

STEP

4

REVIEWING YOUR LEASE & OFFER

WE'RE
OPEN



**It's important
before agreeing to
your offer
document or
signing your
lease that you
check them and
any ancillary
documents very
carefully.**



YOU NEED A LAWYER!

This section is intended to supplement what your lawyer will check out for you – it is not a substitute for legal advice.

A lease is a document that you will be bound by in court, that costs you a lot of \$\$\$, and will last for years. You need to engage a suitably qualified person to help you review it.

All of that said, lawyers are not retail fitout specialists. They are great (and required) for the legal side of things, but there are plenty of items they may not know to look out for, even if they have worked on retail leases in their career.

Even though you might have made verbal agreements, you cannot rely on them. People are human and make mistakes. Your offer and lease documents may be filled with errors and may not include everything you have agreed to and discussed.

The three guides on the following pages will help you closely check your offer, ancillary documents, and lease.

TOP TIPS FOR REVIEWING YOUR LEASE

#1: VERBAL ISN'T BINDING

It is vital that you keep notes on what you have discussed with the landlord and agreed verbally. Have your lawyer check your lease very carefully to ensure it includes these items. If it isn't in writing, you can't expect it to be included!

#2: READ EVERYTHING

Your lease doesn't just cover your rent, it may reference other documents – such as a Fitout Guide, Design Guidelines, House Rules (or whatever the landlord has called their associated documents). Rules in these ancillary documents can cost you a lot of money, so make sure you and your lawyer read them closely as well.

#3: WORK OUT YOUR OPENING DAY FIRST

Work out your program before negotiating your lease. Remember that the leasing agent wants to get you open as fast as possible, and they will push for an early date. You need to feel confident that you can make that work. We recommend having (at the absolute least) 4 months between appointing your designer and open day, and that's for quick projects!

GET HELP

If you're feeling overwhelmed by the details or need help with any aspect of setting up your shop, give us a call on 0424 113 116.

We can help you review your offer, ancillary and lease documents from only \$1,000 + GST.

REVIEWING YOUR OFFER – GUIDE

The “offer” consists of the offer itself and any ancillary documents – they all require close attention and review.

YOU NEED A LAWYER



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Your offer is a document that will be referred to when writing your lease (that you will be bound by in court, costs you a lot of \$\$\$, and will last for years). You need to engage a suitably qualified person to help you review it.

INSTRUCTIONS



The offer will be referred to when producing your final lease document, and everything you require and have agreed upon must be written down in the offer or you cannot presume it will be included in your lease later down the track.

This *Reviewing Your Offer Guide* will help you closely check your offer and ancillary documents. This process is in addition to the review your lawyer will make of your offer and is intended to help you ensure that everything you require and have agreed to verbally with the landlord is included in your offer.

1: COMPLETE THE TENANCY INSPECTION CHECKLIST

Make sure you’ve completed document 1.1 *Property Inspection Checklist* before you review your offer: it will help you identify some areas of concern. For example, your tenancy might not have sufficient power and it therefore needs to be upgraded.

If you have discussed any potential concerns with the leasing agent and they have agreed to do any works on your behalf, make sure these are clearly identified in the offer.

» **Don’t take a verbal promise as an agreement to do anything!** And be very careful of how Lessor’s works are worded – clever landlords can phrase things so that the meaning is ambiguous and you may end up agreeing to something that is not quite what it seemed.

2: CHECK THE WORDING

Check that what you have discussed with the leasing agent is reflected in the offer clearly and in writing. If it is not exactly the same, make sure it is changed.

While the offer is not binding – it is not the lease – it should be offered in good faith and should be true to the information you have discussed. Do not assume you will be able to negotiate an item out of the offer later on.

» **The offer must reflect what you have discussed.** If not, mark it up and send it back – do this by marking lines through things that shouldn’t be included and adding in clear notes on what you want included.

3: ANCILLARY DOCUMENTS

The offer may mention any or all of the following:

- Fitout Guide
- Lessor / Lessee Matrix
- Tenancy Plan
- House Rules
- Body Corporate Rules

and these may be called by other names as well.

These items will all affect how you build in the tenancy.

- » **Sometimes ancillary documents aren't mentioned until your actual lease is drafted up.** Make sure you ask when you get the offer if there are any other documents that will be referenced in the lease and try to get a copy of all of them now, so you have time to review them properly.

Examples of the kinds of phrases to watch out for in your ancillary documents and their consequences for you:

"Works are only allowed at night and on weekends"

This makes the build more expensive for you.

"You must use base build contractors for some works"

Base build contractors are the contractors who carried out the main building works or who have a contract for maintenance ... they may be more expensive and will be trickier for you to manage.

