

NSW RETAIL TENANT'S GUIDE 2017

Knowing the facts up front | Setting up the lease | The costs of leasing | Ups and downs | At the end of the lease

This Guide applies to leases entered into after 1 July 2017. The Guide helps tenants understand the key aspects of leasing a retail shop. The landlord must give a prospective tenant this guide as soon as they start negotiating a lease. The Guide does not replace professional, legal or business advice or try to explain every aspect of the law.

Different laws cover retail, commercial and residential leases. In NSW, the Retail Leases Act 1994 (the Act) sets out legal arrangements between tenants and landlords for shops selling and supplying goods and services where the shop is less than 1,000 square metres and is used for a retail business.

The Act covers what you must do when:

- starting a lease;
- changing the rent;
- transferring a lease; and
- you are in dispute with your landlord.

For more information about retail leases, visit the Office of the NSW Small Business Commissioner's website www.smallbusiness.nsw.gov.au or call **1300 795 534**.

KNOWING THE FACTS UP FRONT

At least seven days before the lease begins the landlord must give the tenant a Lessor's (landlord's) Disclosure Statement. This statement sets out important facts about the shop and the lease. Within seven days of receiving this statement, the tenant must give the landlord a Lessee's (tenant's) Disclosure Statement.

Standard forms of these statements are available at:

www.smallbusiness.nsw.gov.au

If the shop is in a shopping centre, look for extra items that must be included in the landlord's disclosure statement, if they are available to the landlord. These include:

- the annual sales of the centre;
- turnover for specialty shops per square metre, using at least three categories (food, non-food and services);
- centre traffic count;
- details of fit-out construction standards; and
- details of when the leases for major tenants end.

Read the landlord's disclosure statement carefully. Check that it includes all the agreements you reached during negotiations and any promises made. The statement must detail outgoings for the landlord to be able to recover them.

Tell the landlord immediately if you don't understand or don't agree with their statement. If you need to, ask the landlord for a new disclosure statement.

The tenant's disclosure statement must say if:

- you have received the landlord's disclosure statement;
- you have a draft lease;
- you have had any professional advice about your lease obligations;
- you can meet your obligations; and
- **the landlord has made any other verbal agreements or representations to you and the details of them.**

TIPS:

- See a business advisor for help with location and business planning.
- If you are leasing in a shopping centre, ask to see all possible shops.
- Write a report on the condition of the shop before the lease begins that both tenant and landlord sign. This can include photos.

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Examples of comments by a landlord that might be included in the tenant's disclosure statement are:

- the level of passing trade;
- the tenancy mix;
- any works they intend to do; and
- your right to be the only retailer selling certain products or services.

Shops leased from the Rail Corporation New South Wales and at the Sydney (Kingsford-Smith) Airport have special rules under the Act.

WHAT YOU MUST DO

- Carefully read the landlord's disclosure statement and consider getting legal and financial advice to ensure you understand it.
- Give the landlord your tenant's disclosure statement no later than seven days after you receive the landlord's disclosure statement.
- Ask detailed questions about the impact on your business of any expected development of the building or shopping centre, if the landlord's disclosure statement only covers it in broad terms.

SETTING UP THE LEASE

What is a lease?

A lease is a legal agreement between a landlord and tenant for the use of the shop where the tenant conducts their business. A lease cannot override the Act's requirements.

A lease typically starts when both parties sign it. However, a lease can start even if an agreement has not been signed, if:

- the tenant takes possession of the shop; or
- the tenant begins to pay rent.

It is good business practice for a tenant to wait to pay rent or accept the shop until after signing the lease. Once a lease is signed, the landlord and the tenant usually can't end it without the other's consent.

A lease should include:

- the date that it starts and ends;
- a description of the shop;
- how much the rent is;
- how the rent can be changed;
- the type of business;
- any outgoing the tenant must pay;
- what bond, other security or guarantee is needed;
- who repairs and who maintains the property and equipment; and
- core trading hours (when shops must be open for business).

