NSW Retail Tenancy Guide 2020
ACKNOWLEDGEMENT OF COUNTRY

NSW Treasury acknowledges that Aboriginal and Torres Strait Islander peoples are the First Peoples and Traditional Custodians of Australia, and thank them for their custodianship of Country – land, seas and skies. We acknowledge the diversity of First Nations cultures, histories and peoples, recognise their enduring connection to our State, and we pay our deepest respects to Elders past, present and emerging.
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MESSAGE FROM THE SMALL BUSINESS COMMISSIONER


This guide is designed to help both lessors and lessees successfully negotiate and manage positive outcomes in relation to retail leases. Within this guide you will find information about starting a lease, leasing costs, lease management and lease expiry. We recommend this guide be provided as soon as, if not before, lease negotiations start, together with a copy of the proposed lease. This guide can also be used as a reference at any point during the term of a lease.

Different laws cover retail, commercial and residential leases and it is up to lessors and lessees to understand their rights and obligations regarding these laws. This guide does not replace professional advice or try to explain every aspect of the law. We strongly advise getting independent professional advice before signing a lease and would encourage you to visit our website smallbusiness.nsw.gov.au or call 1300 795 534 for further information. In the event of any disputes during the lease, we also have a cost-effective mediation service.

I would like to thank the industry bodies and associations that have assisted the Commission in producing this guide.

Chris Lamont
NSW Small Business Commissioner
December 2020
1. THINGS TO KNOW BEFORE SIGNING THE LEASE

Key information to help you understand aspects of the lease

Signing a lease is a significant financial commitment and the longer the lease, the longer the commitment. No matter how long the lease is, it’s important for both lessors and lessees to understand their rights and obligations before signing a lease.

What is a retail lease?

A retail lease is a legally binding contract between the lessor and lessee for the use of the premises where the lessee conducts their retail business. A retail lease cannot override the requirements of the Retail Leases Act 1994 (NSW). The lease must be provided to a potential lessee at the negotiating stage by the lessor. The Act will relate to your premises if it is less than 1,000 square metres in size, sells and supplies goods and services, is a type of retail business listed in Schedule 1 of the Act, and the length of the lease is between six months and 25 years. Even if your type of business is not listed in Schedule 1, it may be covered by the Act if the premises you are leasing is in a shopping centre. To find out if your business type is listed in the Act, go to: legislation.nsw.gov.au/view/whole/html/inforce/current/act-1994-046

When does a lease start?

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

- the lessee takes possession of the premises; or
- the lessee begins to pay rent.

If the lessee accepts the keys to the premises, this may be enough to start the lease – both parties should be careful to note whether handing over the keys is meant to start the lease or not (such as for a pre-lease inspection).

Terminology

Note that the terms ‘lessor’ and ‘landlord’ (usually the property owner) are interchangeable, as are the terms ‘lessee’ and ‘tenant’. This guide will use the terms ‘lessor’ and ‘lessee’ which are further defined in the Glossary on page 26.
What should the lease include?

While there is no standard lease as such, a lease should include:

<table>
<thead>
<tr>
<th>What to Include</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>The lease term (start/end dates)</td>
<td>A description of the premises and the address</td>
</tr>
<tr>
<td>How the rent is calculated</td>
<td>If and how the rent can be changed</td>
</tr>
<tr>
<td>Any agreed securities (e.g., cash bond, third party guarantee, or bank guarantee)</td>
<td>The type of business the premises can be used for (i.e., the permitted use)</td>
</tr>
<tr>
<td>Who is responsible for the costs of installing fixtures and fittings in the premises (the fit-out)</td>
<td>Any outgoings the lessee must pay (e.g., land tax, cleaning, security, council rates, water/utility charges, etc)</td>
</tr>
<tr>
<td>Who repairs and who maintains the premises and equipment</td>
<td>Core trading hours (when the premises must be open for business) – if applicable</td>
</tr>
<tr>
<td>If there is an option to renew or extend the lease</td>
<td>Any ‘make good’ provisions</td>
</tr>
</tbody>
</table>

Make sure that your lease includes the specific things relevant to your particular premises. Disputes often occur over small issues due to a lack of clarity in the lease. Importantly, no lease can override the Act which itself sets out certain base requirements.
Does the lease need to be registered?
Lessors must register a retail lease with a term of more than three years. This must be done within three months of the lease being signed by both parties via the NSW Land Registry Services. Visit their website: nswlrs.com.au/About/About/Announcements/96

For guidance on registering the lease go to: smallbusiness.nsw.gov.au/register-lease

What is ‘permitted use’?
Permitted use usually describes the type of business that the lessee is allowed to run from the premises under the lease. Before signing the lease, the lessee should check with the local council that the premises can be used for that particular business and what permits may be required from the council and any other authorities. Without these approvals in writing you may not be able to run your business from the premises. If you are taking over a lease (e.g. when buying a business), you should ensure the same approvals are in place. Some examples of permitted use are:

- For a hairdresser – consider, does it also include beauty treatments?
- For a takeaway shop – consider, can meals be served on re-usable plates? Can the type of takeaway food be changed?

