



Terminating Commercial Leases

***I am a Tenant
Get me out of here !!!***

Table of Contents

<i>Table of Contents</i>	2
<i>Introduction</i>	2
<i>Are there any standard terms?</i>	3
<i>Is there a cooling off period?</i>	4
<i>How long is the lease?</i>	4
<i>What happens after the term ends?</i>	5
<i>Can the lease be extended?</i>	5
<i>Can the term be shortened?</i>	6
<i>Early termination based on breach?</i>	6
<i>Can the tenant transfer the lease?</i>	7
<i>Please Release Me</i>	7
<i>Can you abandon the Lease?</i>	7
<i>Can you abandon the Tenant ?</i>	8
<i>Throw money at the Landlord</i>	8
<i>After reading this and the lease, then what?</i>	8

This booklet is not a complete statement of the law. It does not deal comprehensively with your particular situation. This booklet is to provide general information to supplement our specific advice to you. Do not act in reliance on this booklet without our specific advice. We are responsible only if you give us specific instructions and for the specific advice we give. This booklet was last updated in January 2011. It does not reflect changes to the law after that date. You need to take specific advice on the possibility or effect of any such changes.

Introduction

This booklet raises issues for consideration by tenants who want to terminate an existing lease .

This booklet is no substitute for good legal advice .

If, however, you have considered the lease carefully and the brochure, it will save time and cost when we come to give your advice.

This brochure has general advice only.

There is no substitute for reading the lease. A lease is not a standardised document. Although there are typical clauses, each lease is unique. There is no substitute for you reading each paragraph. You need to understand each paragraph.

Are there standard lease terms?

There is no one commercial standard lease in the way there is a standardised contract for the sale of land. Lease arrangements are too complex and vary too much to allow that.

There are typical arrangements.

The Retail Tenancies Code is a system of laws to protect tenants of retail premises. Retail premises are any premises used for:

- any business in a shopping centre, and
- any of the listed business in the code.

If the Code applies to your lease you need to understand those minimum terms as they may change a written agreement to the contrary.

The Retail Tenancies Code is available via the internet at the state government legislation web site; <http://www.thelaw.tas.gov.au> .

The Retail Tenancies Code's specific web address is:

http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=all;doc_id=%2B118%2B1998%2BAT%40EN%2B20060713000000;

The listed retail businesses are generally shops selling to end use consumers. A copy of the list of businesses in the code is at the end of this booklet.

The Code applies to premises with a floor area of not more than 1000 sq metres.

The Code sets down a minimum set of terms which the parties cannot change. Landlord breach of some of these provisions may give a tenant a right to an early exit, for instance :

1. The minimum lease term is 5 years unless a special solicitors certificate is given.
2. The Code establishes minimum requirements for the clarity of documentation, the operation and renewal of tenancy, the assignment of lease and processes to be followed for rent adjustments and determining market value rent.

If the retail premises are in a shopping centre there are further specific provisions dealing with management information, funding of advertising and promotional costs and issues involved in relocation of tenants. There are prohibitions on property owners termination leases on the basis of inadequate sales and turnover figures and regulations on trading hours and enabling provisions for tenants to form associations.

The Code sets up a dispute resolution procedure.

The Code gives tenants the right to terminate the lease in some situations .

Lease not covered by the Retail Tenancy Code or the Residential Tenancy Act are subject to laws governing tenancy but generally these supplement rather than dictate the agreement of the parties.

Is there a cooling off period?

The Retail Tenancies Code requires tenants be given a statement disclosing in table form the basic terms of the lease. The lease must not be signed until 7 days after this disclosure statement is given to the tenant. This is only required for retail premises.

Apart from this disclosure requirement for retail premises there is no automatic cooling off period for leases.

Parties are bound on the written agreements they make from the time they sign.

Tenants may be asked to sign to acknowledge receipt of the disclosure statement, apart from this the parties should not sign until they are ready to be bound.

How long is the lease?

Check what the lease provides as the term.

Subject to exceptions , neither the tenant nor the landlord can withdraw from the lease for that period.

Check the starting date of the term.

At the end of the agreed term, neither party is bound to continue with the lease

When the term of the lease ends (including any exercised option), the landlord need not allow the tenant to remain. The tenant may be forced to vacate the property. This may effectively end the tenant's business or involve substantial relocation costs. Any business based on leased premises need to be valued accordingly.

