NSW Retail Tenancy Guide 2022

NSW GOVERNMENT | Small Business Commissioner

smallbusiness.nsw.gov.au

MESSAGE FROM THE SMALL BUSINESS COMMISSIONER

A retail lease is often a critical contributor to the success of a business.

A lease secures a business's right to trade at a premises. For the property owner, it can underpin the revenue that supports an investment decision.

Entering a lease is a major commitment and it is critical that you understand your rights and responsibilities as a tenant (lessee) or landlord (lessor) before you enter a lease agreement and when any issues arise during the term of the lease.

This guide will assist with many common scenarios including starting a lease, changing the rent, transferring a lease and where lessors and lessees are in dispute. It is relevant for all retail leases entered into after 1 July 2017.

We recommend this guide be read as soon as, if not before, lease negotiations start, alongside a copy of a proposed lease.

The guide can also be used as a reference at any point during the term of a lease.

The guide does not replace professional advice or try to explain every aspect of the leasing laws. Different laws cover retail, commercial and residential leases and it is up to lessors and lessees to know their rights and responsibilities, including obligations and requirements set out within the *Retail Leases Act 1994 (NSW).*

While many individuals or organisations represent themselves as experts in leasing matters, only some are qualified to give advice. We strongly advise getting independent and professional advice before signing a lease and encourage you to visit the Commission's website smallbusiness.nsw.gov.au or call 1300 795 534 if you require further information.

In the event of a dispute during the lease, the Commission offers a cost-effective mediation service which can help resolve lease disputes quickly and efficiently.

We hope this guide helps both lessees and lessors to successfully negotiate positive outcomes regarding retail leases.

Chris Lamont
NSW Small Business Commissioner
July 2022

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ACKNOWLEDGEMENT OF COUNTRY

We acknowledge and pay our respect to the traditional custodians of the lands and waters of NSW, and all Aboriginal Elders, past, present and emerging.

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:

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

Make sure that the lease includes the specific things relevant to the 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.

TIPS

- The lease term should be long enough for the business to pay off fit-out investment, make a profit, and potentially sell the business. Consider negotiating for an "option" if the lessee needs or wants a shorter lease term, with the ability to lock in a longer term if things work out.
- Research 'market rent' by reviewing historical real estate listings and consulting with independent real estate agents, valuers, other retailers, relevant industry associations and specialist retail advisors. Consider also any incentives and how this affects the overall cost of the lease and your assessment of 'market rent'.

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'?

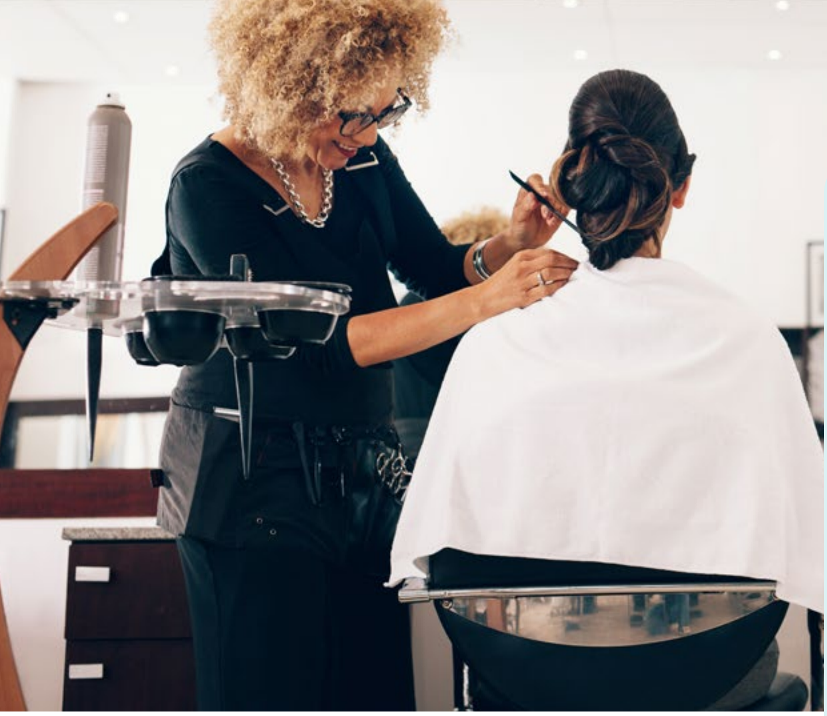
Permitted use usually describes the type of business that the lessor allows to be run from the premises under the lease. Before signing the lease, the lessee should check with the local council that the premises can be used for that particular business and what permits may be required from the council (and strata manager if in a strata building) and any other authorities. Without these approvals in writing you may not be able to run your business from the premises. If a purchaser is taking over a lease (e.g. when buying a business), they 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 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 a similar property based on size, location etc. Lessees may wish to consult other lessees in the same complex, lessees in neighbouring premises, independent real estate agents, relevant industry associations, specialist retail advisors, commercial valuers, conveyancers or private lease negotiators to help understand 'market rent' for the premises. Historical real estate listings can be reviewed online or by accessing historical leases from NSW



