

A Guide to Entering into, Renewing and Terminating Retail Leases

1. Introduction

The purpose of this paper is assist staff involved in the management of retail leases entered into by the University. As a large landholder, the University frequently enters into retail leases with a wide range of businesses, from booksellers to cafes, restaurants and others besides.

In Victoria, retail leases are governed by the *Retail Leases Act 2003* and the *Retail Leases Regulations 2003*. This legislation tells us what constitutes a retail lease, and it sets out the steps that each party must take when entering into, renewing or terminating one. As a member of the staff of the University involved in the management of retail leases, it is your job to help the University comply with its legal obligations as a landlord in a retail lease. This paper is designed help you do this, and at the end of the paper there is a summary of the steps involved.

2. What is a retail lease?

Naturally, the first step is to consider whether you're dealing with a retail lease. This can be difficult to determine sometimes and you should always contact Legal Services for advice to make sure.

The *Retail Leases Act 2003* doesn't define "retail leases" as such. Instead, it simply talks about leases for "retail premises". Generally, premises will be "retail premises" if, under the lease—

*...the premises are to be used, wholly or predominantly for the sale or hire of goods by retail or the retail provision of services...*¹

Goods or services are retailed if they are provided to an end-user or the final consumer. For example, a flour producer sells flour to a bakery, and the bakery uses the flour to make bread or pastry for sale to consumers. The sale of the flour to the bakery would be a wholesale transaction, and the sale of bread or pastry to consumers would be retail transactions. That's a pretty straightforward example, of course. But what if the bakery also sells some, but not all, of its products to a café or a restaurant? Things can become complicated very quickly and it is always best to contact Legal Services for advice.

Exceptions

There are a few exceptions to the definition of "retail premises" in the *Retail Leases Act 2003*, most of which are aimed at ensuring that it only applies to retail leases for small businesses. For example, the *Retail Leases Act 2003* will not apply to a lease if:

1. the sum of the annual rent and outgoings exceeds \$1,000,000.00;

2. the premises are being used (wholly or predominantly) to carry on a business by a tenant on behalf of the landlord as the landlord's employee or agent;
3. the premises being leased are on the 4th floor or higher (excluding basements); or
4. the tenant is a corporation listed on a financial market, such as the Australian Stock Exchange.

Important!

One important thing to note about retail leases is that they are required by law to have a minimum term of 5 years.ⁱⁱ This term can include the options to renew, if any, so a lease that offers an initial 3 year term and an option to renew for a further 2 years will suffice. If a lease doesn't provide a minimum 5 year term, then the *Retail Leases Act 2003* will operate to give it one, regardless of what the lease itself says on the matter. The only way around this is for the prospective tenant to seek a certificate from the Small Business Commissioner that effectively waives the 5-year requirement.ⁱⁱⁱ

3. Entering into a retail lease

There are four steps for a landlord to follow when entering into a retail lease—

Step 1

The first step that the University has to take when offering a prospective tenant the opportunity to enter into a retail lease is simple: as soon as we enter into negotiations with a prospective tenant, we have to provide them with a copy of the proposed lease and a copy of the retail leases information brochure published by the Small Business Commissioner.^{iv} Legal Services can provide you with a copy of both of these.

The copy of the proposed lease doesn't need to be filled-out with all the details of the particular tenancy, like rent and so on. It just needs to include the basic terms of the proposed lease.

What happens if we ignore Step 1?

This first step is important: fines of over \$5,000.00 can apply to the University if we don't comply with it.

Step 2

The second step requires a bit more effort on our part. At least 7 days before we enter into a retail lease, we have to give the prospective tenant a *disclosure statement* and a completed copy of the proposed lease, with all the details included.^v

Legal Services can provide you with a copy of the disclosure statement and help you complete it. It's important to get the details of this statement right, as the tenant can terminate the lease if any information in the statement is false, misleading or materially incomplete. It's also important to have the disclosure

statement ready in time to meet the 7 day deadline, so make sure you start to fill it in earlier rather than later.

Naturally, Legal Services will draft the proposed lease for you. As with the disclosure statement, it's important to have the draft lease ready in time to meet the 7 day deadline, so make sure you give Legal Services enough time to prepare the draft for you.

What happens if we ignore Step 2?

If we fail to give the tenant the disclosure statement at least 7 days before the lease is entered into, and the lease is then entered into, the tenant can give us written notice that they haven't received the disclosure statement. So long as they provide this notice no later than 90 days after the lease is entered into, they can—

- withhold rent until we provide them with the statement (and they never become liable to back-pay this even if we do give them the statement, so they get the period free of rent); or
- simply terminate the lease, even up to 7 days after we provide them with the statement.

Step 3

Assuming all goes well and the parties sign the lease, the next step is fairly simple – we have to give the tenant a copy of the completed and signed lease. We have to do this within 28 days (or within another agreed period, which must be agreed in writing) of the lease being signed by the tenant, regardless of who signs it first.^{vi} A photocopy will do, but it is our practise to have all agreements signed in duplicate so that each party gets an original.