Negotiating rent and trying to understand ‘market rent’
The rent payable under a lease is negotiated between the lessor and lessee. There are a variety of ways that the rent payable under the lease may be structured. For example, the lease may require base rent payments with outgoings paid on top of this, or base rent with based on a percentage of sales turnover (percentage rent or turnover rent). Whatever rent is agreed, this must be outlined in the lease.

‘Market rent’ is rent which is likely to be paid for comparable premises based on things such as size, location, use and the lease term. To help understand ‘market rent’ for the premises, lessees may consider consulting other lessees in the same complex, lessees in neighbouring premises, independent real estate agents, relevant industry associations, specialist retail advisors, commercial valuers or private lease negotiators.
You can also review historical real estate listings online or access historical leases from NSW Land Registry Services with whom all leases greater than three years should be registered. There are also a range of re-sellers of this information. Consider also any incentives being offered by the lessor and how this affects the overall cost of the lease.

Lease incentives

It is common for lessors to provide incentives to lessees to enter into retail leases. Incentives can be provided in different ways, but the most common are:

- a rent-free period;
- a rent reduction/abatement over a part or whole of the lease term;
- the lessor contributes to the lessee’s fit-out;
- the lessor pays outgoings;
- a combination of the above.

These arrangements may be outlined in a deed or agreement which is separate to the lease. If you are comparing leases of various premises, be mindful that these ‘side arrangements’ may be considered confidential so you may not be able to know whether there are any incentives attached to other comparable premises. This means you may not be able to determine the ‘true’ or ‘effective’ rent of other comparable premises.

Can you afford the rent?

A business plan should help lessees know whether they can afford to rent the premises. Don’t forget that the rent itself is only one aspect of the costs of a lease. There are many other costs that need to be considered including fit-out, outgoings, insurance and make-good requirements. For more information see section 2 of this guide ‘Understanding the Costs of Leasing’. Even if rent is considered reasonable compared to other premises, the focus should be on whether the overall costs of the lease align with the business plan. If you need help with your business plan, the services offered by Business Connect are a great starting point. Visit their website business.nsw.gov.au/support-for-business/businessconnect or call 1300 134 359.
Consider getting independent legal advice to make sure you understand the lease and the Disclosure Statement.

Ensure the lease and the Disclosure Statement describe the premises’ permitted use and that this description is broad enough so you can expand and/or sell the business if you wish.

Check council approvals (and any other necessary approvals) are in place for the business you intend to run at the premises.

Useful internet searches to get more information on ‘market rent’ include ‘lease data’, ‘lease information’ and ‘lease records’.

Consider getting independent advice on the likely costs of any fit-out (e.g. from a certified quantity surveyor), as particular construction requirements may well apply. Agree in writing (in the lease if possible) 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.

Before signing a lease or the Disclosure Statement, taking possession of the premises or paying any monies you should consider getting independent legal, financial and business advice.
Rent review

Most leases will provide that the rent can be reviewed on a regular basis, usually every 12 months. The lease will also stipulate the method that is to be used for a rent review. Some common methods are:

- a set percentage increase;
- consumer Price Index (CPI) – The lease should detail which CPI measure is to be used (e.g. the CPI published by the Australian Bureau of Statistics and whether it is monthly or yearly CPI);
- market review;
- any other agreed formulae or method.

Relocation or demolition clauses

Make sure the rent reflects the risk of any potential impact on your business if the lease includes a relocation or demolition clause. Note that any relocation to a new premises may result in an increase in rent if the new premises has higher commercial value, unless you negotiate for your lease to say otherwise.

Shopping centre leases

A shopping centre is defined in the Act as a cluster of premises:

- which are owned by the same person or company/s on the same strata plan;
- where at least five premises are used for retail business;
- which are located in the one building or in two or more buildings that are either adjoining or separated only by common areas or other areas owned by the retail shops owner; and
- which are regarded or promoted as a centre, mall, court or arcade.

