

Leasing property

Legal information for ACT community organisations

This fact sheet covers:

- how incorporation is relevant to leasing property
- identifying the type of lease your organisation is being asked to sign
- tips for negotiating a lease
- rights under a lease
- obligations under a lease, and
- when things go wrong with a lease.

Many community organisations need an office, or some kind of building or property to operate out of. It is very common for organisations to rent, rather than buy that property.

When an organisation enters into a lease, terms and conditions apply. The organisation will usually pay rent and may also be required to pay for other things, such as maintenance.

It is important for community organisations to understand their obligations under a lease, as well as their rights. It is also crucial to properly understand a lease before signing it. It is a good idea to get legal advice before signing a lease.

Incorporation and leases

Whether or not your organisation is incorporated will impact its ability to lease a property.

Generally, only individuals or incorporated legal entities can enter into leases. Needing a lease is a common factor that leads to a group becoming incorporated. When an incorporated entity enters into a lease, its members are protected from liability under the lease.

An unincorporated group is not a legal entity, so it cannot generally enter into a lease in the group's name. An individual or a number of individuals within the group can enter into the lease personally, for the benefit of the unincorporated group. This arrangement would enable the group to use the property. However, this can expose those individuals to personal liability for the obligations in the lease, which can be quite substantial – for example, needing to repair damage to property, or personally pay rent if the group runs out of money.

FURTHER READING

For further information on deciding whether to incorporate go to the Not-for-Profit Law Information Hub page at www.nfplaw.org.au/incorporationdecision.

CAUTION

Individuals should be very careful when considering entering into a lease in a personal capacity for an organisation they are involved with. The individual, not the group, will be personally liable under the lease. The same applies to providing personal guarantees (which makes you like a co-signor to the lease meaning if the tenant does not do certain things under the lease then you will be obliged to) under a lease. You might wish to seek legal advice before agreeing to provide a personal guarantee.



What kind of lease is available and what does this mean for my organisation?

There are three main types of leases used in the ACT - residential leases, commercial leases and retail shop leases. As explained below, the intended use of the property will determine whether the lease will be residential, commercial or retail. The most common type of leases for community organisations are commercial leases or retail shop leases.

In the ACT, both commercial leases and retail shop leases are governed by the *Leases (Commercial and Retail) Act 2001* (ACT) (called 'the Act' throughout this fact sheet).

The Act uses the terms "lessor" (sometimes referred to as the landlord, proprietor, or owner) and "tenant" (sometimes referred to as the lessee, occupant, or resident). Throughout this fact sheet we will use the terms landlord and tenant.

Residential leases

A residential lease is used for residential purposes (i.e. when someone will be living at the property). This type of agreement and the relationship between the landlord and tenant is regulated by the *Residential Tenancies Act 1997* (ACT). It is generally not common for an organisation to enter into a residential tenancy agreement (however, it may do so if for example, it was providing residential services, such as homes for disadvantaged youth).

Commercial leases

A commercial lease is a lease of commercial property, such as a factory, warehouse or office. There are many different types of commercial leases, which means the rights and obligations imposed under this type of lease will often differ, depending on the circumstances and the activities of the organisation. Under the Act, premises are commercial premises:

- if the permitted use of the premises under the lease is for commercial business (that is, a business involving the sale or hire of goods, or the supply of services, by retail), or
- (where there is nothing in the lease about the use the premises are to be put to, i.e. no 'permitted use' is specified), if a commercial business may be carried on on the premises under rules generally applying to ACT land.

Retail shop leases

A retail shop lease is also governed by the Act. Under the Act, premises are retail premises:

- if the permitted use of the premises under the lease is for retail business (i.e. a business involving the sale of hire of goods by retail or the supply of services by retail), or
- (where there is nothing in the lease about the use the premises are to be put to, i.e. no 'permitted use is specified'), if a retail business may be carried on on the premises under rules generally applying to ACT land.

What leases the Act applies to

There are some technical rules in the Act (and related Regulations) which set out which types of premises are covered by the Act. To give some examples, the Act will apply to the following premises in the ACT:

- retail shop premises with a lettable area of 1000sqm and less
- small commercial premises that have a lettable area of 300sqm and less
- premises leased to either an incorporated association or an association eligible for incorporation where the premises are not used for residential purposes
- premises leased to an unincorporated charity where the premises are not used for residential purposes, and
- leased premises for a child care centre, sports centre or art gallery.