The lease period

The lease period is the length of time you rent the shop. The lease must include the lease period, and it may also include an option to renew or extend the lease.

A lease with fair terms and a long lease period is a valuable asset for both landlord and tenant. It helps improve the landlord's investment in the property, and the tenant's investment in the retail business.

WHAT YOU MUST DO

- Get advice from legal and financial experts to make sure you understand the lease and the costs of running the business.

TIPS

- Make sure the lease period is long enough for you to recover your investment, make a profit, and sell the business if you wish.
- If you want a long lease, but don't know if you should make that financial commitment, try asking the landlord for a shorter lease period with an option to extend.
- There is no longer a requirement for a lease to be five years long.

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Permitted use

Permitted use describes the type of business that you can run from the shop.

Before signing the lease, check with the local council that the shop can be used for the business you want. You can't use the shop for any other type of business without the landlord's and the council's consent.

If you are taking over a lease when buying a business, you should personally check with the council to make sure that approvals are in place, as well as receiving this assurance from the seller and the landlord. To avoid disputes and unnecessary financial loss, get the approvals you need in writing.

Some examples of permitted use are:

- for a hairdresser, does it include beauty treatments?
- for a takeaway shop, can meals be served on re-usable plates, or can the type of takeaway food be changed?

WHAT YOU MUST DO

- **Make sure the lease and the landlord's disclosure statement describe the shop's permitted use and that this description is broad enough so you can:**
 - expand the business; and/or
 - sell the business.
- **Check that council approvals are in place for the business you plan to conduct.**

Shopping centre leases

A shopping centre is defined in the Act as a cluster of shops which are:

- owned by the same person or company/s on the same strata plan, where at least five shops are used for retail business; and
- regarded or promoted as a centre, mall, court or arcade.

Some of the special issues to be aware of when setting up a lease in a shopping centre are:

- turnover information the tenant agrees to provide under the lease must be kept confidential and generally needs consent to be disclosed;
- if you have turnover rent, you do not have to report your online sales unless the sales "touch" the shop, such as pick up or delivery from the shop;
- you may be required to contribute to the cost of advertising and promotion of the shopping centre;
- you cannot be required to advertise or promote your own business;
- you cannot be stopped from conducting business outside the centre; and
- the landlord cannot change the centre's core trading hours without a majority of shops agreeing to this in writing.

THE COSTS OF LEASING

Lease preparation

The landlord pays the full cost of preparing the lease, including the mortgagee consent fee. However, if the tenant asks for changes after the tenant's disclosure statement has been returned to the landlord, there may be some cost for those amendments.

Leases with a lease period of more than three years, including any option period, must be registered. This helps protect your interests. The tenant usually pays the registration fees if the lease is to be registered.

Fit-out

You will usually be responsible for the costs of installing fixtures and fittings in the shop (the fit-out). In shopping centres, there is usually a standard of construction required for fit-outs.

You may also be responsible for some or all of the landlord's costs of preparing the shop for the fit-out, known as landlord's works. The landlord's disclosure statement must state whether you pay these costs. You must agree to the maximum cost of landlord's works in writing before beginning the lease.

WHAT YOU MUST DO

- **Make sure you know what expenses you will have in preparing the shop to trade and that you follow the fit-out standard required by the lease.**

Rent

Rent is one of your largest ongoing costs and is normally paid monthly in advance.

Even if you have financial problems, you still must pay the rent and use the shop only for the business stated in the lease. If you sign a lease saying that you will keep actively trading in the lease period, you cannot close your shop.

WHAT YOU MUST DO

- **Pay the rent on time. If you don't pay it, the landlord may lock you out or end the lease without warning or notice.**

Changing the rent

The lease must state when and how the rent can be changed.

If the lease says the rent is set at current market value, and the tenant and the landlord cannot agree on the rent, then the Act provides a process for a specialist retail valuer to determine the rent. From 1 July 2017, the Office of the NSW Small Business Commissioner appoints the valuer and the tenant and landlord share the costs equally.

