



Fineprint

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New ADLS Commercial Lease

HOW WILL THE NEW ADLS LEASE FORM AFFECT LANDLORDS AND TENANTS?

A new edition of the Auckland District Law Society Inc's (ADLS) Deed of Lease, which is commonly used throughout New Zealand for leases of commercial property, has been released. If you are a landlord or a tenant entering into a lease using the new form, the changes will affect you. This article highlights some key changes.

The ADLS Deed of Lease (sixth edition), referred to here as the 'new ADLS lease', was released in November 2012. Many of the changes made in it address problems which came to light with the destruction of commercial buildings in the Christchurch earthquakes. Others reflect changing leasing practice.

CPI rent reviews

The new ADLS lease gives landlords and tenants the option of choosing CPI-based rent reviews instead of (or in addition to) market rent reviews.

In previous versions of the ADLS lease, rent reviews are based on a 'current market rent' test. This means the rent can be adjusted on each rent review date or lease renewal date to reflect 'market rent' for the property. If the landlord and tenant can't agree on the rent, they can resolve the dispute by going to arbitration or determination by registered valuers. This can be costly.

With CPI rent reviews, the rent will be adjusted by increases (but not decreases) in the Consumer Price Index (All Groups). This removes the risk of expensive disputes over market rent.

It's possible to combine both market rent and CPI rent reviews. For example, you could elect to have regular CPI rent reviews, with market rent reviews at longer intervals. This may guard against the possibility that CPI adjustments cause the rent to deviate too far from market rent over time.

There are pros and cons to each of these rent review mechanisms, as well as other possible methods. We can advise you on these, and help you to navigate your way through the rent review process.

Insurance

Building insurance costs have soared in the wake of the Christchurch earthquakes. The new ADLS lease, like previous editions, makes the tenant liable to pay the landlord's insurance premiums for the types of cover specified in the lease. In the event of a claim, however, the tenant is required to pay only a portion of the insurance excess – up to \$2,000. (The tenant's contribution has been increased from the \$500 payable under the previous edition of the ADLS lease.) The landlord is obliged to insure the building against damage and destruction for the usual range of risks (including earthquake cover), with an option in the



lease to select between full replacement and reinstatement, or indemnity to full insurable value. The lease also allows the parties to agree that the landlord will take cover for some additional risks.

If you're entering a lease, you'll need to carefully consider the insurance provisions. They may need to be modified to suit your particular circumstances. Examples would be if insurance cover isn't available for some risks, the premium is unaffordable for the tenant, or the insurance excess is too high or reimbursement of part of the excess isn't suitable.

Outgoings

The new ADLS lease, like previous editions, allows the landlord to pass on certain costs to the tenant as 'outgoings'. A change from the previous ADLS lease is that the landlord is now required to vary the proportion of outgoings payable by the tenant to ensure that it remains fair, for example, if circumstances change.

The list of outgoings hasn't changed greatly. The new ADLS lease, however, specifies that the following costs will not be passed on to tenants:

- Repairs to a building due to defects in design or construction, inherent defects in the building or renewal or replacement of building services
- Charges for repaving or resealing a car park, and
- Costs of upgrading, or other work, to make the building comply with the Building Act 2004.

Many landlords and tenants focus on rent, but don't give enough attention to outgoings, even though outgoings can be costly. It's important to ensure the list of outgoings is modified where appropriate.

Legal costs

The new ADLS lease requires each party to pay their own legal costs in relation to the preparation of the lease, and subsequent variations and renewals. This differs from the previous edition, which required the tenant to pay these costs.

Landlord's maintenance

There have been a number of changes to maintenance provisions, including the addition of a specific requirement that the landlord keep the building weatherproof. The landlord is also required to maintain building services and to replace them if they can no longer be maintained through regular maintenance.

