATIONS

When acting for the landlord

- ❑ If the Retail Leases Act applies advise the landlord at the outset that land tax can't be passed on to the tenant.
- ❑ If the Retail Leases Act does not apply:
  - ask the landlord whether the tenant will pay the land tax and whether it is on a single holding basis or a multiple holding basis
  - check the final lease to ensure the correct payment method is recorded.

When acting for the tenant

- ❑ If the Retail Leases Act does not apply advise the tenant of the basis on which they will be required to pay land tax.

5. OPTIONS

Missed and misunderstood dates for the tenant to exercise an option are another source of claims.

A missed opportunity to exercise an option can be an expensive oversight with major financial implications for a tenant forced to relocate its business.

FAILURE TO EXERCISE AN OPTION

These claims continue to occur mainly as a result of oversight or poor engagement management.

Typically, a lease requires the tenant to exercise an option for a further term in writing and within a specified period of time. Claims arise from a number of circumstances including when:

- the client telephones the practitioner shortly before the period expires for exercising the option and the practitioner either fails to act at all or fails to ensure the notice is dispatched within the required period
- the client claims not to have been advised of the cut-off date for exercising the option or the necessary steps to be taken
- the client alleges the practitioner undertook to contact the client for instructions prior to the option expiring but failed to do so
- the option is exercised but not in the manner prescribed by the lease.

CLAIMS EXAMPLE

Landlord's office moved

The lease required the current option be exercised in writing and sent to the registered office of the landlord. The landlord's registered office had changed and the firm sent the letter to the old address close to the deadline. The landlord subsequently declined to accept the late notice.

Notice to wrong party

The lease required the landlord be given the notice of intention to exercise the option but the firm sent the notice to the firm who acted for the landlord at the time the lease was entered into.

Sub-lease versus head lease

The sub-lease did not impose an obligation on the sub-lessor to exercise an option for the head lease thus rendering any option available to the sub-tenant useless.

CASE TO NOTE

Xiao v Perpetual Trustee Company Ltd & Anor [2008] VSC 412 relates to the notification provisions in section 28 of the Retail Leases Act.

The court interpreted section 28 (1) very strictly to require physical supply of the notice and 'evidence that it is actually provided and received'. In practical terms this is akin to personal service. If your landlord client chooses to put the issue of notification beyond doubt, they may opt to pay for the notice to be personally served.

A landlord does not have to give notice if the tenant has exercised or purported to exercise the option before receiving the notice.

In cases where there is no option to renew, section 64 of the Retail Leases Act requires that notice of the landlord's intentions concerning renewal be given **not more than 12 months nor less than six months** before the lease term ends:

- offering the tenant renewal on specified terms or
- informing the tenant that renewal will not be offered.

Failure to give notice has consequences similar to the consequences that flow from a failure to give notice under section 28 – that is, the term of the lease continues.

OUR RECOMMENDATION

- ❑ When sending the signed lease to the tenant, advise the tenant:
  - the time for exercising the option
  - the consequences of failing to exercise in time
  - that the practitioner accepts no responsibility for reminding the client to exercise the option in time and the tenant must set up its own internal reminder system.
- ❑ Where a client is exercising an option to renew a lease, obtain a fresh consent from the mortgagee.
- ❑ Where the Retail Leases Act applies, advise landlord clients of the obligation on the landlord to notify the tenant at least three months before the last date for the exercise of the option of the following matters:

- the last date for exercise of the option
- the rent payable for the first 12 months under any renewed term of the lease
- the availability of early rent review under section 28A for a tenant before they exercise an option for a further term
- the availability of a cooling off period under section 28B if the tenant has exercised an option to renew but has not requested an early rent review
- any changes to the most recent disclosure statement provided to the tenant.

- ❑ Inform any landlord client that the practitioner accepts no responsibility for reminding the client of the time to send any notice required to be sent by the landlord to the tenant. The landlord will need to set up its own internal reminder system and/or instruct the landlord's managing agent to perform this task. This could be included as a clause in the agreement appointing the managing agent.
- ❑ Check for any unusual clauses in the lease relating to options and advise the client accordingly.

Refer to part 7 and Appendix One for further details about retail leases.

6. DISCLOSURE OBLIGATIONS

Failure to comply with the disclosure requirements under the Retail Leases Act can result in material penalties for landlords the tenant having the right to terminate. Claims against practitioners acting for landlords arise where the formal disclosure requirements are not met. Practitioners acting for either landlord or tenant must be able to recognise when a landlord is in breach of the disclosure requirements in order to advise clients of the rights flowing from a possible breach.

CLAIMS EXAMPLE

Making assumptions

Assumptions were made by both parties that planning permission had been sought and granted for use of premises as a bar and restaurant with a liquor licence. On the disclosure statement the landlord confirmed it had obtained planning approval for any renovations, redevelopments or extensions of the building.