Outgoings

Outgoings are expenses of the landlord the tenant has agreed to pay under the lease. The Act requires outgoings to be:

- meaningfully disclosed;
- directly and reasonably related to the shop being leased; and
- attributable to the management, operation, maintenance or repair of the building or shopping centre in which the retail shop is located. This disclosure gives you an idea of the cost of outgoings. They can go up by market rates over time.

Outgoings are usually major costs for the tenant. Understand these costs before signing a lease, and make plans to meet these payments. Undisclosed outgoings might not have to be paid.

TIPS

- Check the market rent with local real estate agents and valuers, other retailers or industry bodies.
- Negotiate in a reasonable way.
- Before beginning the lease, talk to your advisor/s or contact a retail or industry group to find out the outgoings for similar shops.
- Agree in writing what fit-out items can stay and what must be removed, and how the premises will be "made good" at the end of the lease.
- The landlord must now register a lease longer than three years and must give the tenant a copy of the lease.

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Key money

Key money is either money or a benefit the agent or landlord asks for to grant, renew, extend or assign the lease. Key money does not include paying a cash bond or giving a guarantee. Taking key money for a lease is illegal and a landlord may receive a heavy penalty if they ask for it.

Security

The landlord may ask for some form of security when negotiating the lease. This security may be:

- a cash bond;
- a third party guarantee, which is a promise by an individual to pay the landlord if you break the terms of the lease;
- a bank guarantee, which is a promise by your bank to pay the landlord an amount up to an agreed limit if you break the terms of the lease. (You usually have to give the bank some security to obtain a bank guarantee.)

Cash bond

If you agree to give the landlord a cash bond as security, the landlord must deposit the bond with the NSW Government's Retail Bond Scheme within 20 business days of receiving it. The Scheme holds the money in trust and invests the bond in a special account.

You can download a form to lodge a bond at:

www.smallbusiness.nsw.gov.au

Or call **1300 795 534**

The main advantages of giving the landlord a cash bond are:

- it is held by the NSW Government;
- there are no fees involved, so the amount is secured;
- it is for a specified amount, unlike most third party guarantees;
- it cannot be called on without your agreement, unlike most third party and bank guarantees; and
- there are approval processes and rules for paying out bond money at the end of the lease, which can help keep costs down.

TIPS

- **Make sure the landlord lodges your cash bond in the NSW Government's Retail Bond Scheme.**
- **If you have given a bank guarantee as security, agree in writing when it will end.**
- **The landlord must return the bank guarantee within two months of when you leave the shop unless you owe them money.**

KEY LEASE ACTIONS

When you find a shop you want to rent:

- **Read the draft lease.**
- **Get advice.**

At least seven days before you begin either a new lease or renew a lease:

- **Get a disclosure statement from the landlord.**

Seven days after you receive the landlord's disclosure statement:

- **Give the landlord your disclosure statement, unless you have both agreed you will supply it later.**

Before you sign the lease:

- **The landlord must tell you in writing whether they expect to do any works that may disrupt your business.**

After you sign the lease:

- **You can end the lease in the first six months if the landlord did not give you a disclosure statement before you began the lease.**
- **If the landlord wants to move your shop due to building works and the lease has a relocation clause, they must give you a relocation notice and pay some of your costs of moving.**

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UPS AND DOWNS

Relocation

If the lease has a relocation clause, the landlord must give you at least three months' notice in writing when they ask you to move to another shop. You have one month to tell the landlord that you don't want to move when you get the relocation notice. If you do not accept the new shop, the lease finishes at the end of the notice period.

WHAT YOU MUST DO

- **If you receive a relocation notice, check that the landlord has complied with the Act.**
- **Decide promptly if you want to terminate the lease instead of accepting the new shop, and advise the landlord within one month of receiving the relocation notice.**

Demolition

If the lease has a demolition clause, the landlord can end the lease to demolish the building or shopping centre if the work requires vacant possession of your shop. Demolition includes any major repair, renovation or reconstruction.