Landlord's access for inspection and works

The Christchurch earthquakes have highlighted issues that can arise if a landlord needs extended access to premises to perform works. The new ADLS lease allows the landlord to require a tenant to vacate the premises if this is reasonably required to enable works to be carried out. If a tenant is required to vacate, or the tenant's business is materially disrupted, there will be a fair reduction in the rent and outgoings while the disruption continues. The landlord must act in good faith when exercising this right of access.

Who bears the cost of earthquake-strengthening work?

The cost of earthquake-strengthening work has become an important issue for many landlords. Under the previous edition of the ADLS lease, a landlord may be able to pass a percentage of

earthquake-strengthening costs on to a tenant under the 'improvements rent' provision until the next rent review. However, landlords don't have this ability under the new ADLS lease, as the improvements rent provision has been removed.

Access in emergencies

The Christchurch earthquakes exposed another problem in previous editions of the ADLS lease, which arose when premises were undamaged but couldn't be accessed. In this situation the lease arguably required the tenant to continue to pay rent and outgoings, even if they couldn't access their premises. This led to disputes about whether the tenant could cancel their lease.

The drafters of the new ADLS lease have tried to address this issue. If the tenant can't access their premises due to an emergency, for example, if a cordon is in place, the tenant will be entitled to a fair reduction in the rent and outgoings until the premises can be used again. If the situation continues for too long (nine months is the default period in the lease), either party will be entitled to terminate the lease.

Reinstatement and chattels removal

The new ADLS lease contains several changes relating to the requirement for the tenant to remove its alterations and chattels, and reinstate the premises at the end of the lease.

One useful addition is the option to attach a Premises Condition Report, which is a report of the state of the premises at the start of the lease. This is a good way to reduce the risk of costly disputes at the end of the lease about the state of repair to which the tenant is required to restore the premises.

Bank guarantees

If a tenant assigns their lease to an unlisted company, there is a new option for security to be given to the landlord in the form of a bank guarantee, instead of personal guarantees from the new tenant's principal shareholders.

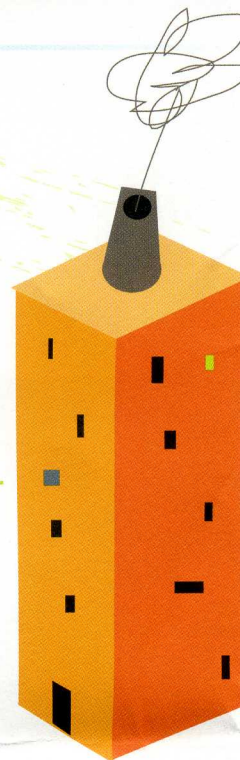
Some landlords are now requiring a bank guarantee from the original tenant, although the new ADLS lease doesn't provide for this. Personal guarantees may be of limited worth if the people giving them have limited assets, or have their assets tied up in family trusts. In addition, some directors are unwilling to provide personal guarantees.

See a lawyer before you sign a lease

Landlords and tenants often enter leases without giving enough attention to the fine print. Once the lease has been signed, it's too late to make changes. You may wish you had done so once you become aware of the full implications of the lease terms later on.

Standard form leases are only a starting point. The ADLS lease isn't always suitable and, when it's used, it should be tailored to your situation. Whether you're a landlord or tenant, you can benefit from customising your lease.

If you see us early in the process, we can work with you to negotiate lease terms which best suit your needs. ■



Healthcare Directives

MAKING YOUR WISHES COUNT WHEN YOU NEED IT

As you head towards your senior years, you may start thinking about what options you have to let others know how you would like to address end of life issues – in this case, medical treatment. This article gives an overview on what a healthcare directive does and how it can be used.

A health directive records your choices about future healthcare procedures or medical treatment. It's often used to record your preferences for controlling medical treatments such as those which prolong life, but not attempting to cure an underlying terminal illness. Examples of this could be a Jehovah's Witness member recording they're not to be given a blood transfusion, or someone with advanced multiple sclerosis refusing all treatments other than those meant to address pain or keep them comfortable.