There are many special issues to consider when leasing in a shopping centre including:

- you may have to pay turnover rent in addition to the base rent. Turnover rent is usually a percentage of the actual turnover of the business conducted from the premises. If you are required to pay turnover rent, you do not have to report your online sales unless the sales “touch” the premises, such as pickup or delivery from the premises;
- you may be required to contribute to the costs of advertising and promoting the shopping centre (marketing/promotional levies);
- the centre’s core trading hours may change if a majority of premises agree to this in writing; and
- you may be relocated, disrupted or the lease may be prematurely terminated in the event of a redevelopment, unless you negotiate for your lease to say otherwise.
If you are considering leasing in a shopping centre:

- Visit the shopping centre’s website for further information about the centre.
- Ask if the shopping centre is a signatory to the Reporting of Sales and Occupancy Costs Retail Industry Code of Practice (Sales Reporting Code). This Code encourages a mutual obligation arrangement that if a lessee provides turnover information to the lessor as part of the lease the lessee can request the lessor provide them with aggregate (anonymous) shopping centre data. To find out more go to: scca.org.au/code-of-practice-reporting-of-sales-and-occupancy-costs/
- Ask if the shopping centre is a signatory to the Casual Mall Licencing Code of Practice. Part 9 of the Disclosure Statement refers to this Code and other aspects of the shopping centre. To find out more go to: scca.org.au/industry-information/casual-mall-licensingcode/
- Be aware that premises leased from the Transport Asset Holding Entity of New South Wales and at the Sydney (Kingsford-Smith) Airport have special rules under the Act.

**TIPS**

- Write a report on the condition of the premises before the lease begins that both the lessor and lessee sign. This should include photos. If you are using and maintaining services provided by the lessor (e.g. air conditioning), check those services to ensure they are in good working order and note this in the condition report. You can download an example condition report at: fairtrading.nsw.gov.au/help-centre/forms
- If the premises is in a shopping centre, look for specific items that should be included in the Disclosure Statement, including:
  - 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;
  - details of when the leases for major lessees end; and
  - any planned construction works at the shopping centre.
**KEY STEPS BEFORE SIGNING THE LEASE:**

1. **Read our guidance ‘Before you sign the lease’ at:** smallbusiness.nsw.gov.au/sign-lease

2. **Read the draft lease and get independent advice on anything you are unsure about and try to negotiate any aspects of the lease you are not happy with. The NSW Law Society’s free solicitor referral service can refer you to an appropriate solicitor. Visit their website:** lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-referral-service

3. **Clearly understand the overall costs and risks of the lease for your business. Further guidance is provided in sections 2 and 4 of this guide. Get independent advice if you are unsure. A great starting point for business support is the Business Connect service. Visit their website:** business.nsw.gov.au/support-for-business/businessconnect

4. **Obtain the Retail Lease Disclosure Statement (with Part A signed by the lessor) at least seven days before you begin a new lease or renew a lease. There are two parts to the Disclosure Statement – one that the lessor signs (Part A, known as the Lessor’s Disclosure Statement) and one that the lessee signs (Part B, known as the Lessee’s Disclosure Statement). A template Retail Lease Disclosure Statement is available at:** smallbusiness.nsw.gov.au/disclosure-statement-form

5. **Carefully read the Disclosure Statement and our guidance ‘Information about Disclosure Statements’ at:** smallbusiness.nsw.gov.au/disclosure-statements. Consider getting legal advice to ensure you understand it. Check that it includes all the agreements you reached during negotiations including whether the lessor expects to do any works that may disrupt your business. If you don’t understand or don’t agree with any parts of the Disclosure Statement discuss with the lessor and ensure any amendments are noted in the Statement following your discussions.

6. **Seven days after you receive the Lessor’s Disclosure Statement (Part A) you must provide the lessor with the Lessee’s Disclosure Statement (Part B).**
2. UNDERSTANDING THE COSTS OF LEASING
Rent, fit-out, outgoings, insurance and other items to consider

It is important to be aware of the costs and risks of leasing and incorporate these into your business planning. Seek independent advice from a retail leasing expert, accountant, solicitor or others before signing your lease.

The main costs of leasing are:

1. Lease preparation
The lessor must pay the full cost of preparing the lease, including any mortgagee consent fees. However, if the lessee asks for changes after the signed Lessee’s Disclosure Statement has been returned to the lessor, the lessee may be required to pay for those amendments. For guidance on preparing the lease go to: smallbusiness.nsw.gov.au/preparing-lease

2. Fit-out
Lessees will usually be responsible for the costs of installing fixtures and fittings in the premises (the fit-out). In shopping centres, there is usually a standard of construction required for fit-outs. Lessees may also be responsible for some or all of the lessor’s costs of preparing the premises for the fit-out. The Disclosure Statement must state who pays these costs. Lessees must agree to the maximum cost of the lessor’s fit-out costs in writing before beginning the lease. Depending on the cost of the fit-out it may be worthwhile to have an independent certified quantity surveyor verify the costs associated with preparing the premises for fit-out. The lessor and lessee will need to consider/agree who is to pay for any surveyor.
3. Rent
Rent is one of the largest ongoing costs of running a business and is normally paid monthly in advance. Even if a lessee experiences financial difficulties, they must still pay the rent and use the premises only for the business stated in the lease.