Nothing was disclosed about the liquor licence because it was assumed the tenant was taking care of this. The prospective tenant later argued that the disclosure about planning approval suggested approval had also been obtained for a 3am liquor licence.

In fact, neither party had obtained the licence and the parties had not clearly communicated with one another on the issue. This misunderstanding was generated by poor communication between the parties and gave rise to a dispute about the meaning of the disclosure about planning approval.

DISCLOSURE STATEMENTS

The Retail Leases Regulations 2013 commenced operation on 22 April 2013.

The regulations prescribe the use of four different disclosure statements.

- Schedule 1 is the form to be used where retail premises are not located in a shopping centre.
- Schedule 2 is the form to be used where retail premises are located in a shopping centre.
- Schedule 3 is the form to be used on renewal of lease.

- Schedule 4 is the form to be used where a lease is being assigned and where there is an ongoing business.

DISCLOSURE FOR NEW LEASES

A copy of the lease and a retail leases information brochure must be provided to the tenant at the start of the negotiations for a new retail lease (section 15). Failure to do so could attract 50 penalty units.

A disclosure statement and a copy of the retail lease including particulars of the tenant, the rent and the term must be given to the tenant at least 14 days before entering a new lease. The lease will not commence until 14 days after this documentation is provided (section 17(1) - 17(1C)). Failing to provide disclosure triggers the following steps:

- between 7 and 90 days after entering into the lease, the tenant may give written notice that no disclosure statement has been provided (section 17(2))
- having given the notice:
    - the tenant may withhold rent until a disclosure statement is provided (section 17(3))
    - no rent is attributable to the period before disclosure (section 17(3)
    - the tenant may terminate before expiration of 7 days after disclosure is given (section 17(3)).

Providing disclosure that is misleading, false or materially incomplete triggers the following steps:

- the tenant may terminate the lease until 28 days after the last to occur of disclosure, receipt of the copy lease or entry into the lease (section 17(5),(6))
- termination occurs 14 days after the notice of termination is served (section 18(1))
- within the 14 days, the landlord may challenge the termination (section 18(2)).

Guidelines – current market rent and engaging specialist retail valuers

The Victorian Small Business Commissioner has guidelines dated 1 July 2017 about current market rent and engaging specialist valuers.

DISCLOSURE FOR RENEWAL

Claims arise where the landlord of retail premises fails to provide disclosure within the prescribed time frame. Under the Retail Leases Act where an option to renew a lease is exercised the disclosure statement must be provided **at least 21 days** before the term ends. If there is no option to renew but an agreement has been reached to renew the lease the disclosure statement must be given **within 14 days** after the agreement to renew is reached: section 26(1). The disclosure statement must also set out any changes to the previous disclosure statement given to the tenant in respect of the lease (section 26(2)).

The prescribed form of disclosure statement for renewed leases is contained in schedule 3 of the Retail Leases Regulations 2013 (Vic).

The same penalty consequences apply if these provisions are breached as for new leases ((section 26(3)-(6)).

DISCLOSURE FOR ASSIGNMENTS

Claims occur involving retail lease assignments where the required disclosure statement is not given before the assignment.

As a result the outgoing tenant loses the benefit of section 62 of the Retail Leases Act, which relieves outgoing tenant and its guarantors of future liability for future amounts payable by the incoming tenant.

The assignor tenant must discharge various disclosure obligations under section 61(3) of the Retail Leases Act. This involves giving the proposed assignee a copy of the disclosure statement originally given to the tenant together with any changes to the relevant information the tenant ought to be made aware. This may involve requiring the landlord to provide an updated disclosure statement for this purpose: section 61(5).

If the assignment relates to premises to be used for an on-going business, the tenant must also give both the landlord and the proposed assignee a disclosure statement (section 61(5A)) as set out in schedule 4 of the Regulations.

Failure to comply with the disclosure obligations by the assignor not only means they lose the benefit of section 62, they can also attract a penalty of 10 penalty units (section 61(3)).

Failure to comply with the disclosure obligations by the landlord attracts a penalty of 10 penalty units and the tenant is not obliged to comply with section 61(3) (section 61(5)). No penalty provided but the assignor and guarantors would not be released from liability under s.62.

CLAIMS EXAMPLE:

Check the law

In another example a practitioner had included in the contract of sale of a business the disclosure statement the landlord gave his vendor client at the start of the lease, thinking that was sufficient disclosure for the incoming tenant. He had not provided the separate disclosure statement required for the assignment of the lease.

The new tenant ran the business badly and was behind on his rent and the landlord looked to the client to pay the rent.

CASE TO NOTE

Disputes sometimes arise after a lease is entered into about whether the Retail Leases Act applies.

In the case of *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor [2013] VSC 344*, the premises, the subject of the dispute, were located at 38-40 Brunswick Street Fitzroy.