Your right to refuse medical treatment is acknowledged in the Bill of Rights Act.

WHAT A HEALTHCARE DIRECTIVE IS NOT

In explaining what a healthcare directive does, it's really easier to explain what it doesn't do. A healthcare directive is not:

- *A Will*: although also known as a living will, a healthcare directive shouldn't be confused with your Will which provides for the management of your estate and distribution of your assets after you die.
- *An Enduring Power of Attorney for Personal Care and Welfare*: a healthcare directive records, in advance, your wishes for treatment in specific circumstances. In contrast, an Enduring Power of Attorney (EPA) for personal care and welfare empowers your attorney to make all health and welfare decisions for you when you are mentally incapable of doing so yourself. Although your attorney's powers are broad, they can't refuse standard medical treatment intended to save your life – only you can refuse such treatment (if that's your wish).

RECORD YOUR WISHES

It's sensible to record your wishes in a written, signed and dated document; there's no particular form or specific format required.

As a starting point, you may want to talk with a trusted medical professional, such as your GP; this will help clarify your options and preferences. We can then work with you to draft a document that records your wishes.

LETTING PEOPLE KNOW

Your healthcare directive will only be effective if the people who need to know about it are aware of its existence. Make sure you give copies to anyone who may need to know your wishes in order to make decisions about your care or treatment. These people could be your family, or a very close friend, your GP or any caregivers you have regular contact with. And remember to let us have a copy as well.

We'd certainly recommend that you involve your family in your healthcare directive decision-making. Let them know your decisions and the reasons for them – the more they know, the easier it will be for them to make sure your wishes are met when the time comes.



“Involve your family in your healthcare directive decision-making”

WILL MY WISHES BE FOLLOWED?

While everyone has the right to refuse to undergo any medical treatment, this right sometimes conflicts with a caregiver's or doctor's obligations to protect and sustain life. A medical professional shouldn't provide services that contradict a healthcare directive unless there are reasonable grounds to doubt its validity. The key points for a validity test are:

- Were you competent to make the decision at the time you signed the directive?
- Was the decision made free from undue influence?
- Were you sufficiently informed to make your decision?
- Does your choice apply to the circumstances currently faced?

You're presumed to be competent unless there are reasonable grounds for believing you may not be. Questions of competency, undue influence and information are easier to answer if it's clear that you've discussed your options with your doctors, have shared your views with your family or close friends, and have recorded your wishes in your healthcare directive.

TAKING CONTROL

A healthcare directive is a useful tool to set out, in advance, your preferences for care; it will only apply if you're unable to make decisions for yourself. As long as you stay mentally capable, you can revoke or replace it at any time.

A healthcare directive deals with specific circumstances; it's not a substitute for other important documents to set out your end-of-life wishes. We do recommend that you have EPAs for both personal care and welfare, and property matters, so that decisions can be made on your behalf if you're no longer able to make them yourself.

It's also useful to review your current Will. If you don't have a Will, now is a good time to record how you wish to be farewelled, and how your assets and personal effects are to be distributed after your death.

Remember that life and circumstances change, so it's important to review all of your personal documents regularly. ■

Is the Concept of the 'Vulnerable Worker' Becoming Redundant?

PROPOSED AMENDMENTS TO EMPLOYMENT RELATIONS ACT

The latter part of 2013 is set to herald the partial reform of Part 6A of the Employment Relations Act 2000, which currently offers special protection to people who are classified as 'vulnerable workers'. This article discusses why owners of small to medium sized enterprises should be aware of the government's proposals.

The proposed legislative changes to the Employment Relations Act form part of a group of wider measures designed to expand the rights of workers to request flexible working hours and to promote an environment which is more conducive to collective bargaining. But what, or more accurately 'who', is the 'vulnerable worker', and why is it particularly important for owners and/or potential owners of small to medium sized businesses of less than 20 employees (SMEs) to be aware of the government's proposed legislative amendments?

