



T I S H E R L I N E R & C O .
L A W Y E R S

**Implications for Tenants and Landlords of the
Retail Leases Act 2003**

Landlords and tenants need to be aware of changes to the regulation of leases as a result of the Retail Leases Act 2003 ("the Act") which was passed by Parliament on 9 April 2003 and affects leases "entered into or renewed" on or after 1 May 2003 (irrespective of when the lease commences). This article identifies some of the important changes and key factors that affect landlords and tenants.

1. Retail Premises

- 1.1 Essentially, retail premises are premises used for the sale or hire of goods by retail or the retail provision of services.
- 1.2 The Act abolishes the previous 1000 square metre floor area qualification and replaces it with the provision that the Act applies to retail premises where the total occupancy cost (including rent and outgoings) is \$1,000,000 or less per annum.
- 1.3 The Minister for Small Business, has determined to exclude from the Act the following:
 - 1.3.1 Commercial premises (excluding retail businesses selling goods or any retail business located in a Shopping Centre).
 - 1.3.2 Retail businesses providing services located above the first three storeys above ground level of a building.

2. Disclosure Statement

The format of the Disclosure Statement has been amended by the Act. If a landlord does not provide a Disclosure Statement at least 7 days before entering into a lease or the Disclosure Statement is incomplete, a tenant may in certain circumstances withhold rent or even terminate the lease. This is not essentially new. A disclosure statement is also now required for an assignment of lease.

MELBOURNE: 317-319 LaTrobe Street, Melbourne Victoria 3000

Telephone: (03) 9602 4055

Facsimile: (03) 9670 6359 DX 181 Melbourne

Web: www.tisherliner.com.au

E-mail: tlandc@tisherliner.com.au

PARTNERS: FRANK R. TISHER LL.B. (Hons.) B. Comm. Accredited Property Law Specialist.
SIMON ABRAHAM LL.B. B.Ec. CONSULTANT;

DENNIS F. LINER B. Juris LL.B. Accredited Mediation Specialist.
RALPH RENARD LL.B.

ALAN GOLDSTONE LL.B.
ASSOCIATE: JONATHAN TISHER LL.B. (Hons.), B.Sc. (Hons.)

3. Written statement of outgoings

The Act requires that landlords are required to annually prepare a written statement which outlines all expenditure by the landlord and identifies to the tenant the outgoings for which the tenant is liable to contribute.

4. Land Tax and other outgoings

Land tax, which was previously considered a recoverable outgoing, will now be considered an expense for which the landlord is liable and is not recoverable from the tenant. This amendment took effect from 1 July 2003. Landlords are also not entitled to claim that the tenant contribute to capital costs of the building in which the retail premises are located, depreciation or a contribution to a sinking fund to provide for capital works.

5. Provision of a Lease at the negotiation stage

A landlord is now required to provide a copy of the proposed lease in writing and a copy of the information brochure when negotiations concerning a retail tenancy lease commence.

6. Creation of a Retail Industry Commissioner

The Act created the office of a Small Business Commissioner ("Commissioner") who is to be notified of a lease within fourteen (14) days of a tenant entering into or renewing a retail premises lease. The landlord must notify the Commissioner in writing of the address of the retail premises, the landlord and tenant's name and address and any other matter which are prescribed by the Regulations.

The Commissioner has also been granted responsibility for a range of retail tenancy functions which are detailed in the Act, including arranging mediation for disputes, endorsing standard form tenancy leases and addressing unfair market practices in the retail industry.

Dennis Liner, a partner of our firm, has been appointed by the Small Business Commissioner to the Panel of Dispute Resolution for the purpose of acting as a mediator in respect to resolving retail tenancy disputes.

7. Unconscionable Conduct

The Act includes new provisions in respect to unconscionable conduct by the tenant or landlord (with substantial penalties for breach).

8. 5 year lease minimum

All leases are now to be for a minimum of 5 years (including any further term of terms provided for by an option) and leases for less than 5 years

MELBOURNE: 317-319 LaTrobe Street, Melbourne Victoria 3000

Telephone: (03) 9602 4055

Facsimile: (03) 9670 6359 DX 181 Melbourne

Web: www.tisherliners.com.au

E-mail: tlandc@tisherliners.com.au

PARTNERS: FRANK R. TISHER LL.B. (Hons) B. Comm. Accredited Property Law Specialist.
SIMON ABRAHAM LL.B., B.Ef. CONSULTANT:

DENNIS F. LINER B. Juris. LL.B. Accredited Mediation Specialist.
RALPH RENARD LL.B.