Your organisation may receive additional protection if its lease is subject to the Act and it may be covered by the Act even if it does not intend to make a profit, as long as it is providing goods or services. The above is not an exhaustive list and your organisation should seek specialist legal advice to check whether its lease is covered by the Act.

Term of lease

The Act will not apply to a lease where the term is less than 6 months, except where the tenant was already in occupation of the premises with the landlord's consent for at least 6 months.

If the Act applies and the term of the lease is less than 5 years, the tenant may extend the term of the lease to 5 years by providing written notice (not later than 90 days before the end of the term of the lease) to the landlord unless:

- the landlord is in possession of the premises under a head lease, has subleased the premises to the tenant and the extension of the term of the lease to 5 years would be inconsistent with the terms of the landlord's head lease, or
- the tenant had received independent legal advice before entering into the lease about the right of a minimum 5 year term and had chosen to enter into a lease for a period of less than 5 years.

Entering into a lease

More often than not, a real estate agent will act on behalf of the landlord of the property that you are interested in and will be responsible for negotiating a lease with your organisation.

Negotiating leases generally

When negotiating a lease, prospective tenants should:

- make sure that the lease is in writing
- make sure that the lease contains all the details of the agreement between the tenant and landlord, and accurately describes the property, any existing damage, any fixtures, fittings or equipment that are included in the lease, and any undertaking (a promise) that the landlord has given (for example, to re-carpet within six months)
- take particular care to read and understand the terms of the lease, particularly the terms setting out the start and finish dates, the amount of rent to be paid (and how this rent will be reviewed) and the permitted uses of the property
- consider if the lease has an option to renew and the date that this option must be exercised (if it does, this date is important and should be noted and entered onto a calendar)
- consider if the lease requires the tenant to provide a bank guarantee or pay a security deposit (these are held by the landlord so if the tenant for example does not pay rent or damages the property the landlord can draw upon the guarantee or deposit to obtain the rent or repair the damage), and
- consider if the lease requires the tenant to pay any costs passed on by the landlord. These costs are known as **outgoings**. If the lease is a commercial or retail shop lease, the landlord must provide a disclosure statement (see below under “Negotiating a retail lease”) and the outgoings must be detailed in this document.

TIP

If you or your organisation are confused about your organisation’s leasing arrangements, or if you have any doubt as to what is required under the lease, or whether the lease is one which is subject to the Act (or other legislation which means it brings certain rights and obligations) you should seek the assistance of a lawyer.

Negotiating a commercial lease or retail shop lease

The Act imposes specific requirements when negotiating a commercial lease or a retail shop lease, such as:

- the landlord must give the tenant a copy of the proposed lease as early as practicable
- if the lease is for less than 5 years the landlord must tell the tenant in writing early in the negotiations if the lease can’t be extended
- at least 14 days before the lease is entered into, the landlord must give the tenant a ‘disclosure statement’ which sets out important aspects of the lease, such as rent, estimate of outgoings, the landlord’s accounting period and other obligations
- the tenant is required to sign and return the disclosure statement at the earlier of the time they return the signed copy of the lease or 3 months after the lease has been entered into, and
- the landlord must tell the tenant about the ‘approved handbook’ which contains information to help landlords and tenants understand the Act.

TIP

The [approved handbook](#) published by the Department of Justice and Safety sets out information for landlords and tenants in relation to the Act.

Please note that prospective tenants should make sure they carefully read and understand the details of the disclosure statement before signing.

Before you move into the new property

Condition reports

It is a good idea to arrange for a condition report to be prepared before the lease starts, so that there is a record of the condition of the property. Who commissions (arranges) and who pays for this report will form part of the negotiations with the landlord.

Having a condition report will hopefully avoid any disputes when you come to vacate and 'make good' (for further information see the section "Make Good" below) the property at the end of the lease as the condition of the property at the commencement is clearly recorded.

Zoning and property use

It is a good idea to contact the ACT Government (Access Canberra) to ensure that the property can be used in the way your organisation intends and that there will not be any zoning issues or planning permits required.

Rights and obligations

Your rights and obligations, and those of your landlord, will be outlined in your lease. They are likely to include some version of the rights and obligations listed below.