At the end of the agreed term, the landlord may allow the tenant to remain but insist on harsh conditions before agreeing to grant a new lease; such as a substantial rent increase. A tenant with a big investment in decorating and fitting out the premises may have to accept a much higher rental.

Typically a lease will have an initial fixed term and optional extra periods the tenant can choose to take up.

Retail leases must be for at least 5 years unless there is a special certificate from the tenant's lawyer before the lease is signed.

What happens after the term ends?

Usually, if the tenant continues in possession at the end of the agreed term without some other agreement being made, the lease continues on the same conditions but with a short specified term such as month to month or quarter to quarter. Check in your lease for such a provision and the period provided.

Note carefully the tenant's obligations at the end of the lease. The tenant may remove his additions to the property unless they have become part of the fabric of the building. Carpets and heaters for instance can usually be removed but not new entrances or windows for instance.

Except as otherwise agreed, the tenant must return the building to its' condition at the start of the lease. What expense would this involve? Does the original condition need to be documented? A good record is especially critical if the lease or property ownership is transferred. A picture paints a thousand words and a video is a thousand pictures.

Can the lease be extended?

Very often, leases contain options for renewal. These entitle the tenant to renew the lease for one or more terms.

An option for renewal gives a tenant flexibility to continue in the premises if they wish or to walk away from the lease when the term has ended. If a tenant is selling their business, prospective purchasers will take a keen interest in the length of the lease and the number and length of any options that are available.

It may be tragic if a tenant fails to properly exercise an option. A tenant may lose the benefit of the option if it is not properly exercised.

When a tenant has validly exercised the option, the landlord must grant a lease on the terms set out in the option clause. Normally, the terms of the renewed lease will be identical to the terms of the old lease except for the rental to be payable during the first year. That rental will often be fixed by a market review.

Can the term be shortened?

It is possible but uncommon for the parties to agree that one or both has the option to shorten the agreed period by notice to the other.

The parties may negotiate a contractual right to end the lease early, what is called “a break clause”.

Break clauses can be for either party but would usually be for the tenant rather than the landlord.

A break clause gives flexibility by giving the tenant an easier way out of a lease than trying to sell it on or subletting.

Make sure the timing of the break suits your likely needs.

There can be an agreement to allow early termination by one or both parties but this is not common. If neither party is in breach, both parties must continue under the agreement until the lease term expires (including options).

Early termination based on breach?

The lease will specify the power of the landlord to terminate the lease if the tenant is in breach.

Often, unrealistically almost every one of the tenant's obligations is said essential to the landlord. Any breach of these essential clauses gives the landlord the right to shut down the lease. This is unfair. Only breaches of truly essential clauses should give the landlord the power to evict.

The lease will not usually specify the power of the tenant to terminate the lease if the landlord is in breach. General contract law on breach and specific terms of the lease might entitle the tenant to terminate early if a landlord could fundamentally breach the lease but this would be rare.

Can the tenant transfer the lease?

Assignment of the Lease to a new tenant is the most common early exit strategy.

The tenant cannot transfer the lease without the landlord's prior written consent. Check the lease provides the landlord cannot unreasonably withhold that consent if the new tenant is suitable

Typically after the transfer of the lease to the new tenant, the tenant will remain responsible to the landlord if there is a breach by the new tenant. This continues even if the new tenant in turn assigns the lease again. If there was a claim after assigning the lease, the original tenant would be able to claim against the new tenant. The new tenants' obligations to the landlord are in addition to the original tenant's obligations rather than in replacement. Effectively, the old tenant becomes a guarantor for the new.

Please Release Me

Consider asking your landlord to terminate your lease.

Your landlord might be willing if the rental market is good and the space can be easily relet, perhaps for a higher rent.

Can you abandon the Lease?

You could just walk away from the lease .

If you walk away from the lease with out a valid termination of the lease , the tenant who signed the lease (most likely you) and any guarantor would be liable for the rent for the rest of the lease or until the landlord finds a new tenant.

This isn't quite as bad as it sounds because the law imposes upon landlords a duty to mitigate damages. The landlord can't just sit back and collect your rent but has a positive n obligation to try to find another tenant to lease your place.

If and when the new tenant pays the same or higher rent, you're off the hook.

If the new tenant pays less rent than required by the lease, however, your landlord may claim from you the difference over the term of the lease.

Your landlord may not be as motivated as you to find a new tenant, especially while you are still liable.

