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# A GUIDE FOR LANDLORDS

The Business Tenancies (Fair Dealings) Act



**LOOK. LEARN. LEASE.**



Northern Territory Government





# A Guide to Retail Leasing for Landlords

This guide aims to give landlords the information they need when leasing premises to tenants for business purposes. It covers the risks associated with retail leasing and the landlord’s and tenant’s rights and responsibilities under the *Business Tenancies (Fair Dealings) Act*.

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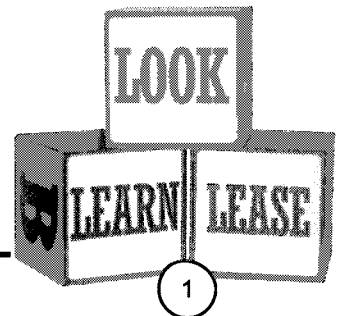
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## **Landlord's checklist**

### **HERE ARE SOME IMPORTANT QUESTIONS TO CONSIDER BEFORE YOU SIGN A LEASE.**

#### **Have you:**

- Satisfied yourself that the prospective tenant has understood the negotiations and representations you have made about the lease?

**Yes / No**

- Given the prospective tenant or assignee a Landlord Disclosure Statement and a draft copy of the lease?

**Yes / No**

- Received a Tenant Disclosure Statement from the prospective tenant or an Assignee Disclosure Statement from the prospective assignee if you have asked that one be provided?

**Yes / No**

- Included in the lease details of payments the tenant may be required to make including:

- contributions to outgoings
- damages for breach of a term of a lease
- an indemnity given by the tenant for loss or damage you suffer as a result of the tenant's actions or omissions
- interest on arrears of rent and outgoings?

**Yes / No**

- Considered whether you want to review the rent paid by the tenant during the lease and made provision for this?

**Yes / No**

- 
- Thought about whether you may need to relocate the tenant to different premises during the term of the lease and made provision for this?

**Yes / No**

- Thought about whether you would be willing to allow the tenant to assign the lease and under what circumstances and, if necessary, included appropriate provisions in the lease?

**Yes / No**

- Sought legal and financial advice about the terms and conditions of the lease?

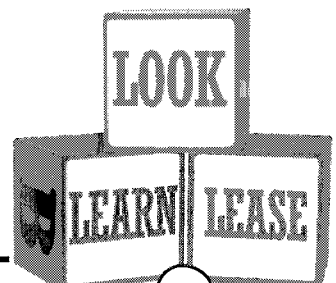
**Yes / No**

- Considered the potential implications of unconscionable conduct provisions in the *Business Tenancies (Fair Dealings) Act* and conducted negotiations accordingly?

**Yes / No**

- Read through the information in this guide so you are familiar with your rights and obligations as a landlord?

**If you answered 'No' to any of these questions, you may still have some work to do before you are ready to sign a retail shop lease.**





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## **What disclosure requirements will impact on you?**

### **DISCLOSURE REQUIREMENTS BETWEEN YOU AND A PROSPECTIVE TENANT**

As a landlord, you must give prospective tenants a copy of the proposed retail shop lease as soon as you enter into negotiations with them about the lease. You must also give prospective tenants a copy of the Landlord Disclosure Statement at least seven days before a lease is entered into.

The prospective tenant must give you a Tenant Disclosure Statement within seven days of receiving your disclosure statement.

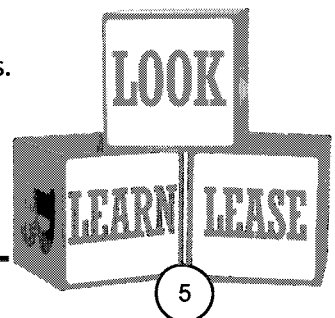
The full details of the information needed in the landlord's disclosure statement are contained in the Regulations to the Act. Copies are available from [www.business.nt.gov.au](http://www.business.nt.gov.au) and follow the Retail Tenancies link, or call the Tenancy Unit on 8999 1999 or 1800 019 319 if calling from outside the Darwin metropolitan area.

