

Motel/Caravan Park

Purchaser's Handbook

PevyLawyers
Management Rights & Motels



Pevy Lawyers is a dedicated accommodation industry law practice which brings together big firm experience with small outfit accessibility, responsiveness and service. Pevy Lawyers has the capacity and understanding to resolve the complex legal issues faced by both small businesses and large corporates alike within the accommodation sector.

Courtesy of its narrow focus, Pevy Lawyers has established itself as one of the top management rights and motel/caravan park law firms in Australia both in terms of the volume and the value of transactions handled. As a consequence, clients can be assured they are receiving the most reliable, up to date and specialised advice and solutions in their industry.

As leaders in such a niche field, the firm is relationship driven – a mantra which echoes through all its dealings with its accommodation industry clients including moteliers and caravan park operators. Trent and his team of lawyers and paralegals seek not just to act for clients, but to partner with them in achieving their business and personal goals, through the delivery of dynamic and valuable legal services across all aspects of purchasing, selling or operating a motel or caravan park.

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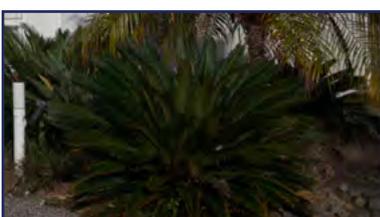
A ABOUT PEVY LAWYERS

The breadth and impact of regulatory change in the motel and caravan park industry places a heavy importance on having in place a reliable and connected legal advisor with specialised experience in this area.

As experts in this field, Pevy Lawyers understand the commercial drivers of this industry to enable it to provide comprehensive and business focused advice for your acquisition, sale or ongoing operation of your motel or caravan park. Whether you operate, or are considering operating a motel or caravan tourist park facility, we are well placed to ensure you receive speedy, accurate and value adding solutions.

Our motel / caravan park sector services include:

- Sale and acquisition of both freehold and leasehold interests, including one of the most comprehensive legal due diligence reviews in the sector;
- Negotiation and structuring of long term leases and chain membership arrangements;
- Advice in relation to associated liquor licence, food licence, regulatory compliance and wholesaler/supplier issues;
- Advice with respect to general structuring matters in consultation with our industry partners to ensure maximum profitability and asset protection; and
- Dispute resolution, strategy and responding to notices to remedy breach of lease or licence requirements.



OUR APPROACH

Meeting with you at your location or in our offices - Where geography permits, we welcome the opportunity to come to you to discuss your matter.

Dealing with the same, experienced person start through to finish – Pevy Lawyers enables you to deal directly with those who have had a decade or more of first hand experience in their fields, not with a junior paralegal or lawyer learning the ropes. You can be assured the same lawyer giving you the fee estimate at the start of your matter will be the one assisting you right through to settlement. How could we truly know and understand your business otherwise?

Proactive, not reactive, advice – As we only practice in the areas of our specialisation, we can predict and prepare you for potential problems or situations long before they arise. Setting us apart from other lawyers, this foresight can dramatically reduce the ultimate cost of your matter and increase the likelihood of it proceeding. With strategies, relationships and industry contacts that only come from having seen it many times before, you can rest easy knowing we are proactively challenging ourselves to remain one step ahead.

Competitive and flexible charging structures where you're not the only one risking a blow out on costs - If there is one pet hate amongst clients, it must surely be getting quoted one thing, and being invoiced another. Sure, occasionally factors beyond your control, or the control of your lawyer, mean the original fee estimate needs to be revised. But should your lawyer really be rewarded for inefficiency or inexperience? We are the only firm in our practice areas who is openly prepared to share the risk of fees above our initial estimates with you on a 50/50 basis - meaning those unnecessary paper wars and point scoring between lawyers will never be our profit drivers.

Doing away with the 'charge for everything' mentality - Forget about dreading the trip to the mailbox at the end of the month – you'll never receive an invoice from Pevy Lawyers without having discussed it with us first. We pride ourselves on our openness and exceptional client care which is why if the unexpected happens, any necessary variation in the fee estimate will be discussed immediately with you as your matter progresses – not just when it comes time for you to open your cheque book.

7 days a week accessibility - For when that pressing concern just can't wait until Monday morning, we provide dedicated after hours support.

Consistent, exceptional service and advice – Our business is very much referral dependent. The greatest compliment you can bestow upon us is a referral. We appreciate this will not occur without providing you with consistent and exceptional service and advice – without the need for you having to constantly send follow up emails or wait for a return phone call.



ABOUT MANAGING DIRECTOR, TRENT PEVY

In his 18 years of private practice, Trent has specialised entirely in property related matters, and in particular the accommodation industry. His years of diverse experience have seen him work in the world's largest law firm, where he represented several Fortune 500 companies, Barclays Bank and the English Government in complex property transactions. Prior to the formation of Pevy Lawyers, Trent was also an integral member of a leading property law firm in Brisbane and the Gold Coast, where he acted for major property players in transactional and advisory matters, again with particular focus in the accommodation industry sector.