The permitted use was as a 'Conference Centre, Café/Restaurant and associated office and storage space'. The tenant sought a declaration that the use was retail and covered by the Retail Leases Act. The landlord argued that the premises were not 'retail' as they were not open to the public as a whole.

The premises were used mainly for pre-booked conferences. The landlord also argued that the premises were not retail because the person who contracts with the tenant (ie the hirer) is not the 'ultimate consumer'. Justice Croft was satisfied the premises were retail as they were open to the public and because they were used by an entity other than the tenant.

More information

More information about retail leases can be found in Appendix One.

OUR RECOMMENDATIONS

When acting for a landlord

- ❑ Determine at the outset whether the Retail Leases Act applies to the leased premises
- ❑ Use an appropriate Retail Leases Checklist that references
    - provision of the information brochure and disclosure statement
    - provision of the disclosure statement and proposed lease (which must include particulars of the tenant, the rent and term of the lease) at least 14 days before entering the lease
    - checking the lease commencement date. A lease will not commence until 14 days after the disclosure statement and lease is provided to the tenant
    - giving written notice of any changes made to a lease previously provided to the tenant.
    - for leases with an option to renew, provision of a notice setting out:
        - the last date for the exercise of the option
        - the rent payable for the first 12 months under any renewed term
        - the availability of an early rent review process under section 28A
        - the availability of a cooling off period under section 28B if the tenant has exercised an option to renew but has not requested an early rent review
        - any changes made to the most recent disclosure statement previously provided to the tenant.
- ❑ Regularly review the disclosure obligations under the Retail Leases Act and the Retail Leases Regulations and ensure your disclosure statement precedents are current.

7. ASSIGNMENTS

There are many issues to consider when acting for a party involved in an assignment of a lease. Do the terms of the transfer or assignment of lease documents affect the existing lease? What disclosure obligations need to be met as part of the assignment? Who is liable to pay the landlord's and managing agent's costs in considering the assignment? When a lease is being assigned to a company are there guarantees from the assignee's directors?

These issues are also covered in the companion LPLC practice risk guide Small business – big risks

Claims have arisen where:

- the client was not fully informed about amendments made to the lease pursuant to the terms of the deed of assignment
- the deed of assignment was not properly executed
- the client was not informed about the difficulties of obtaining an assignment of lease where the existing tenant was in default
- the purchaser of a business was not advised of the risks of entering into possession without first obtaining an assignment of the lease of the premises. Sometimes, clients are so keen to enter into the business they are not prepared to wait for the assignment of a lease to be finalised as it seems to be a minor formality.

CLAIMS EXAMPLES

Business without a lease

The contract of sale was for chattels of the business and not the goodwill. Settlement was initially delayed because no assignment of lease was provided. The tenant's practitioner advised the client not to enter into possession of the business until an assignment of lease or a fresh lease was obtained. The practitioner did not confirm the advice in writing or keep file notes of the conversations.

The client insisted on entering into possession and the practitioner therefore prepared a management agreement. The client soon found that the business was not profitable and attempted to sell it. The client then blamed the practitioner because he was unable to sell the business without a lease.

Problems with the original lease

The purchase of a business was conditional on obtaining an assignment of a lease. There was a problem with the original lease that resulted in delays in obtaining the assignment. The delays were so long that the business was being run down. The client blamed the practitioner for not having picked up the problem with the original lease.

Variations not taken into account

Acting for a shopping centre tenant, the practitioner was involved in negotiating variations to the exclusivity and 'permitted use' terms of a retail lease following an argument with another tenant. The practitioner went on to act for the same tenant in an assignment of the lease but failed to disclose the variations. The practitioner had not searched or reviewed any related files for anything in the recent history of this lease relevant to the assignment.

Assignment amends the lease

In another claim, the practitioner acted for a new tenant in relation to an assignment of a lease. A clause was included in the assignment altering the relocation and demolition clause in the lease. The original lease provided that the tenant would be offered alternative premises in the event of a refurbishment. Pursuant to the assignment, this clause was amended so the lease could be terminated without an offer being made for alternative premises. The client alleged that he was not advised about the variation to this clause.

CASE TO NOTE

AAMR Hospitality Group Pty Ltd v Goodpar Pty Ltd [2009] VCAT 2782 considered Section 60 of the Retail Leases Act.

VCAT held that the words 'acting reasonably' were to be implied in section 60(1)(b) so when considering whether to consent to an assignment of a lease, the landlord must act 'reasonably'. See also *Nanjor Pty Ltd v Golden Pearl Holdings Pty Ltd (Retail Tenancies) [2014] VCAT 453*.

OUR RECOMMENDATIONS

When acting for the outgoing tenant

- ❑ Request the landlords' consent to an assignment: section 61(2).
- ❑ Provide the assignee with the disclosure statement previously given to the tenant and any changes the tenant should be aware of regarding the lease or request an updated version from the landlord: section 61(3).

