

Maritime Property Guide – Establishing Retail Leases

IPE Infrastructure Management System

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1 General

1.1 Context and purpose

This guide:

- provides information to assist potential Lessees in the establishment of a Retail Lease over Maritime Property owned by Transport for NSW (TfNSW)
- is applicable to all new agreements (referred to generically as Leases) issued over TfNSW maritime land for structures and uses associated with the provision of retail services
- will generally be applied by TfNSW 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.

TfNSW staff will assist current and prospective Lessees with their enquiries and provide general information in accordance with the TfNSW Code of Conduct.

Note: To avoid unnecessary duplication Lessees and Licensees will be referred to in this guide generically as Lessees and references to TfNSW relate to its relationship as the property owner and Lessor of Maritime Property.

1.2 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 TfNSW land without planning approval and a suitable Lease.

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 TfNSW land for leasing purposes. TfNSW 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), TfNSW may offer the prospective Lessee an Agreement for Lease (AFL).

Terms and conditions for any TfNSW 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 TfNSW policy, and/or the term of the proposed Lease.

All Lessee obligations will be detailed in the Lease.

Applicants for a new lease must provide the following information to TfNSW when requested:

- a business case setting out the details of the business and operations, including details of any proposed tenancy fit-out and/or maintenance works particular to the Maritime Property
- 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 TfNSW for the purpose of deciding whether, or not to lease land to the prospective lessee.

This information will enable to TfNSW satisfy itself that the proposed business endeavours are viable and have a reasonable prospect of success before entering a Lease or AFL.

All offers to Lease TfNSW Maritime Property will generally be completed via an open market process.

TfNSW is not obliged to offer a Lease on terms or conditions consistent with any existing or previous Lease.

TfNSW may also take one or more of the following into consideration in determining the rent payable:

- any significant infrastructure investment or fit out 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 TfNSW
- 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 public benefits, services or facilities
- relevant legislation.

1.3 Site assessment

Prior to granting a lease, TfNSW will generally conduct an assessment to assist TfNSW in evaluating whether to grant a lease, and the most appropriate category(s) of land use to be conducted under a lease.

1.4 Marketing and tendering

Prior to committing to a new Lease TfNSW will consider the optimal market strategy to achieve 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.

TfNSW will generally conduct a competitive process before granting a new Lease.

Where an adjoining landowner/occupier has exclusive access to the site, TfNSW will generally conduct Lease negotiations directly with that owner/occupier, in line with NSW Independent Commission Against Corruption guidelines on direct dealings.

1.5 Security and bank guarantee

TfNSW will require some form of security to ensure the Lessee's compliance with rental and/or maintenance obligations under a lease. This will usually take the form of a bank guarantee or similar, on terms and for an amount acceptable to TfNSW, which will be determined prior to the execution of the Lease.

1.6 Guarantee amount

Where TfNSW requires a bank guarantee, this will generally be for an amount equivalent to up to 12 months' rent for the property, except in exceptional circumstances where additional securities may be required.

The Bank Guarantee will:

- specify Transport for NSW (ABN 18 804 239 602) 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.

1.7 Parent company or director guarantees

In some circumstances, the directors of a Lessee company may be required to provide personal guarantees to protect the interests of TfNSW. Parent company guarantees may also 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 TfNSW which potentially pose a significant risk to TfNSW resulting from non-performance of the Lessee.

1.8 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 TfNSW to call upon the bank guarantee or security will survive the expiration or earlier termination of the Lease.

1.9 Release of bank guarantee

Where a Lessee whose Lease is due to terminate at expiration or an 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 with the Lease, the balance will be released to the Lessee only after all such obligations have been completed and paid for.

1.10 Indemnities and insurance

Lessees will be required to indemnify TfNSW against any action, liability or loss arising from their occupation of the Land.

1.11 Insurances

The Lessee is required to effect and maintain insurance as deemed relevant by TfNSW 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 (except for Workers Compensation Insurance) may be taken out in the joint names of TfNSW and the Lessee, or in the name of the Lessee with TfNSW's interest noted.