ALAN GOLDSTONE LL.B.
ASSOCIATE: JONATHAN TISHER LL.B. (Hons.), B.Sc. (Hons.)

must be certified by the Commissioner. The Act does not apply to a retail premises lease for a term of less than one year.

9. Shopping Centres

Tenants are only obliged to contribute to outgoings which benefit the tenancy and are not liable for that part of management fees that include salaries or internal costs of the landlord. Tenants are not obligated to undertake any advertising or promotion of their business. Provisions in leases which prevent or restrict the tenant from carrying on business outside the retail shopping centre where the premises are located are void.

10. Assignment

Assignors and its guarantors are now released from future liability where the assignment relates to an ongoing business and the tenant has provided the assignee and landlord with a copy of the disclosure statement.

11. Security deposits

Security deposits must be held by the landlord in an interest bearing account. The landlord must account to the tenant for the interest earned, which may be accumulated to increase the deposit during the term of the lease.

12. Copy of lease to Tenant

The landlord must provide the tenant with a copy of the retail premises lease signed by the tenant within 28 days after it has been signed by the tenant. If the landlord contravenes this section, the tenant may give the landlord a written notice terminating the lease.

13. Refurbishment

The Landlord must not carry out alterations or refurbishment of a building or retail shopping centre which is likely to adversely affect the business of the tenant unless the landlord has notified the tenant in writing of the proposed alteration at least 60 days before the alterations have commenced (unless the alteration is necessary because of an emergency).

The landlord is liable to pay to the tenant reasonable compensation for loss or damage suffered by the tenant if the landlord:

- substantially inhibits the tenants access to retail premises; or
- unreasonably takes action that substantially inhibits the flow of customers to the retail premises or
- unreasonably takes action that causes significant disruption to the tenant's trading at the retail premises; or

MELBOURNE: 317-319 LaTrobe Street, Melbourne Victoria 3000 Telephone: (03) 9602 4055 Facsimile: (03) 9670 6359 DX 181 Melbourne
Web: www.tisherliner.com.au E-mail: tlandc@tisherliner.com.au

PARTNERS: FRANK R. TISHER LL.B. (Hons.) B. Comm. Accredited Property Law Specialist.
SIMON ABRAHAM LL.B., B.Er. CONSULTANT:

DENNIS F. LINER B. Juris. LL.B. Accredited Mediation Specialist.
RALPH RENARD LL.B.

ALAN GOLDSTONE LL.B.
ASSOCIATE: JONATHAN TISHER LL.B. (Hons.), B.Sc. (Hons.)

- fails to rectify any breakdown of plant or equipment or any defect in the retail premises; or
- neglects to adequately clean, maintain or repair the premises.

The tenant is required to give the landlord written notice of the loss or damage as soon as practicable.

14. Relocation of the Tenant's business

A landlord cannot require the tenant's business be relocated or terminate the lease and offer a new lease of alternative premises unless the landlord has provided the tenant with details of the proposed refurbishment, redevelopment or extension. The proposal must indicate a genuine proposal that:

- is to be carried out within a reasonable practicable time after the relocation; and
- cannot be carried out without vacant possession.

The landlord must give the tenant at least 3 months written notice of the relocation. Within one month after being given a relocation notice, the tenant may give the landlord a written notice of termination of the lease. If it does not, it is taken to have accepted the offer of a lease for the new premises.

The tenant is entitled to payment by the landlord of the tenants reasonable costs of relocation. If the amount cannot be agreed, a quantity surveyor of the parties choice will make the decision and failing agreement between the parties, the Commissioner shall decide.

15. Demolition

The landlord cannot terminate a lease to demolish a building where the retail premises are located unless the landlord has provided the tenant with details of the proposed demolition and given the tenant at least 6 months written notice of the termination date.

If the landlord gives the tenant a notice of termination, the tenant may terminate the lease before the termination date by giving the landlord not less than 7 days written notice.

If the demolition is not carried out within a reasonable practicable time after the termination date, the tenant may be entitled to compensation as a consequence of the early termination of the lease.

MELBOURNE: 317-319 LaTrobe Street, Melbourne Victoria 3000

Telephone: (03) 9602 4055

Facsimile: (03) 9670 6359 DX 181 Melbourne

Web: www.tisherliner.com.au

E-mail: tlandc@tisherliner.com.au

PARTNERS: FRANK R. TISHER LL.B. (Hons.) B. Comm. Accredited Property Law Specialist.
SIMON ABRAHAM LL.B. B.Sc. CONSULTANT:

DENNIS F. LINER B. Juris. LL.B. Accredited Mediation Specialist.
RALPH RENARD LL.B.

ALAN GOLDSTONE LL.B.
ASSOCIATE: JONATHAN TISHER LL.B. (Hons.), B.Sc. (Hons.)