

Information Guide – Maritime Property – Establishing Retail Leases

About this guide

This guide:

- Provides information to assist potential Lessees in the establishment of a Retail lease over Maritime Property
- Is applicable to all new agreements (referred to generically as Leases) issued over Roads and Maritime land for structures and uses associated with the provision of Retail services
- Will generally be applied by Roads and Maritime unless the delegated personnel determines that circumstances exist which justify a departure from this guide, including to the extent necessary to comply with its obligations at law.

Roads and Maritime staff will assist current and prospective Lessees with their enquiries and provide general information in accordance with the Roads and Maritime Customer Charter.

Note:

To avoid unnecessary duplication Lessees and Licensees will be referred to in this guide generically as Lessees and references to Roads and Maritime relate to its relationship as the property owner and Lessor of Maritime Property. Terms used in this document have the meanings given them in the [Glossary of Terms and Definitions](#).

Maritime Retail Leases and Agreements

A fully executed agreement with the Lessee is required before any unaccompanied access to or use of the property by the Lessee is permitted. No works may be conducted on Roads and Maritime land without planning approval and a suitable Lease or Licence.

In the case of leases which are required to be registered, the Lessee will be required, at its cost, to create a new title via a Development Application for subdivision of Roads and Maritime land for leasing purposes. Roads and Maritime will not grant such a lease until the title is created against which the lease may be registered.

If a formal lease cannot be entered into until certain events have occurred (for example, planning approvals are obtained or Capital Works completed), Roads and Maritime may offer the prospective Lessee an Agreement for Lease (AFL).

Terms and conditions for any Roads and Maritime Lease need to be agreed between the parties and may vary subject to the nature of the Maritime Property, the type of use, the capital commitment required of the Lessee, current Roads and Maritime Policy, and/or the term of the proposed Lease.

Applicants for a new lease must provide the following information to Roads and Maritime when requested:

- A Business Case setting out the details of the business and operations, including details of any proposed major capital investments and/or maintenance works particular to the Maritime Property

- A report from a suitably experienced and practicing structural engineer qualified for corporate membership of the Institution of Engineers Australia independent of the Lessee and accepted by the Lessor, acting reasonably, as having the appropriate qualifications for marine structures. The report must review the condition and remaining lifespan of structures and improvements on the leased land and certify whether they are fit for purpose in accordance with all legislation and, given prescribed maintenance, will remain so for the proposed lease term. The report, if accepted by the Lessor, will be annexed to the new lease, its findings and recommendations are to be reflected in the Lessee's Business Case and they should form the basis of the initial maintenance plan required to be provided to the Lessor by the Lessee within the first twelve months of the new Lease
- Details of relevant skills and experience in the business or operation proposed to be carried out on the land
- Evidence of capacity to satisfy the financial obligations of the lease (including rent, make-good, proposed capital works and maintenance) as well as information regarding the prospective lessee's compliance with previous leases (if applicable)
- Any other information reasonably required by Roads and Maritime for the purpose of deciding whether or not to lease land to the prospective lessee.

It is the intention that Roads and Maritime will satisfy itself that the proposed business endeavours are viable and have a reasonable prospect of success before entering into a lease or agreement to lease.

Where an existing Retail lease expires, Roads and Maritime may seek to negotiate a renewal with the existing lessee(s), or seek to market the property for a new lease.

Roads and Maritime is not obliged to offer a Lease on terms or conditions consistent with any existing or previous lease.

Roads and Maritime may also take one or more of the following into consideration in determining the rent payable;

- Any significant infrastructure investment or capital works proposed to be carried out during the lease term
- the nature, size and complexity of any proposed development on the Land
- the extent to which existing improvements are owned by Roads and Maritime
- the extent to which existing improvements have been amortised during previous Leases
- the commercial return expected from the lease, having regard to existing market conditions
- any agreed initiatives to provide particular public benefits, services or facilities
- relevant legislation.