Today, Trent is amongst a rare handful of top accommodation industry recognised lawyers in the country, having acted on over 2000 accommodation related transactions throughout Queensland, New South Wales and other states of Australia. He arguably acts for more new clientele to the industry than any other lawyer.

Trent regularly presents seminars to those new to the industry in both Australia and overseas. He holds a Bachelor of Laws and is an admitted solicitor of the Supreme Court of Queensland, Supreme Court of New South Wales and the Supreme Court of England and Wales. He is also a current member of the Queensland Law Society and the Australian Resident Accommodation Managers' Association.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Trent Pevy', written in a cursive style.

Trent Pevy
Managing Director
Pevy Lawyers

So you would like to buy a motel or caravan park? Operating a business in this industry can be rewarding. Commercially speaking, the returns can be very high compared to the risk accompanying it. Nevertheless, it is hard work and may not necessarily be suited to all types of people. One of the greatest positives is that operators do have the ability to add value within a short time, which in turn leads to relatively short ownership periods (typically three years) before an operator looks to move on to their next motel or caravan park opportunity.

Sorting out your business structuring and putting in place a team of specialist advisors before you even start looking will help ensure you're ready to proceed without delay when your offer to purchase is accepted.

1. Your Support Network

The agent, your accountant, your lawyer and your finance broker / financier. These key people will steer you through the purchase process and help you realise your dream of owning a motel or caravan park. Importantly, they will also work together to safeguard a smooth and cost effective transaction.

Be wary of anybody who claims to be a specialist in this field, in particular if none of your advisors have heard of them. With a limited number of motel and caravan park experts around, those dedicated to the industry are almost always familiar with other like minded specialists. Put simply, there is no substitute for true specialisation and experience gained through large numbers of previous transactions. Buying a motel or caravan park need not be complicated, but the pitfalls are many if you are not properly advised. Using an inexperienced advisor will, more often than not, result in nothing but wasted time and money, or even more seriously, an avoidable poor investment.

Ultimately you want your advisors to be one step ahead. If it doesn't sound like they are, do not consider them on your motel or caravan transaction.

2. Determine your budget

How much do you have to invest, and how much can you borrow?

Your borrowing capacity is not as easily determined when purchasing a motel or caravan park compared to say a home. Aside from the equity you personally have to invest, your potential funder will have strong regard to your experience, equity in existing assets, and your projected serviceability of the projected debt.

A short meeting or discussion with a specialist accommodation industry finance broker can alleviate concerns and perhaps even surprise you with what you may be able to afford. Getting answers to these questions, together with having an idea as to your projected purchasing costs (including stamp duty), will help ensure your search for your ideal property is not later undone by unrealistic expectations.

3. Structuring

Aside from finding the right property, one of the biggest decisions you will make in the early part of the purchasing process will be the structuring of your purchasing entity. This could be anything from personal names, a company in its own right or as trustee, a type of trust or even a partnership with other like minded persons (who either share operational responsibilities or fulfil a silent role).

Your decision making with respect to structuring should be weighted on a combination of asset protection and tax minimisation. No one likes to pay more tax than they should, and no one wants to expose their life savings to a lawsuit. It therefore follows that the best advisors for your structuring will be your accountant and your lawyer.

Like most things in life, there is no universal solution for all potential purchasers. Whilst some vehicles such as family discretionary trusts are quite commonplace, correct structuring can only be determined from an analysis of your personal and family circumstances, including any past investment and business dealings.

Once your entities are set up and determined, it is also important for your accountant to register any new entities for a Tax File Number (TFN), Australian Business Number (ABN) and group / PAYG / GST taxes if appropriate.

C LOCATING YOUR PROPERTY AND GOING TO CONTRACT

Found your property? Here we cover the role of the agent, signing an offer and acceptance and entry into the formal contract of sale.

The Agent

The agent is generally your first point of contact concerning the motel or caravan park you may be considering. The agent you are likely to deal with will be a motel and/or caravan park expert. Be cautious of any agent who does not specialise in this sector – they are unlikely to represent to you the true nature of the business you are considering because they themselves do not know the right questions to ask the vendor.

A specialist agent will have many similar listings and can actually assist you in working out whether the motel and caravan park industry is right for you. Ask them questions and tap into their operational knowledge – most have not just sold, but also operated, these types of businesses in the past.

Whilst lawyers may like to claim to be the lynchpin in the transaction, the reality is this role is undertaken by the agent. Although the agent technically acts for the seller, he or she nevertheless provides an invaluable direct link between the vendor and the purchaser during the course of the deal. The agent enjoys this unique position to quickly pass information from one party to another, and negotiate any items that come up after the contracts are entered into.

The agent is paid a commission on the sale by the vendor when it settles, and virtually single handily coordinates the pre-contract offer and acceptance process.

Offer and Acceptance

The offer and acceptance is a one to two page tool for better recording the negotiation that often occurs over the price, conditions and timing of a motel or caravan park purchase.