- ❑ In the case of an ongoing business, also give the landlord and the proposed assignee the disclosure statement required by section 61(5A).
- ❑ Check for any unusual clauses in the lease or any previous deed of assignment restricting the right to assign.
- ❑ Confirm which party is to be responsible for the legal costs relating to the assignment and any managing agent's costs.

When acting for the incoming tenant:

- ❑ Explain to the client the consequences of settling on the purchase of a business without an assignment of lease.
- ❑ Carefully check the terms of the assignment and explain them to your client.
- ❑ Confirm which party is to be responsible for the legal costs relating to the assignment and any managing agent's costs.

When acting for the landlord

- ❑ Ensure any transfer/assignment of lease document properly protects the landlord and is executed by all parties.
- ❑ Where applicable alert the landlord to the need to obtain consent from any mortgagee.
- ❑ Confirm which party is to be responsible for the legal costs relating to the assignment and any managing agent's costs.

Refer to Appendix One for further details about retail leases.

8. MORTGAGEE'S CONSENT

Claims arising from the failure to obtain the mortgagee's consent appear to be linked to the economic cycle and tend to arise more frequently during economic downturns. The consequences are disastrous for a tenant client when the bank moves in to take possession of the premises, leaving the client with no premises and a business of little or no value.

Claims arise because some practitioners:

- are simply unaware of the need to get the mortgagee's consent. They have experienced no problems in the past because the economy was buoyant and the clients' landlords remained solvent
- accept the landlord's word that there is no mortgage when a title search would have revealed otherwise
- become distracted by other aspects of the transaction and, after initial communication with the mortgagee do not follow up the mortgagee for formal written consent
- wrongly assume that because the mortgagee is on notice of the client's impending tenancy, there is no need to obtain written consent
- are instructed on a limited basis by their client acquiring a business to do nothing more than peruse the lease or instruct the practitioner to negotiate terms of the lease.

THE LIV LEASE AND THE MORTGAGEE'S CONSENT

Clause 6.3 of the Law Institute of Victoria copyright lease of real estate provides that the landlord must give the tenant written consent to the lease from all relevant mortgagees. However, the clause can only be enforced after the lease has been entered into.

The clause is of little use to the tenant if the mortgagee refuses consent. The tenant client should be informed in order to fully protect its interests. The consent must be obtained before the tenant enters into the lease.

OUR RECOMMENDATIONS

When acting for a tenant

- ❑ Warn the tenant of **the need to obtain the landlord mortgagee's consent** before entering a new lease, an assignment or other dealing affecting the lease.
- ❑ When acting on a renewal of lease consider whether there has been an **alteration to the terms** of the lease requiring a fresh consent from the mortgagee. If so, ensure this is obtained.
- ❑ Carefully check whether there are any qualifications contained in the form of consent such as consent may only be operative as long as the tenant is not in default under the lease.
- ❑ Consider if an amendment to the form of consent is necessary to properly protect the tenant.
- ❑ Where the mortgagee refuses to provide formal written consent before the lease is executed, practitioners should ask for a 'specimen of consent' – a draft or proposed consent the mortgagee intends to give. This allows the proposed tenant to see the terms of the consent and puts the mortgagee on notice of the proposed tenant's interest.

9. RE-ENTRY ISSUES

When a tenant breaches a lease, the landlord is usually entitled to serve a notice of default on the tenant and subject to the terms of the lease a landlord may be entitled to re-enter the premises and terminate the lease (Section 146 of the *Property Law Act 1958* (Vic)). Claims have arisen where a notice of re-entry has not been properly served.

CLAIM EXAMPLE:

Improper service

A notice of re-entry was served on the tenant at the address of the tenant as shown in the schedule to the lease. The lease required notices to be served on the tenant's registered office.

The address of the tenant as specified in the lease was not the tenant's registered address. The tenant argued that the re-entry was invalid due to the failure to properly serve the notice of re-entry in accordance with the terms of the lease.

THE LIV LEASE AND RE-ENTRY NOTICES

Clause 7 of the Law Institute of Victoria copyright lease of real estate sets out the process to be followed where an event of default occurs. For unpaid rent, a landlord cannot re-enter unless the rent is unpaid for 14 days after becoming due for payment. The effect of this clause is that the landlord cannot re-enter the

premises in reliance on section 146(12) of the *Property Law Act 1958* but must wait until the 14 days have expired.

OUR RECOMMENDATION

- ❑ Take care when preparing and serving a notice of default and/or re-entry to ensure strict compliance with the requirements as set out in the lease and any applicable statutory requirements, for example sections 146 and 198 of the *Property Law Act 1958*.

10. PPS ACT

The *Personal Property Securities Act 2009* (Cwlth) (PPS Act) regulates a single national register of security interests for personal property and a rule-based system to determine priorities between competing security interests.

