



# ENTERING INTO A COMMERCIAL LEASE

**“To guard against costly mistakes, avoid making decisions about a lease in haste or under pressure.”**

**E**ntering into a lease is a significant commitment for a commercial tenant, as fitout costs and other expenses can be substantial. You should consider all aspects of the lease carefully to avoid adverse effects on your business. Here are eight points to keep in mind.

**Planning permit:** Check whether the intended use of the premises is permitted under the relevant zoning, and if so whether a planning permit is required. The zoning may impose restrictions on how the premises may be used. If you enter into a lease where the use is prohibited under the zoning, the council may issue a planning contravention notice to make you stop using the premises. It can be extremely costly to vacate premises, particularly if you have spent a lot on the fitout. It may be difficult to find suitable alternative premises at short notice. Depending on the terms of the lease, the landlord could also issue proceedings for breach of lease.

**Term of the lease:** Negotiate a long lease (initial term plus options for further terms), which gives you security of tenure and the opportunity to develop your business and recoup your investment. It also increases the value of the business, making it easier to sell. It is risky to rely on the landlord to grant a new lease at the end of a short lease. The landlord may have other plans for the premises, including developing the land or occupying the premises itself. The landlord could also decide to charge exorbitant rent under a new lease if it is aware that you have invested heavily in the fitout and that relocating the business would be costly or difficult. If you have concerns about the success of the business or the suitability of the premises, negotiate a short initial term with options for further terms which you can choose not to exercise.

**Mortgagee's consent:** If the property is mortgaged, obtain the mortgagee's consent to occupy the premises from the landlord. While the lease may be binding between you and the landlord, it does not bind the mortgagee unless its consent is obtained. This can be disastrous if the mortgagee takes possession of the premises as a result of

the landlord's default, because the mortgagee can terminate the lease.

**Multiple occupancy building:** If the premises only form part of the lettable area of the building, ensure that an up to date plan is attached to the lease. The plan should correctly describe the lettable area of the premises, any allocated car parking and shared or common areas (toilets, kitchen, car parks, entry to and exit from the premises). This can help avoid disputes about areas you have exclusive use of.

**Condition report:** Obtain a condition report from the landlord, recording the condition of the premises at the start of the lease. The contents of the report should be agreed. Photographs of the premises should be retained by each party. The condition report helps to avoid future disputes about damage, replacement, repair and maintenance of the premises, landlord's fixtures and fittings and your make good obligations under the lease.

**Retail Leases Act:** Determine whether the *Retail Leases Act 2003 (Vic)* (or similar legislation in other states) applies to the lease. This isn't always obvious. If it does apply it provides you with statutory benefits which the landlord cannot exclude and which you may not otherwise be able to negotiate. In some Australian jurisdictions a landlord cannot pass its land tax liability to you, or legal costs for the preparation of the lease.

**Early termination clauses:** Resist clauses that allow the landlord to terminate the lease before the end of the term. The landlord may intend to redevelop the site, forcing you to close or relocate the business. A refurbishment clause can also hurt your business. An extensive refurbishment of the building may inhibit your access and the flow of customers to the premises.

**Due diligence & professional advice:** To guard against costly mistakes, avoid making decisions about a lease in haste or under pressure. Carry out proper due diligence and seek advice from an experienced solicitor. **ml**

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