



Commercial Leases

Most businesses will start life in leased premises. A lease provides the legal right to occupy the premises. It protects you and the landlord by setting out all the agreed terms of occupancy. The landlord is often referred to as the lessor and the tenant as the lessee.

Unlike residential leases, commercial leases are normally non-standard documents prepared by the solicitors acting for the landlord, and in most cases imposes extensive obligations upon the tenant.

The terms of a lease are negotiable before the lease is signed. The lease you end up with will depend on the state of the property leasing market and on the negotiating strength of the parties concerned.

Before Signing a Lease

You should have detailed discussions with the landlord/agent and also seek advice from business associations, your solicitor and accountant. Also consult your local Council about any regulations, permitted use of land and development applications.

The starting point to negotiating the lease is to obtain a draft lease from the managing agent or the landlord's solicitor. Remember that apart from some basic provisions applying only to retail leases, there is no governmental regulation that controls what the terms of the lease will be. It is up to the parties to agree on the terms and to make sure that they are accurately set out in the lease before it is signed.

Before you enter into a lease **ask yourself, the landlord/agent and your advisers** the following questions. Ensure that all agreements arrived at with the landlord are included in the lease.

Optimum Duration

- ? How long should my lease be for – how long do I need to be there to recover my costs and make a profit?
- ? Is the lease too long? The longer the lease, the less flexibility you will have to expand or move premises.

Rent

- ? How much rent can I afford as my starting rent, and can I afford an annual increase?
- ? How is rent calculated? If it is based on estimated turnover could this make me vulnerable?

- ? How and when will rent increases be calculated? When will the first rent review occur and how often can it be reviewed?
- ? What happens if the space becomes unusable or my use is disrupted? Do I have to keep paying rent? Can I get out of the lease? Can my landlord end the lease?

Other Outgoings

- ? Do I have to pay a security bond or deposit? If yes, how much, to whom, is it safe? Who will hold the bond? Can I give it to a bank instead? How can I get it back at the end of the lease? Could I lose it? Do I get interest?
- ? What other costs will I incur and am I paying my fair share? E.g. waste disposal, signs, lease changes, stamp duty, legal costs, management fees, landlord's outgoings, promotion or advertising levies, electricity, gas, cleaning, insurance.
- ? Can I be sure about the level of any extra expenses and can they increase? What information must the landlord give me about extra expenses or outgoings? Do I have the right to review documentation related to outgoings?
- ? What equipment and/or services are included in the lease?
- ? Do I have to pay for repairs and maintenance or a share of them? Who pays for fair wear and tear? Does the landlord have to pay for structural repairs?
- ? Who pays for security for my space and stock, equipment etc? What rights do I have to gain security?
- ? Do I have to pay GST on the rent or other costs? If so, can I claim a GST credit?
- ? Am I liable to pay the lessor a percentage of the goodwill if I sell my business?

Renewal

- ? Should I try to negotiate an option to renew? What will be the renewed period? What are the drawbacks? How would I take up my option?
- ? How and when will the new rent be calculated?
- ? How will I know when it is time to exercise my option?

Other Obligations

- ? What do I have to do when the lease ends - either at the end of the agreed term or because my landlord or I have ended the lease? Will I have to redecorate? To what standard?
- ? Are there any general rules that apply to all the tenants in the building or centre? Are they reasonable? Do they apply fairly to all? How can they be changed?
- ? Does the lease require personal guarantees? If I am paying a security bond as well, is this reasonable?
- ? Does the lease require me to give power of attorney to the landlord if I default? Is this reasonable?
- ? If the landlord claims that I am in default, how much notice am I entitled to before the landlord can terminate the lease? Am I entitled to have a chance to rectify the default first?

Permitted Uses and Access

- ? Are there others with the same or similar businesses in the same centre / location? If the landlord has promised not to allow any of my competitors into the centre or building, is this set out clearly in the lease?
- ? Do I need any licenses to operate my business?
- ? Are there any restrictions imposed by Council zonings, other Local/State legislation or the lease?
- ? What hours can I access the premises? Will this be a problem? Will there be any restrictions imposed by the landlord or Council regulations? Can opening hours be easily changed, if required?
- ? Is the permitted use wide enough to cover an expansion or sale of my business?
- ? Am I satisfied that the description of the premises accurately describes the space I will occupy, my rights to use any common areas or facilities, and any car parking arrangements for me, my staff or my visitors?

