

A PLAIN ENGLISH GUIDE TO



>>Commercial, Industrial and Retail Leasing

Leasing premises is a major investment decision, whether you are a landlord or tenant.

What many people don't understand, however, is how complex a commercial lease can be and how it can be fraught with potential problems. Whilst many people have signed residential leases in adult life and found the process to be fairly simple and easy to understand, a commercial lease has many and far-reaching implications, not the least of which is the prospect of losing a business should something go wrong!

This Plain English Guide highlights some of the issues facing both tenants and landlords in a commercial leasing situation and what should be considered when negotiating a lease agreement.

>>Specific Issues for the Landlord to Consider

As a landlord, there are a number of issues you need to consider. Firstly, and most importantly, you need to ensure that the lease documentation meets your needs. You must also understand how the lease is to operate and what your rights are. A good solicitor will be able to adapt any special needs or requirements you may have into the lease documentation and explain it to you in plain English so that you are clear about what it all means.

Whilst drawing up the lease, you and/or your solicitor will need to consult parties such as your financier (if there is a mortgage over the property), your architect or builder if building works may be required and your property manager or agent. This will ensure that the commercial terms incorporated into the documentation are appropriate.

Secondly, you should endeavour to find a tenant that you are comfortable with and who you are confident will be able to pay the rent and leave the premises in a satisfactory condition.

Other considerations you will need to take into account include:

- Obtaining appropriate security on the lease
- For example, you may wish to obtain personal guarantees from the directors or shareholders of the company leasing the premises in the event that the company fails to meet its obligations under the lease. Another alternative is to request a bank guarantee or cash deposit, usually to the value of three months rent.
- Who is responsible for the fit-out of the premises and who will own the fit-out at the end of the lease, as well as who is responsible for refurbishing the premises at the end of the lease.

- Obtaining the consent of your mortgagee for the lease. Most commercial leases exceed three years (including options to renew) and in NSW this means that they need to be registered with the Land Titles Office. Registration cannot take place without the consent of the mortgagee.
- What is required of you, as a landlord, in terms of maintenance and access of common areas, lobbies, lifts, toilets etc. Whether any strata levies apply and what the rules of the building are etc.

>>Specific Issues for the Tenant to Consider

When you consider that one of your most important business assets is your lease, as a tenant it becomes critical that you understand the implications of a lease and your rights and obligations.

In fact, your premises are the most tangible component of your business and your goodwill is affected by your location, so why risk losing it all over a lease dispute? Expert legal advice will ensure that your needs and your rights are taken into account during a lease negotiation. Not only will it enhance your business opportunities, but in the event that you choose to sell your business, a sound and secure lease is vitally important and could make or break the deal.

When you have found the right premises, in the right location for your business, some of the specific issues you need to consider when negotiating the lease include:

- Whether you can gain the relevant licences (eg liquor licence) and the relevant approvals from Council to run your business within the premises
- What warranties you are able to secure from the landlord regarding damage to the building etc and whether you are covered in case of the need for relocation or demolition of the building

- How, and when, the rent will be reviewed and what your responsibilities are in terms of outgoings
- What is the term of the lease and when are you able to exercise any options for renewal – you will also need to carefully diarise reminders to ensure that you meet the relevant requirements for exercising these options

>>General Items for Negotiation in a Commercial Lease

Most commercial leases will take into account the following "items" that should be negotiated between the landlord and tenant (lessor and lessee) and incorporated into the documentation:

- Rental payments – how much and when to pay
- Commencement date of rent period, depending upon completion of fit-out and obtaining relevant approvals for business etc
- Outgoings payable by the landlord or the tenant
- Term of the lease
- Options available for renewal and how/when to exercise the option
- Maintenance – landlord is generally responsible for structural repairs and tenant for day to day maintenance of premises
- Use - what the premises can be used for and the type of business permitted etc
- Assignment/Sub-letting – whether the landlord gives consent and what approval procedure is in place
- Insurances required
- Obligations of each party at the end of the lease

>>Retail Leasing – Special Considerations

Over the last couple of years, the Retail Leases Act in New South Wales has undergone some major changes, which impact on the negotiation and drafting of leases for retail businesses.

In fact, retail leases are treated quite differently to other commercial leases and are covered by a set of unique rules. Whether you are a landlord or tenant entering into a retail lease you will need advice from a legal expert to ensure that your rights and obligations are adequately taken care of. The Act can be complex and requires expert interpretation – ignorance can lead to significant penalties.

Some of the most important changes to the Act affecting retail leases include:

- The definition of, and what constitutes, a “retail” business – a far greater number of businesses now fall into the category of retail business and are therefore covered by the Act
- There are greater obligations for lessors and agents to disclose and provide information to lessees quickly when entering into negotiation of a lease and also during the term of the lease.
- There are new provisions under the Act for fit-outs and how costs are dealt with between lessor and lessee.
- There are new restrictions regarding the advertising of available retail space to new tenants, unless the lessor has specifically offered a renewal or extension to the existing lessee which has been refused.
- The old security bond system has been replaced and now requires payment of a bond to the Department of State and Regional Development for investment and management.
- A new section of the Act has been written to deal with misleading or deceptive conduct by either party to a retail lease.
- Independent retail valuers will be used to determine rent reviews in the event that both parties cannot agree on the actual rent.
- More detail is required from lessors in the disclosure statement relating to “disturbances” which might interfere with the lessee’s operations if they are to avoid liability (whereas before, a lessor only had to provide written warning of a likely disturbance to avoid responsibility).

Retail landlords and tenants should be aware of the changes to the Act and how they might be affected as their current leases expire and are due for re-negotiation. Enlisting expert legal advice can save money, time and potential heartache over the re-negotiation process.

>>How Coleman & Greig Can Help You

Over the years, the commercial leasing team at Coleman & Greig has assisted many clients in relation to clarifying and negotiating commercial, industrial and retail leases.

We can assist you with:

- Drafting lease agreements
- Negotiating lease agreements
- Assigning, varying or surrendering your lease
- Taking on an assignment of lease
- Enforcing the terms and conditions of your lease
- Any disputes you may have with your landlord or tenant



>>Interpreter Services

Coleman & Greig can provide interpreter services in a range of foreign languages including:

- Arabic
- Assyrian
- Croation
- Samoan

>>Other Services

Coleman & Greig provides a wide range of services including:

Commercial Legal Services

- Corporate & Commercial
- Employment Law
- Occupational Health & Safety
- Franchising
- Litigation & Dispute Resolution
- Debt Recovery
- Intellectual Property
- Trade Practices
- Building & Construction
- Commercial Securities
- Commercial Property
- Business Migration
- Succession Planning
- Notarial Services

Personal Legal Services

- Property and Conveyancing
- Wills and Estate Planning
- Family Law

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For further information:

Level 9, The McNamara Centre, 100 George St, Parramatta NSW 2150
Phone: 02 9635 6422 Fax: 02 9689 3983 Email: info@colgreig.com.au
www.colemanandgreig.com.au

