

Leasing property

Legal information for Western Australian 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, it may 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 Western Australia - residential tenancy agreements, 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 types of leases for NFP organisations are commercial and retail shop leases.

Residential leases

A residential tenancy agreement is used for residential purposes (i.e. when someone will be living at the property). This type of agreement and the relationship between the lessor and tenant is regulated by the *Residential Tenancies Act 1987* (WA). 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, or (in Western Australia) retail premises which are larger than 1,000m². There are many different types of commercial leases, which mean 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 governed by the terms and conditions of the agreement (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

Retail shop leases are the most common type of leases used by community organisations. A retail shop lease is a type of commercial lease but the rights and obligations in a retail shop lease are governed by the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) (called 'the Act' throughout this fact sheet) and the *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* (WA).

In Western Australia a “retail shop lease” means a lease of premises that are less than 1,000m² and:

- if located in a retail shopping centre, are used ‘wholly’ or ‘predominantly’ for the carrying on of “any business”. The usual understanding of a ‘business’ is a commercial activity or profit-making activity, or
- if not located in a retail shopping centre, are used ‘wholly’ or ‘predominantly’ for the carrying on of a “retail business” which generally involves the sale of goods or provision of services to the public by retail.

If a community organisation tenant does not intend on making a profit, the organisation may still be covered by the Act if the organisation 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 advice from a lawyer.

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 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 owner 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 both annually and when you exercise an option to renew the lease for a further term), 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 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 he or she is 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
- the landlord must give the tenant a copy of the 'Tenant Guide Form 6 – Commercial Tenancy Retail Shops', which helps tenants understand their legal rights and obligations under the Act. If the Landlord does not give the tenant the guide or disclosure statement, the tenant has a right to terminate the lease or apply for compensation for any loss, and
- generally, the duration of any retail shop lease (being the initial term and any further terms) must be at least 5 years. If a lease is more than 6 months, but less than 5 years, the Act gives the tenant an automatic option to renew the lease that would give the tenant in total a 5 year term. In this case, the tenant must give the landlord notice in the prescribed form at least 30 days before the expiry of the lease. A copy of the prescribed form is available the Department of Commerce (www.commerce.wa.gov.au – Notice of Exercise of Option - Form 3).



TIP

The [Tenant Guide \(Form 6\)](#), published by the Department of Commerce, contains 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 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 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 deduction of rent and building outgoing if buildings are damaged or destroyed so that they cannot be used or access for the permitted use.

Obligations

Tenants are generally obliged to:

- pay rent on or before the due date
- pay outgoings, including land tax and operating expenses (usually a proportion of total outgoings if the tenant is only leasing part of a 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 property
- contribute towards a sinking fund for repairs and maintenance for 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 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 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 the 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. Consent is deemed to be given by the landlord if the landlord does not respond to the request within 28 days of receipt. 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 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. It is common that a tenant will be responsible for cleaning the property and undertaking general repair and maintenance, but will not be liable for any capital works or expenditure (e.g. asset replacement).

The lease should set out who will be responsible for repairs and maintenance. It is 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 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 removing partitions, removing all alterations undertaken by the tenant during the term and installing new ceiling tiles, etc. (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 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 is important that you ensure rent is always paid on time.

If you breach another condition of your 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 (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 (so long as the notice is valid) 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 is likely to incur costs for both parties.

If your retail shop lease is governed by the Act, the Small Business Commissioner can generally help you mediate the matter or use other alternative dispute resolution. If this is not successful, the Small Business Commission can issue a certificate which will allow an application to be made to the State Administrative Tribunal (**SAT**) for determination. Alternatively, you may be able to commence proceedings in the Magistrates Court, the District Court or the Supreme Court, depending on the monetary value of the claim. There are no mandatory provisions under the Act to attempt alternative dispute resolution prior to applying to the relevant court (although your lease may require you to do so). However it is always preferable for the parties to attempt alternative dispute resolution in the first instance and prior to incurring the fees and other costs that may apply to a court application.

If your lease is a commercial lease that is not governed by specific legislation, then there may be dispute resolution 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 and you are unable to resolve it you can seek advice from [Tenancy WA](#) for a very small sum. The *Residential Tenancies Act 1987* provides a quick and efficient dispute resolution process. Further information can be found [here](#).

NOTE

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

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

✔ The Department of Commerce Western Australia provides information about retail shop leases: <http://www.commerce.wa.gov.au/consumer-protection/commercial-tenancy-agreements>

✔ The Small Business Development Corporation offers a low-cost service to assist small businesses in resolving disputes with other businesses or government departments and offers mediation services: <http://www.smallbusiness.wa.gov.au/i-am-in-dispute/alternative-dispute-resolution/>

Legislation

✔ [Commercial Tenancy \(Retail Shops\) Agreements Act 1985 \(WA\)](#)

✔ [Commercial Tenancy \(Retail Shops\) Agreements Regulations 1985 \(WA\)](#)

A Not-for-profit Law Information Hub resource. Access more resources at www.nfplaw.org.au. Justice Connect Not-for-profit Law acknowledges the generous support of our funders and supporters. Find out more at www.nfplaw.org.au

© 2017 Justice Connect. You may download, display, print and reproduce this material for your personal use, or non-commercial use within your not-for-profit organisation, so long as you attribute Justice Connect as author and retain this and other copyright notices. You may not modify this resource. Apart from any use permitted under the *Copyright Act 1968* (Cth), all other rights are reserved.

To request permission from Justice Connect to use this material, contact Justice Connect at PO Box 16013, Collins Street West, Melbourne 8007, or email nfplaw@justiceconnect.org.au.