



Government of Western Australia
Department of Commerce
Consumer Protection

CONSUMER PROTECTION TENANT GUIDE - FORM 4 FOR NEW RETAIL SHOP LEASES FROM 1 JANUARY 2013



Commercial Tenancy (Retail Shops) Agreements Act 1985
Section 6A[r. 9]
TENANT GUIDE – FORM 4
FOR NEW RETAIL SHOP LEASES FROM 1 JANUARY 2013

Consumer Protection
Forrest Centre 219 St Georges Terrace
Perth Western Australia 6000 (hours 8.30am - 5.00pm)
Advice Line: 1300 30 40 54
(cost of a local call)
National Relay Service: 13 36 77
(for the hearing impaired)
www.commerce.wa.gov.au/consumerprotection
Email: consumer@commerce.wa.gov.au
This publication is available upon request in other formats to assist people with special needs.

Contents

WHAT IS A RETAIL SHOP LEASE? 4

- Which leases are covered by the Act? 4
- When is the lease ‘entered into’? 4

INFORMATION YOU SHOULD HAVE BEFORE ENTERING INTO A LEASE 4

- Tenant Guide to be located in lease..... 5
- Disclosure statement to be given to you by landlord 5
- Disclosure by the tenant 5

PERMITTED USE OF THE RETAIL SHOP..... 5

TERM OF THE RETAIL SHOP LEASE..... 6

- Minimum of five years 6
- The term can be longer or shorter than five years 6
- Exercising an option to renew 6
- At the end of the lease term..... 6
- Does the lease include redevelopment or relocation clauses? 7

RENT 7

- Types of rent 7
- Rent based on turnover 7

RENT REVIEW 8

- Market rent..... 8
- Market rent review 8
- No ‘ratchet’ clauses 8

CONTRIBUTION TO THE LANDLORD’S OPERATING EXPENSES OR OUTGOINGS 8

- No capital expenses or management fees 8
- Operating expenses are not to exceed the ‘relevant proportion’ 9
- Referable expenses 9
- Landlord to provide estimates and statements for operating expenses..... 9

SINKING FUNDS..... 9

OTHER FUNDS AND RESERVES..... 9

FITOUT AND REFURBISHMENT 9

LEGAL FEES 10

TRADING HOURS 10

- When do you have to open your shop?..... 10
- Standard trading hours and operating expenses 10

VOID CLAUSES 10

DISRUPTIONS — COMPENSATION BY THE LANDLORD 11

UNCONSCIONABLE CONDUCT AND MISLEADING AND DECEPTIVE CONDUCT 11

ASSIGNMENT AND SUB LEASING..... 11

- Your responsibilities if you assign your lease 11
- Your responsibilities if you sub lease your shop 11

DEFAULT OR BREACH OF LEASE 12

DISPUTES BETWEEN THE TENANT AND LANDLORD 12

- State Administrative Tribunal..... 12
- Small Business Commissioner..... 12

KEEP RECORDS..... 12

This guide is intended to assist you, as a tenant, to understand some of your legal rights and obligations in relation to a retail shop lease under the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (the **Act**). This guide does not replace financial, legal or business advice.

The Act and the regulations are available from the State Law Publisher at www.slp.wa.gov.au

WHAT IS A RETAIL SHOP LEASE?

Entering into a lease for a retail shop means that you (the tenant or lessee) are entering into a legally binding contract with the landlord (or lessor). The lease agreement sets out your rights and obligations in relation to the use of the retail shop.

A lease cannot override the requirements of the Act.

The Act regulates some of the provisions which may be contained in your lease agreement, including the following:

- rent reviews;
- options to renew a lease;
- terminating a lease;
- operating expenses (or outgoings); and
- trading hours.

Which leases are covered by the Act?

The Act generally applies to leases for premises with a lettable area of 1 000 m² or less:

- that are used for carrying on a business and that are in a retail shopping centre;
- that are not in a retail shopping centre, but that are used (or predominantly used) for the sale of goods by retail; or
- that are used for conducting a 'specified business' — specified businesses include, drycleaning, hairdressing, beauty therapy, shoe repair and video or DVD stores (a list of all specified businesses is available from the Department of Commerce at www.commerce.wa.gov.au).