The landlord must give at least six months' notice that the lease will end because of demolition. You can end the lease during that time by writing to the landlord and giving at least seven days' notice.

WHAT YOU MUST DO

- **Check whether the lease has a demolition clause and if the landlord has to compensate you for reasonable costs.**
- **Make sure the rent reflects the potential loss of your business if the lease includes a demolition clause.**
- **If you want to know more about your rights when facing relocation or demolition, phone the Dispute Resolution Unit on 1300 795 534 or go to: smallbusiness.nsw.gov.au**

Disruptions

The Act requires the landlord to take all reasonable steps to avoid disrupting your business and that you may be compensated, unless you were told about the disruption before starting the lease.

The landlord must give you two months' notice if they want to do any works in the building or shopping centre that may interfere with your business, unless it is an emergency.

If the landlord told you about any planned works in writing beforehand, such as in the disclosure statement or the lease, you may not be entitled to compensation, or only get part-compensation because you had the chance to consider the works and make them part of the negotiation for the rent and terms of the lease.

Repairs and damage

Leases usually state that you must keep the shop and equipment in good repair. However, leases often don't say who must replace equipment when it breaks down and can't be repaired. This is the cause of many disagreements. To avoid this, the lease should clearly state the tenant's or the landlord's obligations to repair or replace equipment that the landlord supplies.

If a tenant has to replace equipment, they need to be sure that their lease is long enough for them to recover their investment.

If your shop or its building is damaged, tell the landlord in writing immediately that you want it repaired. Also tell them when the damage happened. You can ask for compensation if you write to the landlord asking them to clean, replace or fix something that they are responsible for and they don't do so as soon as possible.

If you can't use your shop at all because it is damaged, you don't have to pay rent until it is repaired.

WHAT YOU MUST DO

- **Tell the landlord in writing as soon as possible about any damage, or subsequent repairs that are required.**

TIPS

- **It's wise to have insurance for damage you might do to the shop or the building it is in.**
- **Keep detailed records of any disruptions or damage so you can be specific about their impact and have a better chance of getting fair compensation if your business is affected.**

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Ending the lease for a breach

Nearly all leases have a clause allowing the landlord to end the lease if the tenant breaches or breaks it. Normally, before a landlord can do this, they must give the tenant:

- a notice describing the breach; and
- reasonable time to fix the breach.

In some cases, if the landlord doesn't meet the requirements of the lease, you may have the right to end the lease. Always get legal advice before taking this step, because if you get it wrong there could be financial consequences.

Improper conduct

Neither the tenant nor the landlord may engage in unconscionable conduct. This includes using bargaining power unfairly or using unfair tactics.

For examples of unconscionable conduct see the Australian Competition and Consumer Commission's website: www.accc.gov.au

The NSW Civil and Administrative Tribunal may award damages to someone who has suffered loss because of unconscionable conduct. This is a complex matter that usually requires legal advice to make a successful claim.

As well as unconscionable conduct, neither the landlord nor the tenant can engage in misleading or deceptive conduct. Generally this is behaviour that:

- creates a false impression;
- hides information; or
- makes false claims.

Dispute resolution

The Act says that the Registrar of Retail Tenancy Disputes in the Office of the NSW Small Business Commissioner provides mediation services for disputes between the landlord and tenant of a retail shop lease.

The Dispute Resolution Unit (DRU) provides free strategic and procedural advice to help you think differently about your problem. If you agree, DRU staff can discuss the issue with the other party.

With DRU's help, most problems are sorted out quickly and cheaply.

The Registrar can use mediation to try to resolve the dispute. Mediation is an effective and cost efficient way of resolving disputes, as a neutral mediator helps both parties try to negotiate a solution. There is a cost for both the landlord and tenant for using the services of a mediator.

