New disclosure statement forms for Victorian retail leases — ten things you should know

Max Cameron and Jennifer McConvill MINTER ELLISON

The Retail Leases Regulations 2013 (Vic) (regulations) came into effect on 22 April 2013 replacing the Retail Leases Regulations 2003 (Vic).

The principal effect of the regulations is to replace the former multi-function Victorian disclosure statement with four separate disclosure statements to be used in connection with Victorian retail leases in the following situations:

(i) new leases of premises located in a retail shopping centre;
(ii) new leases of premises not located in a retail shopping centre;
(iii) renewals of lease; and
(iv) assignments of lease that involve the sale of the business operating from the retail premises.

While there is a degree of logic in having different statements for different situations, given that it is only just over two years ago that the adoption of a national form of retail leases disclosure statement was on the horizon when an almost consistent form was adopted by Victoria, New South Wales and Queensland, it is disappointing that Victoria has now taken steps away from a national approach by acting unilaterally.

Set out below are ten things that persons preparing or reviewing disclosure statements should know concerning the new forms of disclosure statements.

1. When must a landlord provide a disclosure statement?

A landlord must provide a disclosure statement:

• seven days before a new lease is entered into;
• 21 days prior to the commencement of an option term; or
• 14 days after an agreement to renew is made.¹

A landlord must also provide a disclosure statement if required by a tenant wishing to assign its interest in a lease within 14 days of being requested to do so.²

2. What transitional arrangements are there?

A disclosure statement in the old form may be given up to and including 22 July 2013. On and from 23 July 2013, the appropriate new form of disclosure statement must be provided.

3. Is it possible to vary the new forms?

The appropriate disclosure statement must be provided in the form but not necessarily the layout prescribed by the regulations.³

This means that the appearance of the disclosure statement may be changed by altering the font and inserting the landlord’s logo and the like, but none of the wording of the relevant prescribed form should be altered.

If a section of the disclosure statement is not applicable, rather than deleting the section “not applicable” should be inserted.

4. What constitutes a retail shopping centre?

A “retail shopping centre” is defined as:

... a cluster of premises where:
(a) at least five of the premises are retail premises;
(b) premises are all owned by the same person or have the same landlord or the same head landlord;
(c) the premises are located in a single building or adjoining buildings; and
(d) the cluster of premises is promoted as, or generally regarded as constituting, a shopping centre, shopping mall, shopping court or shopping arcade.⁴

The lower levels of a commercial office building may constitute a “retail shopping centre” for the purposes of the Act if they contain a food court or other cluster of retail premises.

Confusingly, it will be quite possible for the lower levels of a commercial office building where there are only five or six tenancies to sometimes consistent a “retail shopping centre” and sometimes not.
5. What constitutes a renewal?

A “renewal of lease” is narrowly defined as a lease:

(a) under an option granted under the lease for a further term; or
(b) under an agreement to renew the lease on substantially the same terms and conditions, except as to rent.

If after a lease expires there is a “break in the tenant’s possession” the resumption of possession of the premises is taken not to be a renewal of the expired lease but a new lease.4

In Daco Enterprises Pty Ltd v The Golden Sultana Pty Ltd5 VCAT found that if a tenant holds over on a monthly tenancy without an express prior agreement between the landlord and the tenant concerning the length of the holdover this will constitute a break in the tenant’s entitlement to possession.

Therefore, the new shorter form renewal disclosure statement should generally only be used if the narrow definition of “renewal of lease” has been satisfied and the tenancy was not allowed to go onto a monthly holdover in between the lease expiring and the new lease being entered into.

Note that it is contrary to the Act to provide one of the disclosure statements for new leases if a lease is a “renewal” as defined by the Act. If the lease is a “renewal” the form of disclosure statements for renewals must be used.

6. Are there any other circumstances in which the new short form renewal disclosure statement can be used?

If a short term tenancy falls under the Act as a result of the tenant being in occupation of retail premises for 365 days, the renewal disclosure statement should be used.8

In all other cases one of the longer form disclosure statements must be used.

7. What disclosures are required concerning alterations and demolitions?

All four new disclosure statements require disclosures concerning planned or known alteration or demolition works to the:

(a) the premises;
(b) the building/centre in which the premises are located, including surrounding roads; and
(c) land adjacent to or in close proximity to the premises or building/centre.

The requirement to disclose details of planned or known alteration or demolition works to land adjacent to or in close proximity to the premises or building/centre is new. Particularly for landlords, it will be important to ensure that all statements made concerning such works are up-to-date and not “misleading, deceptive or materially incomplete” as this could give the tenant a right to terminate the lease under s 17 of the Act.

8. When must details of turnover rent be set out in a disclosure statement?

The new disclosure statement for premises located within a retail shopping centre requires the landlord to disclose whether turnover rent is payable by the tenant and, if so, how turnover rent is calculated.

Corresponding disclosures are not required in the new disclosure statement for premises not located within a retail shopping centre or in the renewals disclosure statement. However, Items 14.1 and 2.1 of those statements (respectively) require the landlord to disclose any costs arising under the lease which are not referred to elsewhere in the disclosure statement. This would include turnover rent.