Landlords and tenants will often have personal property security interests that should be registered to protect those interests. Practitioners acting for a landlords should advise their clients about registering security interests where:

- ❑ the tenant pays a cash security deposit that is held in a real estate's agents account or a separate account in the landlord's name
- ❑ the tenant leases personal property such as plant and equipment
- ❑ the landlord pays for the fit-out and retains ownership of it.

Practitioners acting for tenants should advise them about any PPS clauses in the lease and whether they affect other financing arrangements the tenant has in place. At the end of the lease the practitioner should advise about ensuring any security interests registered by the landlord over the tenant's property are released.

For more information see:

- ❑ LPLC Bulletin Personal Property Securities Act 2009 (Cwlth) – background and key concepts
- ❑ LPLC bulletin Land leases and the PPS Act.
- ❑ Key Risk Checklist: Personal Property Securities Act 2009 – practice management
- ❑ PPSA claims and changes
- ❑ Video of Nick Anson's seminar.

11. LPLC TENANT'S PRACTITIONER CHECKLIST

This is not a comprehensive checklist but working through it will help you avoid the most common mistakes made in lease transactions.

Preliminary

- ❑ Search the title to check the landlord's name and see whether the property **is mortgaged**.
- ❑ Where the tenant or landlord is a company, conduct a company search to check the company is registered, its correct name and the **identity of all directors**.

- ❑ **Exchange letters** between the parties confirming what has been agreed. Let your client confirm the contents before sending.
- ❑ Consider whether the premises are **retail premises** as defined by the *Retail Leases Act 2003* (Vic).
- ❑ Consider whether the intended use is permitted or prohibited under the relevant planning scheme.
- ❑ Advise the tenant that they need to consider what due diligence they will undertake. For example, that the tenant needs to ascertain what permits and/or consents are required for their intended use.

Mortgagee's consent

- ❑ Warn the tenant of **the need to obtain the landlord mortgagee's consent** before entering a new lease, an assignment or other dealing affecting the lease.
- ❑ When acting on a renewal of lease consider whether there has been an **alteration to the terms** of the lease requiring a fresh consent from the mortgagee. If so, ensure this is obtained.
- ❑ Carefully check whether there are any qualifications contained in the form of consent such as consent may only be operative as long as the tenant is not in default under the lease.
- ❑ Consider if an amendment to the form of consent is necessary to properly protect the tenant.
- ❑ Where the mortgagee refuses to provide formal written consent before the lease is executed, ask for a 'specimen of consent' – a draft or proposed consent the mortgagee intends to give. This allows the proposed tenant to see the terms of the consent and puts the mortgagee on notice of the proposed tenant's interest.

Assignments - When acting for the incoming tenant:

- ❑ If acting in a purchase of business, make it a requirement of the purchase that an **assignment of lease** has been obtained before the tenant client enters possession.
- ❑ Advise a tenant client in writing of the risks of taking possession without an assignment of lease.
- ❑ Carefully check the terms of the assignment and explain them to your client.
- ❑ Confirm which party is to be responsible for the legal costs relating to the assignment and any managing agent's costs.

Assignments - When acting for the outgoing tenant

- ❑ Provide the assignee with the disclosure statement previously given to the tenant and any changes the tenant should be aware of regarding the lease or request an updated version from the landlord: section 61(3).
- ❑ In the case of an ongoing business, also give the landlord and the proposed assignee the disclosure statement required by section 61(5A).
- ❑ Check for any unusual clauses in the lease or any previous deed of assignment restricting the right to assign.
- ❑ Confirm which party is to be responsible for the legal costs relating to the assignment and any managing agent's costs.

General

- ❑ In non-retail leases check whether the **land tax** is recoverable from the tenant and if so, on what basis it is going to be calculated. Usually this on a single holding basis.
- ❑ Check the liability for **all outgoings** has been accounted for. Have owners corporation charges been dealt with?
- ❑ Ensure you obtain specific instructions from the client as to how the rent is to be determined and/or adjusted for each and every year of each and every term, not just the first term.
- ❑ Highlight to the client any unusual rent provisions.
- ❑ Include **appropriate** GST provisions, that:
    - entitle the tenant to a tax invoice at the time of payment
    - make the GST treatment reciprocal.
- ❑ Check the version of the **lease to be executed** reflects the agreed terms and the client's instructions.
- ❑ Advise the tenant client in writing of the need to **exercise any options** and exactly how to go about it. Ensure the tenant client is aware you will not be responsible for reminding the client of the time for exercise.
- ❑ Document all attendances and meetings with your client and others.

  Your file notes should:
    - be dated
    - identify the author
    - record the duration of the attendance

- record who was present or on the telephone
- be legible to you and someone else
- record the substance of advice given and the client's response/ instructions
- be a note to the file rather than a note to self.