WHO ARE VULNERABLE WORKERS?

The phrase 'vulnerable worker' is a colloquial term that describes people employed in what are typically low paid jobs within the cleaning, catering, orderly and laundry industries. These categories of employees (and the circumstances in which they are covered), are set out in Schedule 1A of the Act.

Part 6A of the Act is designed to provide continuity of employment protection for these workers. It also protects them from the possibility of being replaced by cheaper contractors and/or from having their remuneration and working conditions reduced if the company for which they work is either restructured or ultimately sold. In these circumstances, the current legislation allows vulnerable employees to choose to transfer their employment to the new employer on the same terms and conditions as their previous employment.

The existing vulnerable workers' provisions have been criticised for being difficult to understand and for creating uncertainty concerning staffing levels, expenditure and inherited liabilities. Relating to these concerns is the belief that SMEs have faced greater proportional costs than larger businesses that have adapted more effectively to the current legal requirements.

The Act currently applies to all New Zealand businesses, yet in what's regarded as one of the more controversial amendments proposed by the government, SMEs will be specifically exempted from Part 6A in instances where they are the incoming employer. It's estimated that employees in these businesses account for about one quarter of the 'vulnerable' workforce. This change is likely to be welcomed by SME owners. Let's look at an example below of how this might work for those companies.

CLEAN IT EXAMPLE

Under the current law a small cleaning company (Clean It Limited) which successfully tenders for a cleaning contract may be required to retain any cleaners previously employed by the former contract owner. Not only does this mean that

there's potential for Clean It to inherit underperforming employees, but it also exposes Clean It to a greater risk of unanticipated financial liabilities generated by the transfer process.

According to the proposed amendments, Clean It would be entitled to cherry-pick any staff who they wished to retain; the company would no longer have an obligation either to employ cleaners affected by the restructuring, or to meet any of their entitlements under their existing employment agreements. In these circumstances businesses like Clean It will no longer have the same compliance costs and are likely to have an advantage over larger companies in the tendering process.

UNFAIR SAY LARGE BUSINESS OWNERS

Not everyone, however, is as enthused about the proposed reforms as the majority of SME owners are likely to be. The existing laws designed to protect vulnerable workers will still apply to large businesses. Commentators have argued that the disparate treatment of employers under the proposed changes is anti-competitive and acts as a barrier to productivity.

It's perhaps therefore unsurprising that business lobby groups such as the Business Roundtable and Business New Zealand have from the outset argued that all of Part 6A should be repealed. In the meantime, it will be interesting to see what sort of corporate structures arise in order to circumnavigate the continued application of Part 6A.

To find out more about how the proposed amendments to Part 6A may affect your business, go to the Ministry of Business, Innovation and Employment's website at www.dol.govt.nz, or feel free to contact us. ■





Put the Deal in Writing

GETTING WHAT YOU EXPECT

An old adage is that verbal contracts are not worth the paper that they are written on. Many people believe that using a lawyer for what appears to be a simple deal is costly and time consuming. Much simpler and faster to complete the deal on a hand shake and the parties will be good to their word. Unfortunately, when things go awry, verbal deals often leave some of the terms unstated and the parties have different views on what they actually agreed.

Having your lawyer put the deal into an agreement, a letter or even merely advising by phone can clarify things to the parties; it will help ensure all aspects are taken into account. Often, once a deal has been put into a draft Agreement and the parties get a chance to review what they have supposedly agreed upon (before it's signed), there are often changes to be made as unforeseen issues often arise which have previously gone unconsidered.