4. Changing the rent
The initial rent under a lease is commonly referred to as base rent. The lease must state when and how any change to the rent is to occur. If the lease says the rent is set at current market value, and the lessee and lessor cannot agree on the rent, then the Act provides a process for a specialist retail valuer to determine the rent. The NSW Small Business Commission appoints the valuer and the lessee and lessor share the costs equally. These costs can be upwards of $1,500 per party, however, and will vary depending on the valuer and matter. If either party seeks a review, then both parties may be required to pay for the costs of a further two valuers.

5. Outgoings
Outgoings are expenses of the lessor that the lessee has agreed to pay under the lease. They are usually major costs for the lessee. Lessors are entitled to recover fees for management, operation, maintenance or repair of the premises or land as part of the outgoings. Outgoings may include things such as land tax, cleaning, security, promotional fund levies, council rates, water charges, utilities, insurance, pest control, emergency services levy, management fees and audit fees. The outgoings should be included in the Disclosure Statement and it is important you understand these before signing the lease. Undisclosed outgoings might not have to be paid. Outgoings can go up by market rates over time. For more information on outgoings, visit: smallbusiness.nsw.gov.au/outgoing

6. ‘Make good’ and end of term provisions
‘Make good’ provisions set out the obligations of the lessee before the lease ends, if any. Typically, these provisions require a lessee to return the premises to the lessor in a similar condition to that at the start of the lease. In some cases, make good involves a requirement for a lessee to strip back the premises to base building (or bare shell) condition and redecorate the premises (e.g. re-paint). It is important to agree to these provisions before signing the lease and use a condition report to document the condition of the premises at the start of the lease. You could also include a provision that an independent certified quantity surveyor may be engaged to determine any make-good costs. Retail leases often include a clause which stipulates that where the lessor and lessee cannot agree on the ‘make good’ costs, the President of the Australian Institute of Quantity Surveyors, or another industry body, will nominate an independent certified quantity surveyor to make a binding determination about these costs.
7. Insurance
The lease may include a provision requiring the lessee to take out certain insurance policies. Check these provisions and obtain a range of quotes for any required insurance policies. For further guidance visit: smallbusiness.nsw.gov.au/insurance-claims

8. Security
The lessor may ask for some form of security when negotiating the lease. This security may be: (a) a cash bond; (b) a third party guarantee, or (c) a bank guarantee. For further guidance on bonds, visit: smallbusiness.nsw.gov.au/everything-bonds

8a. Cash bond
If the lessee agrees to give the lessor a cash bond as security, the lessor must deposit the bond with the NSW Small Business Commission within 20 business days of receiving it by using the Bond Lodgement Form at: smallbusiness.nsw.gov.au/bond-lodgement-form

The main advantages of a cash bond are: it is held in trust by the NSW Government; there are no fees; it is for a specified amount; and there are rules for paying out the bond at the end of the lease. For further advice on managing your retail bond visit: smallbusiness.nsw.gov.au/bond-help

8b. Third party guarantees
This is a promise by a guarantor to pay the lessor compensation if the lessee breaks any of the terms of the lease. Be aware that if you personally guarantee a lease, the lessor can sue you for damages should the lessee default and you could personally lose assets or be bankrupted.

8c. Bank guarantees
This is a promise by your bank to pay the lessor an amount in compensation up to an agreed limit if you break the terms of the lease. If you have given a bank guarantee as security, agree in writing when it will end. The lessor must return the bank guarantee within two months of when you leave the premises unless you owe them money.

9. Valuation
Lessors and lessees may wish to get a valuation on the premises to check its market value. This can be done by hiring an expert valuer or by accessing specialist software. This will incur a cost.

10. Key money
A person must not seek or accept key money under the Act. The Act defines key money as any sort of non-refundable benefit, usually money, that the lessor asks for in exchange for the granting, renewal, extension or assignment of a retail lease.
3. MANAGING THE LEASE AND ANY ISSUES DURING THE LEASE

Key dates and how to manage issues as they arise

To best manage your lease and any issues that may arise during the lease, it’s recommended that you maintain your records with the following:

- a copy of the signed lease;
- a copy of the signed Retail Lease Disclosure Statement;
- the condition report and any photos you took as part of this;
- notes about discussions you have with the lessor/lessee or any relevant agents or advisors in case you need to refer to them; and
- a list of key dates related to the lease (as listed below).