If the Retail Leases Act 2003 (Vic) applies

- ❑ Check that a copy of the lease and **information brochure** has been provided to your client as the prospective tenant.
- ❑ Check an adequate disclosure statement been provided?
- ❑ Check that the disclosure statement and a copy of the lease containing details of the tenant, the proposed rent and term of the lease were provided to your client at least 14 days before the start of the lease. The lease will not commence until 14 days after this documentation is provided.
- ❑ Check that your client has been provided with details of any changes made to the previous copy of the lease given to them.
- ❑ Do the provisions concerning statements of estimated and actual outgoings conform to the Act?
- ❑ Do the following provisions conform to the Act?
  - abatement
  - termination
  - rent review.
- ❑ Check the liability for all **outgoings** has been accounted for.
  - Does the lease definition conform to the Act?
  - Have prohibited items been excluded?
  - Has the correct method of apportionment been adopted?
  - Do the landlord's repair obligations conform to the Act?
  - Do the relocation and other interferences provisions comply with the Act?
- ❑ Check that **refurbishment and re-fitting provisions** specify the nature, extent and timing.
- ❑ For leases which provide an option to renew, advise tenant clients as to:
  - the availability of early rent reviews under section 28A; and
  - cooling off rights available under section 28B where the tenant has exercised an option to renew a lease but has not requested an early rent review.

12. LPLC LANDLORD'S PRACTITIONER CHECKLIST

This is not a comprehensive checklist but working through it will help you avoid the most common mistakes made in lease transactions.

Preliminary

- ❑ Search the title to check the landlord's name and see whether the property **is mortgaged**.
- ❑ Where the landlord or tenant is a company, conduct a company search to check the company is registered, its correct name and the **identity of all directors**.
- ❑ **Exchange letters** between the parties confirming what has been agreed. Let your client confirm the contents before sending.

- ❑ Consider whether the premises are **retail premises** as defined by the *Retail Leases Act 2003* (Vic).

The Lease

- ❑ Consider the need to attach a plan to the lease identifying the premises and any accessory lots such as car spaces.
- ❑ Have the client confirm the area of the premises and compare this to the area on any plan.
- ❑ Double check any plan to ensure the correct plan has been attached to the lease. This should be done as close to the execution of the lease as possible.
- ❑ Be careful when using precedent lease documents, lease documents from other files or previous lease documents for the same premises. Consider whether there are any unusual special conditions which should not be included in the new lease.
- ❑ Ensure special one-off terms contained in the original lease are not inadvertently drawn into further terms of the lease. Option clauses should specifically exclude the first term only conditions from future leases.
- ❑ Check any cross-referencing remains valid where a lease is amended.
- ❑ Get someone other than the person who drafted the lease to check that the figures convey the meaning intended by both parties as well as check the percentages and formulae.

Rent

- ❑ Ensure you obtain specific instructions from the client as to how the rent is to be determined and/or adjusted for each and every year of each and every term, not just the first term.
- ❑ Consider including a table in the schedule to the lease setting out the rent payable over the whole period of the lease.
- ❑ Ensure the method of **rent review** is clear and unambiguous, including who may trigger it.
    - Is the date of review clear?
    - Does it make sense, taking into account option periods?
    - Have test calculations been run through the rent review formula?
- ❑ If the Retail Leases Act applies, do the rent review provisions comply with the Act?

Outgoings and land tax

- ❑ Ensure you receive specific instructions about the outgoings payable, make sure the lease expressly refers to the applicable outgoings and whether they are payable by the tenant or landlord.
- ❑ Check the liability for **all outgoings** has been accounted for. Have owners corporation charges been dealt with?
- ❑ Where the *Retail Leases Act 2003* (Vic) (the Retail Leases Act) applies:
    - in accordance with section 39, specify:
        - the outgoings that are recoverable
        - how the outgoings will be determined and apportioned (ensure the method is consistent with the Retail Leases Regulations 2013 (the Regulations))
        - how the outgoings are to be recovered.
    - make the lease definition of outgoings conform to the definition in the Act: section 3

- exclude recovery of prohibited items such as undisclosed fit-out costs, capital costs, depreciation, contribution to sinking funds, interest on borrowings, head lease rents and land tax: sections 20, 41-45 and 50
- adopt the correct method of apportionment by multiplying the total amount of the outgoing by the relevant fraction as set out in the Regulations: regulation 9
- be conscious of the limitations on recovery of management fees: section 49
- ensure the provisions concerning statements of estimated and actual outgoings conform to sections 46, 47 and 48
- be aware that for premises located within shopping centres, operating expenses need to benefit a tenant's premises before the tenant may be required to contribute: section 40

❑ In non-retail leases check whether the **land tax** is recoverable from the tenant and if so, on what basis it is going to be calculated. Usually this is on a single holding basis.

Other Retail Lease Act requirements

❑ Do the following provisions conform to the Act?

