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A GUIDE FOR TENANTS

The Business Tenancies (Fair Dealings) Act



LOOK. LEARN. LEASE.



Northern Territory Government



A Guide to Retail Leasing for Tenants

This guide aims to give tenants the information they need when leasing their business premises. 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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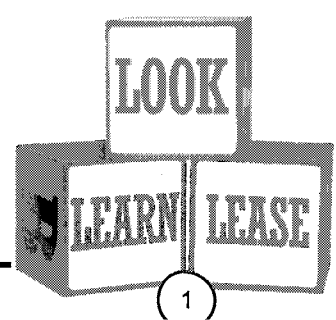
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BEFORE YOU SIGN THE LEASE

Tenant's checklist

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

Have you:

- Done some market research about the kind of business you want to run and where the market for that kind of business is?

Yes / No

- Contacted the Territory Business Centre to find out about registering a business name and the licences and permits you will need to operate your business?

Yes / No

- Looked at a few retail premises for lease and compared the pros and cons of the locations?

Yes / No

- Spoken to an accountant or other business advisor about how much money you will need to start up your business?

Yes / No

- Developed a business plan and worked out how much you can afford to spend on rent?

Yes / No

- Received a copy of the draft lease and Landlord Disclosure Statement from the landlord?

Yes / No

- Read carefully through the draft lease and made a note of any provisions that you did not understand?

Yes / No

- Asked a lawyer for advice about any parts of the draft lease and Landlord Disclosure Statement you did not understand?

Yes / No

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- Asked an accountant for advice about the financial implications of signing the lease?

Yes / No

- Made sure your business will not be adversely affected by the provisions of the lease that relate to financial obligations (including bond, rent, outgoings, and advertising and promotion), permitted use, the term of the lease and any options to renew, relocation, assignment, core trading hours or hours of operation?

Yes / No

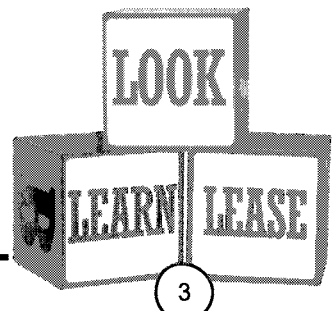
- Given the landlord a Tenant Disclosure Statement (or an Assignee Disclosure Statement if you are an assignee) if the landlord requested one?

Yes / No

- Read through this document so you are familiar with your rights and obligations as a tenant?

Yes / No

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



What is a lease?

A lease is a contract between a landlord and a tenant. It sets out the terms and conditions for the tenancy and the rights and obligations of both parties. It is legally enforceable.

A retail lease will describe the premises in detail and specifies, among other things:

- the formula for calculating the rent
- whether the rent will be reviewed during the lease
- options for renewing the lease
- any contributions you as the tenant may be expected to make to the landlord's expenses
- what the premises are allowed to be used for.

If the retail shop is in a shopping centre, it is a good idea to obtain a plan showing the specific premises to be leased.

Before you sign a retail shop lease, the landlord must have a copy of the proposed lease available for your inspection. The landlord must give you a copy as soon as you enter into negotiations concerning the lease.

WHEN IS A LEASE ENTERED INTO?

A lease is considered to have been entered into when one or more of these things has happened:

- the lease is signed and becomes binding on both parties
- the tenant takes possession of the leased shop
- the tenant starts to pay rent under the lease.

Because of this it is important to consult a lawyer and an accountant *before* you move in.

THE TERM OF THE LEASE

The term of the lease is the period of time the lease allows you to occupy the premises. The *Business Tenancies (Fair Dealings) Act* does not apply to retail shop leases for a term of less than six months, where there is no right for the tenant to extend the lease, or to leases for a term of 25 years or more.

Under the Act, the term of a retail shop lease including extensions or renewals must be at least five years – unless you take special steps to waive this requirement. If you want the total lease term to be less than five years, you must have written certification from a legal practitioner. The certification must say that the practitioner has explained this part of the Act to you and that the requirement for a five-year total term does not apply to your lease.

You must make sure the term of the lease is appropriate to your own business situation. For example, a long lease allows more time to recover the investment in the business. But when times are tough the rent and other payments still need to be met – even if the shop stops trading altogether – for the term of the lease.