FREQUENT DISPUTES

'Standing grass' is always a favourite for a rural dispute. A recent situation had a vendor selling grass by the bale per kilogram of dry matter (kg/dm). The basis of the deal in the vendor's eyes comprised \$30 per bale, for 4x4 foot round bales, weighing in on average 200kg per bale. Over time the discussion moved from charging by kg/dm per bale to a price per bale. Eventually the grass was cut and baled, except the bales were large square bales weighing on average 300 kg. The price offered by the purchaser was the \$30 per bale rate. The issue was the terms of their agreement; was it price per kg/dm or price per bale? Each side had presumed their interpretation was correct; a difference that would have been obvious if it had been committed to writing.

Another situation is where land is leased for a set term at a fixed annual price, with the owner responsible for paying the rates. An owner can overlook that the rates will increase annually, effectively decreasing the payment being received each year. Something they never intended when the agreement was made.

A final example is where a purchaser agrees that chattels or stock can be left or stored at the property being purchased until the vendor can arrange for them to be collected. Often this is left open-ended without any agreement as to a pick up date or some form of rental charge if they aren't collected within a reasonable period of time. With no formal agreement, the new property owner may find that they are storing the items or feeding stock not only for free but also for a long time.

AN AGREEMENT CAPTURES THE FACTS

Often a discussion with us before the negotiations start will ensure that you're best placed to capture the key aspects of the deal. It's also likely that we'll raise other matters which you may not have considered. Investing a bit of time and money at an early stage in negotiating a deal and getting a written agreement is always worth the paper it's written on.

"A written agreement is always worth the paper it's written on."

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Postscript

New telephone service for the hearing impaired

Hearing impaired Kiwis can now use a caption-based telephone service that will allow them to easily take part in a telephone conversation at almost the same speed as ordinary conversations. Captions are generated and transmitted almost simultaneously over the internet, with a delay of around two seconds.

First introduced in the USA, the service has been available in this country since the beginning of March. Using a special Captel phone, the hearing impaired can now talk to someone and then read (on a small screen on the phone itself) word-for-word captions of the other person's response.

The service is available every day between 8am and 9pm.

A Captel phone is available for a one-off loan fee of \$323, a 50% discount off the full price; it's subsidised by the government. The phone remains the property of the Ministry of Business, Innovation and Employment. There's no cost for users to operate the Captel service.

To find out more, go to www.captel.co.nz. ■

Do's and don'ts of daily deals

Websites offering daily deals are now almost commonplace for many of us. Every day there are tempting deals or offers that pop into our Inboxes. How hard is it to resist what seems to be a bargain?

There are truly some great deals in these daily offers, but not all deals are created equal. The Commerce Commission and Ministry of Consumer Affairs regularly receive complaints from customers who have found not all is as it appears for some offers. As with any offer, it always pays to keep your wits about you and do your homework.

The Ministry of Consumer Affairs has given some guidelines:

Do check if the deal is as good as it says it is: Look at the regular price, as well as check out the competition. A quick internet search should do the trick. If the discount is exaggerated or any of the information is misleading, you can report the company to the Commerce Commission.

Don't stand for poor quality: Whether you buy the deals at full price or at a discount or sale price, all offers must comply with the Consumer Guarantees Act. Goods must be of acceptable quality and fit for the particular purpose, and services must be provided with reasonable care and skill.

Do resist an impulse buy: Tempting as it is to grab one of these deals on the spot, take a few minutes to think if you really need the Belgian waffle-making set.

Don't be fobbed off: If you have a problem with something you've bought on one of these daily deals, ask the discount site or provider to put it right. If you're not satisfied you can take your complaint to the Commerce Commission or the Disputes Tribunal.

What commonly occurs is that so many people take up the offer that the company is overwhelmed and has difficulty supplying the goods or services within the timeframe or at all. Persevere with the provider, they may be able to offer a time extension or you may be able to ask for your money back.

Read the terms and conditions: How many times have we said this in *Fineprint*? Read the t's and c's carefully every time you accept a deal.

These daily deals are a fun way to give yourself a treat or to get a bargain. But think carefully about the offer and take a deep breath before you press the BUY button. ■



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