



ISSUES RELATING TO COMMERCIAL LEASING

AUSTRALIA (NEW SOUTH WALES)

Clayton Utz

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- 1. Describe [National][state][territorial][provincial] or local transfer taxes payable on creation or assignment of a lease.**

Stamp duty payable on the creation of Leases, pursuant to the Duties Act 1997 (NSW), has now been abolished on Leases executed on or after 1 January 2008. However, stamp duty is still required to be paid on a transfer or assignment of a Lease. Furthermore, Leases of land under the Real Property Act 1900 (NSW) exceeding three (3) years must be registered. To register a Lease a tax must be paid to the Department of Lands, Land and Property Information NSW.

- 2. Describe any legal restrictions limiting the maximum term of a lease (including renewals).**

Under the Australian common law, a lease in perpetuity is void as its duration is not fixed with certainty. Accordingly, perpetual leases can only be granted where allowed by statute. Furthermore, the duration of a lease term needs to be fixed with certainty and it is not sufficient to fix the duration by reference to a future event. Various statutes may also limit the number of years which government bodies can grant leases of their land.

- 3. Describe any laws requiring landlords to allow a tenant to renew its lease.**

A Landlord is required to allow a Tenant to renew its lease if the Tenant has an effective option in the lease. Options for renewal are normally contained as a covenant in the Lease

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and can be characterised as irrevocable offers or conditional contracts. An enforceable option for renewal creates an equitable interest in land which runs with the land and the reversion and is enforceable against the Landlord and successors in title to the Landlord.

4. Describe any restrictions on rent that may be charged for to a tenant.

There is no restriction on the amount of rent that can be charged for commercial and industrial premises. However, rent can only be increased during the term of the lease and any option period in accordance with the rent review provisions in the Lease. However, if the manner in which the rent is increased under the Lease is considered oppressive and unconscionable in the circumstances, a Court exercising equitable jurisdiction may strike out the clause.

Furthermore, some leases, such as retail leases and residential leases, have statutory restrictions imposed on the timing and method of increasing rent during the term.

5. Describe any laws permitting tenants to terminate a lease prior to its stated expiration date.

There are six (6) key methods of terminating a lease prior to its stated expiration which can be used by a Tenant (or a Landlord in some instances). These methods are as follows:

1. Surrender of the lease
2. Termination pursuant to a term in the lease
3. Frustration
4. Termination pursuant to specific statutory grounds
5. Merger
6. Breach of fundamental term by the Landlord or the Tenant's acceptance of the Landlord's repudiation

Furthermore, the Retail Leases Act 1994 (NSW) provides certain grounds for early termination of a lease. These include the failure of the Landlord to give a complying disclosure statement to the Tenant, the demolition of the premises or damage to the premises. The Residential Tenancies Act 1987 (NSW) and the Contracts Review Act 1980 (NSW) extend to residential leases and leases of "farming undertakings" as does the Agricultural Tenancies Act 1990 (NSW). These Acts also provide some statutory grounds for termination.

6. Describe any laws allowing tenants to assign or sublease without landlord's consent.

Under the Australian common law, the right to assign a lease is incidental to every leasehold interest. Accordingly, if there were no specific Lease covenants dealing with the right to assign or sub-lease then a Tenant could assign a lease or grant a sub-lease without having to obtain the Landlord's consent. However, this rarely happens in practice and the Tenant must usually seek the Landlord's consent pursuant to the terms of the Lease and any applicable statutory rules.

7. Describe any laws allowing landlord to restrict assignments or subleases by tenants.

Under the Australian common law, a Landlord can have a covenant in a Lease which absolutely prohibits the Tenant from assigning or subleasing their leasehold estate. Alternatively, the Landlord can have a covenant in a Lease which qualifies their consent to an assignment or a sublease. The latter situation, however, is governed by the Conveyancing Act 1919 (NSW) which specifies that the Landlord cannot unreasonably withhold consent. Furthermore, the Retail Leases Act 1994 (NSW) limits the grounds on which a Landlord may refuse consent.

8. What is the common form of eviction proceeding? What is the customary length of time for that proceeding?

In regards to commercial premises there is no legal bar to the Landlord recovering physical possession without instituting legal proceedings. However, forfeiture can only be effected after the Tenant has failed to comply with an effective notice. Alternatively, the Landlord may institute proceedings for possession and seek an appropriate order from the Court. If the Tenant does not comply with the order then the Landlord may apply for a Writ for the Possession of Land which will be enforced by the Sheriff. The timing will depend on the nature of the property and the Court or Tribunal where relief is sought. Residential disputes which can be dealt with by a tribunal will be faster than Court proceedings.

9. Are there any legal restrictions on pledging a leasehold interest as security for a financing?

A leasehold interest may be used for security for land which is registered under the Real Property Act 1900 (NSW) (Torrens system land) or old system land. However, a Torrens title mortgagee does not automatically become liable on the Tenant's covenants in the Lease since the registered mortgagee is not an assignee of the leasehold interest but a chargee only. However, the mortgage should be registered to ensure adequate protections for the mortgagee.