There are some retail shops with a lettable area greater than 1 000 m² that are also covered by the Act — a list of these premises can be obtained from the Department of Commerce at www.commerce.wa.gov.au

The Act generally does not apply to leases to publicly listed companies.

(See section 3(1) of the Act, definition of retail shop lease).

When is the lease 'entered into'?

A lease is usually entered into when both parties have signed it. However, a lease is still valid even

if the lease document hasn't been signed by the parties if:

- the tenant takes possession of the shop premises; or
- the tenant starts paying rent.

(See section 3(4) of the Act).

What you should do:

- If necessary, seek advice as to whether your lease is covered by the Act.
- Establish the area of the retail shop under the lease and have this verified if necessary.

INFORMATION YOU SHOULD HAVE BEFORE ENTERING INTO A LEASE

Before entering into a lease you should do the following:

- carefully read this **tenant guide**;
- carefully read the **disclosure statement** provided by the landlord or the landlord's agent;
- carefully read any **written lease document (including any assignments, extensions or deeds of variation)**; and
- obtain **independent financial, legal and business advice**.

Rent, the term of the lease, options, outgoings and related costs are open to negotiation with the landlord. Make sure that you understand these, and all other aspects of the lease, before signing it. To avoid disputes at a later stage, you should make sure that all agreements that you have made are in writing and that the lease documents are consistent with any representations made by the landlord or the landlord's agents.

What you should do before signing or entering into a lease:

- Seek independent legal and business advice before entering into a lease.
- Make sure you understand the lease and your rights, liabilities and obligations before signing it.
- Seek advice from financial experts to ensure you understand the costs of running the business.

Tenant Guide to be located in lease

A new retail shop lease must include this tenant guide at the front of the lease.

If the landlord does not give you a tenant guide, you may have the right to do either or both of the following:

- terminate (end) the lease at any time up to 60 days after the lease was entered into (after this time you may apply to the State Administrative Tribunal for an order to terminate the lease); and
- apply to the State Administrative Tribunal for an order for compensation for any monetary loss suffered by you.

(See section 6A of the Act).

Disclosure statement to be given to you by landlord

At least seven days before a lease is entered into the landlord must give you a disclosure statement. The disclosure statement sets out important facts about the retail shop and the lease. A copy of this tenant guide, the form of lease and annual estimates of expenditure in relation to operating expenses should be attached to the disclosure statement.

If the landlord does not give you a disclosure statement or gives you a disclosure statement that is incomplete or contains incorrect information you may have the right to do either or both of the following:

- terminate (end) the lease at any time up to six months after the lease was entered into; and
- apply to the State Administrative Tribunal for an order for compensation for any monetary loss you have suffered.

The disclosure statement should be in a prescribed form (this form is Form 1 of Schedule 2 to the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* and is available from the Department of Commerce at www.commerce.wa.gov.au). It is important to read the statement carefully and make sure it includes all verbal and written agreements, promises or commitments made during negotiations with the landlord or the landlord's agent (for example, any representations about customer traffic).

The disclosure statement should also contain details about the following:

- the landlord's property, such as the total lettable area, tenancy mix and services provided;
- the shop premises, such as location, area and services provided;
- key terms and conditions of the lease such as rent, term of the lease, options to extend the term and rent review;

- permitted use of the premises;
- your contribution to the landlord's expenses (operating expenses); and
- any additional charges payable by you, such as shop fitout or contributions to marketing and sinking funds.

By signing the disclosure statement you are acknowledging that you understand the basis for the retail shop lease with the landlord. If you do not understand or agree with anything in the disclosure statement you should advise the landlord immediately.

It is vital that you are satisfied that the disclosure statement sets out all relevant information regarding the retail shop and (where applicable) the shopping centre building and property. If necessary, you should check details by making relevant enquiries and by seeking appropriate independent legal or expert advice.

(See section 6 of the Act).

What you should do:

- Make sure that you understand the disclosure statement before signing it and ensure it includes any agreements you reached during negotiations and any promises made to you by the landlord or their agent.

