

# PropertySpeaking

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LAWYERS

Welcome to this final edition of *Property Speaking* for 2019. We hope you find the articles in this e-newsletter are both interesting and useful.

To talk further about any of the topics we've covered, or indeed on any property matter, please don't hesitate to contact us – our details are to the right.



## Leasing commercial premises Before you sign the lease

Commercial leases come in varying shapes and sizes. Whether you operate a transport business and need a place to park your trucks, manufacture and sell goods from a warehouse or conduct your trade from a boutique store in the heart of the CBD, your lease agreement will be at the heart of your business.

Before you sign a lease, there are a number of core issues to consider.

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### First home buyer scheme changes

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# Leasing commercial premises

## Before you sign the lease

Commercial leases come in varying shapes and sizes. Whether you operate a transport business and need a place to park your trucks, manufacture and sell goods from a warehouse or conduct your trade from a boutique store in the heart of the CBD, your lease agreement will be at the heart of your business.

Before you sign a lease, there are a number of core issues to consider. It is important to do your homework and talk with us before you commit to anything.

## The rent

The first thing you are likely to consider is how much rent you will be paying. It's good to remember that an agreed rent as stated in the lease can change (usually up!) through a rent review process. If you have a sub-lease your rent may be linked to the head lease. If this happens, and your landlord's rent is increased, then your rent is also likely to increase.

## The parties to the lease

If you run your business as a sole trader, then it is likely that you will be the tenant in a personal capacity.

If your business operates through a company, your company is likely to be the tenant. In addition to your company being

the lessee, the landlord may also require personal guarantees from those involved in the company. You may need some guidance on the impact of being a guarantor under a commercial lease. Generally speaking, it holds you personally responsible for any of your company's defaults under the lease.

The landlord should be the legal owner of the property. If the property is not owned by the landlord, you should find out who does own the property. Otherwise you could be unwittingly entering into a sub-lease agreement, which comes with slightly different rules. Your sub-lease will likely be subject to the head lease which may impose additional responsibilities on you in favour of the head landlord.

## Check the premises description

You must ensure that the lease correctly identifies the premises you are leasing. If you lease the entire property, then the lease should refer to the property's title reference. If you are only leasing part of the property, then it is useful for the landlord to attach a floor plan that outlines the premises for which you have exclusive use and any areas that you can use in common with other tenants. It's also wise to check if there are car parks attached to your lease and for you to identify if you have exclusive use of these or if they are available on a first-come-first-served basis.



## Use of the premises

You should check the permitted use (also called 'business use') in the lease and ensure this correctly identifies what you want to use the premises for. If the use says retail shop but you want to open a takeaway shop, you will need to have the use changed.

Most leases contain a provision that allows you to ask your landlord for a change to the permitted use. A landlord needs to consider your request and cannot unreasonably

withhold consent. We can assist you with this process if required.

## Factor in the outgoings

Outgoings (sometimes known as 'opex') are the additional day-to-day expenses you must factor into your costings, over and above the rental. These outgoings include charges for rates, utilities, insurance and maintenance. It is important to carefully read the list of outgoings in your lease. If there are outgoings that don't apply to your



# Residential tenancies

## Affecting both landlords and tenants

The Residential Tenancies Amendment Act 2019 came into force on 27 August 2019. This legislation affects both landlords and tenants in a number of ways including limiting a tenant's liability for careless damage in rental properties, and how methamphetamine (meth) contamination of rental properties is to be tested and managed. Landlords are also now required to provide a statement in the tenancy agreement about the property's insurance.

## Damage to rental properties

The legislation is designed to encourage tenants (and their guests) to look after the property they rent, and for landlords not to be out-of-pocket for careless or intentional damage by their tenants.

As a landlord, you cannot hold your tenant liable for any fair wear and tear to your rental property or your chattels. However, your tenant is liable if you can show that the destruction or damage was:

- » Intentionally caused by your tenant (or their guests)
- » The result of your tenant doing something illegal which could result in them going to prison, such as making meth, or

- » The result of your tenant doing something careless, such as cooking while intoxicated.

If your tenant is liable for the damage to your rental, their liability is limited to the lesser of:

- » The excess of your property insurance or
- » The equivalent of four weeks' rent.

Unfortunately, you will have to wear the difference if your actual costs to repair the damage are greater than what your tenant must pay.

## Methamphetamine contamination

The new legislation allows for landlords to test for meth contamination in rental properties whilst their tenants are living there.

You must give 48 hours' notice to your tenants before entering your property, and you must tell your tenants that you are testing for meth contamination. You are also required to share the test results with your tenant within seven days of receiving them.

Still to come are the regulations that will detail the level of meth contamination that is acceptable, the processes for

testing for meth and decontamination of a property.

There is more detail about meth contamination in rental properties [here](#).

## Insurance

Landlords must now provide a statement with any new tenancy agreement stating whether the property is insured and providing the insurance excess amount for that policy or policies. If you don't provide this information, or don't tell your tenants of any insurance changes, you could be fined up to \$500.

Tenants on existing tenancies (pre-27 August 2019) can ask for your property's insurance information, and you must provide this within a reasonable timeframe.