9. Are disclosures concerning management fees required?

Section 49(1)(b) of the Act states that:

A provision of a retail premises lease is void to the extent that it makes the tenant liable to pay an amount for management fees unless ... the lease or a disclosure statement given to the tenant ... specifies —

(i) the amount of the management fees for any accounting period of the landlord during the term of the lease; and
(ii) a rate, or a method for calculating a rate, for working out the amount for which the tenant is liable for that period.

Therefore if a landlord wishes to charge management fees and the relevant details are not provided in the lease, this information must be set out in the disclosure statement.

This information could be provided in the section of the relevant disclosure statement titled “Other monetary obligations and charges”.

Alternatively, new items could be added to the outgoings section of the relevant disclosure statement as follows:

[item no] In accordance with s 49(1)(b) of the Retail Leases Act 2003, the amount of the management fees for the building/centre for the accounting periods during the term of the lease are as follows:
Period | Management fee for the building/centre
---|---
1/7/13 – 30/6/14 | $[insert] excluding GST
1/7/14 – 30/6/15 | Management fee for the preceding accounting period, increased by CPI

[item no] In accordance with s 49(1)(b) of the Retail Leases Act 2003 (Vic), the formula for determining the tenant’s share of the management fee for the building/centre is as follows:

[insert formula]

10. When must a tenant provide a disclosure statement?

Before requesting a landlord’s consent to an assignment an outgoing tenant must give the incoming tenant a copy of any disclosure statement received by the outgoing tenant in relation to the lease together with details of any changes of which the outgoing tenant is aware or could reasonably be expected to be aware.9 As previously stated, the outgoing tenant may request that the landlord provide a new disclosure statement for this purpose.10

If premises will be used for an ongoing business, the outgoing tenant must also provide an assignor disclosure statement in the new form prescribed to both the landlord and to the incoming tenant.11

If a disclosure statement is not provided by a landlord:

(a) in the case of a new lease, the tenant may no earlier than seven days and no later than 90 days after entering into the lease, give the landlord a written notice that a disclosure statement has not been given12 and having done so, the tenant:

(i) may withhold payment of rent until the day on which the landlord gives a disclosure statement;
(ii) will not be liable to pay rent for the period from the day the notice was given to the date on which a disclosure statement is given; and
(iii) may give a written notice terminating the lease at any time up to seven days after a disclosure statement is given.13

(b) in the case of a “renewal”, the tenant may no earlier than seven days and no later than 90 days after the date by which the landlord was required to provide the disclosure statement give the landlord a written notice that a disclosure statement has not been given14 and having done so, the same provisions as set out in paragraphs (a)(i)–(iii) above will apply;15

(c) if the case of a lease which became subject to the Act as a result of the tenant being in occupation of retail premises for 365 days, the tenant may no earlier than seven days and no later than 90 days after the day on which the Act became applicable to the lease give the landlord a written notice that a disclosure statement has not been given16 and having done so, the same provisions as set out in paragraphs (a)(i)–(iii) above will apply;17

(d) in the case of an assignment and the tenant requesting the landlord to provide a disclosure statement, if the landlord fails to do so within 14 days of receiving the request the landlord may be subject to a fine of up to ten penalty units.18

All disclosure statements must be completed thoroughly and accurately.

If the information provided in a disclosure statement is misleading, false or materially incomplete, the tenant may have a right to terminate the lease within 28 days of the last to occur of:

(a) if the lease is not a “renewal”, the tenant being given the disclosure statement;
(b) the tenant being given a copy of the proposed lease; and
(c) the lease being entered into, subject to a right for the landlord to object on the basis that the landlord acted honestly and reasonably and the tenant is substantially in as good a position.19

For landlords with significant Victorian landholdings, the process of completing disclosures statements can be streamlined by using pre-populated and/or automated versions of the new disclosure statements but it is important that any such precedents are used critically and updated whenever changes in circumstance occur.

Max Cameron
Partner
Minter Ellison

Jennifer McConvill
Senior Associate

Footnotes
1. Retail Leases Regulations 2013 (Vic) ss 17(1) and 26(1).
2. Above, n 1, s 61(5).
3. Above, n 1, ss 17(1), 26(1) and 61(5A).
4. Above, n 1, s 3.
5. Above, n 1, s 9(1).
6. Above, n 1, s 9(2).
8. Above, n 1, s 12(3)(b)(i).
9. Above, n 1, s 61(3).
10. Above, n 1, s 61(5).
11. Above, n 1, s 61(5A).
12. Above, n 1, s 17(2).
13. Above, n 1, s 17(3).
14. Above, n 1, s 26(3).
15. Above, n 1, s 26(4).
16. Above, n 1, ss 12(3)(b)(ii) and 26(3).
17. Above, n 1, s 26(4).
18. Above, n 1, s 61(5).
19. Above, n 1, ss 17(5), 17(6), 18(2), 26(1), 26(2) and 26(4).