

Commercial Leases

We bet that you wouldn't exactly choose to read an article about Commercial Leasing in your spare time unless you absolutely had to. Perhaps you found your way here because you're a business owner, looking to find a new home for your business to operate out of. Or, maybe you own a commercial property and want to lease it out to someone looking to find a new home for their business.

Either way, leases are important documents and, as the old saying goes, information is power. Whether you're a tenant or a landlord, here's our brief guide to commercial leasing, which contains information that will empower you, with the help of your lawyer, to sign up to a lease that suits your situation and protects your legal position.

Understanding some jargon

First of all, here's a bit of clarity on some terms we'll be using when we talk about leases. This guide talks about leases of *commercial* premises or buildings. Commercial premises are those that are used for business activities, rather than being used as a home or a place for people to live, which are residential properties. Renting a residential property is a different kettle of fish, with its own different set of rules and documents. With a commercial lease, the person who pays money to rent the premises is called the **Tenant**. The owner of the building being leased is called the **Landlord**.

When we talk about a lease, we're referring to a "**Deed of Lease**" which is a formal document that talks about how the property is going to be leased and what roles and duties the tenant and the landlord have. Most leases in New Zealand are created by using a Deed of Lease template prepared by the Auckland District Law Society. Different versions of this template have been available over the years. The latest version out there? It is the Sixth Edition, last updated in 2012. However, it is common to see older versions floating around too. It's good to know that each version has slightly different terms as the law or circumstances change.

Perhaps you've heard about an "**Agreement to Lease**" too. How does that fit into the picture? Well, the difference between an Agreement to Lease and a Deed of Lease is this. An Agreement to Lease is more of a preliminary document - the first crack at setting out some basic terms that the parties are in agreement on. An Agreement to Lease is an extra document, rather than a required one, but we usually see them being signed if, for example:

- A real estate agent is closely involved in negotiating the Lease;
- There is some agreement about doing something before the lease starts (for example, the landlord or tenant doing construction work on the property);
- There is a condition that needs to be met before the lease goes unconditional; or
- One party needs some comfort or evidence of agreement before there is a formal Deed of Lease.

Just because it's a preliminary document doesn't mean that an Agreement to Lease is not important from a legal perspective. Before you sign up to any Agreement to Lease, either as a landlord or a tenant, we recommend chatting with your lawyer, as it's a little known fact that the terms you sign up for in the Agreement are very hard to get out of once it is all signed up.

If there is an Agreement in place that is signed by everyone involved, and the arrangement goes ahead, *then* lawyers for the landlord will turn the terms of that Agreement into a Deed of Lease. The Deed is fuller document, containing more information about how the arrangement is to work. Again, we recommend getting your lawyer's advice before you sign this document. Why's that? Well ...

We stand by our earlier statement: Leases are important

If you're thinking about becoming a **tenant**, signing up to a Lease with a landlord is likely one of the biggest business decisions you will make. In general terms, a Lease is a serious commitment (financial and otherwise) that lasts for many years. It isn't always easy to get out of a Lease if you change your mind down the road, so you want to make sure that its terms suit you and your specific circumstances.

If you own a commercial building and you would like to rent it out to a tenant (that is, you're thinking about being a **landlord**), it is important to sign up to a Lease with tenants *and* terms that will protect your investment and that give you an appropriate financial return on your investment.

What kind of stuff does a Deed of Lease talk about?

A Deed of Lease is a fuller document that builds on the Agreement to Lease (if there was one) and sets out the terms that govern the relationship between a tenant and a landlord. A standard Deed of Lease talks about a lot of things, including:

• Who the tenant is	• Who the landlord is
• Start date of the Lease	• What property is being leased
• End date of the Lease	• What activities the tenant can use the property for
• How much rent the tenant pays	• How to review the rental price
• When the tenant pays the rent	• How the property is maintained
• Landlord's obligations	• Tenant's obligations
• Role of any guarantor	• GST obligations
• Insurance responsibilities	• Who pays for various outgoings (e.g., rates, electricity etc.
• Who pays legal costs	• Whether the Lease can be transferred to other people

<ul style="list-style-type: none"> • If the Lease can be renewed (and if so, how) 	<ul style="list-style-type: none"> • What happens if there is damage to the property
<ul style="list-style-type: none"> • How to cancel the lease 	<ul style="list-style-type: none"> • Dealing with disputes under the Lease

As a tenant or a landlord, it's important to have a broad understanding of all of these things. That may sound daunting, but the good news is that your lawyer is there to help you get your head around these different components. Before signing any Deed of Lease, talk to your lawyer about the document so that they can help explain these things to you, as well as negotiate any key changes necessary for your circumstances.