Disclosure by the tenant

The landlord may ask for details of your retailing experience and financial capacity to establish and trade profitably and professionally. Any information provided to the landlord by you must also be correct and contain no misleading information.

PERMITTED USE OF THE RETAIL SHOP

The permitted use clause in a lease is very important as it sets out the type of business that you can run from the premises. You should ensure that the description of permitted use is broad enough to cover the type of business that you want to operate and, if anticipated, to allow you to expand the business.

The kind of things to consider about permitted use include:

- for a hairdresser, does the permitted use include providing beauty treatments?
- for a takeaway shop, can the type of food be changed?
- your future plans for the business.

You should also check that any local government approvals are in place for the type of business that you plan to operate. Avoid potential disputes by getting the approvals you need in writing.

A permitted use clause in a lease does not mean that you have the exclusive right to carry on a particular type of business in a shopping centre. Exclusivity is a separate issue that needs to be agreed separately with the landlord and included in the lease agreement.

What you should do:

- Make sure the lease and the landlord's disclosure statement describe the shop's permitted use and that this description is broad enough so you can expand or sell the business.
- Check that local government approvals are in place for the business you plan to conduct — get the approvals in writing.
- Confirm whether or not you have an exclusive right to carry on your particular type of business.

TERM OF THE RETAIL SHOP LEASE

The term of a lease is the length of time for which you can rent the shop. The lease must set out the lease term and may also include one or more options to renew or extend the term.

The length of the term of the lease is critical because it should be long enough to enable you to recover your investment, make a profit and sell the business, if you wish.

Minimum of five years

In most cases, the Act gives a tenant who is entering into a new lease a right to a minimum five year lease term. The five year term can be a combination of the initial term and options to extend the lease (for example, an initial term of 2 years and an option to renew of 3 years). The initial term does not need to be five years.

If the lease does not provide for options to extend the lease to a five year term, you have a legal right to do so (often called a 'statutory option'). You can exercise this option by giving the landlord written notice in the standard form at least 30 days prior to the expiry of the term of the lease (the standard form is Form 3 of Schedule 2 to the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* and is available from the Department of Commerce at www.commerce.wa.gov.au). Although the Act allows you to extend the lease to a five year term, you do not need to extend the lease for the whole of this period if you choose not to.

The right to a five year term will only apply to retail shop leases with a term of more than 6 months (this includes any lease where the tenant has been continuously in possession of the premises for more than 6 months).

(See section 13 of the Act).

The term can be longer or shorter than five years

Even though the Act gives tenants a right to a minimum five year term, you can negotiate a term that is longer than five years (for example, a 10 year term, or a five year initial term with two options to renew for a further five years each).

In some circumstances, you may agree to a term shorter than five years, but this must be your decision and needs to be approved by the State Administrative Tribunal.

(See section 13(7b) of the Act).

Exercising an option to renew

It is important that you exercise an option to renew a lease in the way set out in the lease (you may need to let the landlord know in writing and within certain timeframes). If you do not exercise an option to renew properly the landlord may not be obliged to renew the lease.

The Act requires the landlord to give you written notice of the expiry date for any options to renew (the date on which the option to renew is no longer valid). You must receive this notice between 6 and 12 months before the expiry date. If the landlord fails to give you notice the option expiry date may be extended.

(See section 13C of the Act).

At the end of the lease term

At the end of the term of the lease and the use of any options to renew the lease, the landlord does not have to renew the lease and you will have no further rights to occupy the premises. In some instances the landlord may allow you to continue to occupy the premises on a month to month basis.

Within 12 months before the end of the lease term you can make a written request to the landlord asking whether the landlord intends to renew the lease. The landlord must reply to such a request in writing within 30 days.

(See section 13B of the Act).

What you should do:

- Seek advice as to the appropriate lease term for your business.
- Don't assume that you will get a new lease at the end of the lease term — you need to make sure that the term of your lease is appropriate for your business structure.
- Seek advice as to the landlord's intentions at the end of the lease term as early as possible so that you can plan accordingly.

Does the lease include redevelopment or relocation clauses?

Many leases include a clause allowing a landlord to terminate a lease before the end of the agreed lease term if the premises are to be redeveloped. In some instances the landlord may offer to relocate a tenant to alternative premises.