The NSW Civil and Administrative Tribunal

If mediation is not successful, the next step to resolve the dispute is to go to the Tribunal. Unlike mediation, the Tribunal strictly focuses on legal matters and solutions. You can represent yourself at the Tribunal or engage a lawyer.

If you want to represent yourself, get legal advice before the hearing so you know exactly how to put your arguments to the Tribunal and improve your chances.

The monetary limit of the Tribunal's jurisdiction is now \$750,000.

TIPS

- **Try to resolve disagreements by discussion and negotiation.**
- **Contact industry bodies to see if they can help.**
- **Talk to the Office of the NSW Small Business Commissioner about issues as they arise, to avoid or manage disputes.**
- **For information and online dispute resolution services, go to: weagree.nsw.gov.au**

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AT THE END OF THE LEASE

When the lease ends, the landlord is free to find a new tenant. The landlord should give you six months' notice stating whether they plan to offer you a new lease.

If the landlord doesn't issue a notice telling you whether there will be an offer of a new lease, write to them before the lease ends to ask for this notice. The lease can be extended by up to six months from the time they give you the notice.

If the landlord offers you a new lease and you do not accept it within one month, they can withdraw the offer.

The landlord does not have to negotiate a new lease or an extension and they can stop negotiations at any time. They must tell you in writing that they have finished the negotiations before they can advertise the shop for lease.

The landlord can allow you to stay in the shop after the lease ends. This is usually on a month-to-month basis, which either of you can end with one month's notice.

If you want to hold over on a month-to-month basis, ask the landlord for their consent in writing before the lease ends.

WHAT YOU MUST DO

- **If no extension is offered you must vacate the shop. Unless you have a different arrangement with the landlord, by the end of the lease you must:**
 - remove all your property; and
 - return the shop to the state required by the lease.

If the lease has an option

Check your lease to see what you need to do to exercise the option and when it needs to be done. If you want to take up the option, you must tell the landlord (in writing) before the end of the option period stated in the lease.

If the option says that the lease is to be renewed or extended at the current market rent, you can ask the landlord in writing before the time to exercise the option starts, usually nine to six months before the end of the lease, what the new rent will be. If you don't agree with the new rent, you can have a valuer determine it. Valuations can be expensive. Discuss this option with the DRU.

Once the current market rent is agreed or determined, you have up to 21 days to exercise the option. If you miss the date to exercise the option, you will probably lose the right to the option.

Selling the business

If you decide to sell your business, you will usually want to transfer (assign) your lease to the buyer (the assignee).

You should consult our fact sheet to make sure you get the process right. Then ask the landlord to agree to the assignment. This involves giving information to the landlord and to the new tenant, in order to be released from the financial obligations of the lease.

TIPS

- Having an option may add value to your business.
- Ask the landlord for an updated disclosure statement before you exercise the option.
- If you are vacating the shop, stop trading and leave enough time to remove your property and restore the shop to the state agreed in the lease.

KEY DATES TO REMEMBER

These dates apply if your landlord uses a 1 July to 30 June financial year. If they don't use a financial year accounting system these dates will be different.

By 31 May

If you pay outgoings the landlord must give you an estimate for the upcoming accounting period.

If you're in a shopping centre and pay advertising and promotion expenses, the landlord must give you a written marketing plan of the proposed advertising and promotion expenses during that accounting period.

By 30 September

The landlord must give you a written statement which has been audited, detailing the outgoings for the previous accounting period.

The landlord must give you a sinking fund statement, where this applies.

If you are in a shopping centre and you contribute to a marketing plan or an advertising and promotion plan, the landlord must give you a written and audited statement with details on advertising and promotional costs.

By 31 January

If you are in a shopping centre and you contribute to a marketing plan or an advertising and promotion plan, ask to examine a written statement with details of advertising and promotion costs for the previous accounting period.

By 31 October

The tenant and landlord should settle any under-payment or over-payment to adjust the actual outgoings for that financial year.

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