



**Leaker Partners**  
Corporate and Commercial Lawyers

Ground Floor, 57 Havelock Street, West Perth, WA 6005

Phone. (08) 9324 8590 | Fax. (08) 6210 1892  
Email. [reception@leakerpartners.com.au](mailto:reception@leakerpartners.com.au) | Web. [leakerpartners.com.au](http://leakerpartners.com.au)  
Leaker Partners Pty Ltd ABN. 67 606 613 996

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July 2016

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### **Congratulations to Victoria and Greig Maitland on their wedding!**

Victoria is now hitched!

Congratulations to Victoria and Greig Maitland, who tied the knot in a beautiful ceremony on Saturday, 2 July 2016. We are pretty sure you will join us in wishing the couple many happy years together.

Victoria and Greig will be leaving for their honeymoon to Scotland on 21 July. Victoria will return to the office on 15 August.



### **Breakfast Seminar: Business Acquisitions – Structuring the Deal**

Mark Leaker will be presenting our latest breakfast seminar on Business Acquisitions – Structuring the Deal on 27 July 2016. The details are as follows:



**Date:** 27 July 2016 at 7:30am

**Venue:** The Western Australian Club, Level 11, 12 St Georges Terrace, Perth WA 6000

For more information, or if you are interested in attending, please contact Leaker Partners at [reception@leakerpartners.com.au](mailto:reception@leakerpartners.com.au) or on (08) 9324 8590.

This newsletter contains general advice only. Further information may be obtained from Leaker Partners on (08) 9324 8590 or [info@leakerpartners.com.au](mailto:info@leakerpartners.com.au)

## **Leaker Partners will be moving shortly!**

Leaker Partners will be moving offices on 1 September 2016. Our new offices will be located at:

**44A Kings Park Road, West Perth WA 6005**

We look forward to inviting you to our new premises soon.



## **Negotiating a Commercial Lease in the current market**

- The commercial leasing atmosphere in Perth has changed quite significantly recently
- High vacancy rates are creating a tenant's market
- However, tenants must be wary of landlords' traps and pitfalls
- In the current market (as with any market) – read the lease before you sign!

### Lease incentives

1. Commercial landlords are now offering all manner of lease incentives for tenants to enter into commercial leases.
2. In a perfect world, lease incentives are a benefit to both the landlord and the tenant. However, the tenant needs to be wary of traps and issues arising out of their use.
3. A lease incentive is a bonus offered to a tenant in consideration for their entry into a lease.
4. Lease incentives take many forms, but the most common are contributions to fit out expenses, rent free or discounted rent periods. Others include cash payments, payment for relocation costs and the landlord taking over lease-tail liabilities.
5. The amount of the incentive will depend on a variety of factors, including the local market supply and demand conditions, the location of the premises, amount of space taken, length of the lease, and ability to pay the rent.

6. There are a number of considerations when it comes to rent incentives. The implications of rent incentives are as follows:
- a. Tax – a cash incentive will generally be considered taxable income of the tenant. The tenant should consider this fact in consulting with their accountant or tax advisor.
  - b. Repayment – the tenant should scrutinise the lease carefully, as some subclauses of incentives often provide that a portion of the incentive is repayable by the tenant in the event the lease is terminated, surrendered or assigned prior to the expiry of the term. This is often overlooked.
  - c. Commencement of rent free period – tenants often rely on rent free periods as an inducement to sign a lease before getting legal advice. In other words, the lease is signed without any legal advice being obtained. The obvious pitfall is that the tenant is then bound to the lease without the benefit of having been properly advised on it.
  - d. Disclosure of incentive – sometimes, landlords grant the tenant an incentive pursuant to a deed which is independent of the lease. This keeps the incentive confidential between the parties. However, this does not remove the landlord's obligation to disclose the concession to relevant 3<sup>rd</sup> parties, such as their financier.
  - e. Ownership of fit-out – where an incentive relates to the provision of or contribution towards a fit out, the tenant should carefully review the lease to confirm who is given title to the fit-out at the expiry of the lease. This could affect the tenant's make good obligations at the expiry, assignment or termination of the lease. There are also tax implications as to who can claim the depreciation.
  - f. Current vacancy rate – what is the current vacancy rate in the area? Could you negotiate something even better?
7. Tenants should seek accounting advice as to how the ATO treats the receipt of lease incentives for tax purposes. Some rent incentives may be treated as assessable income, as well as triggering GST and stamp duty consequences. This can obviously reduce the benefit of the leasing incentive dramatically.
8. Get legal advice before you sign the lease. Remember, the incentives will not last forever and you will be locked into the terms of the lease once it has been signed!

#### Rent reviews

9. A tip: check to see if there is a 'ratchet clause' in place, preventing the rent to drop below the previous year. Also remember that 'ratchet clauses' are not allowed in retail shop leases.

#### Outgoings

10. A tip: is the premises a mixed use development? If the premises are shared by both retail and commercial tenants, for example, beware that operating costs can vary widely. Some operating costs related to retail are significantly higher than that for commercial premises. Beware outgoings that are recovered by averaging costs across the various property use categories, as you may be paying a higher rate than you should be.

11. Another tip: remember that the landlord cannot claim capital expenditure as outgoings. This includes expenses relating to structural elements, the base building and building services, and interest charges on financial arrangements.

#### Make good

12. A tip: consider using cash settlements instead of a requirement tenants to undertake contractual make good works.

#### Permitted Use

13. A tip: make sure your intended use is clear in the lease – consider your use now and in the future. Be broad to capture all business activities e.g. wholesaling, manufacturing, repairing, retail sales, etc. A broad definition will also allow a business to grow and diversify.

In the current market (as with any market) – read the lease before you sign! If you are unsure, obtain legal advice.

Leaker Partners advises on the commercial leases generally. If you would like further advice, please contact us on (08) 9324 8590 or [info@leakerpartners.com.au](mailto:info@leakerpartners.com.au).