TIPS

- Keep written records of your dealings with the lessor/lessee during the term of the lease.
- 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.
<table>
<thead>
<tr>
<th>Key Dates</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td><strong>By 31 January</strong></td>
<td>If the lessee is in a shopping centre and contributes to a marketing plan or an advertising and promotion plan, they may ask to examine a written statement with details of advertising and promotion costs for the first six months of the previous accounting period (1 July to 31 December).</td>
</tr>
<tr>
<td><strong>By 31 May</strong></td>
<td>If the lessee pays outgoings the lessor must give the lessee an estimate for the upcoming accounting period. In addition, if the lessee is in a shopping centre and pays advertising and promotion expenses, the lessor must give the lessee a written marketing plan of the proposed advertising and promotion expenses during that accounting period.</td>
</tr>
<tr>
<td><strong>By 31 July</strong></td>
<td>If the lessee is in a shopping centre and contributes to a marketing plan or an advertising and promotion plan, they may ask to examine a written statement with details of advertising and promotion costs for the last six months of the previous accounting period (the lessor cannot refuse).</td>
</tr>
<tr>
<td><strong>By 30 September</strong></td>
<td>The lessor must give the lessee a written statement which has been audited, detailing the outgoings for the previous accounting period. The lessor must give the lessee a sinking fund statement, where this applies. In addition, if the lessee is in a shopping centre and the lessee contributes to a marketing plan or an advertising and promotion plan, the lessor must give the lessee a written and audited statement with details on advertising and promotional costs.</td>
</tr>
<tr>
<td><strong>By 31 October</strong></td>
<td>The lessor and the lessee should settle any under-payment or over-payment to adjust the actual outgoings for the previous financial year.</td>
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</tbody>
</table>
POTENTIAL ISSUES THAT MAY ARISE DURING THE LEASE


Disruptions

Lessees should tell the lessor in writing as soon as possible about any disruptions impacting their business, as it may affect when they may be able to claim compensation for such disruptions.

The Act requires the lessor to take all reasonable steps to avoid disrupting the lessee’s business. Lessees may be compensated, unless they were told about the disruption before starting the lease.

Keep detailed records of any disruptions so you can be specific about their impact and have a better chance of getting fair compensation if your business is affected. Collect evidence to help validate your claims such as photos or relevant sales/customer data. Consider seeking independent advice if necessary.

TIP

Try to resolve disagreements by discussion and negotiation wherever possible as they will be less costly and time-consuming.

Repairs and damage

Leases usually state that you must keep the premises and equipment in good repair. However, leases often don’t say who must replace equipment when it breaks down and can’t be repaired. The lease should clearly state the lessee’s or the lessor’s obligations to repair or replace equipment that the lessor supplies.

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

Lessees are entitled to compensation if they write to the lessor asking them to clean, replace or fix something that they are responsible for and they don’t do this as soon as possible. If the lessee can’t use the premises at all because it is damaged, they don’t have to pay rent until it is repaired, and may be able to terminate the lease.

A lessee is not usually responsible for latent or inherent defects to the building, but the lease should clearly outline who is responsible for these, and in which circumstances.

It may be wise to have insurance for the premises. This may also be a condition of the lease.
Relocation notices

If a lessee receives a relocation notice, they should check whether the lease has a relocation clause. For further guidance visit: smallbusiness.nsw.gov.au/relocation-notice

If the lease has a relocation clause, the lessor must give the lessee at least three months’ notice in writing when they ask the lessee to move to another premises.

The lessee has one month to tell the lessor that they don’t want to move when they get the relocation notice.

If the lessee does not accept the new premises, the lease finishes at the end of three months from the original notice (or earlier if agreed).

Demolition notices

If a lessee receives a demolition notice, they should check whether the lease has a demolition clause and if the lessor has to compensate them for reasonable costs.

If the lease has a demolition clause, the lessor can end the lease to demolish the building or shopping centre if the work requires vacant possession of the premises. This applies whether all or part of the building is being demolished. Demolition includes any major repair, renovation or reconstruction.

The lessor 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 lessor and giving at least seven days’ notice.

What happens if someone breaches the lease?

If a lessee or lessor does not abide by the lease then it may be a breach of the lease. For example, if the lessee doesn’t pay rent on time it is a breach of the lease. Similarly, if the lessor fails to repair or maintain the premises as stipulated in the lease, it is a breach of the lease. Where a party has breached the lease, the other party may recover any losses they experience because of the breach. Note that the non-breaching party must take reasonable steps to minimise their losses. In addition, certain breaches may entitle a party to terminate the lease. Seek legal advice if concerned.

What happens if the lessee has been locked out of the premises?