What happens if we ignore Step 3?

If we fail to carry out Step 3 in the time required, the tenant can give us written notice that they have not received a copy of the completed and signed lease. Provided they do this within 28 days of entering into the lease or, if we provide the lease but do so later than required, within 28 days of the day we provide it, the lease will terminate 14 days after the date the tenant gives us the notice.

Step 4

The final step requires us to give the Small Business Commissioner written notice of the entering into of the retail lease.^{vii} Generally, this notice must be given within 14 days after the lease is signed by all the parties, and it must contain certain information. A form for the notice is available from the Small Business Commissioner's website^{viii} and Legal Services can help you to fill it in and lodge it with the Commissioner.

What happens if we ignore Step 4?

If we fail to lodge the required notice on time with the Small Business Commissioner, the University can be exposed to the risk of fines of over \$1,000.00.

4. Renewing a retail lease

Often, a retail lease will give the tenant one or more options to renew the lease for further specified periods of time. Options can be exercised unilaterally by a tenant at their discretion and, so long as they are exercised in the manner and within the time required by the lease, the lease will be renewed and will continue to be binding on the University for the renewed term. The University does not need to agree to the exercise of the option for it to be binding – the right of renewal is the tenant’s alone.

If a lease doesn’t include any options then the parties are always free to come to an agreement about renewing or extending the term of the lease.

The following steps will apply each time a retail lease is renewed—

Step 1

However it comes about, if a retail lease is renewed, the University, as the landlord of the renewed lease, has to give the tenant another disclosure statement.^{ix} This is just like the one we have to give to a tenant when entering into a retail lease, except that the information it contains must, of course, be current and up-to-date. You can obtain a copy of this form and advice on how to complete it from Legal Services.

As you might expect, a deadline applies for giving the new disclosure statement: it must be done at least 21 days before the end of the current term of the retail lease or, if the lease is renewed by agreement rather than by the exercise of an option, no later than 14 days after the entering into of the agreement to renew.

What happens if we ignore Step 1?

The consequences here are the same as those we face if we don’t give the tenant a disclosure statement on entering into a lease. The tenant can withhold rent until we do give the statement or even terminate the lease.

Step 2

This step only applies if the retail lease is being renewed through the exercise by the tenant of an option to renew.

If the retail lease includes one or more options to renew, then we must give the tenant a written notice reminding them of their right to exercise the option before the current term of the lease expires. This notice must be given at least 6 months, but no more than 12 months, before the date after which the option can be exercised.^x The retail lease will tell you what the last date for the exercise of the option is; if you’re unsure about this, contact Legal Services for advice. Some suggested text for such a notice is set out after the Summary at the end of this paper.

What happens if we ignore Step 2?

If we fail to provide notice within the required time, then the *Retail Leases Act* 2003 provides that the lease is to be read as if the date after which the option is

no longer exercisable is 6 months after we notify the tenant. If this extended date would be after the date on which the current term would normally end, then the lease is also to be read as if the current term extends to that date.^{xi} In any case, the tenant also has the option to terminate the lease.^{xii}

Step 3

The final step requires us to give the Small Business Commissioner written notice of the renewal of the retail lease.^{xiii} Generally, this notice must be given within 14 days after the renewal, and it must contain certain information. A form for the notice is available from the Small Business Commissioner's website^{xiv} and Legal Services can help you to fill it in and lodge it with the Commissioner.

What happens if we ignore Step 3?

If we fail to lodge the required notice on time with the Small Business Commissioner, the University can be exposed to the risk of fines of over \$1,000.00.

5. Terminating a retail lease

Like any other form of contract, a retail lease can be terminated for a variety of reasons, including because of a breach of the terms of the lease by either party. Termination for breach is often a highly contentious and complex affair, and it is beyond the scope of this paper. In a case like that you should always seek the advice of Legal Services.

Termination under Part 7 of the *Retail Leases Act 2003*

Note that the following only applies in relation to a retail lease that does not include any options to renew.

If a retail lease does not contain any options to renew, then the landlord is required to give the tenant written notice offering a renewal or stating that there will be no renewal. This notice must be given to the tenant at least 6 months, but no earlier than 12 months, before the date on which the term of the lease ends.^{xv}

If the landlord wishes to offer a renewal, the notice must specify the terms on which the renewal is being offered.^{xvi} These terms should, as a minimum, include the period for which the renewal is being offered and the rental for that period. An offer to renew the lease cannot be revoked without the tenant's consent for 60 days after the offer is made.^{xvii} If the landlord doesn't give notice as required, the landlord must give the notice anyway and lease is deemed to continue until the date specified in the notice, which cannot be any earlier than 6 months after the date on which the notice is given.^{xviii}

Some suggested text for notices is set out after the Summary at the end of this paper.