### **DISCLOSURE REQUIREMENTS BETWEEN YOU AND A PROSPECTIVE ASSIGNEE**

Before approaching you for consent to a proposed assignment, the tenant (as assignor) is required to provide the prospective assignee with a copy of the most recent Landlord Disclosure Statement along with details of any information that has changed in the statement since you gave it to the tenant.

The tenant may ask that the prospective assignee give you information about their financial standing and business experience before requesting your consent to a proposed assignment.

See page 18 for more information about assignments.





## Outgoings

Outgoings are your expenses that are directly attributable to the operation, maintenance or repair of the retail shopping centre or building; and charges, levies, premiums, rates or taxes that you must pay because you own or occupy the centre or building, or the land on which it is located.

If you want your tenant to contribute to your outgoings, you must make specific provision for this in the lease. The lease must specify what expenses are to be regarded as outgoings, how they will be determined and apportioned and how you will recover them from the tenant.

You must also give the tenant an estimate of outgoings in each accounting period at least one month before the start of the period.

You must also provide an annual audited statement of outgoings within three months of the end of the accounting period. These statements must be prepared in accordance with relevant principles and disclosure requirements of applicable accounting standards. They must also be accompanied by a report on the statement prepared by a person who holds a public practice certificate issued by an accountant's body.

If the lease requires the tenant to contribute to outgoings related to obtaining statistical information (such as traffic counts) you must make the statistical information available to the tenant.

If the lease relates to a shop in a retail shopping centre the share of outgoing expenses a tenant can be required to pay must not be more than the proportion that the area of the tenant's shop is to the net lettable area of the centre. For example, if the tenant's shop was one-twentieth of the shopping centre, you could not require the tenant to pay more than one-twentieth of non-specific outgoings.



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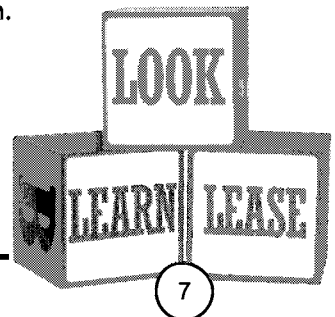
## Unconscionable conduct

The unconscionable conduct provisions in the *Business Tenancies (Fair Dealings) Act* prohibit landlords and tenants from behaving in a way that is unconscionable in relation to a retail shop lease.

Unconscionable conduct is basically where one party in a business transaction misuses their greater bargaining or market power to achieve a business result that is largely disadvantageous to the other party. For example, unconscionable conduct may be where one party takes advantage of another who then is unable to make a voluntary or independent decision or who is unable to make a decision in accordance with what is in their best interests.

The unconscionable conduct provisions enable a court of competent jurisdiction to take into consideration a range of matters in determining whether a party has engaged in unconscionable conduct. This could include:

- the relative bargaining powers of the parties
- whether the other party was able to understand any of the documents relating to the lease
- the extent to which the party unreasonably failed to disclose to the other party any intended conduct that might affect the other party's interests
- whether any undue influence or pressure was exerted on, or any unfair tactics used against, the other party
- the extent to which the party's conduct towards the other party was consistent with the party's conduct in similar transactions
- the extent to which the party was willing to negotiate the terms and conditions of the lease with the other party
- the extent to which the parties acted in good faith.