Land Registry Services (nswlrs.com.au/Find-Records), with whom all leases greater than 3 years should be registered. There are also a range of re-sellers of this information. Useful internet search terms include 'lease data', 'lease information' and 'lease records'. 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. When comparing leases of various premises, be mindful that due to such confidential 'side arrangements', the 'true' or 'effective' rent may not be obvious.

TIPS

- **The lessee should know what expenses they will incur in preparing the premises for trade and follow the fit-out standard required by the lease.**
- **The lessee should check whether the electrical wiring in the premises is part of an embedded network (typically in apartment blocks, retirement villages, caravan parks and shopping centres) as it may affect their energy costs. For further information see: aer.gov.au/consumers/information-for-electricity-consumers-in-embedded-networks**
- **The lessee must pay the rent on time. If they don't, the lease may allow them to be locked out without warning.**

Can the lessee afford the rent?

A business plan should help lessees know whether they can afford to rent the premises. 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. For help with a business plan, the services offered by Business Connect are a great starting point. Visit their website: https://www.nsw.gov.au/working-and-business/business-advice-and-support/about-business-connect or call **1300 134 359**.

TIPS

- Consider getting independent legal advice about the lease, the Disclosure Statement, and the ongoing cost implications.
- Ensure the lease and the Disclosure Statement describe the premises' permitted use accurately, and for the life of the lease term.
- Check council approvals (and any other necessary approvals) are in place for the business type.
- Seek advice on outgoings for similar premises and be clear on what contribution the lessee will be making to lessor outgoings.
- Write a report on the condition of the premises before the lease begins that both the lessor and lessee sign. This may include photos.
- Be clear about the key contact points for any future discussion about the lease obligations during the term and maintain open and respectful communication throughout. Miscommunication is a key contributor to disputes and can escalate into unnecessary and costly conflict.

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 (eg. 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

A lessee will want to consider any potential impact on their 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 negotiated 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:

- Rent based on turnover is sometimes negotiated, turnover rent is usually a percentage of the actual turnover of the business conducted from the premises. If a lessee agrees to pay turnover rent, they do not have to report their online sales unless the sales “touch” the premises, such as pickup or delivery from the premises;
- a contribution by the lessee to the costs of advertising and promoting the shopping centre (marketing/promotional levies) is often negotiated;
- the centre’s core trading hours may change if a majority of premises agree to this in writing; and
- there may be relocation or other disruption in the event of a redevelopment, unless you negotiated otherwise.

Potential lessees in a shopping centre may wish to enquire about:

- The **Reporting of Sales and Occupancy Costs Retail Industry Code of Practice** (Sales Reporting Code) at scca.org.au/wp-content/uploads/2015/06/FINAL-Code-of-Practice_Reporting-of-Sales-and-Occupancy-Costs_2018.pdf; which 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.
- The **Casual Mall Licencing Code of Practice** at scca.org.au/industry-information/casual-mall-licensing-code/. Part 9 of the Disclosure Statement refers to this code and other aspects of the shopping centre.