Site Assessment

Prior to granting a lease, Roads and Maritime will generally conduct a Site Assessment. The Site Assessment will assist Roads and Maritime in evaluating whether to grant a lease, and the most appropriate category(s) of land use to be conducted under a lease.

The determination of land use categories to be offered at any particular site will be at the discretion of Roads and Maritime. Where multiple categories of land use are proposed for a single site, these will generally be incorporated into a single lease document.

Marketing and Tendering

Prior to committing to a new Lease Roads and Maritime will consider the optimal market strategy to achieve the NSW Government objectives and will need to be satisfied that the on-going business operation is viable and has a reasonable prospect of continued success before entering into a renewed Lease.

Where a new Retail Lease is for a site upon which there is no current or recently expired lease for that activity, Roads and Maritime will generally conduct a competitive process. However, if the adjoining landowner/occupier has exclusive access to the site, Roads and Maritime will generally conduct lease negotiations directly with that owner/occupier.

Security and Bank Guarantee

Roads and Maritime may require some form of security in order to ensure the Lessee's compliance with rental and/or maintenance obligations under a lease. This will usually take the form of a bond, Bank Guarantee or similar, on terms and for an amount acceptable to Roads and Maritime, which will be determined prior to the execution of the Lease.

Guarantee Amount

Where Roads and Maritime requires a Bank Guarantee, this will generally be for an amount equivalent to up to twelve months rent for the property, except in exceptional circumstances where additional securities may be required.

The Bank Guarantee will:

- State Roads & Maritime Services (ABN 76 236 371 088) as sole favouree
- Be unconditional and irrevocable with no expiry date
- Be issued by an Australian owned Authorised Deposit Taking Institution regulated by the Australian Prudential Regulatory Authority (APRA)
- Be in Australian Dollars.

Exceptional circumstances where an additional Guarantee Amount may be applicable include (but are not limited to):

- Where the structures on the property have unique heritage significance or maintenance obligations such that it is reasonable to expect that additional security is required to ensure that they are adequately maintained
- Where leasing incentives have been provided to the Lessee in the form of a rent free period or any other form of financial assistance
- Where the Lessee has a history of non-compliance with previous Leases
- Where the lease is for the temporary use of land and it is a condition of the lease that substantial structures must be removed at the conclusion of the lease term.

Parent Company or Director Guarantees

In exceptional circumstances, the directors of a Lessee company may be required to provide personal guarantees to protect the interests of Roads and Maritime. In addition parent company guarantees may be required in addition to the financial securities provided by the Lessee company.

Circumstances that may require parent company and/or director personal guarantees may include (but are not limited to):

- Where leasing incentives have been provided to the Lessee in the form of a rent free period or any other form of financial assistance
- Where a long term lease term has been agreed and the Lessee is required to undertake significant capital improvements
- Where other lease arrangements exist between the Lessee and Roads and Maritime which potentially pose a significant risk to Roads and Maritime resulting from non-performance of the Lessee.

Review and Replacement of Guarantee

At any time during the term of the Lease the Guarantee Amount may be reviewed if:

- The Lessee has breached any of its obligations under the agreement
- The Property(s) fall into a state of disrepair and maintenance obligations are not being met by the Lessee
- Rent is increased in accordance with the Lease
- After five years to ensure the guarantee reflects the value of the rent for the following 12 months
- There is another reasonable basis for review.

If at any time the Bank Guarantee is called upon then the Lessee must provide a replacement Bank Guarantee.

A demand for payment under the Bank Guarantee may be made if the Lessee breaches or fails to perform any of the material obligations under the Lease. In addition, the rights of Roads and Maritime to call upon the Bank Guarantee or security will survive the expiration or earlier termination of the Lease.

Release of Bank Guarantee

Where a Lessee, who's Lease is due to terminate at expiration, or earlier determination, all or part of the Bank Guarantee may only be released once all the Lessee's obligations under the Lease have been met. Where all or part of the Bank Guarantee is called upon in accordance of the Lease, the balance will be released to the Lessee only after all such obligations have been completed and paid for.