10. Describe any requirements for landlords to hold security deposits in separate accounts and, if such requirements exist, describe if there can be one separate account for all tenant security deposits or whether each security deposit must be held in its own separate security deposit.

The holding of security deposits by Landlords is regulated by statute for residential leases and retail leases. Under the Landlord and Tenant (Rental Bonds) Act 1977 a Landlord must deposit any security deposit with the Rental Bond Board which is a statutory body constituted under the Act. The Rental Bond Board will hold the security deposit and the Landlord will not hold this money in its own account. Similarly, under the Retail Leases Act 1994 (NSW) a Landlord is required to lodge a security deposit with the Director-General of the Department of State and Regional Development. The Landlord is not to keep these deposits in its own bank account.

11. Describe any required statutory or other legal disclosures to be made to all tenants.

At least seven (7) days before a retail lease is entered into the Landlord must provide the Tenant with a document called a "Lessor's Disclosure Statement". The Lessor's Disclosure

Statement sets out various information pertaining to the lease such as rent, rent reviews and any option periods, There is no other form of prescribed statutory disclosure document.

12. Describe all taxes on rent or other taxes that landlord are required to collect from tenants.

There are no taxes on rent in New South Wales which are distinct and separate from the requirements of a Landlord to pay income tax or company tax on its rent. If the Tenant pays GST (Goods and Services Tax) on its rent then the Landlord is required to collect that portion of the rent which is payable as GST for the Commonwealth Government.

13. Describe any limitations on the ability of landlords to exercise self-help.

It is common for commercial contracts to contain various self-help provisions such as termination and other rights. A simple termination right, for example, would usually be beyond challenge. However, terms which quantify or limit damages or allow the Landlord to keep certain benefits received are subject to restrictions. These include restrictions imposed by fair trading legislation, the ability of Courts to grant relief against forfeiture and the refusal to enforce a penalty as well as other equitable remedies available to a Court.

14. Describe whether remedies such as acceleration of rent must be expressly stated or whether they are implied.

If the Landlord terminates a lease for the Tenant's default the Landlord may sue the Tenant for damages including loss of rent which may include loss of rent after the Landlord has mitigated its damages. This remedy does not have to be expressly stated and is implied in the common law. A Lease may also allow a Landlord to recover a fixed sum of money from the Tenant, which may represent the "accelerated rent" due under the lease, in the event of a Tenant's default. Such a provision would need to be expressly stated in the Lease. However, this sum of money must be a genuine pre-estimate of damages the Landlord will suffer so as not to constitute a penalty and be held to be void by a court exercising equitable jurisdiction.

15. Describe whether there are any expedited remedies for tenant default and, if so, what lease provisions (such as waiver of jury trial, for example) would be required for a landlord to seek expedited remedies.

Disputes in relation to residential leases are determined by a Tribunal which due to its informal nature and wide range of statutory powers is capable of providing fast relief for applicants. Injunction is another remedy available to a Landlord to restrain a Tenant's default. This remedy is available under the common law and no express covenant is required to seek it. The Landlord may also re-enter the premises and forfeit the lease for the Tenant's default. The Conveyancing Act 1919 (NSW) implies this right although it can be varied by agreement which is the more common method of the Landlord acquiring this right.

16. Describe any formal requirements for the execution of a lease.

For land under the provisions of the Real Property Act 1900 (NSW) (Torrens title land which is the vast majority of land in New South Wales) a Lease for a term exceeding three (3) years must be effected by executing a Lease in the approved form and in order to pass to the Tenant a leasehold estate the Lease must be registered.

17. Describe whether a memorandum of lease or other document would need to be recorded for the lease to be enforceable against third parties.

As previously noted, a lease of land exceeding three (3) years under the Real Property Act 1900 (NSW) must be registered. Such registration gives the lease indefeasibility under that Act as well as priority over all later registered interests. This priority extends to any option to renew in the Lease. Accordingly, if after the Lease is registered a mortgage is given over the land the mortgagee takes subject to the rights of the Tenant under its options to renew. If a lease exceeding three (3) years was not registered then it is accorded the status of an equitable interest only and would be unenforceable against a competing registered interest.

18. Describe any restrictions on the transfer of ownership of real properties subject to a lease. Does such a transfer affect the tenant's rights or obligations?

A transfer of land under the Real Property Act 1900 (NSW) which is subject to a registered Lease will transfer title to the purchaser subject to that Lease. There are no restrictions but a purchaser should be aware of registered leases on title as well as potential unregistered leases which may affect the purchaser's desire for vacant possession.

For land under old system title a deed is necessary to create a legal leasehold interest. The Conveyancing Act 1919 (NSW) provides that covenants "having reference to the subject matter" of the lease are annexed to and run with the reversion. The Act also provides that the benefit of every condition of re-entry is annexed to and runs with the reversion. However, covenants in a Lease which were personal to the former Landlord and Tenant will not be enforceable against a new purchaser and vice versa, unless the parties have executed a deed providing for the new Landlord to have all the rights and obligations of the former Landlord.