Global Corporate Real Estate Guide - Australia

Leases

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

# What are the usual forms of leases?

In Australia, arrangements between commercial landlords and tenants are primarily governed by lease documentation. These documents, especially those used by institutional landlords, contain detailed provisions that regulate the relationship between the landlord and the tenant.

**Commercial leases**

Commercial leases are commonly net leases, i.e., the tenant pays an agreed rent (subject to rent increases on agreed terms) and a contribution to the landlord’s operating expenses for the building or land.

The proportion of the tenant’s contribution to operating expenses is generally calculated by reference to the proportion (expressed as a percentage) the lettable area of the tenant’s premises bears to the total lettable area of the building or property involved.

**Retail leases**

Most states and territories have enacted separate retail lease legislation to enshrine certain statutory protections on retail tenants that are considered to have little or no bargaining power against institutional landlords. The retail lease legislation differs between states and territories, including as to what falls within the category of a “retail lease” in that jurisdiction. However, all forms of retail lease legislation share the common objective of ensuring that retail tenants are entitled to certain minimum conditions that override any provision to the contrary in a lease.

**Ground leases**

Another form of leasing arrangement is a long-term ground lease, typically granted from a government authority over larger types of developments under which the ground tenant or developer usually leases vacant land for development. Once the development is completed, the ground tenant will sublet the space to retail, office or industrial subtenants, depending on the type of development. Ground leasehold interests may be bought and sold in a manner similar to freehold property interests.

**Residential leases**

Residential lease terms are strictly regulated by state and territory legislation to provide residential tenants with tight consumer protections.

# Are lease provisions regulated or freely negotiable?

Generally, commercial lease provisions are freely negotiable but are subject to common law and the legislation dealing with general property principles and title registration. There is limited opportunity to opt out of the provisions of the retail tenancy legislation, which applies to certain retail tenancies, including tenancies in a shopping center.

There are also usually limited rights to amend residential lease terms where they are prescribed by state or territory legislation.

# Is there a maximum term for leases? Can these be extended?

There is no prescribed maximum term for a commercial lease. However, there may be rights in a particular jurisdiction to convert a very long-term lease of several hundred years into freehold. The duration of the lease term can be for any number of years or up to a fixed date (and sometimes Crown land can be subject to leases in perpetuity). Parties can often negotiate a right to extend or renew the lease for a further term through lease options in favor of the tenant.

Alternatively, a lease may contain a holdover clause that allows tenants to remain in occupation of the leased premises on the basis of a monthly tenancy or some other agreed period after the lease term has expired, but typically only with the prior consent of the landlord.

In some circumstances, planning approval may be required to grant a lease of part of land (not part of a building) for a certain period, and some leases require approval under the FATA and 2015 Regulations.

Note that in most jurisdictions, leases with a longer term are required to be registered, whereas shorter term leases (e.g., a lease with a one-year term) may be, but are not required to be, registered. The only state that does not require any leases to be registered is Victoria.

# What are the usual lease terms?

The length of commercial leases in Australia can vary depending on the nature of the premises and the intention of the parties. The typical term of a commercial lease for commercial premises is usually between three and five years for smaller tenancies and approximately 10 years for major tenants, with or without option rights in favor of the tenant to extend. For major retail leases, such as those to anchor supermarkets or department store tenants, lease terms can significantly exceed 10 years and generally include a series of option rights to extend, sometimes up to a total of 40 years.

Many retail leases are governed by specific legislation and, in most jurisdictions, have a minimum term of five years (inclusive of options for renewal) unless the tenant agrees to waive that right.

# Are there instances where tenants may demand an extension of the lease?

There is no right imposed by statute that entitles a tenant to a renewal of a lease. In the case of leases that are subject to retail lease legislation, the landlord can be required to give prior notice as to whether it intends to extend the retail lease on expiry, and the lease will continue until a set period after this notice is given.

# On what grounds may a lease be terminated?

A landlord can generally terminate a lease only when the tenant is in breach of their essential obligations under the lease. Generally, if a tenant defaults under a lease, the lease will provide the tenant with a period (e.g., 14 days) to rectify the default or otherwise pay compensation to the landlord in circumstances where the breach cannot be rectified. Leases usually also contain clauses that allow for a party to terminate in the event of damage or destruction of the premises or if the land involved is resumed.

Additionally, for retail leases, some jurisdictions allow the landlord to terminate a lease if the landlord intends to demolish the premises for redevelopment subject to limited compensation, if these provisions are clearly set out in the disclosures prior to the grant of the retail lease and in the lease itself.

# Must rents be paid in local currency?

It is standard practice that rents be paid in Australian dollars.

