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## RETAIL SHOP LEASE or NOT

When undertaking a new commercial enterprise selling to the general public, it is important to distinguish between whether the proposed use is a “retail shop” or not.

If the proposed use is a retail shop the parties involved will be bound by the Retail Shop Leases Act 1994.

It does not however apply to a shop that became a retail shop after the commencement of the lease, an assignment of the lease, or a renewal of the lease under an option (Section 15). It is illegal to try and contract out of the Act and so any provision which seeks to do so will be void.

The Act will even prevail over an inconsistent provision of a retail shop lease.

### **What is a retail shop lease?**

The schedule of the Act contains a dictionary which defines a retail shop. A retail shop is one that is situated in a retail shopping centre or use wholly or predominantly for the carrying on of one (1) or more retail businesses which are prescribed in the regulations. Some examples of business’ goods or services that are retail shops include: pawn broking, sale of cheesecakes, sale of sunglasses, fast food shops, selling domestic appliances, selling fabrics and other soft goods, flower retailing, and fruit & vegetable retailing. This of course is by no means an exhaustive list.

A retail shop lease is a lease of a retail shop except in certain circumstances.

Before entering a retail shop, the proposed tenant must receive a Disclosure Statement from the landlord (Section 22).

The proposed tenant must also make disclosure to the landlord (Section 22A). It is also usual for financial and legal advice reports to be supplied by the proposed tenant so that the tenant knows what he is getting into.

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**Why is determining a lease as a retail shop lease important?**

If a lease is a retail shop lease, then it comes within the legislation. There are a number of consequences of this but we will summarise here some of the more important ones:

- Under Section 24 & 48 of the Act the Lessor cannot charge his legal expenses for preparation of lease documents.
- Under Section 36A a “ratchet rent provision” is void. This is a clause which would seek to enable the landlord to prevent rent decreasing under a rent review.
- Section 37 of the Act provides that the tenant may be required to pay the landlords outgoings. However, these outgoings must be specifically specified and a formula for determining them must be clearly stated in the lease.
- The landlord may have to pay compensation to the tenant in certain circumstances. For example, if a landlord substantially restricts the tenants access to the shop or takes action that substantially restricts access of flow of customers past the shop, or causes some other significant disruption to the tenant. The Act says that this is an implied term in any lease that is a Retail Shop Lease.
- Under Section 46A of the lease, a landlord cannot engage in conduct that is “unconscionable”. Unconscionable conduct has been defined in the cases and we will not go into that further here, suffice it to say that it relates to wrongfully moral improper conduct that causes loss to the tenant by the landlord.
- To determine this, the QCAT (if the matter is before that tribunal) can look at such matters including the relative strengths of bargaining of the parties, whether undue influence or pressure was exerted, what similar leases might say, and other matters such as an industry code.

It should be stated that the above represents but a sample of some of the protections afforded to tenants if a lease is a Retail Shop Lease.

However, under an ordinary lease for example a professional suite, there is no requirement for such protections to be offered and so this is why it is wise for such leases to always be examined by your solicitor before entering them.

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