TIPS

- **Consider getting independent advice on the likely costs of any fit-out (e.g. from a certified quantity surveyor), particularly in shopping centres where high construction standards may 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.**
- **If the premises is in a shopping centre, review 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.**

BEFORE SIGNING A PROPOSED LEASE, THE LESSEE MAY WISH TO:

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 they are unsure about and try to negotiate any aspects of the lease they are not happy with. Contact the NSW Law Society's solicitor referral service: 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 their business, and take independent advice if unsure. A great starting point for business support is Business Connect: business.nsw.gov.au/support-for-business/businessconnect. Also see section 2 of this Guide on 'Understanding the Costs of Leasing'.

4. Obtain the **Retail Lease Disclosure Statement** (with Part A signed by the lessor) at least seven days before they 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 they understand it. Check that it includes all the agreements reached during negotiations including whether the lessor expects to do any works that may disrupt your business. If they don't understand or don't agree with any parts of the Disclosure Statement the lessee should discuss this with the lessor and ensure any amendments to the lease are also noted in the Statement following any discussions.

6. Seven days after receiving the Lessor's Disclosure Statement (Part A) the lessee 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 any business planning. Seek independent advice from a retail leasing expert, accountant, solicitor or others before signing a lease.

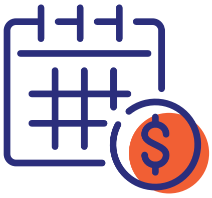
The main costs of leasing are:

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.

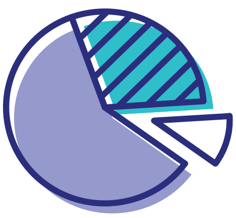


3. Rent

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. If the lease requires the lessee to keep actively trading in the lease period but they close the premises (including due to insolvency legislation and laws), it may be a breach of 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 able to negotiate recovery of 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

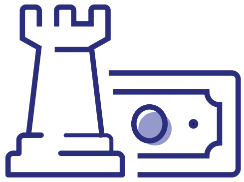
6. ‘Make good’ and end of term provisions

‘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 an empty and neutral state, which is not necessarily a similar condition to that at the commencement 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. 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 quotes for any required insurance policies.

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. Retail bonds are managed by NSW Fair Trading. See: fairtrading.nsw.gov.au/housing-and-property/renting/rental-bonds-online

8a. Cash bond

If the lessee agrees to give the lessor a cash bond as security, the lessor must deposit the bond with NSW Fair Trading within 20 business days of receiving it. 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.

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. The person providing the guarantee can be sued and put their personal assets at risk should the lessee default.

8c. Bank guarantees

This is a promise by a bank to pay the lessor an amount in compensation up to an agreed limit if you break the terms of the lease. The lessor has the right to cash in the bank guarantee or draw on it if the lessee breaches the lease or damages the premises. The lessor is usually not required to inform the lessee that they have drawn on the bank guarantee before they do it. A bank guarantee can have an expiry date or be unlimited. The lessor should release the bank guarantee within two months of the lessee leaving the premises unless they owe 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

Key money is 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. Key money does not include paying a cash bond or giving a guarantee. Lessors must not take key money for 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 taken as part of this;
- notes about discussions between the lessor, lessee or any relevant agents or advisers in case you need to refer to them.

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.**

KEY DATES TO REMEMBER DURING THE LEASE

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

By 31 January

If in a shopping centre and the lessee 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).

By 31 May

If the lessee pays outgoings the lessor must provide an estimate for the upcoming accounting period. In addition, if in a shopping centre and paying advertising and promotion expenses, the lessor must provide a written marketing plan for the proposed advertising and promotion expenses during that accounting period.

By 31 July

If in a shopping centre and the lessee contributes to a marketing plan or an advertising and promotion plan, they may ask for a written statement with details of advertising and promotion costs for the last six months of the previous accounting period.

By 30 September

The lessor must provide a written statement which has been audited, detailing the outgoings for the previous accounting period. The lessor must provide a sinking fund statement, where this applies. In addition, if in a shopping centre and the lessee contributes to a marketing plan or an advertising and promotion plan, the lessor must provide a written and audited statement with details on advertising and promotional costs.