Even if the landlord does not comply with any of these requirements, the tenant can always notify the landlord in writing terminating the lease from a day that is no earlier than the day on which the main term of the lease expires.^{xix}

Expiry of lease

If a retail lease simply expires and there are no disputes about payment of rent or anything like that, then the lease will come to an end of its own accord. There are no legislative requirements for either party to give notice, although it is a good idea to send a tenant a polite reminder in advance. Such a reminder is best given by way of written notice, and ideally at least 3 months before the term of the lease expires. If it is not planned to offer the tenant a renewal of the lease, then a notice to vacate should also be given to the tenant 1 month before the term of the lease expires. You should contact Legal Services about preparing a notice to vacate.

If the tenant is simply allowed to continue to occupy the premises after the expiry of the term then an implied lease will arise under the common law. Termination of an implied lease requires the giving of reasonable notice. What is reasonable will vary according to the circumstances of the particular case and you should seek the advice of Legal Services.

6. Contacting Legal Services

If you need advice about a retail lease, you can contact George Sdraulig, the Director of Legal Services, on extension 1695.

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Summary

Entering into a retail lease

Step	What we have to do	When we have to do it	What happens if we don't
1	Give the prospective tenant a copy of the proposed lease and Small Business Commissioner's information brochure on retail leases	As soon as we enter into negotiations with the prospective tenant	Fines of over \$5,000.00
2	Give prospective tenant the disclosure statement and a completed draft of the lease	At least 7 days before the lease is entered into	Tenant can give notice and withhold rent or terminate
3	Give tenant a copy of the completed and signed lease	Within 28 days of the lease being signed by the tenant (regardless of who signs it first)	Tenant can terminate
4	Give Small Business Commissioner written notice of entering into of lease	Within 14 days of the lease being signed by all parties	Fines of over \$1,000.00

Renewing a retail lease

Step	What we have to do	When we have to do it	What happens if we don't
1	Give tenant the disclosure statement	At least 21 days before the end of the current term or, if renewed by agreement rather than option, no later than 14 days after entering into agreement to renew	Tenant can give notice and withhold rent or terminate
2	If lease includes option to renew give tenant notice reminding	At least 6 months but no more than	Deadline automatically

	them that deadline for exercising option is approaching	12 months before deadline for exercising option	extended by Act, and tenant has right to terminate
3	Give Small Business Commissioner written notice of renewal of lease	Within 14 days of the lease being renewed	Fines of over \$1,000.00

Sample text for letters

Notice of last day for exercising option to renew

I refer to the lease which you entered into with the University dated [insert date of lease]. As you will be aware, the lease provides you with an option to renew the term of the lease for a further two years. Under section 28 of the *Retail Leases Act 2003*, we, as the landlord, are required to provide you with written notice reminding you of the last date for exercising that option.

Accordingly, please be advised that if you intend to exercise the option to renew the lease for the further term, you must give us written notice no later than [date].

Notice offering renewal

I refer to the lease which you entered into with the University dated [insert date of lease]. As you will be aware, the lease expires in 7 months' time and does not provide you with any options to renew.

Under section 64 of the *Retail Leases Act 2003*, we, as the landlord, are required to provide you with written notice reminding you of the impending expiration of the lease and to indicate whether we wish to offer to renew the lease.

I am pleased to offer you a renewal of the lease for a further period of [X] years. The renewal will be on the following terms and conditions:

[insert details – for example “on the same terms and conditions as is presently provided for in the lease”]

If you wish to accept this offer of a renewal, please sign and date both copies of this letter in the space provided below and return one copy to me.

Notice requiring vacant possession

I refer to the lease which you entered into with the University dated [insert date of lease]. As you will be aware, the lease expires in 7 months' time and does not provide you with any options to renew.

Under section 64 of the *Retail Leases Act 2003*, we, as the landlord, are required to provide you with written notice reminding you of the impending expiration of the lease and to indicate whether we wish to offer to renew the lease or whether we do not intend to renew the lease.

We do not intend to offer any renewal of the lease and instead require you to vacate the premises at the end of the term of the lease. Accordingly, please ensure that you have vacated the premises by the expiry date, which is [date].

ⁱ *Retail Leases Act 2003*, section 4.

ⁱⁱ *Ibid*, section 21.

ⁱⁱⁱ *Ibid*, section 21(5), (5A) and (6).

^{iv} *Ibid*, section 15.

^v *Ibid*, section 17.

^{vi} *Ibid*, section 22.

^{vii} *Ibid*, section 25.

^{viii} See www.sbc.vic.gov.au.

^{ix} *Retail Leases Act 2003*, section 26.

^x *Ibid*, section 28.

^{xi} *Ibid*, section 28(2).

^{xii} *Ibid*.

^{xiii} *Ibid*, section 25.

^{xiv} See www.sbc.vic.gov.au.

^{xv} *Retail Leases Act 2003*, sections 64(1) and (2).

^{xvi} *Ibid*, section 64(2)(a).

^{xvii} *Ibid*, section 64(3).

^{xviii} *Ibid*, section 64(4).

^{xix} *Ibid*, Section 64(5).