

Commercial Leasing

Commercial leases are complex documents that can be difficult to understand without the assistance of a lawyer.

With the assistance of a lawyer with experience in commercial leasing, you can negotiate lease terms more favourable to you, providing you with peace of mind and added security for your business.



10 Pitfalls of Commercial Leasing.

What is commercial leasing?

Commercial leasing allows parties to enter an agreement whereby one party owns a premises and another party occupies the same premises. Commercial leasing is an umbrella term that refers to two types of leases: retail and non-retail. Both types of commercial leases are subject to different laws that impose specific rights and obligations. It is therefore important to obtain professional legal advice tailored to your particular type of commercial lease.

1. Permitted Use

A commercial lease will generally state the types of activities that the premises may be used for. As a tenant, it is important to consider both the current and future business activities at the premises to ensure that the premises may be used in that particular way.

For example, it is common for a commercial lease for a gym business to permit the premises to be used for exercise and the operation of gym equipment, but not provide for the sale of any exercise foods or supplements. Another example is where a cafe

business does not currently serve meals but intends to expand its range of products and services in the future.

In these circumstances, if the permitted use is not sufficiently wide to cover all business activities intended at the premises, a tenant may be in breach of the commercial lease and be charged with additional fees.

2. Do the terms allow you to conduct your particular type of business?

When reviewing any commercial lease it is important to have the proposed business in mind to ensure that the commercial lease does not contain any clauses that would impinge on the type of business that a tenant intends to conduct.

For example, we have reviewed commercial leases for a retail pizza business that did not allow heating equipment or ovens to be used within the premises. Another example is where a veterinary business is considering entering a commercial lease that prohibits animals from entering the premises.

It is important to ensure the terms are consistent with the type of proposed business so as to ensure that the core business activities do not constitute a breach of any terms.

3. Registration

A benefit of a commercial lease is that it is capable of being registered over on the title to the premises. In Queensland, a lease for a term of more than 3 years is required to be registered on the title of the property in order to protect the interests of the tenant in the event of an incoming purchaser. If a lease of more than 3 years is not registered, a tenant risks an incoming purchaser not honouring the terms of their commercial lease.

It is common for a prospective tenant to have a short term lease of, say, 2 years, with two options of 2 years, and fail to register the lease. In this scenario, whilst the original term of the commercial lease is less than 3 years, if the options are exercised and the term of the commercial lease extends beyond 3 years, the tenant's interests are not protected.

4. Ancillary Deed

With the increasingly competitive leasing market, it is becoming more popular for a landlord to offer various incentives to a prospective tenant. This may be in the form of

a fitout contribution, rent holiday, periodic rent reduction or other incentive detailed within a deed separate to the lease.

It is important to ensure the terms of any ancillary deed is consistent with the commercial lease terms as any breach of the lease terms may have adverse ramifications for any repayment of incentives provided by the landlord to the tenant.

5. Option

An option to renew in a commercial lease is important to consider when first entering a lease. If a commercial lease contains one or more options to renew, it allows the parties to extend the term of the lease and avoid the expense of renegotiating a new lease. It can also help reduce any costs borne by the tenant in relocating the business.

It is vital that any option in a commercial lease is exercised in the prescribed way. For example, most commercial leases will prescribe a method and time period in which to exercise an option. Should the option not be exercised in the prescribed manner, a tenant may forfeit their right to a further term of the lease.

6. Relocation and destruction of premises

When entering a commercial lease, it is important to contemplate the possible circumstance where you are required to relocate your business premises or your business premises are destroyed. The applicable clauses in a commercial lease may not provide for any rent abatement while the business premises is relocated or unable to be used. Depending on the applicable clauses, it may be prudent to obtain business interruption insurance to satisfy your various financial obligations during such a time.

7. Assignment and subletting

Should a tenant wish to assign their interest in a commercial lease to an incoming purchaser or sublet part of their premises, most commercial leases will require a tenant to obtain the landlord's prior written consent.

It is commonly not known that in the event the tenant enters the lease under a company structure and this company structure is altered in such a way where the effective control of the company is changed, this can trigger the assignment and subletting clauses of the commercial lease and potentially cause a tenant to be in breach of the lease.

8. Repair and maintenance provisions

A tenant is generally required to make good the premises at the end of the term of the lease, with fair wear and tear being excepted. However each commercial lease is unique and may impose particular obligations on a tenant in terms of redecorating the premises. It is important to review these terms to ensure that the obligations of a tenant at the end of the term of the lease, or throughout the term of the lease, are not too onerous to require a full renovation of the premises.

9. Outgoings

It is easy to enter a commercial lease based on the amount of rent payable and not take into consideration the other ongoing costs and expenses under the lease. A tenant is usually required to pay a proportion of the outgoings of the premises, which can be a significant financial commitment. It is particularly important in shared premises to carefully review the structure of the outgoing clauses to ensure that the repayment structure is fair and reasonable in the context of the area of the premises being leased. It is also important to check the type of outgoing expenses being charged as there is specific legislation applicable to retail commercial leases that excludes a landlord from passing on certain expenses.

10. Licensed areas

It is common for a business premise, such as a restaurant or café, to include an area on the premises for the sitting of guests and provision of meals. It is important to ensure that the commercial lease covers this area or that separately a licence is granted from the owner of this area (for example, council footpath) to ensure that a tenant is not in breach of any council provisions relating to the use and occupancy of council property.

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