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Signing a shop lease?

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Whether you are setting up shop for the first time or renewing an existing shop lease, you will usually be asked by your landlord to sign a written lease. The lease should, and often in fact does, contain all the relevant terms and conditions of your tenancy, including any specific agreements made with the landlord.

Nothing should be left to chance or to a *'gentleman's handshake'* when it comes to a [commercial lease](#). A written lease containing all agreed terms and conditions not only gives certainty to the landlord-tenant relationship, it can avoid potential disputes down the track.

The law which governs retail shop leases in South Australia is by and large found in the *Retail and Commercial Leases Act 1995* ("the Act"). A *'retail shop lease'* is defined under this Act to mean:

"an agreement under which a person grants or agrees to grant to another person for value a right to occupy a retail shop for carrying on a business—

1. *whether or not the right is a right of exclusive occupation; and*
2. *whether the agreement is express or implied; and*
3. *whether the agreement is oral or in writing, or partly oral and partly in writing”.*

Under the above definition, a retail shop lease need not be in writing however a landlord of a retail shop must provide certain documentation to a prospective lessee before the lease is entered into.

The Act sets out various minimum requirements for retail shop leases as well as prohibits certain types of terms and conditions from being legally enforceable.

Some of the most relevant provisions include:

- A landlord is required to provide a prospective tenant with a copy of the proposed retail shop lease at the time negotiations are first entered into. Whilst this requirement does not sit well with the fact that a lease can be made orally, the objective of the Act appears to put the onus on landlords to provide written leases;
- A landlord must supply a Disclosure Statement to a prospective lessee before a lease is entered into or renewed. The Disclosure Statement must be in an approved form and contain certain key details about the lease, which are set out in section 12 of the Act;
- A landlord cannot recover more than one half of the lease preparation costs from the lessee unless the lessee withdraws from negotiations with the landlord;
- A landlord cannot charge or accept a premium in connection with granting a retail shop lease. For example, the landlord cannot require a prospective tenant to pay a sum of money in addition to rent and any security bond to secure the lease;
- There is a statutory warranty by the landlord that the retail shop premises are structurally suitable for the type of business which the lessee intends to carry on, provided the landlord is advised by the lessee of such intended business before entering into the lease. Please note however that the warranty may be excluded expressly in the lease (and often is);
- A landlord cannot require a payment under a security bond which amounts to more than 4 weeks' rent. Note however that this restriction is often circumvented by the landlord instead requiring a bank guarantee or other form of security, which is often more than 4 weeks' rent;
- The term of a retail shop lease must be at least 5 years or for aggregate terms which total 5 years or more. However, this requirement does not apply if the tenant supplies the landlord with a certificate from a lawyer waiving the operation of the 5 year minimum rule, or where the lease is for a period of 6 months or less, or the tenant has already been in occupation of the leased premises for 5 years;
- In the case of retail shop leases within a retail shopping centre, a landlord must give an existing tenant at the end of the tenancy the first right of refusal if it intends to relet the premises in terms no less favourable to the tenant;
- Where a lease provides for rent to be reviewed to market rent, the Act stipulates certain conditions that apply when calculating the market rent. For example, the value of the goodwill or the tenant's plant and equipment in the business cannot be taken into account;

- The recovery of outgoings by a landlord from a tenant must be specified in the lease and how any outgoings are to be apportioned between the landlord and the tenant or with other tenants as the case may be;
- An estimate of all outgoings in respect of the retail shop lease for one year are to be provided in the Disclosure Statement before the lease is entered into;
- Land tax is not recoverable by a landlord from the tenant;
- A landlord is required to compensate a tenant for any unreasonable disruption or disturbance the landlord causes or fails to prevent or stop.
- A landlord is required to give a tenant at least month's notice of any alteration or refurbishment works it intends to undertake except in the case of an emergency;
- A landlord cannot refuse consent to the assignment (transfer) of a retail shop lease to a new tenant (eg. where the tenant's business is sold) except in certain limited circumstances under section 43 of the Act;
- Where a retail shop lease is assigned to a new tenant, the landlord cannot hold the previous tenant liable under the lease after the current term of the lease expires or after two years after the assignment occurs.

The above does not contain full details nor is it an exhaustive list of all key provisions of the Act but contains some of the more relevant provisions which commonly apply to retail shop tenancies. We strongly suggest that a lawyer look over a lease before you sign it as there may be other aspects which need to be considered. For instance, how long the lease should be, whether it should contain any rights to renew, what rent review clauses should it contain and what fit-out and maintenance works the tenant may be required to undertake.

At Andersons, there are several experienced lawyers within our [commercial](#) team who can assist you with any lease matters.

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