Indemnities and Insurance

Lessee's will be required to indemnify Roads and Maritime against any action, liability or loss arising from their occupation of the Land.

Insurances

The Lessee is required to effect and maintain insurance as deemed relevant by Roads and Maritime for the duration of the term of the Lease. Proof of insurance of the leased property, the Lessee's property and third party liabilities is required prior to grant of a Lease, and throughout the term of the Lease, allowing access to the property.

Policies (with the exception of Workers Compensation Insurance) may be taken out in the joint names of Roads and Maritime and the Lessee, or in the name of the Lessee with Roads and Maritime's interest noted.

Types of Insurances

The insurances required will vary dependent on the nature of the Lease but may include the following:

- Public liability insurance for quantum advised for any one occurrence or for any other amount Roads and Maritime reasonably requires, containing all provisions that are normally contained in public liability insurance policies, or as reasonably required by Roads and Maritime and expressly referring to and covering all of the Lessee's obligations under the Lease, including the obligation to indemnify Roads and Maritime, for not less than \$20,000,000, or other amount as reasonably required by Roads and Maritime
- Worker's Compensation Insurance in respect of work related injuries for all the Lessee's employees and agents at any time in, on or in the vicinity of the property
- Insurance for the leased property (if not specified in the Lease as provided by Roads and Maritime), for the full cost of reinstatement of the property (including demolition and remediation) if damaged or destroyed

- Insurance for the contents of the leased property for the full cost of replacement and reinstatement of the contents if damaged or destroyed
- Insurance to cover loss of earnings and profit resulting from any interruption to conduct of the Lessee's Business on the leased maritime property
- Insurance to cover any Pollution or Contamination arising from any activity associated with the use of the property
- Any other insurance required by law and as Roads and Maritime reasonably requires.

Insurance Policy Requirements

All insurance policies are required to be effected and maintained in terms of the following requirements:

- Policies are taken out with insurers approved by the APRA of registered insurers (and listed under 'Insurers Authorised to Conduct New or Renewal Insurance Business in Australia') or any other insurer reasonably approved by Roads and Maritime
- Policies are to be in the name of the Lessee and note the interests of Roads and Maritime and any other person who has an insurable interest relevant to the Lease
- Lessees must use all reasonable endeavours to ensure that policies are eligible insurance contracts under the Terrorism Insurance Act 2003 (Cth.) and Regulations under that Act
- Policies provide that the insurer will not cancel the insurance without first seeking Roads and Maritime approval.

Certificates of Currency

Certificates of Currency must be provided to evidence the existence of all insurances required to be effected and maintained throughout the lease term. Access to the property will not be granted until these have been provided. The Lessee must also provide copies of the insurances whenever the policies are renewed or at any time during the lease following a written request from Roads and Maritime.

Retail Lease Agreement Conditions

A Heads of Agreement (HOA) or Term Sheet is used to record the agreement of key terms and conditions of a proposed Lease. The HOA or Term Sheet may:

- Be non-binding unless specifically stated that the intention of the parties is that the HOA or Term Sheet is binding
- Include details of other less material clauses which are expected to be agreed after confirmation that the proposed Lease will be granted.

For Retail Leases a Construction Licence (Agreement For Lease - AFL) and Lease or Licence To Use will generally be used to provide rights to build DA approved works. The grant of a Lease or Licence over the completed work is subject to the satisfaction of preconditions spelt out in the AFL.

The Construction Licence, once executed is binding on both parties and will have a draft pro-forma Lease Agreement or Licence To Use attached. Typically, the Construction Licence will contain (in a schedule or annexure) details of the property design and specification of DA approved works, the works to be done in a development or details of the refurbishment of existing Improvements.

If entry to and use of the Maritime Property by the Lessee prior to the grant of a Lease has been agreed for 'fitting-out' or other reasons, this access and use must be governed by an executed lease or licence to protect the interest of Roads and Maritime.