- landlord's **repair obligations**
- **relocation** and other interferences provisions
- **abatement**
- **termination**

❑ Check that **refurbishment and re-fitting provisions** specify the nature, extent and timing.

Directors guarantees

❑ Advise the landlord client to obtain **directors' guarantees** where the tenant is a company.

❑ Check the guarantees have been **properly executed.**

❑ When acting on a renewal of lease consider whether there has been an **alteration to the terms** of the lease requiring a fresh consent from the mortgagee or fresh guarantees from the directors of the tenant company.

GST

❑ Include **appropriate** GST provisions.

- State whether the consideration is inclusive or exclusive of GST.
- Pass on the GST (if consideration is GST-exclusive) to the tenant.
- Prevent the charging of GST component of outgoings.

General

❑ Check the version of the **lease to be executed** reflects the agreed terms and the client's instructions.

❑ Send a copy of the signed lease to the tenant

❑ Document all attendances and meetings with your client and others.

Your file notes should:

- be dated

- identify the author
- record the duration of the attendance
- record who was present or on the telephone
- be legible to you and someone else
- record the substance of advice given and the client's response/ instructions
- be a note to the file rather than a note to self.

Security deposits

- ❑ If a security deposit or **bank guarantee** is to be provided, diarise to obtain it within the time specified in the lease
- ❑ Check that any security deposit has been lodged in an interest-bearing account.
- ❑ For Retail Lease Act leases, be aware of the landlord's obligation to return security deposits within 30 days of the end of the lease if the tenant has performed their obligations under the lease.

Options

- ❑ Advise the landlord client in writing of the need to notify the tenant of the **last date for exercising the option** or the landlord's intentions where there is no option. Ensure the landlord client is aware you will not be responsible for reminding the client of the time to serve the notice.
- ❑ For Retail Act leases containing an option to renew, advise your landlord client of the landlord's obligation to provide tenants with a written notice setting out the following information at least 3 months before the last date for exercising the option:
    - the last date for the exercise of an option to renew
    - the rent payable for the first 12 months under any renewed term of the lease
    - the availability of an early rent review under section 28A
    - the availability of a cooling off period under section 28B if the tenant has exercised an option to renew but has not requested an early rent review
    - any changes to the most recent disclosure statement provided to the tenant.

Disclosure for new Retail Leases Act leases

- ❑ Check that a copy of the lease and **information brochure** has been provided to the prospective tenant.
- ❑ Check that the disclosure statement and copy of the lease including particulars of the tenant, the rent and term were provided to the tenant at least 14 days before commencement of the lease.
- ❑ Check the lease commencement date as prescribed under the Retail Leases Act. Irrespective of the date stipulated in the lease, the lease will commence 14 days after the proposed lease and disclosure statement has been provided to the tenant (section 17 (1C)).
- ❑ Has the correct disclosure statement been provided?
    - Schedule 1 is the form to be used where retail premises are not located in a shopping centre.
    - Schedule 2 is the form to be used where retail premises are located in a shopping centre.
    - Schedule 3 is the form to be used on renewal of lease.

- Schedule 4 is the form to be used where a lease is being assigned and where there is an ongoing business.

Disclosure for renewal of Retail Leases Act leases

- ❑ Check that the disclosure statement provided to a tenant on renewal of a retail lease sets out any changes made to the previous disclosure statement provided to the tenant.

Default and re-entry

- ❑ Take care when preparing and serving a notice of default and/or re-entry to ensure strict compliance with the requirements as set out in the lease and any applicable statutory requirements, for example sections 146 and 198 of the *Property Law Act 1958*.
- ❑ Ensure any **notice to quit** is either dated and served the same day or undated with the time in which to vacate calculated from the date of service.

13. APPENDIX ONE – RETAIL LEASES

APPLICATION OF THE RETAIL LEASES ACT 2003 (VIC)

Practitioners need to be aware of the circumstances in which the *Retail Leases Act 2003* (Vic) (the Act) applies and the consequences of non-compliance. For example, if a lease falls short of the five-year minimum term, it is extended by virtue of section 21. If the landlord does not comply with the disclosure requirements, this gives the tenant the right to terminate.

The Act applies to retail premises leases entered into or renewed after the Act commenced: 1 May 2003.

Retail premises with occupancy costs equal to an amount prescribed by regulation ($1million per annum) are exempt. Occupancy costs are defined in section 4(3).

How occupancy costs are calculated was considered in *William Buck (Vic) Pty Ltd v Motta Holdings Pty Ltd* [2018] VCAT 15. It was determined that GST was included as part of the calculation of occupancy costs. This meant the lease fell outside the operation of the Retail Leases Act. If the amount was GST exclusive the lease would have been caught.

The application of the Act is no longer governed by size of floor area.

Retail premises used only for the provision of services are not subject to the Act if the premises are wholly or partly on the fourth or higher storey of a building (excluding any basement levels) which is not in a retail shopping centre (Minister's determination 29 April 2003).