## Information about a tenant's turnover

### WHEN CAN THIS INFORMATION BE REQUIRED?

If the tenant's rent, or a portion of the rent, is to be determined as a percentage of their turnover, the lease will determine the type and frequency of information the tenant is required to provide you. However, the *Business Tenancies (Fair Dealings) Act* specifies that turnover rent does not include:

- the amount of losses incurred in the resale or disposal of merchandise purchased from customers as trade-ins in the usual course of business
- the amount of deposits and instalments received on account of lay-bys, hire purchase or credit sales that have been refunded to customers
- the amount of a refund on a transaction if the proceeds of the transaction have been included as part of turnover
- the amount of service, finance or interest charges payable to a financier relating to providing credit to customers (other than commission on credit or store cards)
- the price of merchandise exchanged between the tenant's shops if the exchange is made solely for the convenient operation of the business of the tenant and not for the purpose of concluding a sale made at or from the shop to which the lease relates
- the price of merchandise returns to shippers, wholesalers or manufacturers
- the proceeds of sale of the tenant's fixtures and fittings after their use in the conduct of business at or from the retail shop to which the lease relates
- the amount of discounts allowed to customers in the normal course of business
- the amount of uncollected credit accounts that are written off
- the net amount paid or payable by the tenant for tax imposed at the point of retail sale or hire of goods or services
- the amount of delivery charges
- the amount received from the sale of lottery tickets and similar tickets, other than commission on those sales.

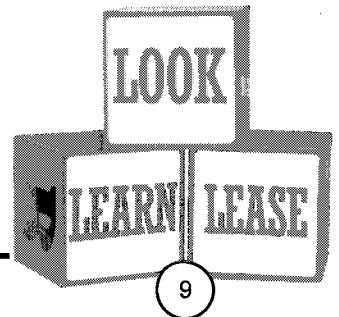


## HOW CAN THE INFORMATION BE USED?

Strict provisions govern how turnover information can be used by landlords, including how and to whom the information is allowed to be provided.

You may include information about a tenant's turnover in a document giving the aggregate turnover information about a retail shopping centre as long as it is done so that the turnover of the individual tenant is not disclosed. Information about a tenant's turnover may also be communicated or disclosed:

- with the consent of the tenant
- to your own professional advisers or to a financial institution for the purposes of enabling you to obtain financial accommodation
- in compliance with a court, the Commissioner of Business Tenancies or a person conducting dispute resolution proceedings under the *Business Tenancies (Fair Dealings) Act*
- to a prospective purchaser of the retail shop or the building in which it is located.



## **Rent reviews**

### **WHAT DO THE RENT REVIEW PROVISIONS ALLOW?**

Most leases state that the rent will be reviewed at certain intervals. If this is the case, the lease must specify when a rent review will be conducted and how it is to be done.

A lease entered into under the *Business Tenancies (Fair Dealings) Act* may only specify one basis for each separate rent review during the term of the lease, or under an option to renew or extend the lease.

The *Business Tenancies (Fair Dealings) Act* specifies certain methods that may be used to review rent. These are:

#### **Current market rent**

The current market rent is based on the rent that would reasonably be paid for a vacant shop on the open market, taking into consideration the permitted use and other lease conditions. The current market rent should reflect all the advantages and disadvantages of the premises and the proposed business and represent fair value.

If you and the tenant disagree about the current market rent value of a shop and cannot agree on a specialist retail valuer to make a determination, the Commissioner of Business Tenancies can nominate a specialist retail valuer. The valuer will determine the current market rent and this will be the new rent payable under the lease.

The specialist retail valuer may require you to provide certain information to enable a thorough determination. Under the *Business Tenancies (Fair Dealings) Act*, you must give the information to the valuer within 14 days. If you fail to do this the valuer may apply to the Commissioner of Business Tenancies for an order that you comply.

If a specialist retail valuer undertakes a current market rent determination, you and the tenant must each pay half of the valuer's fee.



### **Independently published index of prices or wages**

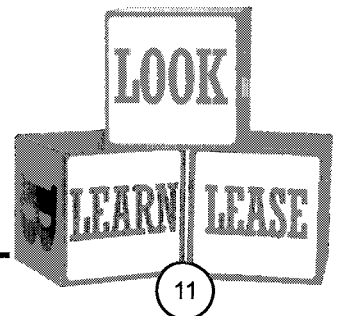
The Consumer Price Index (CPI) is a commonly used index for rent reviews. In this case the rent is tied to a formula that is based on the movement in the CPI. This is generally stated as a percentage increase or decrease.