Conditions and requirements of the Lease will include, but are not limited to:

- Payment of rent in accordance with rental formulae and conditions
- the Lessee is to notify the Lessor of changes or events which affect the property such as the changed development on the adjoining dry land
- All costs associated with the Lease are to be borne by the Lessee
- Permitted Uses of the property and requirements relating to the berthing of Vessels, maintenance and repairs
- The Lessee must indemnify and release the Lessor from any loss relating to occupation or use of the property
- The Lessee must fully insure the property and the Lessor against all foreseeable risks associated with the occupation and use of the property
- Upon prior written approval from the Lessor, the Lessee may assign the Lease
- Sub-leasing is prohibited unless otherwise provided in the Lease or Licence and approved in writing by the Lessor
- The Lessee is obliged to comply with all relevant work, health and safety laws and all relevant environmental laws
- The Lessee has responsibilities and obligations in relation to land contamination, pollution and land remediation
- The Lessee Will be required to rectify any Defaults or breaches of the lease
- The Lessee has the right to quiet enjoyment of the property
- The Lessor has certain rights including the right of entry onto the property to undertake inspections and the right to recover costs in the event of a breach of the Lease
- Dispute resolution processes
- The Lessee may, under certain circumstances, be required to remove structures from the property in accordance with the terms of the Lease
- Provision by the Lessee of any securities required under the Lease
- The Lessee must not lodge any caveat over the property
- Holdover.

Maritime Retail Lease Rental Framework

A Maritime Retail Lease relates to the use of Roads and Maritime land for a lease in accordance with the *Retail Leases Act 1994*. Examples of Retail Leases offered by Roads and Maritime include premises for the provision of food or entertainment (other than by a Registered Club), a takeaway food outlet on a public ferry wharf, or a privately-owned waterfront restaurant.

Indicative terms for maritime retail leases are up to 10 years when marketed through direct negotiation and up to 20 years when marketed through an open market competitive tendering process. Roads and Maritime may consider longer lease terms when marketed through direct negotiation if significant capital expenditure is proposed by the Lessee.

Subject to the *Retail Leases Act 1994*, incumbent Roads and Maritime Retail Lessees will be offered a replacement Retail Lease via direct negotiation in the first instance. Where these negotiations fail to generate a satisfactory outcome in accordance with this guide, Roads and Maritime will generally conduct a competitive process.

New Retail Leases (that is, Retail Leases for sites upon which there is no current or recently expired Retail Lease) will generally be awarded via competitive process.

Rents for land uses in the Retail Lease category may be determined as a percentage of Gross Revenue, a market rental based on the valuation of the property, an amount agreed between the parties, or a combination of these methods.

For the purposes of applying the rental framework all revenue figures cited in the procedure are exclusive of GST.

Revenue Rents

Percentage revenue rent will be charged on the actual gross revenues generated by all activities, excepting those that are subject to a sublease, which are conducted on Roads and Maritime land and which are income producing activities, or are capable of generating an income, including (but not limited to):

- Berthing
- Subleasing (charged on rent received by Roads and Maritime's lessee, not the gross revenue generated by the sub-lessee)
- Accommodation, including administration space and caretaker apartments
- Fuel sales
- Boat repairs, Travel Lift, Tender Service
- Maritime Industrial
- Operations of a Registered Club Lessee

The Rent is payable in advance.

Where revenue generating activities operate across the boundary of Roads and Maritime and adjoining land owned or legally accessed and used by Roads and Maritime Lessees, the proportion of gross revenue attributable to Roads and Maritime land will generally be based on the proportion of that specific business activity which occupies Roads and Maritime land. Revenue rents will generally only be applicable in circumstances where the majority or all of the income-generating activities occur on the site leased from Roads and Maritime.

\$/m² rates are charged for hardstand areas. This method may also be used to assess rent related to other income producing activities such as boat storage, carparking, administration offices, storage and amenities.

A flat rate of \$2,500 plus CPI per annum plus GST (from the effective date of this procedure) is charged for each pair of slipway rails that generate, or are capable of being legally used to generate income.