For the initial five years of a lease term, a redevelopment or relocation clause may only be included in a lease if:

- it is in the prescribed form (see item 2 of Schedule 1 to the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* and is available from the Department of Commerce at www.commerce.wa.gov.au); or
- it has been approved by the State Administrative Tribunal (if the parties have agreed to a provision that is different to the prescribed form).

If five years of the term have already expired, then the clause must be in accordance with the provisions of the Act — which sets out requirements in relation to notice, offer of alternative premises, payment of the tenant's reasonable costs and payment of compensation.

(See section 14A of the Act).

What you should do:

- Carefully look at any redevelopment or relocation clause in the lease and consider:
 - > what commitment is the landlord giving about relocation of the shop – will the new location and rental be comparable to the current premises?
 - > what compensation is the landlord offering you if your trade is affected?
 - > what effect will it have on your business?
- Seek independent financial, legal and business advice on the clause.

RENT

Rent is usually the largest ongoing payment required under a lease. The Act does not regulate what the rent should be. However, the Act includes some rules relating to rent based on turnover and review of rental.

Types of rent

The initial rent for a shop is a matter for negotiation between the landlord and the tenant. Rental for retail shops can vary considerably depending on the

location, the size of the shop, the term of the lease and the type of business.

Some common methods of determining rent are:

- net rent — an agreed base rent plus a contribution to the landlord's operating expenses or outgoings;
- gross rent — an all inclusive payment for all the shop's occupancy costs;
- semi gross rent — an amount charged for rental inclusive of some outgoings (for example, the tenant may pay the semi gross rent plus its proportion of rates and taxes); and
- turnover rent or percentage rent — a component of rent that is determined as a percentage of the tenant's turnover during a specified period.

What you should do:

- Seek expert advice as to the basis for determining rent that best suits your business operations.
- Pay your rent on time — if you don't pay your rent, the landlord may be able to end your lease.

Rent based on turnover

Some leases base rent (or a part of the rent) on a percentage of the turnover of the tenant's business.

If you have agreed to a rent based on turnover, then:

- the lease must set out an agreed formula; and
- your agreement must be formalised in writing on the prescribed form before the lease is entered into (the prescribed form is Form 2 of Schedule 2 to the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* and is available from the Department of Commerce at www.commerce.wa.gov.au).

The Act also recognises the confidentiality of turnover figures to a retail business and limits the use of this information.

(See section 7 of the Act).

The landlord cannot require you to provide turnover figures unless your rent is to be based on turnover.

(See section 8 of the Act).

RENT REVIEW

Most leases will state that the rent will be reviewed at regular intervals.

At each review time the lease must set out a single basis on which the rent is to be reviewed, this can include:

- the market rent;
- an increase by reference to the Consumer Price Index (CPI);
- a set percentage increase; or
- an agreed formula or combination, for example, CPI + 2 per cent.

The types of review may vary over the life of the lease (the lease may state that reviews are to alternate between CPI and market review). However, the lease cannot give the landlord the right to choose the greatest return from a range of rent types at any one review (for example, the lease cannot state that the increase is to be CPI or 5 per cent whichever is higher).

The lease may specify only one method of review at a time.

Market rent

The Act provides that market rent is the rent obtainable for the retail shop in a free and open market if it were vacant and to be let on similar terms.

The market rent is not to take into account:

- the goodwill of the business;
- any stock, fixtures or fittings that are not the property of the landlord; or
- any structural improvements paid for or carried out by the current tenant.

Market rent review

If your lease specifies a market rent review, the Act provides that both parties can initiate the market rent review process and if the parties cannot agree on the rental:

- appoint a licensed valuer (agreed to by both parties) to determine the new rental;
- request that the Small Business Commissioner appoint a valuer to determine the rental; or
- each appoint a valuer to determine the rental.

A landlord is required under the Act to provide a valuer with certain information in relation to retail shops in a shopping centre or in the same building in order to assist the valuer to decide the market rent. A valuer must keep this information confidential.

A disagreement regarding the new rent may be referred to the Small Business Commissioner for mediation or to the State Administrative Tribunal for determination. Until the new rent is agreed, the current rent continues to apply. Once the higher or lower rent is agreed, adjustments will be backdated to the review date.