1.12 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's advised for any one occurrence or for any other amount TfNSW reasonably requires, containing all provisions that are normally contained in public liability insurance policies, or as reasonably required by TfNSW and expressly referring to and covering all of the Lessee's obligations under the Lease, including the obligation to indemnify TfNSW, for not less than \$20 million or other amount as reasonably required by TfNSW.
- 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 TfNSW), 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 TfNSW reasonably requires.

1.13 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 TfNSW.
- Policies are to be in the name of the Lessee and note TfNSW as an interested party and any other party 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 TfNSW approval.

1.14 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 TfNSW.

1.15 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.

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 licence to protect the interest of TfNSW.

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
- 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 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 provision.

1.16 Maritime retail lease rental framework

A Maritime Retail Lease relates to the use of TfNSW land for a lease in accordance with the *Retail Leases Act 1994*. Examples of Retail Leases offered by TfNSW 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.

Terms for maritime retail leases are determined on a case-by-case basis and informed by offering new opportunities through an open market competitive tendering process. Longer lease terms may be considered by TfNSW in exceptional circumstances, such as if significant capital expenditure is proposed by the Lessee.

Incumbent TfNSW Retail Lessees with expiring leases will be managed in line with the *Retail Leases Act 1994*.

All new Retail Leases, including properties with expiring agreements or sites upon which there is no current or recently expired Retail Lease, will be offered to the market via an open 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.

1.17 Revenue rents

Percentage revenue rent, if applicable, will be charged on the actual gross revenues generated by all activities.

The rent is payable in advance.

1.18 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 TfNSW 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 TfNSW'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 TfNSW 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 TfNSW:

- Any additional rent payable by the Lessee having regard to the discrepancy.
- Interest on the additional rent payable by the Lessee.
- The costs and expenses of the audit incurred by TfNSW.

1.19 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 TfNSW
- 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 TfNSW, the applicable rent dispute resolution provisions of the Lease will apply.

1.20 Other matters

1.20.1 Maintenance obligations

Lessees will be always required to maintain the structures on the land in a safe and physically suitable condition for the retail activities permitted in the Lease.

1.20.2 Goodwill and residual value of improvements

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

1.20.3 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.

1.20.4 Subleases and mortgage or charge of lease

TfNSW 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 TfNSW.

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 TfNSW, this may require renegotiation of applicable elements of the head lease.

Where a sublease is created on land leased from TfNSW, 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 TfNSW 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 TfNSW will be liable for any breaches of lease conditions caused by sublessees and TfNSW will generally only deal with the Head Lessee, and not the Sublessee.

1.20.5 Transfer or assignment of a lease

TfNSW generally allows for the transfer or assignment of leases over retail property following the prior written approval of TfNSW.

The conditions of assignment of a Lease are outlined in the respective Lease document.

Information covering the Assignment of a Retail Lease can be found in the *Maritime Property Guide – Managing Retail Leases*.

1.20.6 Ownership and removal of Lessee's improvements

As TfNSW 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 TfNSW.

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 TfNSW.

Further guidance on the procedures for the removal of structures or improvements from TfNSW land can be found in the *Maritime Property Guide – Removal of Structures*.

1.20.7 Holding over

TfNSW will manage expiring Retail Leases in line with requirements of the *Retail Leases Act 1994*.

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. Generally, this determines that the Lease may be terminated by either party by giving one month's notice in writing.

This notice period does not apply where TfNSW has commenced action to terminate a lease following material breaches of essential lease conditions.

1.20.8 Default

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

1.20.9 Access to premises

TfNSW, its agents or contractors may access the Premises for the purposes of carrying out an assessment, allowing prospective lessees or purchasers to inspect the premises or land; or for any other purpose in the carrying out of TfNSW's statutory responsibilities or ensuring compliance with essential lease terms.

2 Further information

2.1 Disclaimer notes

- 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 acting in relation to any matters covered by this document.
- While every reasonable effort has been made to ensure that this document is correct at the time of publication, the State of New South Wales, its agencies and employees, disclaim all liability to any person in respect of anything, or the consequences of anything, done or omitted to be done in reliance upon the whole or any part of this document.

3 Document history

Version	Published date	Summary of changes
1.0	June 2025	First version of the document