Location and Building Design

- ? Does the location and space suit my business and can it be used for the intended purpose?
- ? Will the building need to be upgraded or renovated to enable the proposed use, or to meet legislative requirements? Who will pay for this and any ongoing maintenance?
- ? If fitout is required, what will be needed and who will pay for and maintain it? Who will own the fitout, and do I need approval to change it? Does the fitout have to be removed at the end of the lease?

Insurance

- ? Will I have to take out any insurance? What type – public liability, building, glass, for my fittings, workers compensation? How much will it cost? Will I have to get consent from the landlord about things that might affect his/her insurance?
- ? Do I have to contribute to the Landlord's insurance as well as paying for my own?

How Much Will a Lease Cost to Prepare?

As a lessee, you may have to pay for the preparation costs of the lessor, as well as your own costs. You are also responsible for Government stamp duty on the lease.

Keep in mind: The cost of legal advice before you sign a lease may be small compared with possible losses arising from a badly worded or misunderstood lease contract.

Some General Precautions to Take

- Check with your accountant what is the most tax effective way to structure the payment of rent, fitout costs and GST.
- Make sure that all negotiated agreements are written into the lease.
- Inspect the property and take notes and photographs prior to moving in.
- Talk to any other tenants – see how they get along with the landlord.
- Ask for audited statements about outgoings such as gardening, maintenance and advertising.
- Make sure that you know who is going to keep the bond and where, and who gets the interest. Get this in writing.
- How can the lease be assigned, terminated or sublet? It is usually not possible for a tenant to terminate the lease before the expiry date (unless the landlord is in breach), but having the right to assign and/or sublet will give you some flexibility.
- Put all the issues that arise during term of lease in writing. If you and the landlord agree to a variation during the term of the

lease, make sure this is agreed to in writing and, if necessary, registered with the Land Titles Office.

- The lease should clearly identify the premises and all parties to the lease, the date of commencement and expiry, plus any options for extending the period of the lease term.
- Some landlords ask for frequent market rent reviews. It is expensive and time consuming to dispute the landlord's assessment of rent. Setting a fixed percentage increase, or using the Consumer Price Index is more certain. Market reviews will be to the tenant's advantage if market rents generally are falling.
- The term of the lease is important. A long lease may reduce flexibility but improve security. A shorter lease with an option to renew might be preferable, although this will depend on economic conditions and your choice of premises.
- All leases of three years and over must be registered with the Land Titles Office.
- File a copy of your lease in a safe place.

Dispute Resolution

It is important to remember that signing a lease is the start of a relationship. Both you and your landlord share a common interest – to trade successfully and profitably. Many simple problems can be overcome if you read your lease and talk to your landlord or agent. This often works and saves time and money.

Unfortunately, it does not always work. If you need to resolve a dispute, there are a number of options:

- Agree on a dispute resolution process i.e. try mediation before going to court.
- Consult your solicitor. If you don't have a solicitor, or your solicitor does not practise in this area, contact the Law Society of New South Wales for a referral to a solicitor in your local area who practices leasing law, or to an Accredited Specialist in Business Law. Phone (02) 9926 0333 or visit the website at www.lawsocnsw.asn.au.
- Get a copy of the Resolving Small Business Disputes kit available from the Commonwealth Department of Industry, Tourism and Resources on 1800 024 095.
- For retail tenancy agreements – consult the Retail Tenancy Unit of the Department of State and Regional Development for assistance with mediation on 1800 063 333 or 9223 0466. If mediation does not work, the matter can be referred to the Retail Leases Division of the Administrative Decisions Tribunal.

For More Information:

Contact your local Business Advisory Service on 1300 650 058 to talk over business management issues or visit the Department of State and Regional Development's Small Business Website at: www.smallbiz.nsw.gov.au.