When you assess the risks associated with a longer lease, consider negotiating for the inclusion of market rent reviews to reflect changing market conditions and keep rent at a manageable level.

Another factor to consider is that, without an option to renew in the lease, you may not necessarily be able to continue operating the business from those premises once the lease is up. You need to think about the potential cost of closing down the business or moving to different premises.

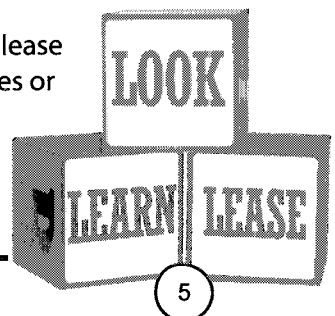
LEASE PREPARATION EXPENSES

As a tenant, you do not have to pay any of the landlord's legal or other expenses relating to the preparation of the lease unless:

- the landlord gives you a copy of the account presented to the landlord for those expenses and
- the landlord's disclosure statement includes the amount of the charges, or the method of calculation.

Other expenses include:

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



Important terms to understand

Your obligations under a lease could be affected by many factors. It is important to understand what the following terms mean.

BONDS AND RENT IN ADVANCE

Some leases may require a tenant to lodge a security deposit or a bank or personal guarantee. This is similar to the bond a person would pay if renting a residential property.

Solicitors or real estate agents may hold the security deposit in a trust account. The landlord and tenant should agree on who holds the money and how it is managed. It is important to ensure that the person holding the bond is reputable so that the money will be secure. Otherwise, the money should be deposited in a bank account that needs the landlord's and tenant's signatures to withdraw the money.

A landlord may also require the tenant to pay rent in advance. This is usually the amount payable for one rental period under the lease.

TURNOVER RENT

One way to determine the amount of rent to be paid under a lease is to decide on a percentage of the turnover of the tenant's business operated from the leased premises. Turnover is also known as gross takings, gross receipts or gross income. A retail shop lease is taken to provide for an underpayment or overpayment of rent to be adjusted within one month after the tenant's written request to the landlord. The adjustment usually happens once a year.

RENT REVIEWS

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.

The *Business Tenancies (Fair Dealings) Act* specifies certain methods that may be used to review rent. Leases under the Act may only use one method for rent reviews during the term of the lease. The methods 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 the landlord and tenant disagree about what the current market rent of a shop should be and cannot agree on a specialist retail valuer to undertake a current market rent determination, the Commissioner of Business Tenancies can nominate a specialist retail valuer. The valuer will determine the current market rent which will be the new rent payable under the lease. In this case, the landlord and tenant would each pay half of the valuer's fee.

Independently published index of prices or wages

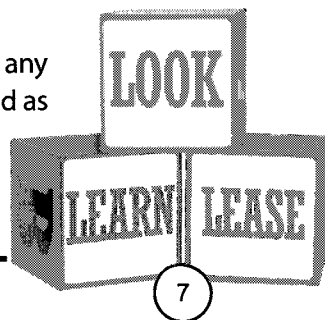
The Consumer Price Index (CPI) is a commonly used index for rent reviews. In this case the rent is tied to a formula that is based on the movement in the CPI. This is generally stated as a percentage increase or decrease.

Fixed percentage of the base rent

The base rent in a retail shop lease can be varied by any percentage negotiated and agreed by the landlord and tenant and is contained in the lease.

Fixed annual amount

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



OUTGOINGS

Outgoings are the operating costs of the landlord.

Under some leases the tenant may be required to contribute to outgoings in addition to rent. The lease must specify what expenses are regarded as outgoings, how they will be determined and apportioned, and how the landlord will recover them.

Outgoings typically include lighting, cleaning, air-conditioning of common areas, centre management costs, rates, taxes, levies and insurance premiums.

See page 18 for more information about outgoings.

PERMITTED USE

The permitted use clause of a lease is very important as it determines what type of business you can operate from the leased premises. Make sure the type of business you intend to operate and the merchandise you plan to sell are covered.

A permitted use clause in a lease does not mean you have an exclusive right to operate a particular type of business in the shopping centre. This is a separate issue you should discuss with the landlord so you know how many other shops in the centre may be in the same kind of business as you.