For both tenants and landlords, it is important that Lease details are accurate and correctly reflect the agreement between both sides. However, the key issues that tenants should know about, and watch out for, are slightly different to those that the landlord will need to consider. We'll take a look at both perspectives below for some examples of things that matter in your Lease.

Things that matter	Notes
Identity of the parties	<p>For both parties, it is important that the other is accurately described in the Lease and easily identifiable. This helps if any issues arise under the Lease and one party needs to take some kind of legal action against the other.</p> <ul style="list-style-type: none"> • Tenants: You want to make sure your landlord is the legal owner of the building. • Landlords: You want to make sure your tenant can pay the rent. Therefore, do your research on who the tenant is, when they started their business, and whether they appear to be financially stable.
Guarantees / Deposits	<p>If the tenant is a company or a trust, the landlord will probably request a personal guarantee from a director or shareholder of the company. This means that if the tenant can't pay the rent, the guarantor must pay all of the money that the tenant owes, and is personally liable for those debts.</p> <ul style="list-style-type: none"> • Tenants: Agreeing to a personal guarantee imposes a big responsibility on that person. It's important to for any potential guarantor to carefully consider their obligations before agreeing to sign up to this position. Get advice from your lawyer before you agree to this. • Landlords: Personal guarantees are a way to protect your position under the Lease and are highly recommended when the tenant is a company. Another way to protect your position is to require some form of deposit from the tenant, or require a bank guarantee.

Duties and responsibilities under the Lease	<p>The Lease will require tenants and landlords to comply with certain duties and carry out certain jobs. Knowing about these is crucial to making sure you don't breach the terms of the Lease. While many duties and obligations are included in the template Deed of Lease, it's common for the terms to be negotiated and changed. Therefore, it pays to look closely what you're being asked to do under your specific Lease to avoid future problems, confusion or cost. It's really common, for example, for tenants and landlords to squabble over who is going to pay for fixing damage and maintaining the property.</p>
Rent Review	<p>Most leases include clauses that say the price of the rent can be reviewed, then changed, at various times during the Lease, in order to account for any change in economic/market conditions over the period of the Lease. The parties can elect the method of changing the rent, either a "market rent review" or a "Consumer Price Index review". Whichever one is decided upon, the process can be complicated so it's good to talk to your lawyer and make sure you understand what you're signing up for and what you'll need to do at the relevant times.</p>
Term	<ul style="list-style-type: none"> • Tenants: Depending on the stage of your business or your goals with the property you're leasing, think carefully about the term of the Lease. For example, if you're a new business, it may be better to negotiate a shorter Lease as a starting point, but build in "rights of renewal" once the initial term expires. This gives you the option to extend the Lease if the business is going well, but lessens your initial commitment.
Rights of Renewal	<p>It's relatively common for leases to have "rights of renewal".</p> <ul style="list-style-type: none"> • Tenants: You'll have the right (subject to some conditions) to renew the Lease if you want to, or, alternatively you can let the Lease expire without renewal. However, leases do not renew automatically, so you have to actually exercise your right by giving notice to the landlord, way before the term of the Lease is due to expire (usually at least three months) and, at that time, you have to be complying with the Lease - for example, you can't renew the Lease if you're not paying the rent. If you don't give the correct notice to the landlord, you might lose your chance to renew. • Landlords: If the tenant gives you notice of renewal and all conditions are met, you have to agree to the renewal of Lease. <p>If the term expires and the Lease is not renewed, then the Lease shifts to being on a "month-to-month" basis. This is a vulnerable position for both parties, as either one could cancel the Lease by simply giving 20 working days' notice to the other.</p>

Outgoings	The Lease will say what percentage of outgoings each party will be responsible for. For both parties, you should take a close look at the list of outgoings for the premises and make sure that you're generally aware of the costs you'll be responsible for before signing up to pay them. Dividing up outgoings is something that often causes conflict between landlords and tenants.
Cancelling the Lease	<ul style="list-style-type: none"> • Tenants: If your rent is overdue by at least 10 working days, or you breach another term of the Lease, your landlord can cancel the Lease (provided they go through the correct procedure). • Landlords: Although you may have the right to cancel the Lease, you will need to go through a series of specific steps before you can cancel the Lease, including preparing a notice that must have very specific information in it. We recommend getting your lawyer's help with this procedure.

This is a small sampling of the things that pay to look into when you're thinking about signing up for a Lease. Because each situation is different and because leases can be such important documents, we suggest you talk to your lawyer before signing up to anything.

Have a question about a commercial lease? Or perhaps you just fancy a chat about how this information applies to your situation? If so, we would love to help. You can give us a call or send us an email for more information.

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