Rent is not levied on gross revenue generated by the operation on Roads and Maritime land of commercial moorings under a Roads and Maritime Commercial Mooring Licence or levied on non-income generating, common user facilities such as toilets, pathways and marina structures, such as jetties, gangways and pontoons which only provide access to income generating activities such as berthing.

Audit requirements for leases involving Revenue Rents

It will be a standard Lease condition for leases involving Revenue Rent that lessees provide annual audited accounts and relevant taxation documents sufficient to determine the actual Gross Revenue from applicable activities carried out on Roads and Maritime land and an annual rent assessment will be made accordingly.

The lease will require the Lessee to provide the information and documentation considered necessary to have the Gross Revenue audited by an independent auditor. If an independent audit reveals that the Revenue has been underestimated by a material amount, appropriate adjustments will be made to past and future rent payable and the Lessee must pay Roads and Maritime's costs in obtaining the independent audit.

In the event where, after consideration of market conditions and gross revenue for similar commercial activities, actual gross revenues provided are not considered market or do not include revenues for all activities on Roads and Maritime property, rent will be assessed on the imputed gross revenues.

If an audit discloses a discrepancy in Actual Gross Revenue, the Lessee must pay to Roads and Maritime:

- Any additional Rent payable by the Lessee having regard to the discrepancy
- Interest on the additional Rent payable by the Lessee; and
- The costs and expenses of the audit incurred by Roads and Maritime.

Market Valuations

Where rent is to be based wholly or partly on market valuation that part of the rent may be subject to:

- An annual adjustment to reflect positive movements in CPI (Sydney — All Groups)
- A regular rent review at a specified period(s) during the lease term, to ensure the lease provisions remain consistent with market rates
- Where relevant an independent Market Rent Valuation to determine an appropriate Market Rent for the lease may be obtained by Roads and Maritime
- To the extent permitted by law, a 'ratchet' clause providing that despite the methodology for the rent review, a reviewed market rent may not be less than the rent payable prior to the review.

If a lessee disputes the market rent determined by Roads and Maritime, the applicable rent dispute resolution provisions of the Lease will apply.

For small retail premises (for example, takeaway outlets or kiosks on public wharves), an indicative lease term will be ten years. For large retail premises (for example, waterfront restaurants), an indicative lease term will be ten years if the lease arises from direct negotiation, or twenty years if the Lease results from a competitive process.

Capital works

Roads and Maritime encourages investment in new and renewed maritime infrastructure, to ensure the delivery of world-class commercial and recreational boating facilities.

Roads and Maritime may agree to incentives for investment in capital works. These may commence at the start of a lease (for example, a rent-free period while capital works are undertaken).

A proposal for a significant capital works program may also be a consideration in determining prospective lessees during a competitive process to select a lessee for a Roads and Maritime commercial site.

It will be a standard lease condition that significant works may only be carried out on the Premises provided:

- Prior written approval has been obtained from Roads and Maritime

- The Lessee has obtained and complied with all relevant planning approvals, consents and permits for the works; and
- The works are carried out in accordance with any timetable, program or standards agreed in writing between the parties prior to commencement of works.

If a lessee fails to meet these Obligations, Roads and Maritime may:

- cease providing any concessions or incentive contingent upon the works
- seek repayment of the Value of applicable concessions or incentives provided; and/or
- commence action to terminate the Lease or AFL

Most marine structures on Sydney Harbour will require a Construction Certificate (CC) prior to work commencing. A CC certifies that the detailed construction plans and specifications for the development are consistent with the Development Consent and comply with the Building Code of Australia.

If work requires a CC, a Principal Certifying Authority (PCA) must also be appointed before work commences. The PCA will inspect building works during their construction to allow them to issue an Occupation Certificate.

An accredited certifier can be engaged to issue the CC and/or act as the PCA.

Accredited certifiers are recognised by the Building Professionals Board and carry a certificate of accreditation. In order to certify marine structures, generally an A1 or A2 category of accreditation is required.