Rights

Tenants generally have the right to:

- use (quiet possession) of the property without interruption by the landlord
- their own use (exclusive possession) of the property unless otherwise provided for in the lease, and
- receive a suspension of an abatement of rent and outgoings if the property is damaged or destroyed so that they cannot be used or accessed for the permitted use.

Obligations

Tenants are generally obliged to:

- pay rent on or before the due date
- pay outgoings (usually a proportion of total outgoings if the tenant is only leasing part of a building)
- pay a security deposit (or 'bond', as referred to in the Act), which could be in the form of a bank guarantee (under the Act, the maximum security amount payable by a tenant is equal to 3 months' rent)
- maintain certain insurances (for further information see the section 'Insurance' below)
- continue its business and not abandon the property

- repair and maintain the property (for further information see the section 'Repairs and maintenance' below)
- ensure the property is kept clean and tidy and at the end of the lease return the property to its condition as at the commencement date
- notify the landlord of any damage, hazards, notices or orders affecting or relating to the property
- use the property, and only allow others to use the property, for the permitted use, and
- indemnify (i.e. reimburse) the landlord for any damage caused to the property except to the extent caused or contributed to by the landlord, and release the landlord from liability (legal responsibility) arising from events outside the landlord's control.

Subleases and assignment

An assignment is, generally speaking, where you transfer your whole interest in the property (in this case, a lease) to another person or entity. It is similar to selling a property. That is, the person you transfer the lease to steps into your shoes as tenant so takes over all of your obligations and rights under the lease (for example paying rent to the landlord). A direct legal relationship is created between the landlord and the new tenant (also called the 'assignee') in place of your relationship with the landlord.

A sublease is where you lease all or part of the premises to another party. This usually happens if you have more space than you require for your organisation's needs. Your organisation becomes the landlord to the subtenant but is still a tenant to the main landlord (so you still pay rent to your landlord). Usually, there is no direct legal relationship created between your landlord and the subtenant. If you are thinking of subletting your property you need to consider what obligations you will have to your subtenant and you should consider obtaining further legal advice.

If the lease is governed by the Act, and if certain requirements are met, an assignment will release you from any future obligations to the landlord. If the lease is not governed by the Act, a release will need to form part of the commercial negotiations. A sublease however, will not release you from your obligations to the landlord.

If an organisation want to assign a lease or sublet leased property, it will need to comply with the requirements under the lease. The following requirements are reasonably common in most leases:

- a request for assignment or subletting will need to be made in writing to the landlord. This request will often need to include information about the business and financial resources of the proposed assignee. Often a lease will provide that the landlord cannot unreasonably withhold its consent if the tenant can demonstrate that the proposed assignee or subtenant is respectable, solvent and capable of performing the tenant's obligations under the lease. It is important that you check that the landlord cannot withhold its consent in its absolute discretion. If your lease is governed by the Act, the landlord will only be entitled to withhold consent to an assignment or sublease in limited circumstances (for example, the landlord has reasonable grounds for believing the prospective assignee or subtenant intends to use the premises for a purpose not allowed under the lease or does not have the financial resources to run the business)
- a deed of assignment or sublease will need to be prepared and signed by the parties, and

- the tenant will need to pay the landlord's reasonable legal and other costs incurred in making the decision whether to consent to the assignment or sublease.

For leases governed by the Act, the tenant must also provide prospective assignees or subtenants with a copy of the disclosure statement that had previously been given to the tenant by the landlord and set out details of any material changes of which the tenant is aware. If the tenant does not have the disclosure statement they may request a copy from the landlord. The landlord is required to comply with the tenant's request within 14 days.

Insurance

Most leases state that the landlord must take out building insurance and the tenant will reimburse the landlord for the costs of the premiums (by paying outgoings). If your organisation is only leasing part of a property you will generally contribute a proportion of the premium. The proportion is usually based on the proportion of the total area of the property that you occupy.

It is also common that tenants have an obligation to take out public liability insurance (usually for \$20 million) and tenant's property insurance including breakage of glass.

RELATED RESOURCES

Not-for-profit Law has a Guide to Insurance. Go to the Insurance page on the Information Hub at www.nfplaw.org.au/insurance.

Repairs and maintenance

It is important that an organisation clearly understands who will be responsible for repairing and maintaining the property, and the lease should set this out. It is common that a tenant will be responsible for cleaning the property and undertaking general repairs and maintenance.