# Is rent paid on a monthly basis? Is it required to be paid in advance?

Usually, rent is paid on a monthly basis, in advance and on the first day or business day of the month.

# How is rent reviewed? Are there limits to the increase in rent?

Generally, commercial rents are reviewed in the following three ways:

Fixed annual percentage increase (e.g., presently around 3%-5%)

Determination of a market rent value usually settled by an independent valuation

Cost of living increases measured by the Consumer Price Index published by the Australian Bureau of Statistics

Parties may also agree to use a combination of these types of reviews during a lease term, such as providing for a fixed rent increase every year with a market rent review upon commencement of an option term.

Additionally, landlords often seek to include a “ratchet” clause that provides that the rent will not decrease, regardless of the outcome of the review. In most jurisdictions, ratchet clauses and certain other forms of rent reviews are controlled or prohibited in retail leases.

# What are the basic obligations of landlords and tenants?

The following is usually required of landlords:

Repair and maintain the structural parts of the property, rectify inherent defects and be responsible for fair wear and tear of the premises

Ensure that the tenant has quiet enjoyment of the premises

Provide certain services to the tenancy

The following is usually required of tenants:

Pay rent on time

Pay a proportion of the building’s outgoings (which may include cleaning costs)

Maintain the premises in a good and clean condition

Repair damage caused by the tenant or by the tenant’s property

Give the landlord access for inspections and landlord’s work

Yield up the premises to an agreed condition at the expiry of the lease (which is generally an obligation to return the premises in the same state as they were at the commencement of the lease, although a lease drafted more in favor of the landlord may impose significant “make-good” obligations on the tenant)

# What provisions or restrictions typically apply to the transfer of the lease by the tenant? May a tenant sublet the leased premises?

Commercial tenants are typically permitted to assign or sublet the premises with the landlord’s prior written consent. Where the landlord’s consent is required, the landlord is usually required to act reasonably and promptly when considering the tenant’s request to assign or sublet the leased premises. The lease may also set out certain criteria that the proposed transferee or sublessee must satisfy as a condition of the landlord’s consent to the transfer or sublease. The underlying principle behind such criteria is that the current tenant may only transfer or sublet to a person of the same caliber as the current tenant.

In more sophisticated leases, there are detailed change of control provisions affecting the tenant that can trigger the transfer and assignment provisions in the lease.

# What happens in the event of destruction of the leased premises?

If the premises is substantially destroyed, rent generally abates and the lease may be terminated by either party subject to certain preconditions. In most leases, there is an obligation for the landlord to undertake repair works within a certain period, with the failure of the landlord to undertake such works giving rise to a right for the tenant to terminate.

The definition of “substantially destroyed” will usually be the subject of negotiations between the parties, although the typical approach is to define this concept by reference to a percentage of the premises that is rendered unusable as a result of the destruction.

If the premises are not substantially damaged, the landlord may choose to repair the damage or, alternatively, terminate the lease. Typically, rent will abate (on a proportional basis) until the premises are fully repaired unless the damage has been caused by the tenant, in which case, the right to rent abatement is usually lost.

# Who is usually responsible for insuring the leased premises?

Commercial landlords are generally responsible for insuring the building in which leased premises are located. However, the cost of this insurance is typically passed on to the tenant as part of the building outgoings.

The tenant will normally be responsible for maintaining insurance policies for the leased premises that relate to their use and occupation of the premises (such as public liability insurance, plate glass insurance and tenant’s property insurance). The level of public liability insurance required by commercial landlords from tenants is relatively high when compared to other overseas jurisdictions and is usually set between AUD 20 million to AUD 50 million.

# Will the lease survive if the owner sells the leased premises?

The tenant has the right to remain in occupancy until the end of the lease term, subject to the registration of the tenant’s interest under the Torrens title (where required).

# Will the lease survive if the leased premises are foreclosed?

Foreclosure is not a common mortgagee remedy in Australia as the mortgagee is usually required to offer the property for sale by public auction. There are also other controls that limit the vesting of property in the mortgagee.

Nevertheless, a lease entered into before a mortgage is placed on the property will survive a foreclosure, as will any lease that has been consented to by the mortgagee during the term of the mortgage, noting that the mortgagee’s consent is required as a precondition of registration of a lease under the Torrens title system, for the mortgagee to be bound by a lease granted after the registration of the mortgage.

©Copyright © 2024 Baker & McKenzie. All rights reserved. **Ownership**: This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion**: All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites. **Attorney Advertising**: This Content may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction**: Reproduction or copying of the Content on this Site without express written authorization is strictly prohibited.