COMMON AREAS

The common areas of a retail shopping centre are areas in or near the centre for the public or the tenants of the shops in the centre. They include:

- stairways, escalators, and elevators
- malls and walkways
- parking areas
- toilets and restrooms
- gardens and fountains
- information, entertainment, community and leisure facilities.

Common areas do not include leased areas or adjacent vacant land not used for the shopping centre.

OPTIONS FOR RENEWAL

An option to renew a lease basically gives the tenant a right to remain in the retail premises after the original or previous lease term expires. The terms of the option should be realistic, attainable, capable of being exercised and spelt out clearly. For example, you may be offered a 3 x 3 x 3 lease. This means the first lease term is for three years, but you have the option to renew it for a second and third three-year period, giving a total of nine years.

If your lease allows an option to renew, make sure you know exactly when and how you exercise the option.

In the 3 x 3 x 3 example, you might decide at the end of the first three years that you no longer wish to lease the premises. The lease then ends and the landlord will seek a new tenant.

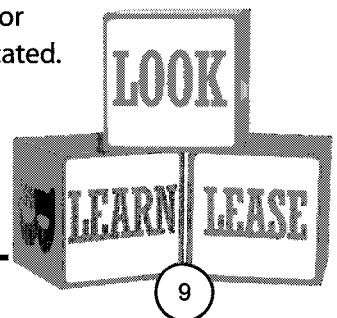
Options provide longer periods of time over which to amortise business establishment and close-down costs and may add flexibility to the lease and to the business.

KEY MONEY AND GOODWILL

Key money is an amount to be paid or a benefit to be conferred to secure for the tenant the granting, renewing, extending or assigning of a lease. The *Business Tenancies (Fair Dealings) Act* prohibits a landlord from seeking or accepting any payment of key money or for the goodwill of your business operated in the leased premises.

SINKING FUNDS

The landlord may require you to contribute to a sinking fund. These contributions are to 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. Sinking funds are subject to strict accountability and auditing provisions.





PROMOTION AND ADVERTISING

A landlord cannot require you to undertake advertising or promotion of your business. However, if the shop is in a shopping centre and the promotion and advertising expenses are not part of the landlord's outgoings, you may be required to contribute separately to the promotion and advertising of the shopping centre in which the leased premises are located. Strict accountability and auditing provisions apply to promotion and advertising contributions.

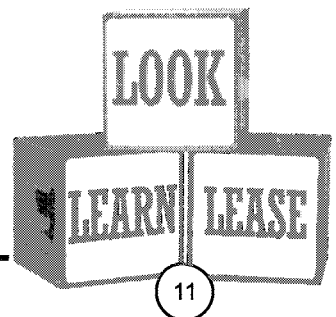


Other payments you may have to make

Your landlord is able to require that you pay for:

- damages for breach of a term of a lease (if specified in the lease)
- an indemnity for loss or damage the landlord suffers as a result of your actions or omissions (if specified in the lease)
- interest on arrears of rent and outgoings (if specified in the lease)
- the landlord's reasonable expenses incurred in investigating a proposed assignee
- the landlord's reasonable expenses of and incidental to an assignment of a retail shop lease and any consents to the assignment
- amounts spent by the landlord in 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 the landlord in connection with the granting of the lease.

The landlord cannot require you to contribute to the capital costs, including plant, of the building or shopping centre. The landlord cannot require you to contribute to a sinking fund to provide for capital works.



Who needs to disclose what information?

WHAT INFORMATION SHOULD A LANDLORD GIVE YOU BEFORE YOU ENTER INTO A LEASE?

In any business dealing you need enough information to make a sound commercial decision. It is no different in the retail industry.

The *Business Tenancies (Fair Dealings) Act* requires a landlord to fully inform a tenant of the facts relating to the lease conditions. The landlord is obliged to give you, as a prospective tenant, a copy of the proposed retail shop lease as soon as you enter into negotiations concerning the lease. The landlord must also give you a landlord's disclosure statement at least seven days before the lease is entered into.

The disclosure statement will give you easy to access information about the lease including:

- the identification and location of the shop
- the approximate area for lease
- the proposed lease term and any option periods
- the rent payable or the method of calculating the rent
- the timing and method for rent reviews
- the proportion of the tenant's share of outgoings and the proportion of the tenant's leased area to the total lettable area subject to outgoings
- the uses to which the leased area may be put
- the details of any work on the leased premises to be carried out by either party
- the expected date of occupancy or availability of the leased premises.