A lengthy design review period is specified and/or the landlord specifies fancy/expensive finishes

This will add more time in your program, pushing out your opening date, and making the build more expensive for you.

- » **You will need to know about all these requirements before finalising your budget and program.**

4: LOOK OUT FOR EXTRA FEES

Watch out for any extra fees or charges that might appear in the offer. One example is a "Tenancy Coordination fee", another might be a "marketing levy" or "food court levy".

- » **Some tenants negotiate out of these fees, so give it a go!**

5: HOURS OF OPERATION

Your "Permitted Hours of Operation" should be included in the offer – check them closely. Residential areas might have limitations on late hours, and some shopping centres will want you to be open 7 days a week.

- » **Make sure the permitted hours of operation are specified in your offer** in line with how you want to trade once you open up shop.

6: CASH INCENTIVES & RENT-FREE PERIODS

An *incentive* is an amount that the landlord offers to attract a suitable tenant. An incentive reduces the costs you need to pay for your fitout and they can come in the form of cash, works or a rent-free period (or any combination of the three).

Incentive payments range in size (from \$0 up to \$1,000,000). It's important to note that many factors – including market conditions – can affect the amount of incentive.

Rent-free periods and cash incentive amounts should be detailed in the offer. Check them against the notes you've taken during your discussions with the leasing agent.

See 4.2 *Reviewing Your Lease Checklist* for more information on incentives.

- » **Make sure the language is clear and straightforward, not ambiguous.** If you don't understand any terms, ask for them to be explained and then cross out and rewrite any unclear passages.

7: OTHER REQUIREMENTS

Requirements for insurances, rent deposits, bank guarantees, directors guarantees etc. will also be included in the offer.

Bank guarantees in particular often have to be made out very carefully to comply with the landlord's requirements.

- » **Make a note of each of these requirements included in your offer** and get started arranging them as each will take some time to put in place.

REVIEWING YOUR LEASE – GUIDE

Your lease has several parts to it and may reference other documents, such as the Fitout Guide, Design Guidelines and House Rules.

YOU NEED A LAWYER



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INSTRUCTIONS



The lease is not just about your monthly rent amount! You need to review all of the ancillary documents and your lease closely to get a full picture of what you will be expected to do and what costs you are responsible for.

This *Reviewing Your Lease Guide* will help you closely check your lease and ancillary documents. This process is in addition to the review your lawyer will make of your lease and documents and is intended to help you understand the terms of your lease and ensure it includes everything you have agreed upon.

Look out for these clauses:

1: RELOCATION

This clause covers whether the landlord can make you move (e.g. to a different site in the same centre as part of a redevelopment of a centre) and who is responsible (you or the landlord) for covering the costs if they do. Relocation clauses can be hard to negotiate, and it is very unlikely that any landlord will budge on them.

» **So while you're not likely able to negotiate any changes to this clause, it is very important that you understand clearly what you will be in for financially if a relocation is required.** Talk to the landlord about how likely a relocation might be in the next 5 years. Ask the question: "Do you have any development or redevelopment plans in the future that might necessitate the relocation of my shop?"



2: REFURBISHMENT

Many landlords require refurbishment at the end of the first term if you are exercising your option – it keeps the centre looking fresh and up to date.

So check what is expected – a full new fitout or just a lick of paint? Get this clarified as much as possible.

» **It can be worth having this clause written as “extent to be agreed between tenant and landlord”, but always include that the “landlord will not act unreasonably”.** This can be useful in case of an economic downturn, changes in trading conditions in the centre and so on – it’s hard to predict what will happen in 5 years time!

3: MAKE GOOD

How much work do you need to do to the tenancy when you leave?

This can easily cost upwards of \$10,000, so you want to minimise the scope if possible.

» **Try to limit “make good” terms to removing your signage and loose items.**

4: FITOUT

Read this section closely and look out for strange or unclear clauses about the shop fitout. Make sure the landlord is not allowed to direct the tenant’s contractors to carry out works. This is dangerous in many ways! First of all, your landlord doesn’t have a contract with your contractors: you do. So they are not entitled under law to direct your contractors. The landlord can direct you, but not your contractors. This is an important distinction, because if your landlord wanders by and tells your shopfitter to do something, you will get the bill, not the landlord.

Secondly, you won’t have any recourse on additional costs unless you make it absolutely clear to your shopfitter, in writing, in your contract, that they can only accept instructions from you. You could end up paying thousands more because of things your landlord has told them to do.

» **If you don’t understand any terms in your lease, ask for them to be explained.** If the terms aren’t suitable, cross them out and write in what you require in their place. And, of course, speak to your lawyer before sending it back to the landlord.