### **Fixed percentage of the base rent**

The base rent in a retail shop lease can be varied by any percentage as negotiated between the parties and contained in the lease.

### **Fixed annual amount**

The base rent in a retail shop lease can be varied by any fixed amount negotiated between the tenant and landlord and contained in the lease.





## **Payments tenants can be required to make**

In addition to paying rent and outgoings, tenants can also be required to make payments for other items. These payments can usually only be required if provision is made for the payment in the lease.

You cannot require the tenant to pay an amount towards the capital costs, including plant, of the building or shopping centre in which the retail shop is located.

### **CONTRIBUTIONS TO SINKING FUNDS**

You can require your tenants to contribute to a sinking fund for maintenance and repairs if provision is made for this in the lease. However, you cannot require the tenant to make contributions to a sinking fund to provide for capital works. Money contributed to a sinking fund may only be used for major maintenance and repairs of the building, plant and equipment of the building or shopping centre in which the leased premises are located.

You may only keep one sinking fund and you must deposit all sinking fund contributions into an interest bearing account. The total payments made by all tenants of a shopping centre for any one year should not be more than 5 percent of the estimated total outgoings for the centre and the total amount of money held in the account should not exceed \$250,000.

Sinking funds are subject to strict accountability and auditing provisions.

### **CONTRIBUTIONS FOR PROMOTION AND ADVERTISING**

As a landlord you cannot require a tenant to undertake advertising or promotion of the tenant's business. However, if the shop is located in a shopping centre and the promotion and advertising expenses are not considered as part of the your outgoings, the tenant may be required to contribute separately to the promotion and advertising of the shopping centre.

Strict accountability and auditing provisions apply to promotion and advertising contributions.



## LEASE PREPARATION EXPENSES

As a landlord you may not pass onto the tenant any of your legal or other expenses relating to the preparation of the lease unless:

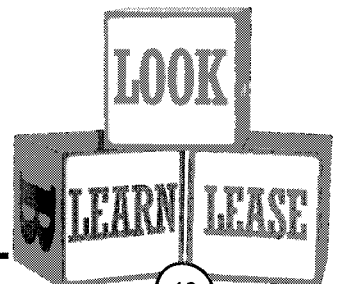
- you give the tenant a copy of the account presented to you for those expenses and
- the amount of the charges, or the method of calculation, is included in your disclosure statement.

Other expenses include:

- the negotiation, preparation and execution of the lease
- obtaining necessary consents from mortgagees or government agencies and
- any surveys or compliance with a requirement made by or under an Act.

## PAYMENTS FOR KEY MONEY AND GOODWILL

The *Business Tenancies (Fair Dealings) Act* prohibits you from seeking or accepting any payment of key money from a tenant. You are not able to seek or accept any amount for the goodwill of the tenant's business operated in the leased premises.





## MISCELLANEOUS PAYMENTS

You are also allowed to receive payment from a tenant for a range of other items including:

- damages for breach of a term of a lease (if specified in the lease)
- an indemnity for loss or damage you suffer as a result of the tenant's actions or omissions (if specified in the lease)
- interest on arrears of rent and outgoings (if specified in the lease)
- your reasonable expenses incurred in investigating a proposed assignee
- your reasonable expenses relating to an assignment of a retail shop lease and any consents to the assignment
- a repayable bond to secure the tenant's obligations under the lease
- amounts you spend fitting out the leased shop
- granting a franchise in relation to the granting of a retail shop lease
- payment for plant, equipment, fixtures and fittings sold by you to the tenant in connection with the granting of the lease.