The full details of the information needed in the landlord's disclosure statement are contained in the Regulations to the Act.

A landlord does not have to give you a landlord disclosure statement if you are renewing a lease under an option, however you may be given a written statement updating the provisions of a landlord's earlier disclosure statement.

If a landlord fails to give you a landlord's disclosure statement or if the statement is incomplete or contains information that is materially false or misleading, you may terminate the retail shop lease by notice in writing within six months after the lease was entered into.

WHAT INFORMATION SHOULD YOU GIVE A LANDLORD BEFORE YOU ENTER INTO A LEASE?

Within seven days of receiving the landlord disclosure statement you must give the landlord a tenant's disclosure statement.

Copies of the tenant disclosure statement are in the Regulations to the Act.

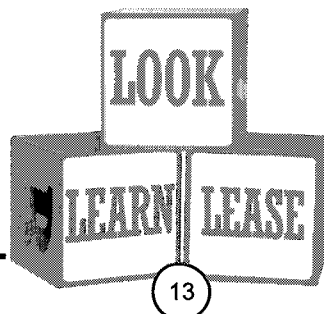
It is advisable for all prospective tenants to seek legal and financial advice before entering into the lease.

WHAT IF A TENANT WANTS TO ASSIGN A LEASE TO YOU?

If a tenant wants to assign their lease to you then you are entitled to certain information from the tenant and the landlord.

Before asking for the landlord's consent to the arrangement, the assignor (the tenant) must give you (the assignee) a copy of the most recent landlord's disclosure statement with any changes noted, and an assignor's disclosure statement. The assignor may ask that you provide information concerning your financial standing and business experience to be passed to the landlord when seeking consent to the assignment of the lease.

See page 19 for more information about the responsibilities of assignors and landlords when a lease is being assigned. Copies of the assignor disclosure statement are set out in the Regulations to the Act.



Unconscionable conduct

Under the *Business Tenancies (Fair Dealings) Act* landlords and tenants are prohibited from behaving in a way that is unconscionable in respect of a retail shop lease.

Unconscionable conduct, at a basic level, is 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 including:

- the relative bargaining powers of the tenant and the landlord
- whether the other party was able to understand any of the documents relating to the lease
- the extent to which one party unreasonably failed to disclose 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

Getting the right advice

WHY IS THIS IMPORTANT?

Entering into a retail shop lease can be one of the most significant financial decisions of a person's life. As well as the investment involved in starting up any kind of business, there is also a substantial commitment to pay thousands of dollars, often hundreds of thousands of dollars, in rent and other payments to a landlord over many years. Once a lease is signed you are responsible for meeting all the costs of that lease until the lease expires.

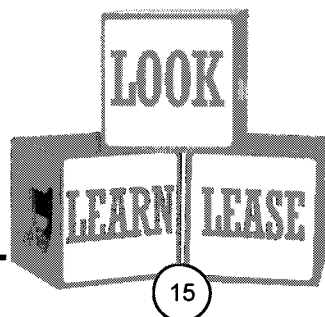
WHAT KIND OF ADVICE DO YOU NEED?

It makes good sense to make sure you get advice from qualified professionals about the terms and conditions of the lease you are thinking of signing, as well as advice about the business you are proposing to operate. All prospective tenants should seek legal and accounting advice at a minimum.

Other advice can also be valuable in ensuring you know exactly what is involved in leasing retail premises and operating a retail business.

Firstly, you should make sure the business you intend to operate has the potential to be viable. You should do some market research into the kind of business you plan to operate and do some preliminary business planning. You should also seek advice about:

- setting up the necessary bookkeeping and accounting processes
- establishing an appropriate legal structure for your business
- developing a marketing strategy for your business
- effectively displaying your merchandise
- setting up customer service standards
- employing the right people and complying with award requirements





You will also need to ensure you have all the necessary business licences and permits to undertake the kind of business you are proposing to open. The Territory Business Centre is the Northern Territory Government's one-stop-shop for business licences, permits and business names registration.

Territory Business Centre contact information is listed below.

