

# Leasing property

## Legal information for South Australian 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 South Australia - 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 not-for-profit organisations are commercial or retail shop leases.

### Residential leases

A residential lease 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 1995* (SA). It's generally not common for an organisation to enter into a residential lease – 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 of the agreement and conditions (rather than 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')

### Retail shop leases

A retail shop lease is a type of commercial lease but the rights and obligations in a retail shop lease are governed by the *Retail and Commercial Leases Act 1995* (SA) (**the Act**) and the *Retail and Commercial Leases Regulations 2010* (SA) (**the Regulations**). The Act and Regulations provide certain protections to tenants, for example requiring landlords to provide the tenant with full information before the lease is signed.

The Act uses the terms 'lessor' (otherwise referred to as the landlord, proprietor, or owner) and 'lessee' (otherwise referred to as the tenant, occupant, or resident). In this fact sheet we use the terms 'landlord' and 'tenant'.

In South Australia, a retail shop lease made to a company that is a 'public company' (or a subsidiary of a public company) is not covered by the Act, and is therefore treated in the same way as a general commercial lease. A company limited by guarantee is a public company, and this is a structure commonly



used by community organisations – so you'll need to check your structure to be clear on whether your lease can be covered by the Act. The incorporated association structure is not a public company so may also be covered by the Act.

Unless the above exception applies, the Act will generally apply to a lease of a retail shop. That is, a business premises used for the sale of goods to the public 'by retail', or the provision of services to the public. The usual understanding of a 'business' is a commercial activity or profit-making activity, and the fundamental feature of 'retail' is the provision of an item or service to the ultimate consumer for fee or reward.

Retail property commonly includes property such as shops and property for consumer, business, and trade services. However, if a community organisation tenant does not intend to make a profit, the organisation may still be covered by the Act if it is providing goods or services. It will not always be clear whether your organisation's activities meet these tests, and you may need to seek legal advice to confirm the type of lease you are entering into.

## Entering into a lease

More often than not, a real estate agent will act on behalf of the landlord of 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)
- 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 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 retail shop lease

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

- the landlord must give a copy of the proposed lease to the person they are negotiating with
- the landlord must give the tenant a copy of a '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, and



- generally, the duration of any retail shop lease (being the initial term and any further terms) must be at least five years unless the tenant expressly agrees to waive this right. A waiver is achieved through a 'certified exclusionary clause' in the lease. If the tenant provides a waiver of the right to a five year term, the tenant's lawyer will need to provide a certificate that they have explained the waiver of five year term and that the tenant was not coerced or unduly influenced to waive its right



### Tip

The [Retail and Commercial Leasing Guide](#) published by the Small Business Commissioner contains a checklist and information which explains what a tenant should do and think about before entering a retail shop 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 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 start is clearly recorded.

### Zoning and property use

It's a good idea to call the local council 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 or a reduction of rent and outgoings if the property is damaged or destroyed so that it 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 bond, which could be in the form of a bank guarantee
- maintain certain insurances (for further information see the section 'Insurance' below)
- 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 (ie 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 often 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 consider seeking 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 wants 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. If your lease is governed by the Act, the landlord will only be entitled to withhold consent to an assignment in limited circumstances. Generally, even in leases to which the Act applies, a landlord is entitled to withhold consent to a sublease in its absolute discretion
- 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 relating 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 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 property and the lease should set this out. It's common that a tenant will be responsible for cleaning the property and undertaking general repairs and maintenance. It's important that the lease states that the landlord will be responsible for any structural or capital repairs and maintenance.



If the Act applies, you may be required to contribute to a 'sinking fund' to cover the landlord's costs of major items of repair or maintenance. This needs to be set out in the disclosure statement given to you.

## '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 property 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 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 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 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'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 will give 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 your organisation needs to do to fix the breach, and
- the timeframe for fixing the breach

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

### Resolution of disputes

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

If your retail shop lease is governed by the Act, the Office of the South Australian Small Business Commissioner (**Commissioner**) can make arrangements to facilitate the resolution of disputes through mediation. Otherwise, either party can apply to the Magistrates Court to hear the dispute. While there are no mandatory provisions to attempt alternative disputes resolution, the Magistrates Court may refer the dispute to the Commissioner for mediation before hearing the matter.

It is preferable for the parties to attempt mediation in the first instance, and before incurring the fees and other costs that may apply to an application to the Magistrates Court. If the claim involves an amount exceeding \$100,000, the Magistrates Court must refer the dispute to the District Court if either party applies for them to do so.



#### Note

The Office of the South Australian Small Business Commissioner assists in resolving disputes between landlords and tenants through mediation. Either party can lodge a dispute using the [online form on the Commissioner's website](#).

If your lease is a commercial lease that is not governed by a special act, 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, Consumer and Business Services may be able provide assistance with [information and advice](#). A dispute may also be heard by the South Australian Civil and Administration Tribunal. Further information is available on the [Legal Services Commission of South Australia website](#).



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

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

# Resources

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## Not-for-profit Law 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

- ▶ The [Retail and Commercial Leasing Guide](#) published by the South Australian Small Business Commissioner.

## Legislation

- ▶ [Retail and Commercial Leases Act 1995 \(SA\)](#)
- ▶ [Retail and Commercial Leases Regulations 2010 \(SA\)](#)