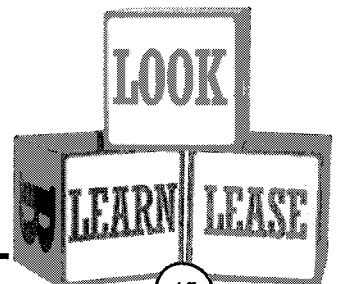
## Relocating a tenant

If a lease contains a relocation provision you may be able to relocate a tenant to different premises under certain circumstances during the term of the lease. However, if you are planning on relocating a tenant to different premises, you must give the tenant at least three months written notice ("relocation notice") of your intention and include in the notice details of the premises the tenant will be moved to.

If the tenant does not want to be relocated they may give you written notice terminating the lease three months from the date of the relocation notice. They must give this termination notice within one month of receiving the relocation notice.

The tenant is entitled to be offered a new lease of the alternative shop on the same terms and conditions as the existing lease. The rent can be adjusted to take into account the difference in the commercial values of the two shops.

You must pay the legal costs for the relocation and other reasonable costs the tenant incurs such as dismantling and reinstalling fixtures and fittings.





## **Alterations and refurbishment**

If you are planning on altering or refurbishing the building or shopping centre of which the tenant's business forms a part, you must give the tenant at least two months notice in writing before you start.

If the alteration or refurbishment is necessary because of an emergency you must give the tenant as much notice as is practicable under the circumstances.

## **Damaged premises**

If the tenant's shop or the building of which it forms a part is damaged then the tenant does not have to pay rent, outgoings or other charges for the period that the shop cannot be used or is inaccessible due to the damage. If the shop is still useable but the damage diminishes its useability, then the tenant's liability to pay rent etc is reduced by a proportional amount.

If you consider the damage is extensive enough to make repairs impracticable or undesirable you may advise the tenant in writing and either you or the tenant may terminate the tenancy by giving at least seven days notice in writing.

If you fail to repair the damage within a reasonable time after the tenant's written request to do so, the tenant may terminate the lease by giving you at least seven days notice in writing..



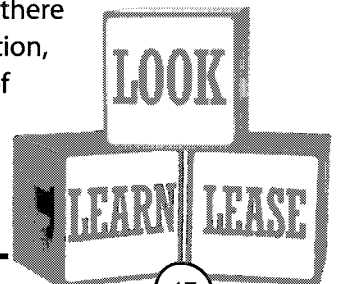
## When you may need to compensate a tenant

The *Business Tenancies (Fair Dealings) Act* lists a range of circumstances when you may have to compensate a tenant because of loss or damage suffered as a result of your actions. These include:

- relocating the tenant’s business to other premises during the term of the lease (see “Relocating a tenant” above)
- substantially inhibiting the tenant’s access to their shop
- substantially inhibiting or altering customer access or the flow of potential customers past the tenant’s shop
- significantly disrupting trading to the tenant’s business or failing to take reasonable steps to prevent a disruption over which you may have control
- failing to rectify any breakdown in plant and equipment under your care or to rectify certain types of defects in the building or common areas
- neglecting cleaning, maintenance or repainting of the building or common areas which are your responsibility
- causing the tenant to leave the shop before the lease expires for the purpose of extending, refurbishing or demolishing part or all of the building
- causing the tenant to enter into a lease as a result of false or misleading statements or misrepresentations
- failing to make the shop available to the tenant for trading on the nominated date.

Any provision in a lease that attempts to limit the amount of compensation payable to the tenant in any of the above circumstances is void.

If any of these circumstances arises, you should try to agree with the tenant on an acceptable amount of compensation. If there is any disagreement about the amount of compensation, a dispute should be lodged with the Commissioner of Business Tenancies. A conciliator may be appointed to help you reach agreement, or if this fails, further action may be taken.



## **When a tenant wants to renew their lease**

A lease is written to cover a specific period. Some leases provide for an option to renew and others do not.