5: HANDOVER DATE

The “handover date” is the day you take possession of the tenancy for your fitout. BUT it may not be the day you are allowed to start work on site. Clever landlords will give you handover even if you are not ready for it!

Ideally you want the fitout works to be able to commence on your handover date so that you have the best chance of being open on trading date to take advantage of any rent-free period you have. This means being ready to go with a shopfitter and completed design.

» **Head to the “Work out your Program” section of this guide to make sure you have allocated the correct amount of time** for your design to be completed and your shopfitter appointed prior to your handover date. And do not be afraid to ask for the date to be pushed back to enable you to complete these things.

6: BANK GUARANTEE (BG)

This will probably need to be completed to reference a specific entity, and banks regularly take a week or more to issue the Bank Guarantee (BG). Plus they sometimes contain errors, which can delay the process.

Most landlords will want the BG made out in the same name as the lease. Minor alterations such as using a shortened version of a name – Eddie instead of Edward for example – can have your BG sent back to you as unsuitable.

» **Any issues with your Bank Guarantee (and holdups at the bank’s end) can delay your fitout works starting on site, so get onto arranging it early.**

7: INSURANCES

You will need to have your Public Liability Insurance in place for Handover and start of the building works, because that is when the property is under your control. Make sure to check if the landlord needs to be noted on the policy and get the certificate of currency to them in plenty of time.

You don’t need to insure the building – your landlord will do that. But you do need to insure your fitout and anything you put into the building.

There are lots of online options for finding insurance, including simply Googling “business insurance”. Sometimes Public Liability Insurance is packaged in with other kinds of insurance in a Business Pack or similar.

» **Look into your insurance early in the process, and, again, make sure they are correct and as required by the lease.**

8: INCENTIVES

Check closely the terms of the incentive payments.

Lots of landlords make you jump through hoops to get your incentive e.g. you have to provide copies of your invoices to show you have spent the money you are asking for on the fitout, or provide an asset register. And while they say they will pay you when your fitout is complete and you are open, their standard payment terms might be a month or more! (See more detail on incentives in worksheet 4.1 and the Cashflow section.)

» **Make sure you ask your landlord how long it will take to get paid and get that stated clearly in your lease.** Plus, some landlords will do part payments throughout the design and fitout period to help support your cashflow. It’s worth asking for these terms!

9: REFERENCE TO OTHER DOCUMENTS, SUCH AS FITOUT GUIDE, HOUSE RULES ETC.:

If other documents are referenced, make sure you have a copy of them.

» **Use the Referenced Documents Checklist on the following pages to closely review any documents referred to in your lease.**

10: LESSOR / LESSEE SCOPE DOCUMENTS

Sometimes called a *Lessor-Lessee Matrix* or *Schedule*, this shows what you will be getting as the basic finish in the building.

Make sure it reflects your deal, or that there is a note specifying that your Lessors Works are over and above the base building standard.

» **Again, verbal agreements cannot be relied on.** If something you have agreed on is not in the Lessor-Lessee matrix, then you’re not getting it! So check it closely and ensure everything you require is detailed, in writing.

REVIEWING YOUR REFERENCED DOCUMENTS – GUIDE

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INSTRUCTIONS



The Fitout Guide, Design Guidelines, House Rules, or whatever the landlord has called their associated documents, are very important.

Rules in these documents can cost you a lot of money, so make sure you read them carefully!

Some terms and items to look out for:

1: DESIGN

We have mentioned this before, but it is worth mentioning again: most landlords will want to approve your plans and this will be in writing either in your lease or design guidelines. In most cases, you have very little right of reply. Even big national retailers have to go through this process. While these retailers have an established brand they can claim takes precedence, they will typically have to make some concessions.

If this is your first (or even fifth) shop, the Retail Design Manager (RDM) will have lots of suggestions for you. Except they're not usually "suggestions": they're actually "instructions". These can range from changing the type of lighting, ceiling finish, floor finish, style of joinery, racking, right through to the colours of your paint and finishes.

The important thing to note here is that RDMs are interior designers. Your own interior designer might love all the RDM's suggestions, because they will usually make your shop look fabulous (and also make your project look great on their website!). But beware the costs of going along with all the "suggestions". It's okay for you or your designer to push back against the RDM's "suggestions" by providing justification why operationally or financially their suggestions won't work for you.

There are usually 3 stages in the design review and approval process. We'll go through these in more detail in *Step 6 The Design Stages Explained - Guide*, but make sure your documents and lease allow up to a few months for the design phase.

» **Read the design guidelines carefully so you can understand what you are required to include in your design.**

Plus, if you're setting up shop in an existing shopping centre, go visit it and find the newest shop fitout you can. Look at the height of the shopfront, the amount of glass, the type of furniture, and so on. This will help you get a more realistic idea of costs and requirements – take photos too!