By 31 October

The lessee and lessor should settle any under-payment or over-payment to adjust the actual outgoings for the previous financial year.

TIP

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

POTENTIAL ISSUES THAT MAY ARISE DURING THE LEASE

If any of the below issues arise, you should seek independent advice if you are unsure about what to do, and review your lease. For further guidance, you should also review the Act: legislation.nsw.gov.au/view/html/inforce/current/act-1994-046.

Disruptions

Lessees should tell the lessor in writing as soon as possible about any disruptions impacting their business.

The Act requires the lessor to take all reasonable steps to avoid disrupting the lessee's business. Lessees may be able to seek compensation, 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. **Consider seeking independent advice if necessary.**

Repairs and damage

The lessee is often going to be responsible for repairs and maintenance under the lease. Retail and commercial leases can be very different to residential leases, which often require the lessor to do more of the repairs and maintenance.

If the lessor supplies any equipment, such as individual air-conditioning units, then it is also common for the lease to require the tenant to maintain that kind of equipment whilst they are in occupation. The lessor might also agree to replace the equipment if it breaks down completely. These things can be negotiated at the start of the lease and it is sensible for both parties to document all repair and maintenance obligations from the start.

If there is any damage to the premises or equipment supplied by the lessor, then the lessee (occupier of the property) should tell the managing agent (or the lessor if they are self-managing) about what has happened. This can often be a phone call in the first instance, but it's also a good idea for the tenant to send photos and a description of what has happened in writing (by email, for example).

If there is significant damage that makes the property or part of the property unusable, then a common question from the lessee will be whether they have to keep paying rent in full. If the damage is caused by weather or other events that are out of the control of the lessee or the lessor, then a negotiated outcome where the lessee pays less rent, or no rent for a period of time whilst the damage is being repaired, is also quite common. Under the *Retail Leases Act 1994 (NSW)* there are provisions that describe each party's rights when there are damaged premises. They include what happens with rent, notice requirements and termination if the premises cannot be repaired. Termination is not usually what a tenant with a long-term lease is looking for, so a mutually acceptable outcome can usually be negotiated. A mediator can always try to assist and can be arranged through the Mediation Services team.

Insurance should also be considered by both lessors and lessees and any contributions towards insurance premiums are usually detailed in the outgoings section of the lease. It is common for tenants to contribute towards building insurance premiums whilst they are in occupation and this is something that can be agreed before the lease starts.

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. A lessee 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 doesn't do what is required of them under 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/get-help/disputes/how-does-mediation-work.

The NSW Courts and the NSW Civil and Administrative Tribunal

If mediation is not successful you may be able to seek orders from a court or the Tribunal to resolve the dispute. Unlike mediation, the courts and tribunals focus strictly on legal matters and solutions. You can represent yourself at the Tribunal or engage a lawyer.

TIPS

- **To find out more about you rights when facing these issues, visit our website at: smallbusiness.nsw.gov.au**

  Or, call us on 1300 795 534. Read the full *Retail Leases Act 1994 (NSW)* at: legislation.nsw.gov.au/view/html/inforce/current/act-1994-046

- **If you need help to resolve a dispute and would like to access our mediation services, visit: smallbusiness.nsw.gov.au/get-help/disputes/how-does-mediation-work**

4. WHAT TO DO AT THE END OF THE LEASE

Ending, renewing, extending or transferring the lease

The 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.

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 Registrar of Retail Tenancy Disputes 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

Almost all 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 fixed term period. 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.

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 is good business practice to actively seek to negotiate a new lease with a new fixed term before the lessee transitions into a month-to-month lease unless they are seeking premises elsewhere.

> **TIP**
>
> **If the lessee is vacating the premises be sure to leave enough time to remove any property and restore the premises to the state agreed in the lease (see sections 2 and 4 of this Guide which refer to 'make good' provisions).**

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.

Typically, make good provisions require a lessee to return the premises to the lessor in "original condition", which may mean returning the property to the condition it was in when it was first built. In many 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 they must be sure to leave enough time to remove any property and restore the premises to the state agreed in the lease. Alternatively, lessee's often agree to a payment 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 the lessor for this arrangement. If lessees don't carry out the make good, they will normally be liable to pay the lessor's costs.