If a lease does contain an option, the tenant must exercise the option in accordance with the terms of the lease, usually by a particular date.

If a lease does not contain an option for the tenant to renew the lease, you must either by written notice offer the tenant a renewal or extension of the lease or advise that you do not propose to make such an offer. This notice must be given to the tenant not less than six months and not more than 12 months before the lease expires.

## **Assignments of leases**

If a tenant wants to sell their business, no longer wants to operate a business, or for other compelling reasons cannot continue to operate the business, they may approach you to consent to an assignment of their lease to another party (the assignee).

Before they approach you they should have largely finalised their negotiations with the prospective assignee. When the tenant does formally request your consent to the assignment they should provide you with supporting information to assist you in making your decision. This might include information about the prospective assignee's financial stability, retailing history and the proposed use of the premises.

The lease may impose conditions on when or if the lease may be assigned. For example, a lease might specify that the lease may not be assigned during the first two years of the lease term. However, subject to any conditions imposed by the lease, you may not unreasonably withhold consent to an assignment as long as the tenant has complied with the terms of their lease. You may not impose new obligations or remove any rights from the assignee that applied to the tenant. You may not impose any unreasonable conditions on the tenant as a condition of consenting to the assignment.

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You must respond to the tenant within 42 days of receiving the tenant's request.

The tenant and/or the proposed assignee usually meet any reasonable legal or other costs incurred in processing the request for assignment.

You cannot seek or accept key money to grant consent, however, you can:

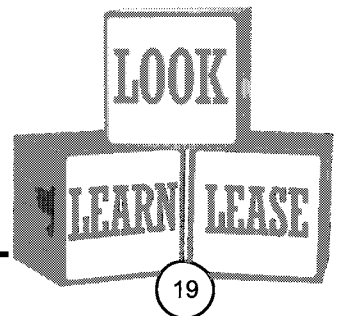
- receive rent in advance
- require the provision of a bond, security deposit or a guarantee
- receive payment for goodwill attributable to the conduct of the business by yourself
- receive payment for plant, equipment, fixture or fittings sold by you; and
- payment for the grant of a franchise.

You are considered to have consented to the assignment if:

- the tenant has given the proposed assignee a copy of your most recent disclosure statement and
- you have not provided written advice either consenting or withholding consent within 42 days of the request for assignment being made.

If the assignment is in connection with the lease of a retail shop that will continue to be an ongoing business the tenant must provide you and the proposed assignee with an assignor's disclosure statement.

See page 5 for more information about assignments.





## **What if a dispute arises?**

The *Business Tenancies (Fair Dealings) Act* defines a retail tenancy dispute as “a dispute concerning the liabilities or obligations of a party to a retail shop lease that arose under the lease, or in connection with the use or occupation of the retail shop to which the lease relates”.

Essentially, this means that if there is any disagreement between you and your tenant about the lease or the retail premises you may approach the Commissioner of Business Tenancies for help.

For more information about dealing with retail shop lease disputes see ‘A Guide to Dispute Resolution for Retail Tenancy Claims’.

## **Where to go for information and assistance**

For more information about retail shop leasing matters and what you should do before you enter into a retail shop lease, contact the Tenancy Unit on 8999 1999 or 1800 019 319 if calling from outside the Darwin metropolitan area.

If you have any concerns or questions about the terms and conditions of your lease you should consult a lawyer to ensure you are fully benefiting from your rights and meeting all your obligations under the lease.

The Property Council of Australia is a lobby group for commercial property owners, ranging from smaller private owners to institutions. It also has access to a wide range of experience in retail-related issues. Although it does not offering a help line service, it can direct inquiries to experts.





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For more information  
contact the Tenancy Unit:

phone: 8999 1999  
or 1800 019 319

email: [businessstenancies@nt.gov.au](mailto:businessstenancies@nt.gov.au)

web: [www.business.nt.gov.au](http://www.business.nt.gov.au)