If a lessee has been locked-out of the premises, or received a letter or warning that the lessor or their agent is considering what is sometimes known as ‘re–entry’, ‘repossession’, ‘eviction’ or ‘termination’ they should seek immediate independent legal advice on these warnings due to the potential impact on their business. For further guidance, visit our website: smallbusiness.nsw.gov.au/lock-out
Improper conduct

Neither the lessee nor the lessor may engage in unconscionable conduct, or misleading or deceptive conduct. This is a complex matter that usually requires legal advice to make a successful claim.

Dispute resolution

The NSW Small Business Commission provides mediation services for disputes between the lessor and lessee of a retail lease. Mediation is an effective and cost-efficient way of resolving disputes, as a neutral mediator helps both parties try to negotiate a solution. If you need help resolving a dispute, you can submit an application for Mediation at no charge. A Mediation Officer will be allocated to your matter and will assist both parties. If the parties decide a mediation session could help, they share equally in the relatively low Mediator’s fee. For more information on mediation and the costs, visit: smallbusiness.nsw.gov.au/mediation-cost

To apply for a mediation, go to: smallbusiness.nsw.gov.au/mediation-apply

The NSW Civil and Administrative Tribunal

If mediation is not successful or appropriate you may be able to seek orders from the Tribunal in order to resolve the dispute.

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, consider getting legal advice about your case before the hearing so you know exactly how to put your arguments to the Tribunal and improve your chances of success. For further guidance visit: ncat.nsw.gov.au/ncat/case-types/consumers-and-businesses/retail-leases.html

TIPS

- To find out more about your rights when facing these issues, visit our website at: smallbusiness.nsw.gov.au/get-help


- If you need help resolving an issue and would like to access our mediation services, visit: smallbusiness.nsw.gov.au/access-mediation
4. WHAT TO DO AT THE END OF THE LEASE

Ending, renewing, extending or transferring the lease

Your lease will outline when the lease is due to end as well as whether there are any options to extend or renew the lease. As the end of your lease approaches it is important for lessors and lessees to discuss their options so that there can be a smooth transition to appropriate future arrangements.

What happens when a lease, without an option, ends?

If the lease does not have an option to extend or renew then when the lease ends, the lessor is free to find a new lessee.

The lessor must give the lessee written notice about whether they intend to offer the lessee a new lease or if they want the lessee to move out at the end of the current lease. This notification must be given at least six months before the lease expiry date and not more than 12 months before expiry.

If the lessor offers the lessee a new lease and the lessee does not accept it within one month, the lessor can withdraw the offer.

If the lessor doesn’t issue a notice telling the lessee whether there will be an offer of a new lease, the lessee should consider writing to the lessor before the lease ends to ask the lessor for this notice indicating their intentions. Otherwise, the lease may continue on a month-to-month basis.

The lease can be extended by up to six months from the time the lessor gives the lessee the notice.

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

If no extension is offered or agreed between the parties then by the end of the lease you must vacate the shop, remove your belongings and ‘make good’ the premises as outlined in the lease.

For more information on what happens when a lease without an option ends, go to: smallbusiness.nsw.gov.au/options-end

TIP

The lessee should ask the lessor for an updated Disclosure Statement before they exercise the option to renew or extend the lease.
What happens if the lease has an option to extend or renew the lease?

A retail lease may include an option to renew or extend the lease.

Check the lease to see what you need to do to exercise the option and when it needs to be done.

If the lessee wants to take up the option, they must normally tell the lessor in writing during the ‘option exercise window’ stated in the lease. If the lessee misses the last date to exercise the option, they will probably lose the right to the option.

For more information on lease options go to: smallbusiness.nsw.gov.au/lease-options

Rent changes resulting from a lease extension or renewal

If the option to extend or renew the lease states that the rent changes to current market rent, the lessee may ask the lessor in writing to outline what the new rent will be. The lessee may send this request to the lessor before the time to exercise the option starts, usually nine to six months before the end of the lease.

If the lessee and lessor cannot agree on the current market rent, then the Act provides a process for a specialist retail valuer to determine the rent. The NSW Small Business Commission appoints the valuer and the lessee and lessor share the costs equally. These costs can be upwards of $1,500 per party, however, will vary depending on the valuer and matter. If either party seeks a review, then both parties may be required to pay for the costs of a further two valuers. Once the current market rent is agreed or determined, the lessee has up to 21 days to exercise the option. If the lessee misses the date to exercise the option, they will probably lose the right to the option.

Continuing the lease on a month-to-month basis

While the lease may not include an option to renew, many leases give the lessee an opportunity to ‘hold over’ the lease and stay in the premises on a month-to-month basis at the end of the lease. The lessee becomes a ‘periodic lessee’ or ‘lessee at will’ and in this situation, either the lessee or the lessor can end the lease with one month’s notice.

Be aware that some franchise and licence to sell agreements require a lease not to be month-to-month.

