

# Leasing property

## Legal information for New South Wales community organisations

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### 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
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**Many community organisations need an office, or some kind of building or property to operate out of. It's 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's important for community organisations to understand their obligations under a lease, as well as their rights. It's also crucial to properly understand a lease before signing it. It's 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 can't generally enter into a lease in the group's name. A person or a number of people in 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).



### Related Not-for-profit Law resource

For further information on deciding whether to incorporate go to [our webpage on the incorporation decision](#).



### Caution

People should be very careful when considering entering into a lease in a personal capacity for an organisation they are involved with. The person, not the group, will be personally liable under the lease.

The same applies to providing **personal guarantees** under a lease. This makes you like a co-signor to the lease and means that you will be obliged to perform under the lease if the tenant doesn't do certain things under the 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 New South Wales - residential tenancy agreements, commercial leases and retail 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 not-for-profit organisations are commercial or retail leases.

### Residential leases

A residential tenancy agreement is used for residential purposes (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 2010* (NSW). It's 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.

A commercial lease is a type of contract so is generally governed by the terms and conditions of the agreement (rather than industry specific legislation).

You may want to seek the assistance of a lawyer when considering a commercial lease because:

- tenants have less consumer protection (consumer laws that apply to residential leases do not cover commercial leases)
- most terms of the contract are negotiable (rent amount, rent increases, length), so can be written in the landlord's favour, and
- some contracts may have prohibitive clauses, for example, restrictions on signage, the permitted use, assigning and subletting (see below for more information on 'Subleases and assignment')



### Related Not-for-profit Law resource

For more information on contracts and consumer protection for community organisations, go to [our webpage on contracts](#).



## Retail leases

Retail leases are the most common type of leases used by community organisations. A retail lease is a type of commercial lease but the rights and obligations in a retail lease are governed by the *Retail Leases Act 1994* (NSW) (**the Act**).

The Act provides certain protections to tenants – for example requiring landlords to provide a tenant with full information before the lease is signed and giving tenants the right to a minimum five-year term (which the tenant can opt out of if they want to).

The Act is a complex piece of legislation. It applies to some premises or businesses (such as shops and premises for consumer, business, and trade services or hire of goods) but not all. Under the Act, a retail lease is a lease used 'wholly' or 'predominantly' for the carrying on of a business.

In New South Wales, a retail lease is a lease of a retail shop of less than 1,000 square metres, as long as the lease term is not 25 years or more.

A 'retail shop' is defined as:

- premises used wholly or predominantly for one or more of the businesses listed in the Act. This list includes a large variety of provision of goods and services, for example entertainment services, second-hand goods shops, hairdressers, pet shops and dry cleaners. Note however that there are specific exceptions (for example any shop within premises where the principal business is the operation of a cinema, bowling alley or skating rink and the shop is operated by the person who operates the principal business), or
- premises used for any business in a retail shopping centre. A retail shopping centre is defined in the Act as a cluster of shops which are owned by the same person or company on the same strata plan, where at least five shops are used for retail business, and regarded or promoted as a centre, mall, court or arcade

It's not always clear whether a lease falls within the definition of a 'retail lease', so it's often difficult to be certain whether a tenant will have the protection of the Act. You should seek specialist legal advice to determine whether a lease you are entering into is covered by the Act.

## 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 the lease is in writing
- make sure 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 retail 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 retail lease

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

- the landlord must give the tenant a copy of the proposed lease and a copy of the retail tenant's guide issued by the Small Business Commissioner
- the landlord must give the tenant a landlord's disclosure statement which sets out important aspects of the lease, such as rent, outgoings and other obligations. Prospective tenants should make sure they carefully read and understand the details of the disclosure statement
- the tenant must then give the landlord a tenant's disclosure statement which confirms the tenant has received the above documents and believes they will be able to fulfil the obligations in the lease. The tenant's disclosure statement also allows the tenant to record any statements or representations made by the landlord which may not be recorded in the lease, and asks the tenant to state whether they have sought independent advice on the lease, and
- the duration of any retail lease (being the initial term and any further terms) must be at least five years unless the tenant expressly agrees to waive this right. In this case, the tenant must obtain a certificate signed by their lawyer or conveyancer saying they agree to a shorter lease period



### Tip

The [NSW Retail Tenant's Guide](#) published by the Small Business Commissioner explains what a tenant should do and think about before entering a retail lease, and explains the process of entering into a retail lease.

## Before you move into the new property

### Condition reports

It's 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 premises. 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 premises on expiry of the lease as the condition of the premises at the start is clearly recorded.

