

Preparing and Reviewing Commercial Leases: Protecting your rights (Part 2 of a series)

By Andrew Grima

In our previous update, I discussed the importance of laying strong foundations in a leasing transaction.

Imagine for a moment that these foundations have been laid – you have signed the letter of offer or the heads of agreement (“the HOA”) and you or your solicitor is now required to prepare a lease or review a lease submitted by the other party. You would probably ask yourself, where do I begin? What should be in the lease?

It is not possible in the limited space I have here to list every item that should go in a lease. I will however draw to your attention some of the key issues that need to be considered when drafting and reviewing a lease.

Where to start

The starting point in the process is reviewing the HOA and ensuring the lease documents reflect the terms and conditions set out in the HOA, including term, monies payable, guarantees and bond required, method of rent review, and any special conditions dealing with issues such as car parking, fit out and construction.

Once it is clear on what the terms and conditions are, you need to consider whether there are any issues that the HOA has not addressed but which may have arisen during negotiations. Armed with all this information then you are now ready to prepare or review the lease documentation.

Issues that can arise

Over the years I have found that irrespective of how well the foundations have been established in a leasing transaction, the following issues often emerge during the drafting and review process:

1. If the tenant is responsible for reimbursing the landlord for outgoings, what will go into the definition? Are all outgoings to be included or are certain items to be excluded, such as repairs of a capital nature?
2. Is there to be a claw back of fit out contribution in the event of assignment or early termination?
3. Is the bank guarantee to have an expiry date and if so, for how long?
4. Are the dates for exercise of any option to renew practical?
5. How is rent to be determined during any holding over period?
6. Where are notices to be served – for example if the tenant is operating a number of sites and has a head office, is it more practical for notices to be served at the head office?
7. In the event of assignment, when is the tenant released from obligations under the lease? Is it practical for the lease to provide that change in ownership or control is to be treated as an assignment?
8. Do any insurance provisions allow for the tenant to satisfy its obligations through a global policy, where they operate from a number of sites or outlets?
9. To what extent is the tenant responsible for make good upon termination?
10. Is there provision to allow the landlord to refurbish or demolish and if so, how does the lease address the impact of this on the tenant? Eg. Is there a right to terminate and are there compensation provisions?

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11. Are additional documents required given the nature of the transaction such as a fit out deed, which will document the parties' obligations for works, payment of any incentive and set out the basis upon which handover and commencement date will be determined?
12. Who will be responsible for ensuring that the premises comply with relevant regulations and insurance requirements including the maintenance and installation of apparatus such as fire extinguishers and sprinkler systems?

The Property Team at Coleman Greig are experienced in both drafting leases and reviewing them. We will consider these and other issues which may arise during the drafting process and ensure your rights are protected. For more information contact Andrew Grima at agrama@colemangreig.com.au.



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