If a lessee wants to hold over on a month-to-month basis, they should check the terms of the lease to see whether this is permitted and consider asking the lessor for their consent in writing before the lease ends. It can be risky to remain in a month-to-month lease without negotiating for a new fixed term lease.
For example, it can and does happen that lessees are unable to sell their business because their lessor is able to choose to terminate the month-to-month lease and a buyer typically wants a longer term lease.

It may be wise business practice to actively seek to negotiate a new lease with a new fixed term before you enter into a month-to-month lease unless that works for you (e.g. because you are seeking premises elsewhere).

For more information on lease hold overs and renewals, visit: smallbusiness.nsw.gov.au/hold-over

**Are you required to ‘make good’ the premises at the end of the lease?**

‘Make good’ provisions set out the obligations of the lessee before the lease ends, if any.

Check if the lease has a ‘make good’ provision. Typically, these provisions require a lessee to return the premises to the lessor in a similar condition to that at the start of the lease. In some cases, make good involves a requirement for a lessee to strip back the premises to base building (or bare shell) condition and redecorate the premises (e.g. re-paint). Ideally, you may be able to refer to the condition report prepared at the beginning of the lease.

If the lessee is vacating the premises be sure to leave enough time to remove your property and restore the premises to the state agreed in the lease. Alternatively, parties often agree to a payment by the lessee to the lessor in lieu of the lessee carrying out the make good, leaving it to the lessor to carry out as necessary. Lessees can try negotiating with their lessor for this arrangement, if preferable. If lessees don’t carry out the make good, they will normally be liable to pay the agreed costs.

Retail leases may include a clause which states where the lessor and lessee cannot agree on the make good costs, the President of the Australian Institute of Quantity Surveyors (AIQS), or another industry body, will nominate an independent certified quantity surveyor to make a binding determination about these costs.

**Selling the business**

If the lessee decides to sell their business, they will often be expected to transfer (assign) their lease to the buyer (the assignee). So, there are two transactions that may need to occur – a sale of business and a transfer of lease. Asking the lessor to agree to the assignment of the lease involves giving information to the lessor and to the new lessee, in order to be released from the financial obligations of the lease.
Under the Act, an Assignors Disclosure Statement is to be provided to the lessor when a lessee is requesting the lessor to consent to the assignment (transfer) of a lease. A copy should also be given to the assignee (proposed new lessee). A copy of this statement is available at: smallbusiness.nsw.gov.au/assignors

You should also consider getting independent advice. For more information on transferring your lease, visit: smallbusiness.nsw.gov.au/transfer-lease

Collecting your property after the lease has ended

Usually, unless the lease states otherwise, the property the lessee brings into the premises remains the lessee’s property after the lease has ended. The lessor has to give the lessee reasonable opportunity to remove their goods, whether the lease has expired, or it has ended early because of a breach of the lease terms. The lessee should contact the lessor and arrange a suitable time to collect their goods. Lessees may be liable to the lessor for compensation or damages for leaving their goods at the premises if this has not been agreed. For further guidance on lessee’s right to enter a property after a lease ends, go to: smallbusiness.nsw.gov.au/right-to-enter

Useful resources

- Everything you need to know about bonds: smallbusiness.nsw.gov.au/everything-bonds
- How to access the Commission’s mediation services: smallbusiness.nsw.gov.au/access-mediation
- Retail leases and COVID-19 FAQs: smallbusiness.nsw.gov.au/covid-faq
CHECKLIST FOR LESSORS

☐ Consider seeking legal and financial advice when preparing a lease document, including to ensure it complies with the relevant legislation.

☐ Conduct appropriate enquiries to understand the financial capacity of the lessee.

☐ Provide a copy of this guide as soon as lease negotiations commence.

☐ Provide full details to the proposed lessee of all outgoings they are agreeing to pay under the lease.

☐ Consider clarifying who is responsible for the maintenance and repair of particular items (e.g. air conditioning, roof, structural issues).

☐ Clarify what will happen if there is a breach of lease, and what termination clauses are agreed.

☐ Provide the lessee with a copy of the lease within three months after it has been signed by the lessor.

☐ Register a lease longer than three years with NSW Land Registry Services within three months of the lease being signed by both parties.

☐ Hand over possession of the premises after the lease has been prepared and signed.

CHECKLIST FOR LESSEES

☐ Look around for a suitable premises and consider talking to other retailers, independent real estate agents, valuers or relevant industry bodies.

☐ Consider seeking legal and financial advice prior to signing a lease. Ensure you read the lease and other lease documents (e.g. Disclosure Statement) thoroughly and highlight any parts which are unclear and seek clarity on these.