Other Matters

Maintenance obligations

Lessees will be required at all times to maintain the structures on the Land in a safe and physically suitable condition for the commercial activities authorised by the Lease.

Details of Maintenance and Repair obligations of lessees are found at [Information Guide — Maritime Property— Managing Retail Leases](#).

Goodwill and Residual Value of Improvements

No compensation will be payable to a lessee by Roads and Maritime for the residual value of any improvements, or for business goodwill, at the expiry, termination or assignment of a lease.

Legally binding relationship

No lease or agreement to lease (or variation of an existing lease or agreement to lease) will be legally binding on either party unless it is in writing and is signed by authorised representatives of the parties concerned.

Subleases and Mortgage or Charge of Lease

Roads and Maritime generally allows for the sublease or licence of leases over commercial property and such leases being security for a mortgage or charge following the prior written approval of Roads and Maritime.

All sub-leases and other sub-tenancy arrangements, including catering agreements must be for market rent and must be consistent with the terms of the head lease, including any changes that may apply to that head lease from time to time. At the discretion of Roads and Maritime, this may require renegotiation of applicable elements of the head lease.

Where a sublease is created on land leased from Roads and Maritime, the head lessee's rent will increase either by a proportion of the rent payable by the sub-lessee, or by a fixed amount agreed between Roads and Maritime and the head lessee.

Subleases are not subject to the indicative lease durations outlined in this procedure, but may not be for a term, including any option provisions, that would extend beyond the expiry of the head lease.

Lessees of Roads and Maritime will be liable for any breaches of lease conditions caused by sublessees and Roads and Maritime will generally only deal with the Head Lessee, and not the Sub-Lessee.

Transfer or assignment of a lease

Roads and Maritime generally allows for the transfer or assignment of leases over commercial property following the prior written approval of Roads and Maritime.

Information covering the Transfer or Assignment of a Retail Lease can be found at [Information Guide — Maritime Property — Managing Retail Leases](#).

Ownership and removal of improvements

As Roads and Maritime legally owns any structures affixed to its Land, the lessee must not remove any such structures either during the lease term or upon expiry or earlier termination of the lease without the written approval of Roads and Maritime.

Leases may require the removal of some or all structures or improvements, upon the expiration of the term or the earlier termination of the lease and at the lessee's cost. In addition, the lessee may be required to carry out "make-good" and remediation works to restore the land to the reasonable satisfaction of Roads and Maritime.

Further guidance on the procedures for the removal of structures or improvements from Roads and Maritime land can be found at [Information Guide — Maritime Property — Removal of Structures](#).

Holding over

If a Lease expires and the lessee remains in occupation of the Premises with the consent of the Lessor, the lease holdover provisions of the Lease, where applicable, will apply and the Lease may be terminated by either party by giving six months' notice in writing.

The notice period under this clause does not apply where Roads and Maritime has commenced action to terminate a lease following material breaches of essential lease conditions.

Default

Persistent breaches of essential lease terms or conditions (such as persistent failure to pay the applicable rent) will entitle Roads and Maritime to certain remedies, including commencing action to terminate the Lease.

Access to Premises

Roads and Maritime, its agents or contractors may access the Premises for the purposes of carrying out a Site Assessment, allowing prospective lessees or purchasers to inspect the Premises or Land; or for any other purpose in the carrying out of Roads and Maritime's statutory responsibilities or ensuring compliance with essential lease terms.

Other relevant Information Guides.

The following guides provide further information on matters affecting Retail Leases;

- [Information Guide — Maritime Property - Managing Retail Leases](#)
- [Information Guide — Maritime Property— Gaining Roads & Maritime Permission to Lodge DA](#)
- [Information Guide — Maritime Property - End of Lease Activities](#)
- [Information Guide — Maritime Property - Removal of Structures](#)

Important Note: *This document does not constitute legal advice and provides guidance only. Users are advised to seek professional advice and refer to the relevant legislation as necessary, before taking action in relation to any matters covered by this document.*

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