A specialist retail valuer can help you decide if the rent being proposed by the landlord is reasonable.

WHERE TO GO FOR INFORMATION AND ASSISTANCE

For more information about retail shop leasing 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're thinking of starting up a business of any kind, contact your nearest Territory Business Centre on 1800 193 111 for advice and assistance.

For all the Northern Territory and Commonwealth licences and permits required to operate a business in the Northern Territory, including business name registration, contact the Territory Business Centre on 1800 193 111.

AFTER THE LEASE IS SIGNED

What happens now?

COPY OF THE CERTIFIED LEASE

If the lease is not to be registered under the *Land Title Act* the landlord must give you an executed copy of the stamped lease within one month after the lease is returned to the landlord following payment of stamp duty.

If the lease is to be registered the landlord must lodge the lease for registration within one month after it is returned to the landlord following payment of stamp duty. The landlord must then give you an executed copy of the stamped and registered lease within one month of it being registered.

REGISTERING A LEASE

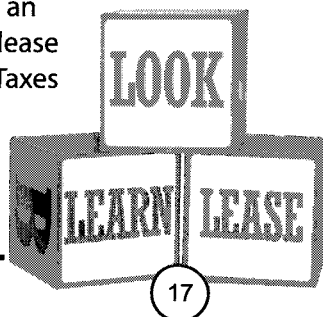
The *Land Title Act* states that a lease may be registered. Leases may be registered at the Lands Title Office, Nichols Place, in Darwin or Belvedere House in Alice Springs. The Registration process protects landlords and tenants by creating an official record of the lease that both parties have signed.

A landlord can require you to contribute to the expenses associated with registering a lease, including survey fees.

STAMP DUTY ON A LEASE

Under the *Stamp Duty Act*, leases and agreements for a lease must be submitted to the Commissioner of Taxes for a determination of the stamp duty payable when they are first entered into and when they are renewed. When stamp duty has been assessed on an estimate of rent payable over the term of a lease, the lease may have to be resubmitted to the Commissioner of Taxes for reassessment of stamp duty when the actual amount of the rent is known.

The tenant is liable for the payment of stamp duty.



WHAT INFORMATION SHOULD YOU BE GIVEN ABOUT OUTGOINGS?

If the lease requires you to contribute to the landlord's outgoings, the landlord must give you an estimate of the outgoings at least one month before the start of the accounting period to which they refer. The landlord must also give you an annual audited statement of expenditure within three months of the end of the accounting period for which the estimates were provided.

Outgoings may include expenses directly relating to the operation, maintenance or repair of the retail shopping centre or building, and charges, levies, premiums, rates or taxes that the landlord must pay.

If your lease requires you to pay an amount for outgoings related to expenditure incurred in obtaining statistical information (such as traffic counts) the landlord must make the information available to you.

If your lease is for a shop in a retail shopping centre your share of non-specific outgoing expenses must not be more than the proportion that the area of your shop is to the net lettable area of the centre. For example, if your shop was one-twentieth of the shopping centre, you would not be expected to pay more than one-twentieth of non-specific outgoings.

Situations that might arise

WHAT IF YOU WANT TO SELL YOUR BUSINESS BEFORE THE LEASE EXPIRES?

If you want to sell your business and the lease has not expired, you will need the landlord's consent for an assignment or transfer of the lease. You must make your request in writing and the landlord must deal with it expeditiously.

It will help you gain consent if you make yourself aware of the landlord's basic requirements. The landlord may wish to have information about the prospective assignee's financial stability, retailing history and the purpose for which the premises would be used.

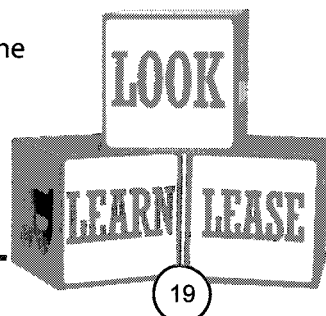
However, subject to any conditions imposed by the lease, the landlord may not unreasonably withhold consent to an assignment as long as you have complied with the terms and conditions of your lease.

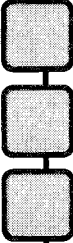
You and/or the proposed assignee usually meet any reasonable legal or other costs associated with processing the request for assignment. The landlord cannot seek or accept key money in connection with granting consent. However, the landlord can:

- 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 the landlord
- receive payment for plant, equipment, fixture or fittings sold by the landlord
- payment for the grant of a franchise.