Premises leased for 15 years or more where the lease requires the tenant to build or maintain the structure or plant and equipment and disentitles the tenant from removing them, are excluded from the Act (Minister's determination 20 August 2004).

Franchises are no longer exempt.

An exemption applies to listed corporations and their subsidiaries.

There are a total of seven ministerial determinations exempting certain leases from the application of this Act (including Barristers' Chambers Ltd, leases by councils to not-for profit bodies and leases at Melbourne Markets). All of the determinations can be found on the Small Business Commissioner website.

MINIMUM TERM: SECTION 21

Leases must have a minimum five-year term (taking into account any options) unless at the tenant's request, the Small Business Commissioner certifies that an explanation has been given to the tenant and the tenant waives the application of the relevant section by delivering a copy of the certificate to the landlord.

The extension operates in relation to the initial term only and does not alter any option for renewal. For example, a lease for a term of two years with an optional further term of two years would see the initial term changed to three years so as to provide the total minimum term of five years (taking into account the two-year option).

SECURITY DEPOSITS: SECTION 24

Security deposits must be lodged by the landlord in an interest-bearing account on behalf of the tenant. Interest is added to the security deposit and the landlord must give the tenant details of accrued interest. The tenant will be liable for tax on the interest.

Landlords must return security deposits within 30 days of the end of the lease if the tenant performs all of the tenant's obligations under the lease.

FIT-OUT

Certain requirements apply whenever a tenant is required to pay or contribute to the cost of alterations connected with fit-out and the requirements are designed to set a limit on recovery: section 30.

Until a landlord's fit-out is completed, rent and outgoings are not payable: section 31.

A special rent may be charged to cover the landlord's costs of fitting out: section 32.

Repair (section 52)

The landlord is under a specific obligation to repair.

INTERFERENCES WITH TENANCY

The tenant is required to give notice of the loss or damage associated with an interference with the tenancy but this is not a pre-condition to an entitlement to compensation for interference: section 54.

At least **60 days'** notice of refurbishment works which might adversely affect the premises must be given: section 53.

Relocation provisions deal with clauses providing for termination accompanied by the offer of new premises and also the question of rent for the alternative premises: section 55.

There is a two-level compensation regime where a tenant is required to vacate premises intended for demolition, which depends on whether the demolition is carried out: section 56.

An abatement and termination regime applies relating to damaged premises: section 57.

Refurbishment and re-fitting provisions are void unless they give details of the nature, extent and timing of the work to be carried out by the tenant: section 58.

RETAIL TENANCY DISPUTES (PART 10)

Part 10 deals with disputes.

Generally, (ie. except for injunctions) you cannot issue in VCAT unless the Small Business Commissioner certifies that mediation (or another form of ADR) has failed or is unlikely to resolve the dispute. VCAT is given the same jurisdiction as the Supreme Court to provide relief from forfeiture. Parties must bear their own costs in VCAT except where the proceeding is vexatious, a party has conducted the proceeding in a way that unnecessarily disadvantaged the other or refused to take part in mediation.

ESSENTIAL SAFETY MEASURES

Recovery of essential safety measure costs incurred prior to 23 September 2020

For costs of essential safety measures incurred in retail lease arrangements prior to the enactment of the *Retail Leases Act Amendment Act 2020 on* 23 September 2020 an Advisory Opinion on Essential Safety Measures handed down by VCAT on 1 May 2015 sets out who should pay for essential safety measures in retail lease arrangements. In summary:

- a landlord must bear the cost of compliance with essential safety measure obligations, and cannot pass these costs on to the tenant
- for some obligations, the landlord may agree with the tenant for the tenant to meet the requirements, but at the landlord's expense
- more generally, the landlord cannot pass on to the tenant as outgoings the cost of complying with certain repair and maintenance obligations under the Retail Leases Act.

Recovery of essential safety measure costs incurred on or from 23 September 2020

By agreement in the lease, a landlord can pass on to the tenant as outgoings, the cost, or part of the cost of repairing and maintaining essential safety measures, and the cost of installing essential safety measures as part of a fit-out incurred in retail lease arrangements. See sections 41(2) and 122.

A landlord and tenant can also agree for the tenant to carry out repairs and maintenance works in respect of an essential safety measure (section 52(6)). However, the landlord as building owner remains responsible for compliance with any obligations under the Building Act 1993 and regulations under that Act in respect of essential safety measures (section 52 (7)).

MINISTERIAL DETERMINATIONS

The Minister for Small Business has determined some property to be not retail premises. These include:

- Determination 29 October 2019 - farming land
- Determination 6 October 2014 – a range of premises used for the purposes of public, municipal, educational, sporting, religious or war veteran activities.

LEGAL
PRACTITIONERS'
LIABILITY
COMMITTEE