### Zoning and property use

It's important to call the local council to ensure that the premises 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 premises without interruption by the landlord
- their own use (exclusive possession) of the property unless otherwise provided for in the lease, and
- receive a suspension or a reduction of rent and building outgoings if buildings are 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 day on which it falls due for payment
- pay outgoings (usually a proportion of outgoing if the tenant is only leasing part of the building)
- pay a security deposit, which could be in the form of a bank guarantee
- maintain certain insurances on the property (for further information see the section 'Insurance' below)
- not abandon the premises
- repair and maintain the property (for further information see the section 'Repairs and maintenance' below)
- ensure the premises are kept clean and tidy and upon expiry of the lease return the premises to their condition as at the start date
- notify the landlord of any damage, hazards, notices or orders affecting or relating to the property
- use the premises, and only allow others to use the premises, for the permitted use, and
- indemnify (reimburse) the landlord for any damage caused to the premises 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's 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 (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 relationship created between your landlord and the subtenant. If you are considering subletting the premises, you need to consider what obligations you will have to your subtenant and you should consider seeking legal advice.

If the lease is governed by the Act there is a set procedure to follow for an assignment. If the lease is not governed by the Act, a release of your obligations as tenant 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 wants to assign a lease or sublet a part of the premises, 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's 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 in limited circumstances

- 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 legal and other costs of and incidental to providing consent or otherwise

## 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 to a proportion of the insurance 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 Not-for-profit Law resource

Read our Guide to Insurance on [our Insurance webpage](#).

## Repairs and maintenance

It's important that an organisation clearly understands who will be responsible for repairing and maintaining the premises. It's common that a tenant will be responsible for cleaning the premises and undertaking general repairs and maintenance.

If the lease is a retail lease:

- governed by the Act – the lease can't require the tenant to contribute to the capital costs of the building in which the retail shop is located or (in the case of a shop in a retail shopping centre) of any building in the shopping centre or any areas used in association with any such building. There are also specific rules in the Act which apply to the situation where a tenant contributes to a sinking fund (a fund for major repairs or maintenance). For example, if the retail shop is in a shopping centre, contributions by the tenant to the fund must not exceed 5% of the landlord's total estimated outgoings for the year in respect of the centre. A landlord must also not require or accept contributions by a tenant to a sinking fund if the fund is already more than \$250,000 in credit, or
- is not governed by the Act – the lease itself will set out who will be responsible for repairs and maintenance. It's important that the lease states that the landlord will be responsible for any structural or capital repairs and maintenance.

## 'Make good' and reinstatement

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

It's common that a tenant will be required to remove all of its property from the premises and 'make good' (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 premises were 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 premises 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 in the agreement itself.

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

If you breach another condition of the lease your landlord may give you a notice that gives you a specified amount of time to remedy (make right) that breach.

The notice should include:

- the nature of the breach alleged (ie. which obligation your landlord says you have not fulfilled)
- what needs to be done to remedy the breach, and
- the time-frame for fixing the breach

If you don't comply with the notice, the landlord may have a right to terminate your lease and evict you from the premises.

### Resolution of disputes

If a dispute arises, it's preferable to resolve it informally as formal dispute resolution it likely to incur costs for both parties.

If your retail lease is governed by the Act, the Small Business Commissioner can help you mediate or use other alternative dispute resolution. If alternative dispute resolution fails, the matter may be then need to be dealt with by the NSW Civil and Administrative Tribunal (**NCAT**). If none of these steps are successful, the matter may be dealt with by a higher court and perhaps ultimately the Supreme Court. This is usually very expensive and stressful for all involved and should be avoided as far as possible.

If your retail lease is not governed by the Act or if your lease is a commercial lease that 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 that you are unable to resolve, [NSW Fair Trading provides a free complaint service](#). A dispute may also be heard by the [NSW Civil and Administrative Tribunal](#).



#### Caution

The [NSW Small Business Commissioner](#) assists in resolving disputes between landlords and tenants through mediation and other forms of dispute resolution.



#### Related Not-for-profit Law resource

For more information on dispute resolution go to [our webpage on disputes](#).

# Resources

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## Related Not-for-profit resources

▶ [The incorporation decision](#)

The 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

- ▶ The NSW Small Business Commissioner's [dispute resolution service](#)
- ▶ NCAT's [information and forms](#) on disputes for tenants and landlords

## Legislation

- ▶ [Retail Leases Act 1994 \(NSW\)](#)