No 'ratchet' clauses

Any provision in a lease about a market review that seeks to prevent the rent from rising or falling above or below a certain level is void. The lease must allow the rent to rise or fall to a level supported by market evidence, for example, a clause cannot stop the rent from decreasing on a market review.

(See section 11 of the Act).

What you should do:

- Make sure that you understand how your rent is to be calculated and what other payments may be required.
- Consider whether your business can sustain the current rent, rent increases and operating expenses over the term of the lease.

CONTRIBUTION TO THE LANDLORD'S OPERATING EXPENSES OR OUTGOINGS

You may be required to contribute to a proportion of the landlord's expenses. The landlord's expenses are described in the Act as operating expenses. Leases can also refer to them as 'outgoings or variable outgoings'.

Operating expenses are the costs of operating, repairing or maintaining the landlord's premises including any building common areas. Typically these costs include the rates and taxes, cleaning, air conditioning, security, insurances and other valid expenses of running the property.

Details about the operating expenses and their payment are to be set out in the lease and the disclosure statement.

No capital expenses or management fees

The landlord cannot recover the following from you as an operating expense:

- management fees; or
- capital expenditures in relation to a retail shopping centre (for example, asset replacement).

Operating expenses are not to exceed the 'relevant proportion'

Your contributions to operating expenses are negotiable. The Act provides that a tenant cannot be required to contribute more than the 'relevant proportion' in relation to an operating expense. Nothing prevents you from negotiating with the landlord to pay less than the relevant proportion.

The relevant proportion is calculated by comparing the lettable area of your shop to the total lettable area of the shopping centre or the group of premises to which the expense relates.

$$\text{relevant proportion} = \frac{\text{lettable area of shop}}{\text{total lettable area}}$$

Referable expenses

In certain circumstances an operating expense may be incurred in relation to only some of the businesses in a centre or group of premises, for example, specialised cleaning used by only a few tenants. This is called a 'referable expense' and can be allocated using the total lettable area of only the shops to which the referable expense relates.

What you should do:

- Make sure that you understand the operating expenses before signing the lease.
- Budget to meet the operating expenses payments.

Landlord to provide estimates and statements for operating expenses

In order to recover operating expenses from you, the landlord must provide you with:

- an annual estimate of expenditure for each operating expense; and
- an audited operating expenses statement for each accounting period detailing all expenditure by the landlord (this statement must be given within three months after the end of the accounting period).

(See section 12 of the Act).

SINKING FUNDS

If your shop is in a shopping centre and you have agreed to contribute to a fund for major repair and maintenance works, your contributions are protected under the Act. These funds are subject to accounting and audit provisions and should not be spent by the landlord on anything other than the purpose for which they are collected. These costs may be in addition to operating expenses charged under the lease.

Capital works must be paid for by the landlord and would include such works as the construction of extensions to the shopping centre and the replacement of major plant and equipment.

(See section 12A of the Act).

OTHER FUNDS AND RESERVES

The landlord is also required to properly account for the administration, expenditure and auditing of any other funds or reserves that you have agreed to contribute to for specific purposes such as for marketing or promotion. These costs may be in addition to operating expenses charged under the lease.

(See section 12B of the Act).

FITOUT AND REFURBISHMENT

Tenants are usually responsible for the costs of installing fixtures and fittings in the shop (the fitout). There may be a standard of construction required for fitouts. You may also be responsible for some or all of the landlord's costs of preparing the shop for the fitout.

Fitout requirements must be detailed in the disclosure statement.

A provision in a lease requiring a tenant to contribute to the cost of any of the landlord's finishes, fixtures, fittings, equipment or services will be void unless the disclosure statement notifies the tenant about the effect of the provision.

(See section 12(3A) of the Act).

The Act provides that a clause about refurbishment or refitting will be void unless it provides the tenant with enough detail about the required refurbishment or refitting as is necessary to indicate the nature, timing and extent of work required.

(See section 14C of the Act).