## Unlawful tenancies

The new legislation also clarifies obligations about letting 'unlawful residential premises'. This is a place used for the occupation for a person but that place cannot lawfully be occupied for residential purposes, or where a landlord has failed to comply with their obligations under the [Residential Tenancies Act](#).

An example of 'unlawful residential premises' is where a landlord has let a

# Property briefs

## Frequent buying and selling of property tax rules under review

If you frequently buy and sell property, you may want to keep a close eye on Inland Revenue's review of some property tax rules that was announced in September 2019. One area being targeted is the use of the 'main home exemption'.

Under current rules, you may be exempt from paying tax on a property sale if the property is your main home. You cannot rely, however, on the 'main home exemption' if:

- » You have already claimed the exemption twice within the previous two years, or
- » You engage in a regular pattern of buying and selling residential properties.

The IRD is considering tightening the exemption rules. It proposes reviewing property transactions under your own name together with transactions under the name of someone living with you or an entity associated with you, such as a family trust. If there appears to be a pattern when all those transactions are looked at together, you may be liable to pay tax.

Further limits on the exemptions that apply to property used as residential and business premises are also contemplated. The IRD is likely to announce a decision on these changes later this year, with law changes



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being made in 2020. The full details on the proposed rule changes can be found [here](#). ■

## Buyers must take care when cancelling an agreement

The proposed purchaser of a Dunedin property is at least \$150,000 out of pocket after improperly cancelling his agreement. The outcome in the recent court case *Strack v Grey*<sup>1</sup> warns buyers to take a diligent approach to conditions in an agreement for sale and purchase of property.

Mr Grey signed an agreement which included conditions allowing him to cancel the purchase if he was dissatisfied with a written building report or unable to obtain sufficient finance. Last year, the High Court found that Mr Grey breached this agreement when he cancelled it on the basis that he was dissatisfied with the building report. Mr Grey's concerns about the property's

retrofitted insulation were, in fact, founded in his own research, not the building report.

In September, the Court of Appeal ordered Mr Grey to compensate the Stracks \$150,000 for his breach (being the difference between Mr Grey's offer and the offer of the property's eventual buyer). In reaching its decision, the court rejected Mr Grey's argument that he should not have to pay given he would have cancelled the agreement anyway under the finance condition. Mr Grey was unable to prove to the court that he would have been unsuccessful in obtaining finance as he only made preliminary enquiries with one bank.

This latest decision in *Strack v Grey* reiterates that it is essential that your reasons for cancelling an agreement are properly linked back to any conditions in the agreement and that you do 'all things that might reasonably be necessary' to meet the agreement's conditions before cancelling. ■

## First home buyer scheme changes


In the Winter 2019 edition of *Property Speaking*, we outlined schemes available to help first home buyers. Following the government's announcement on 4 September 2019 of changes to the schemes, some schemes have been re-named:

- » Welcome Home Loan is now the **First Home Loan**
- » HomeStart Grant is now the **First Home Grant**, and
- » Housing New Zealand, HLC and KiwiBuild have amalgamated to establish **Kāinga Ora – Homes and Communities**.

As part of more substantive changes, if you are a first home buyer, you now may be able to:

1. Access a First Home Loan and First Home Grant even if you only have a 5% deposit

<sup>1</sup> *Strack v Grey* [2019] NZCA 432.

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## Leasing commercial premises


leasing situation, cross them off the list. In some situations, your landlord may add items such as paying for the external maintenance of the premises.

If you only lease a portion of the property, then you will pay a percentage of the outgoings. If charges are not separately metered, you should think about adding a clause to determine how these are calculated.

## Who pays the costs for leases?

In most cases the parties pay their own legal fees for the signing of a lease and documenting any changes such as rent reviews or renewals. If you don't meet your obligations under the lease, your landlord can recover any expenses incurred in enforcing their rights from you.

Signing a commercial lease is a significant commitment and there is a great deal to consider before you sign on the dotted line. Make sure you've addressed every issue before you sign; it is much harder to renegotiate a lease once the terms have been agreed and the lease signed. If you'd like some guidance on your commercial lease, we can help tailor your lease to suit your business goals. ●

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## Residential tenancies


property that does not comply with the [Healthy Homes Standards](#).

Tenants in unlawful residential premises may terminate their tenancy with only two days' notice.

If you let unlawful residential premises to a tenant and your tenant falls into rent arrears, unless there are special circumstances, the Tenancy Tribunal cannot order your tenant to repay those arrears. In addition to this the tribunal may order you to:

1. Reimburse your tenant for any or all rent they have paid while the premises are unlawful
2. Complete work on the premises and/or
3. Terminate the tenancy.

The new legislation has been in force for more than two months, and all landlords and tenants should now be aware of their obligations and responsibilities. If you would like to know more, click [here](#). If you would like more detailed information, please don't hesitate to contact us. ●

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## Property briefs

2. Sell a KiwiBuild property after you have lived in the property for one year (instead of three), and
3. Pool together First Home Grants to buy a property with no limit on the total grant as long as all buyers will live in that property.

The government has also announced that it will introduce new progressive ownership schemes, such as a rent-to-buy scheme.

If you are unsure about whether you are eligible for a first home buyer scheme or how to apply, we can help. ●

