

Assigning a Commercial Lease

There is often a rather optimistic expectation with business vendors that, once a heads of agreement has been signed, settlement of the business should be able to occur within a couple of weeks. Unfortunately, that's rarely the case.

One of the main obstacles to a quick settlement is the transfer of the lease. In short, the transfer and approval process can be lengthy, and the process needs to be complied with strictly to avoid delays.

The first thing to note is that the transfer (or lease assignment) process can be different depending upon whether you are dealing with a retail or a non-retail lease.

The Assignment of a Retail Lease

In the context of a retail lease, the *Retail Leases Act 2003 (Vic)* (**Act**) governs the assignment process. Under section 60 of the Act, a landlord is only entitled to withhold consent if one or more of the following applies:ⁱ

- the proposed tenant proposes to use the retail premises in a way that is not permitted under the lease;
- the landlord considers that the proposed tenant does not have sufficient financial resources or business experience to meet the obligations under the lease;
- the current tenant has not complied with the reasonable assignment provisions of the lease; and
- the current tenant has not provided the proposed tenant with business records for 3 years (or such shorter period as the business has been operating).

The Act goes on to say that a request for the landlord's consent must be in writing, and the tenant must provide the landlord with such information as the landlord "*reasonably requires about the financial resources and business experience of the proposed assignee*".ⁱⁱ

Before requesting the landlord's consent, the tenant must give the proposed tenant a copy of any Disclosure Statement given to the current tenant, and details of any changes of which the tenant is or ought to have been aware.ⁱⁱⁱ

If the assignment is in connection with the lease of retail premises that will continue to be used for the carrying on of an ongoing business, the tenant must also give the landlord and the proposed assignee a disclosure statement in the form prescribed by the regulations.^{iv}

If the tenant has complied with the above provisions, then a landlord is obliged under the Act to "*deal expeditiously with a request for consent*" and is "*taken to have consented*" if it has not given written notice to the tenant consenting or withholding consent within 28 days after the request was made.^v

Moreover, if the current tenant strictly complies with the assignment process under the Act, it (and any guarantors) will be entitled to a statutory release of any lease obligations from the assignment date.^{vi}

The Assignment of a Non-Retail Lease

In the context of a non-retail lease, however, the assignment process is not governed by the Act and therefore any assignment will be determined ***solely in accordance with the lease terms***. In certain instances, a Landlord can withhold consent "in its absolute discretion".

Moreover, unlike a retail tenant who may be entitled to an automatic release from the assignment date, a non-retail tenant will typically remain “on the hook” (or liable for any breaches by the incoming tenant) for the balance of the current lease term *unless* a specific release is negotiated in the assignment document.

Assignment Provisions in LIV Lease

The Law Institute of Victoria (**LIV**) Commercial lease (which has been widely adopted by landlords across Victoria) has been drafted having regard to the provisions of the Act.

Under General Condition 4, it provides that a landlord “*must not unreasonably withhold consent*” to a transfer of the lease if the tenant has:

- asked the landlord in writing to consent to the proposed transfer or sub-lease;
- given the landlord such information as the landlord reasonably requires about the financial resources and business experience of the proposed tenant;
- provided a copy of the proposed document of transfer or sub-lease to the landlord; and
- remedied any breach of the lease of which the tenant has been given written notice.

The above provisions are considered “*reasonable assignment provisions of the lease*” and are therefore consistent with the Act.

Proposed Tenant Reference Material

The classic obligation set out in most leases – which can be expressed in slightly different ways – is for the **current**

tenant to demonstrate that the proposed tenant is solvent, responsible, and able to meet the lease obligations.

Whilst the requirements of each landlord (or their managing agent) can be slightly different, the following reference material is often requested:-

1. At least two (2) trade references;
2. An Assets and Liabilities Statement certified by the proposed assignee’s accountant;
3. If the proposed assignee is a company, then:-
 - (a) a current ASIC Company Search;
 - (b) an Assets and Liabilities Statement from all directors of the Company certified by their accountant;
4. If the Tenant or directors own property, a copy of an updated Council rates notice for their property which shows the capital improved value;
5. A Business Plan which details the type of business the proposed tenant intends to operate, as well as details of all relevant experience; and
6. Details of any planned changes/upgrade to the fit out.

This material, in conjunction with a draft copy of the transfer of lease, is then sent to the landlord’s agent to obtain the landlord’s consent. The process can take weeks. As such, the quicker the material is submitted the better.

What are “Reasonable Expenses”?

An outgoing tenant must also pay the landlord’s “reasonable expenses” incurred in connection with an application for consent and the completion of documents, as well as any stamp duty on the documents (if applicable).

This is appropriate having regard to the fact that a landlord is usually required, at its own cost, to engage its leasing agent to assess and interview a proposed tenant, and arrange for its solicitor to advise on the assignment document. However, the question begs: what are “reasonable expenses”?

Unfortunately, the answer to that question will depend on the particular circumstances of a transaction. If, for example, an agent and/or solicitor has been involved in extensive negotiations with the current or proposed tenant, or had to assess complex or voluminous reference material, then (reasonably enough) the fee ought to reflect such time, skill and effort.

However, in circumstances where there is a straightforward transfer with a minimal amount of time involved, the costs should be significantly less. Whilst each transaction will be different, a leasing agent’s costs to assess a new tenant will typically be between \$1,000 – \$1,500 plus GST. A landlord’s solicitor’s costs might be between \$750 – \$2,000 plus GST.

Again, these are costs that are usually paid for by the current tenant. The only exception to this is where an incoming tenant is seeking to negotiate significantly new terms, or a new lease. In that case, the parties need to negotiate how such costs are to be apportioned.

Disputes with the Transfer Process

In the context of a retail lease, a tenant will usually have a number of contractual and statutory rights it can rely upon to protect itself when it seeks to transfer its lease. Importantly, too, if there is an inconsistency between the lease and the Act, then the Act will prevail to the extent of any inconsistency.^{vii}

Additionally, if there is ultimately a dispute in connection with the assignment of a retail lease, the parties are entitled to refer the matter to mediation through the Office of the Small Business Commissioner or, if necessary, through the Victorian Civil and Administrative Tribunal (**VCAT**).

The purpose of the Act is to promote “*certainty and fairness in retail leasing arrangements between landlords and tenants*” and provide mechanisms to resolve disputes.^{viii} Whilst the Act can never completely guard against unscrupulous behaviour, it does go some way to ensuring that all parties are treated fairly.

However, as noted above, the process for resolving disputes under a non-retail lease will be determined solely through the provisions of the lease. This might entitle a party to invoke a right of mediation or – perhaps more worryingly – the process might to be subject to the vagaries of the landlord’s “discretion”!

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Disclaimer: *The information contained in this article is intended to provide general information only and is not legal advice or a substitute for it. You should always*

*consult your own legal advisors to discuss
your particular circumstances.*

ⁱ See section 60 of the *Retail Leases Act 2003 (Vic)*

ⁱⁱ See section 61(2) of the *Retail Leases Act 2003 (Vic)*

ⁱⁱⁱ See section 61(3) of the *Retail Leases Act 2003 (Vic)*

^{iv} See section 61(5A) of the *Retail Leases Act 2003 (Vic)*

^v See section 61(6) of the *Retail Leases Act 2003 (Vic)*

^{vi} See section 62 of the *Retail Leases Act 2003 (Vic)*

^{vii} See section 94 of the *Retail Leases Act 2003 (Vic)*

^{viii} See section 1 of the *Retail Leases Act 2003 (Vic)*