Then go through the guidelines and photos with your interior designer so that they can point out anything that might cost you more than you were planning for. This will help you work out what to challenge or negotiate in the design guidelines.

Remember, it's ok for you to push back on your designer and the RDM. This might be because you don't like how it looks, can't afford it, or it won't work for you operationally. Don't be afraid to speak up.

2: FITOUT GUIDE & HOUSE RULES

This is usually where the information about what you need to do to get your shopfitter onsite is held. Read this section carefully as it can restrict who you choose to do your fitout.

Other conditions to look out for relating to your shopfitter

The document may stipulate that your shopfitter needs to be CM3 accredited.

This is a safety management system that the builder needs to be registered with. It can add several thousand to the cost of your fitout and I've never seen anyone get away with not complying with it.

You might need a site supervisor on site at all times.

This is an extra cost for you. Often shopfitters will have a keypad or digital lock on a site and let subcontractors come and go without supervision, but some landlords will not allow this and require a supervisor to be present whenever work is underway.

Again, as this is a safety requirement it is very difficult to get out of (everyone wants to be as safe as possible).

Safety documentation.

We will always encourage you to keep safety as a priority, and every building site has some risks. Most landlords will want your contractors to provide a safety plan and other documentation to review before work can start.

Hours of work.

To avoid disrupting any existing tenants or residents, working hours maybe limited. This will particularly apply to the big 3: noisy, dusty and smelly works. Even if you are allowed to work during the day, you might have to restrict these works to certain times. In a trading centre, hours may be limited to night works, similarly in an office building. Under apartments you are likely to be able to work during the day. Check carefully for stipulations regarding hours of work as out of hours work will cost you a premium.

If the site is under development, you may find that developer's sub-contractors are aligned with enterprise agreements and that the developer likes to maintain industrial harmony. You will need to check if there are any requirements for your shopfitter and their sub-contractors to be similarly aligned.

» **Don't be fooled by how pretty these documents look nor by the fact that they are physically separate from your lease.** You need to read these two documents very closely as they are material clauses in your lease – if you have been given them, it means you have to comply with them.

These ancillary documents can have the appearance of simply a glossy brochure that is designed to sell you on a tenancy in a centre – but make no mistake, they are a formal part of your lease.

3: SERVICES

Base building services are fire services (fire hose reels, sprinklers etc), HVAC (air-conditioning, kitchen exhaust), hydraulics (water & gas supply, sewer and trade/greasy waste), and electrical (supply of power and a switchboard – but not necessarily a meter).

Many landlords will insist on doing services adjustments, (also called Class 2s, Cat 1s or Category 1 Costs) for you, but at your costs. This is important to know early on as it limits your ability to negotiate a better price and adds some weeks into your program.

Some tenants ask for their *Cat 1s* to be capped at a certain amount. It's worth asking!

We don't recommend trying to guesstimate these costs from the list that landlords provide – there are always confusing names, things that need to be added in that you don't realise you need, and so on. But you should note that it is going to be a bit more expensive and will need more time and management to have the works done if this is the case.

Ideally, your shopfitter will be able to give you a ballpark estimate at this stage, but until you have your plans done, the estimate will be rough. Just make sure you are allowing a decent chunk of both time and money in your budget for services.

» **If possible, negotiate that the landlord provides your services adjustments to your layout as part of your incentive.** It pushes this irritating bit of work back onto them.

They will likely push you to give them your final design a bit earlier than you would have otherwise, but it can be worth it for the sake of a couple of extra weeks. Just make sure to move your handover date back to suit!



4: TENANCY PLAN

Ideally, your landlord should provide you with a Tenancy Plan (TP), but older buildings may not have an up to date or accurate plan. New buildings should definitely be able to provide one.

A good TP contains detailed information about what is already provided in the tenancy (e.g. services, information about what the walls are made of, etc.), plentiful measurements, notes on materials, and location plans including the location of fire hose reels and toilets.

If you cannot get a good TP, then your designer will have to allow to come to site to create one. They should always come to site anyway to do a check, but they would need to allow a longer site visit in the absence of base build information.

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6: LESSEE/LESSOR MATRIX

A handy document that some landlords produce is a Lessor/Lessee Matrix, or Lessor/Lessee Scope of Works that outlines who is responsible for doing each part of the fitout works. This document will identify the base building services, but also detail who is responsible for building the shopfront, outdoor heating and lighting, what is provided by way of flooring, and so on. It’s a useful document, and can hold some surprises, so make sure to ask for one and read it carefully. Your designer and shopfitter will also need copies when the time comes.

7: REGULATORY FEES

For more information, check out our helpful resources page in the Appendix on page 104.