Retail leases may include a clause which states that if 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 need 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 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

- **Lease Disclosure Statement:** smallbusiness.nsw.gov.au/disclosure-statement-form
- **Information about Disclosure Statements:** smallbusiness.nsw.gov.au/disclosure-statements
- **Information about lease options:** smallbusiness.nsw.gov.au/lease-options
- **Manage your bond online at NSW Fair Trading:** www.fairtrading.nsw.gov.au/housing-and-property/renting/rental-bonds-online
- **How to access the Commission's mediation services:** https://www.smallbusiness.nsw.gov.au/get-help/disputes/how-does-mediation-work
- **Retail leases and COVID-19 FAQs:** smallbusiness.nsw.gov.au/covid-faq
- ***Retail Leases Act 1994* (NSW) (the Act):** legislation.nsw.gov.au/view/html/inforce/current/act-1994-046

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 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.

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.
- [ ] Be clear about 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.

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

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

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. Mediation is a cost-effective and quick way to settle disputes. The NSW Small Business Commission provides mediation services.

Option

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). The responsibility for paying these outgoings is to be 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

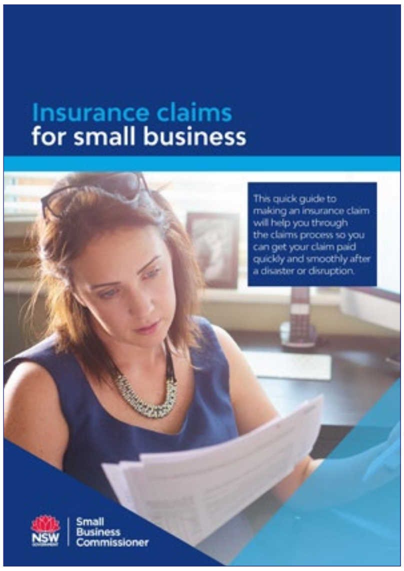
The duration of the fixed term of the lease, being the minimum amount of time that a lessee may remain at the premises. A lease agreement may also provide options to renew or extend the lease term.

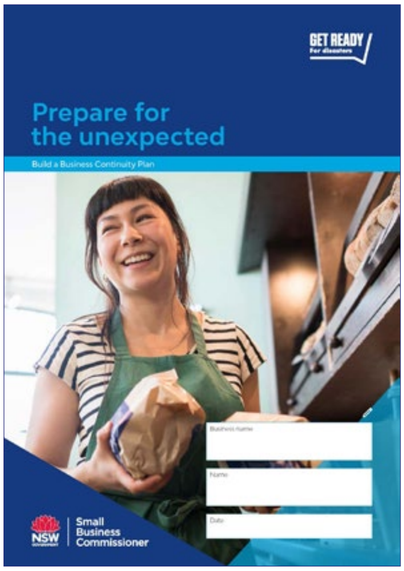
For further information see: smallbusiness.nsw.gov.au

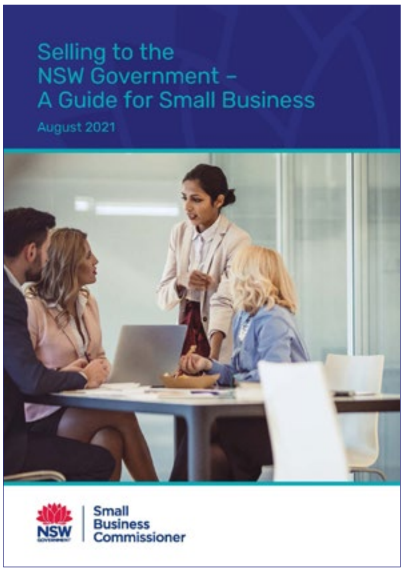
This document has been developed in consultation with a range of industry bodies including:

- Australian Institute of Quantity Surveyors
  aiqs.com.au
- Australian Retailers Association
  retail.org.au
- Business NSW
  businessnsw.com
- CPA Australia
  cpaaustralia.com.au
- 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

Other guides from the NSW Small Business Commissioner







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Small Business Commissioner

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