What you should do:

- Ensure that you understand your obligations with regards to the fitout of the premises.
- If possible, obtain or prepare a condition report prior to entering into the lease so that you have evidence of its condition.
- Ensure you have a sufficient fitout budget as some fitout costs (for example cost of moving plumbing) are often overlooked.
- Discuss variations of standard fitout with the landlord — as this could cost you extra.

LEGAL FEES

The Act prohibits the landlord from claiming legal or other expenses from you relating to:

- the negotiation, preparation or execution of the lease (or any renewal or extension of the lease);
- obtaining the consent of a mortgagee to the lease; or
- the landlord's compliance with the Act.

However, if you assign your lease or sub let the premises, the landlord may claim from you any reasonable legal or other expenses incurred in connection with the assignment or sub letting.

(See section 14B of the Act).

TRADING HOURS

The trading hours for your shop may be affected by a number of matters.

Retail trading hours legislation in Western Australia sets out those hours that retailers may open (this can vary depending on the type of business you operate).

If your retail shop is located inside a shopping centre then for practical reasons the opening and closing times for the centre (core hours) may be different to the trading hours permitted by law. This should be set out in the disclosure statement by the landlord.

When do you have to open your shop?

A clause in a lease which requires you to open your premises at specified hours or for specified times is void under the Act. For example, you cannot be required to open your shop for the core hours for a centre. You can choose which hours to open your shop.

If you believe that your lease has not been renewed because you did not open at certain times you can apply to the State Administrative Tribunal for compensation.

(See section 12C of the Act).

What you should do:

- If your premises are in a shopping centre you should check that the core hours are suitable for your business.
- Find out whether you can open your shop at any times outside of the core hours and find out about what costs are involved.
- Remember that the lease can't require you to open your shop for specified hours or during specified times.

Standard trading hours and operating expenses

The Act also sets out 'standard trading hours' which are used only for the purposes of allocating operating expenses.

For the purposes of allocation of operating expenses 'standard trading hours' are:

- 8.00 am to 6.00 pm Monday, Tuesday, Wednesday and Friday
- 8.00 am to 9.00 pm Thursday
- 8.00 am to 5.00 pm Saturday.

The Act provides that if you do not open outside standard trading hours, then you cannot be charged operating expenses related to the extended hours (for example, additional security costs).

If, however, you do open outside the standard trading hours, you may be required to pay operating expenses related to the extended hours. These expenses should be calculated based on the lettable area of those shops which were open during the extended hours.

If you are closed for a period during the standard trading hours (for example, if you do not open your shop until 10 am), you may still be charged operating expenses for the time that you are closed, that is, between 8.00 am and 10.00 am.

(See section 12(1)(c) of the Act).

Retail trading hours law may allow you to open at times outside of the standard trading hours (for example, Sunday trading) however:

- you can't be forced to open your business; and
- you are not required to make a contribution to operating expenses relating to non standard hours if you choose not to open during those times.

VOID CLAUSES

The lease agreement and any other verbal or written agreements cannot include clauses that are contrary to any provision in the Act.

In addition, the Act specifically precludes the lease or any other agreement from containing clauses that:

- require a tenant to pay key money, which is any money or other benefit in addition to rent paid to the landlord or others for the right to lease retail shop premises (*see section 9 of the Act*);
- prevent the tenant disclosing the rent it has agreed to third parties, such as other retail tenants or their valuers (*see section 11(2a) of the Act*);

- require the tenant to contribute to any fund that applies moneys to capital expenditure in a shopping centre, such as new building works (*see section 12(2) of the Act*);
- require a tenant to open for specified hours or during specified times (*see section 12C of the Act*);
- prevent a tenant from joining a tenant’s association or similar body (*see section 12D of the Act*); and
- require a tenant to provide turnover figures to the landlord, unless the tenant has agreed to pay rent based on turnover (*see section 8 of the Act*).

A clause in a lease that is contrary to the provisions of the Act is void and has no effect.

DISRUPTIONS — COMPENSATION BY THE LANDLORD

The Act states that, if your shop is in a shopping centre, you are entitled to seek reasonable compensation from the landlord if the landlord:

- inhibits or prevents your, or customer, access to the shop premises;
- disrupts trading conditions, causing loss of profits to your business; or
- does not properly repair, maintain or clean the shopping centre premises or common areas.