The landlord is taken to have consented to the assignment if:

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





If the assignment relates to the lease of a retail shop that will continue as an ongoing business you must provide the landlord and proposed assignee with an assignor's disclosure statement. This statement contains information or material specified in the Regulations to the Act.

WHAT IF THE LANDLORD WANTS TO RELOCATE YOUR BUSINESS?

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

If you do not want to be relocated you may give the landlord written notice terminating the lease three months from the date of the relocation notice. This termination notice must be given within one month of receipt of the notice of relocation.

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

The landlord is obliged to pay the legal costs relating to the relocation and other reasonable costs you incur such as dismantling and reinstalling fixtures and fittings.

WHAT IF THE LANDLORD WANTS TO CARRY OUT ALTERATIONS OR REFURBISHMENT?

If a landlord is planning on altering or refurbishing the building or shopping centre where your business is sited, you must be given at least two months written notice before work starts.

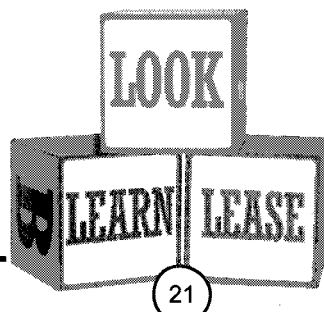
If the alteration or refurbishment is necessary because of an emergency the landlord must give you as much notice as is practicable under the circumstances.

WHAT IF THE PREMISES ARE DAMAGED?

If your shop or the building it is in is damaged, you do 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 your liability to pay rent etc is reduced by a proportional amount.

If the landlord considers the damage is extensive enough to make repairs impracticable or undesirable he may advise you of this in writing. Either the landlord or yourself may terminate the tenancy by giving at least seven days notice in writing.

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



WHAT IF YOUR BUSINESS DOES NOT PERFORM TO EXPECTATIONS?

If your business fails to achieve specified sales or turnover performance the landlord cannot use this as a reason to terminate your tenancy.

WHAT IF YOU WANT TO RENEW THE LEASE?

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

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

If a lease does not contain an option to renew or you have come to the end of all of your option periods, the landlord must either:

- offer you a renewal or extension of the lease in writing or
- inform you in writing that he does not plan to offer a renewal or extension.

A notice of offer to renew must be given to you between six and 12 months before the lease expires.

See page 9 for more information about options.

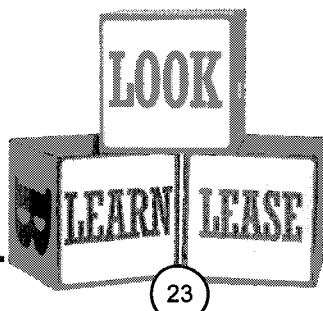
WHAT HAPPENS IF THE LANDLORD DOES SOMETHING THAT AFFECTS YOUR BUSINESS?

In certain instances a landlord may be liable to pay you reasonable compensation for loss or damage suffered. For example, you may be entitled to compensation if the landlord:

- relocates your business to other premises during the term of the lease
- substantially inhibits access to your shop
- substantially inhibits or alters customer access or the flow of potential customers past your shop
- unreasonably takes an action that causes significant disruption or has a significant adverse effect on the trading of your shop
- fails to take reasonable steps to prevent a disruption over which the landlord may have control
- fails to rectify any breakdown of plant and equipment under the landlord's care
- fails to adequately clean, maintain or repair the shopping centre, including common areas which are the landlord's responsibility
- causes you to enter into a lease as a result of false or misleading statements or misrepresentations.

This is not an exhaustive list and there may be other circumstances when a landlord may be liable to pay you compensation.

If there is any disagreement about the amount of compensation to be paid, a dispute should be lodged with the Commissioner of Business Tenancies. A conciliator may be appointed to help you reach agreement. If this fails, further action may be taken.



What if there's a dispute?

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 landlord 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'.



Northern Territory Government



For more information
contact the Tenancy Unit:

phone: 8999 1999
or 1800 019 319

email: businessstenancies@nt.gov.au

web: www.business.nt.gov.au