☐ Ensure the property is suitable/appropriate for conducting your business for the duration of the lease.

☐ Understand what the lease allows you to do (the permitted use) and also what other licenses or permits might be required (e.g. from local council or other authorities).

☐ Ensure it is clear what the rent is and how it can be increased (if at all) and that this is clearly outlined in the lease.

☐ Ensure the area to be leased is clearly defined in the lease documents.

☐ Be aware of any security payments required (e.g. cash bond, third party guarantee, or bank guarantee).

☐ Note the deadline by which you must exercise an option, if you have one.

☐ Obtain a copy of the Disclosure Statement at least seven days before you begin a new lease or renew a lease.

☐ Ensure you fully understand what costs you have agreed to, such as outgoings, fit-out costs and other occupancy costs as well as the make good provisions at the end of the lease.

☐ Understand who is responsible for maintenance and repairs of the building and infrastructure, plant and equipment, air conditioner etc.

☐ If the premises is in a shopping centre, make sure you are aware of some of the unique requirements related to renting in a shopping centre.

☐ Before taking possession, consider doing an inspection/condition/dilapidation report (including photos) that both the lessor and lessee sign.

☐ Take possession of the premises after the lease has been prepared and signed.
GLOSSARY OF KEY TERMS

Disclosure Statement
A list of information, as required under the Act, that lessors and lessees must sign before entering into the lease. There are two parts to the Disclosure Statement: (a) Part A, known as the Lessor’s Disclosure Statement, which is signed by the lessor and must be provided to the lessee at least seven days before the commencement of a lease; and (b) Part B, known as the Lessee’s Disclosure Statement, which is signed by the lessee and must be provided to the lessor within seven days after receipt of Part A.

Lessee (Tenant)
The tenant of the leased premises.

Lessor (Landlord)
The owner of the leased premises, who grants a lease to the lessee (tenant).

Hold over (Holdover)
You are on ‘hold over’ if you continue to occupy the premises after the expiry of the fixed term where the lessor has not taken action to end the lease. Leases often give the lessee an opportunity to ‘hold over’ under the lease and stay in the premises on a month-to-month basis. Under this arrangement either party can terminate the lease with one month’s notice. See also: hold-over, holding over period, month-to-month, monthly tenancy, week-to-week, weekly tenancy, tenancy at will.

Make good (Makegood)
The obligation of a lessee at the end of their lease to ensure that their premises are returned to the condition it was first built, the same condition as at the start of the lease, or some other condition as specified in the lease. For example, the make good obligations may include re-painting or restoring partitions. Note: ‘cold shell’ or ‘warm shell’ are sometimes used in shopping centres, where you may need to take all services back to capped points, and install hoarding when the shop front is removed.

Mediation
A confidential process in which the participants, with the support of the mediator, identify issues and commercial interests, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a neutral third party to support participants to reach their own decision. Mediation is generally a cost-effective and quick way to settle disputes. The NSW Small Business Commission provides mediation services.

Option (Option to Renew or Extend)
Typically an option in a lease is a right for the tenant to call for a new lease with the same terms as their current lease, for a new fixed period of years, removing (striking out) the option that was used, and resetting the rent by a specified method. An option in a lease usually means an extra period that the lessee has the right to occupy the premises, in addition to the initial fixed term of the lease. For example, a lease with an initial fixed term of two years may have two options which will allow the lessee to stay for a further three years. A lessee may choose whether to ‘exercise’ or take up an option. Any option should be documented in the lease (in writing). The deadline for exercising an option is usually some months prior to the end of the lease (not the last day of the lease). If you miss that deadline, you lose the option.

Outgoings
The costs incurred by the lessor in operating and maintaining the leased premises which are typically passed on to the lessee. As such these are usually referred to as ‘lessor outgoings’ (i.e. separate to outgoings of the business itself). Outgoings are negotiated between the lessor and lessee and should be outlined in the lease. Examples may include council and water rates, repairs and maintenance and management fees. The Retail Leases Act 1994 (NSW) impacts on what outgoings may be charged to the lessee.

Term
The duration of the fixed term of the lease, being the minimum amount of time that a lessee may remain at the premises. A lease agreement may also provide options to renew or extend the lease term.

For further information see: smallbusiness.nsw.gov.au
This document has been developed in consultation with a range of industry bodies including:

- Australian Institute of Quantity Surveyors
  aiqs.com.au

- Australian Retailers Association
  retail.org.au

- Business NSW
  businessnsw.com

- National Retail Association
  nra.net.au

- Newsagents Association of NSW and ACT Ltd
  nana.com.au

- Restaurant and Catering Australia
  rca.asn.au

- Shopping Centre Council of Australia
  scca.org.au

- The Law Society of NSW
  lawsociety.com.au

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