It is also important that the lease states that the landlord will be responsible for any structural or capital repairs and maintenance.

'Make good' and reinstatement

It is important that an organisation understands the extent of its 'make good' obligations at the end of the lease.

It is common that a tenant will be required to remove all of its property from the property and 'make good' (i.e. repair) any damage caused by removal. However, a 'make good' obligation may be far more extensive than this and can provide that the tenant must re-paint and re-carpet, even if the property was not freshly painted or carpeted when the tenant moved in. 'Make good' obligations can also extend to things such as removing partitions, removing all alterations undertaken by the tenant during the term and installing new ceiling tiles (that is, returning the property to a bare shell). A tenant needs to be fully aware of its make good obligations so that it can anticipate the cost of undertaking all necessary works.

When things go wrong

Breach of lease

The consequences of breaching your lease should be contained within the agreement itself.

It is important to note that if you do not pay rent, your landlord has the right to terminate your lease and evict you from the property. Depending on what your lease says, your landlord may be entitled to do either of these things without prior notice. For this reason, it is important that you ensure rent is always paid on time.

If you breach another condition your landlord may give you a notice. The notice will give you a specified amount of time to remedy (make right) that breach. The notice should include the nature of the breach alleged (i.e. which obligation your landlord says you have not done), what your organisation needs to do to fix the breach and the timeframe for fixing the breach. If you do not comply with the notice the landlord may have a right to terminate your lease and evict you from the property.

Resolution of disputes

If a dispute arises, it is preferable that it be resolved informally as formal dispute resolution it likely to incur significant costs for both parties.

If your retail lease is governed by the Act, the Magistrates Court will be the appropriate court to make an application in relation to a dispute. Although there are no mandatory provisions to attempt alternative dispute resolution prior to applying to the court, on receipt of an application the Magistrates Court must hold a case management meeting to assess the likelihood of the parties resolving the dispute before proceeding to a hearing. If the court considers this likely, they must promote the settlement of the dispute which may include referring the dispute to other dispute resolution methods like mediation.

It is preferable for the parties to attempt alternative dispute resolution methods in the first instance, and prior to incurring the fees and other costs that may apply to an application to the Magistrates Court. If at a case management meeting the Magistrates Court considers it unlikely that the dispute can be resolved by the parties, the Magistrates Court must act as quickly as possible in hearing the dispute and provide written notice of the terms of any order it makes at the end of the hearing within 14 days of making the order.

If your lease is not governed by specific legislation, then there may be dispute resolution clauses in your lease which will need to be followed. If there are no dispute resolution clauses then mediation or another form of alternative dispute resolution should be attempted in the first instance. Court should only be used as a last resort as it is time consuming and costly.

If you have a dispute about a residential lease, you can find information about the dispute resolution process set out in the *Residential Tenancies Act 1997* in the '[Renting Book](#)' published by the ACT Government. You could also contact the [Tenants' Union ACT Inc.](#)

RELATED RESOURCES

For more information on dispute resolution go to the Not-for-profit Law Information Hub page on Disputes and Conflicts at www.nfplaw.org.au/disputes.

Resources

Related Not-for-profit Resources

✔ [The incorporation decision](#)

This fact sheet explains in more detail what incorporation means and provides a general overview of some of the main differences between an 'unincorporated' and an 'incorporated' group including information on: what it means to incorporate and the benefits, the practical things to consider when deciding whether to incorporate, and the obligations of incorporated groups.

✔ [Understanding Contracts](#)

This guide includes information on general principles of contract law, reviewing a contract and approval processes for contracts, and specific types of contracts.

✔ [Consumer guarantees and not-for-profits](#)

This fact sheet explains consumer guarantees contained in the Australian Consumer Law (ACL) and how they apply to not-for-profits.

✔ [Insurance](#)

The Insurance and Risk Management for Community Organisations Guide for all Australian states and territories, provides detailed information on risk management strategies and different insurance products that can be used as part of a community organisation's risk management.

Other Related Resources

✔ Guide to the Australian Capital Territory *Leases (Commercial and Retail) Act 2001*: [Leases commercial and retail handbook](#)

✔ Renting handbook authorised by the Commissioner of Fair Trading: [The renting book](#)

Legislation

✔ [Residential Tenancies Act 1997 \(ACT\)](#)

✔ [Leases \(Commercial and Retail\) Act 2001 \(ACT\)](#)

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