You will only be entitled to compensation from the landlord if you have given the landlord notice in writing to rectify the problem and the landlord has not done so.

If you cannot agree the amount of compensation with the landlord, you can make an application to the State Administrative Tribunal for a decision as to the amount payable.

In most cases, before making an application to the State Administrative Tribunal you must attempt to resolve the matter through the Small Business Commissioner’s dispute resolution processes.

(See section 14 of the Act).

UNCONSCIONABLE CONDUCT AND MISLEADING AND DECEPTIVE CONDUCT

The Act provides that neither the landlord nor the tenant can engage in conduct that is:

- unconscionable (conduct that is so harsh, oppressive or unreasonable that it goes against good conscience); or
- misleading or deceptive.

The State Administrative Tribunal can hear a claim for unconscionable conduct or misleading and deceptive conduct and may make an order for payment of compensation or another appropriate order (such as an order to vary a lease or an order that a party stop doing something).

In most cases, before making an application to the State Administrative Tribunal you must attempt to resolve the matter through the Small Business Commissioner’s dispute resolution processes.

(See Part IIA of the Act).

ASSIGNMENT AND SUB LEASING

During the term of the lease, your circumstances may change and you may want to sell your business and assign your lease or sub let all or part of the premises.

Your responsibilities if you assign your lease

If you assign your lease the new tenant ‘takes over’ and assumes all your rights and responsibilities including rent and any other obligations under the lease from the date of assignment.

Although the Act gives you a right to assign your lease, the landlord may withhold consent on reasonable grounds. Examples of reasonable grounds include:

- if the landlord believes that the new tenant would not be able to meet their financial obligations; or
- if the proposed use of the premises is contrary to the use permitted in the lease.

You will need to write to the landlord seeking consent for assignment of the lease. If the landlord doesn’t reply within 28 days, you are entitled to assume the landlord has consented to the assignment.

You may have to pay the landlord’s reasonable expenses for assessing a prospective tenant to take over your lease.

Your responsibilities if you sub lease your shop

If you sub let all or part of your premises you effectively become the landlord and the person you sub let to is your tenant. Sub leasing means that you will still be responsible under the lease to your landlord (for example, you may be liable for the rent if the sub lessee does not pay).

You will also have obligations to the person you sub let to, for example, you will need to provide a tenant guide and disclosure statement to your sub tenant.

Your lease may include restrictions on sub leasing. You should check your lease and seek advice as to its requirements on sub leasing.

You may need to write to the landlord seeking consent to sub lease. If the landlord doesn't reply within 28 days, you are entitled to assume the landlord has consented to the sub lease.

(See section 10 of the Act).

What you should do:

- Seek independent legal advice as to the requirements of the Act and your obligations on assignment or sub leasing.

DEFAULT OR BREACH OF LEASE

Most leases allow the landlord to terminate (or end) the lease on a breach or default by the tenant (for example, failure to pay rent). You should ensure that you understand the procedures set out in the lease in relation to default. For example, in many instances, your obligation to pay future rent will continue even after a lease has been terminated.

DISPUTES BETWEEN THE TENANT AND LANDLORD

State Administrative Tribunal

If you are unable to resolve a dispute with your landlord over any aspect of your retail shop lease the Act allows the State Administrative Tribunal to deal with these disputes.

Either you or the landlord may initiate this action with the Tribunal by making an application and paying the appropriate fee. The Tribunal generally deals with matters through an initial directions hearing, a mediation process or in a hearing.

(See section 16 of the Act).

Small Business Commissioner

In most cases, before making an application to the State Administrative Tribunal you must attempt to resolve the matter through the Small Business Commissioner's dispute resolution processes.

(See Part III of the Act and regulation 10).

Advice about a dispute can be obtained from lawyers with property experience, the Small Business Development Corporation, industry sources, tenant advocates and retail representative groups.

KEEP RECORDS

You should make sure that you keep records of all agreements, undertakings, correspondence (including emails) and other communications with the landlord. Where possible you should confirm things in writing.

Make sure that you diarise important dates in relation to your lease.

If you need to make a claim in the Tribunal you will need to provide appropriate evidence to support your claim.