Are you better to keep control of the premises and try to locate a new tenant yourself to assume the lease obligations.

Can you abandon the Tenant ?

Consider who is the person nominated as tenant on the lease in the context of your overall business plans and structures.

If you have use a company or some other holding structure, can the company or holding entity be abandoned and wound up?

Is there a director's guarantee or other continuing liability ?

If you are personally bound are things so bad you are better to go bankrupt and start afresh? Desperate times require desperate responses.

Throw money at the Landlord

Do you need to pay money to the landlord to be released or to persuade a new tenant to take over the lease ?

Should you could offer part or all of any bond or security deposit to get out of your lease?

After reading this and the lease, then what?

Discuss any of the matters in the lease or above that concern you initially with us and then directly with the landlord. There may need to be negotiation between the lawyers later.

Businesses specified as retail premises under the Code of Practice for Retail Tenancies (as at January 2000)

Antique shop, Art gallery, Art supplies shop, Arts and crafts shop, Barber, Barbecue equipment shop, Beautician, Beauty shop, Beauty therapist, Beachwear shop, Beer, wine and spirit shop (except where goods are for consumption on the premises), Bicycle shop, Bicycle accessories shop, Biscuit bar shop, Bookshop, Boot and shoe repairer, Bridalwear sales and hire shop, Building supplies shop, Business machines and equipment shop, Butcher shop, Cake shop, Camping equipment shop, Card shop, Carpet shop, Casket shop, Cigarette shop, Clock shop, Coin and coin collection shop, Confectionery shop, Convenience food shop, Cookie shop, Copper fitting shop, Cosmetics shop, Costumes and formal wear hire shop, Craft shop, Curtain shop, Delicatessen shop, Department store, Dinnerware shop, Disposals shop, Drapery shop, Dry cleaner, Duty free shop, Electrical appliance shop, Electronic equipment and supplies shop, Engraver, Equestrian equipment and supplies shop, Equipment hire shop, Fast food shop, Fast photo processor, Flag shop, Floor covering shop, Florist shop, Flower shop, Fruit and vegetable shop, Fruit juice shop, Furniture shop, Games and hobbies shop, General store, Gift shop, Giftwrapping shop, Grocery shop, Greengrocer shop, Haberdashery shop, Hairdresser, Hardware shop, Health food shop, Hearing aid shop, Hot bread kitchen shop, Hot water system shop, Household appliance shop, Household fixtures and fittings shop, Ice cream shop, Interior decoration shop, Jewellery shop, Key cutting shop, Kitchenware shop, Kite shop, Leather goods shop, Lighting shop, Linen shop, Lingerie shop, Lottery agency, Manchester shop, Martial arts supplies shop, Mixed business shop, Motor vehicle and motorcycle accessories shop, other than a tyre shop or battery shop, Music shop, Newsagency shop, Nick-nack shop, Nut bar shop, Optometrist, Organ shop, Paint and paper shop, Pastry shop, Pet shop, Pharmacy shop, Phone shop, Photographic equipment and supplies shop, Picture frame shop, Plumbing supplies shop, Pool and spa shop, Poultry shop (whether fresh or frozen poultry or both fresh and frozen poultry), Precious stones shop, Prints and posters shop, Restaurant, cafeteria, coffee lounge and other eating place, Rock shop, Rubber stamp supply shop, Seafood shop, Second-hand goods shop, Service station, Shoe shop, Shops selling or engaged in any one or more of the following goods or services in relation to girls, women and infants:, accessories, baby wear, bags, caps, clothing, clothing alterations, sunshades, Shops selling or engaged in any one or more of the following goods or services in relation to men and boys:, accessories, caps, clothing, clothing alterations, sunshades, Shops selling any one or more of the following goods:, cassettes, musical instruments, pre-recorded tapes, records, compact discs, sheet music, Silverware shop, Sleepware shop, Smallgoods shop, Snack bar, Soft drink shop, Soft furnishing shop, Souvenir shop, Sporting goods shop, Stamp and stamp collection shop (whether for purchase or sale or both), Stationery shop, Supermarket, Surfboard shop, Surfing accessories shop, Takeaway food shop, Television, video equipment and other household appliance hire shop, Tobacconist shop, Toy shop, Umbrella shop, Underwear shop, Variety store, Videotape and pre-recorded music library, Vitamin shop, Wall decoration shop, Watch shop, Writing materials shop,