The offer and acceptance rarely involves lawyers as it is not binding. An experienced agent will help guide you through this process and ask you the right questions to ensure all key matters are covered. Expect to be asked whether you need a long settlement, if a valuation is required, and of course, the most important items of what price has been agreed and how much deposit are you offering up front!

Signing Up

Once you have your offer accepted, either the agent or the vendor's lawyer will prepare the contracts of sale, converting the non binding offer and acceptance into a formalised watertight promise between the vendor and purchaser. The role of both the vendor's and the purchaser's lawyers is to ensure the contracts reflect the offer and acceptance exchanged and their client's instructions.

Whilst most motel and caravan park contracts are relatively standard, each has its own nuances depending on the key contract terms and the type of accommodation business being sold.

Once contracts are finalised and agreed, the agent will typically arrange for their execution by each party. Once signed, each party will then have their copy distributed to their lawyer. Only then will timeframes for satisfying contract conditions commence.

D THE KEY CONDITIONS

In the pages ahead, we will consider the key conditions in a typical contract and the role each of these advisors play in your motel or caravan park purchase.

Most motel and caravan park contracts will be subject to four or five key conditions:-

1. **Accounting verification;**
2. **Legal due diligence;**
3. **Finance approval;**
4. **Landlord consent (leasehold businesses only); and**
5. **Transfer of any licences necessary to conduct the business.**

In some jurisdictions, it can be common for the motel or caravan park contract to only be subject to conditions 4 and 5, on the basis that the accounting verification, legal due diligence and finance approval will be expected to be satisfied prior to exchange of contracts. This highlights the importance of having any contract document reviewed prior to signing.

Whilst the timing for addressing these conditions is generally in this order, this is not to say they must be dealt with in the same manner and order in every instance. If the transaction warrants a different sequence, this will be discussed with your lawyer prior to entering into the contract.

Otherwise, this sequencing ensures that your financier (and valuer) will have access to copies of the reports from your accountant and lawyer prior to finalising the valuation or submitting your finance application for approval.

1. Accounting Verification

A motel industry specialist accountant is critical not just for their expertise in reviewing the performance of the motel, but also to ensure your prospective financier is prepared to rely on their report in lieu of carrying out their own verification (which would be at your cost). You should always ask your accountant whether they hold specific experience in the motel sector and whether their report is accepted by industry financiers.

Timing – The accountant is generally ‘first on the scene’, with legal due diligence generally delayed until after the accountant and the purchaser are satisfied with respect to the review of the motel’s trading figures. This is predominantly because the motel’s trading performance is what it is – no amount of accountant wizardry can fix bad numbers. Aspects of the accountant’s report will also be relevant to the lawyer’s legal due diligence.

Verification Process – Unlike the legal due diligence process, the accountant’s verification will virtually always include an onsite visit to the motel. This provides the accountant with the opportunity to interview the vendor, access their books and records (including computer systems) and provide first hand observations on the suitability and sustainability of income and expenses included in the vendor’s profit and loss figures.

CONTRACT POINTERS

- As soon as your offer is accepted, discuss with your prospective accountant their availability to attend onsite (bearing in mind travel arrangements will need to be made);
- If you have any specific concerns about the vendor’s trading figures provided by the selling agent, discuss them with your accountant prior to their verification;
- Read and understand the verification report (including any assumptions made), prior to confirming to your lawyer that you are satisfied with respect to figures;
- Ensure you have support from your accountant on handover if necessary – you cannot solely rely on a cooperative vendor during pre and post settlement tuition.

Report - Your accountant's report should cover the whole ambit of financial information associated with the motel, including detailed analysis of revenue, trade debtors and creditors, staffing and wage costs, occupancy rates, forward bookings, service agreements, accounting systems in place and those to be carried over, customer and competitor highlights and star rating impacts.

After settlement – Once your accountant has completed the verification, he or she will generally only become involved again in the lead up and after settlement. Your accountant can assist in keeping your books and records accurate and up to date, and prepare your tax returns and trading statements for the tax office and your financier.

2. Legal due diligence

Aside from our role assisting in all aspects of the transaction, a key part of our engagement is the legal due diligence on the motel business and review of the lease (in the case of leasehold motels).

Timing - Our report is generally commenced as soon as we have an indication from you and your accountant that you are satisfied with the review of the figures. Along with your accountant's verification report, the legal due diligence report should heavily influence the decision to proceed and on what terms.

Due diligence process – Unlike the accountant, there is no need for the lawyer to attend onsite. Reliance is placed on documentation provided by the vendor's solicitor as required by the contract, and searches carried out against the vendor, the land and the motel business.

The Uniqueness of our Report - Unlike many lawyers, our report highlights not just the legal aspects of operating the business, but also key commercial items for your consideration (drawing on our extensive experience and industry know how). Our report also gives strong regard to potential impacts on resale prospects (an aspect which is often disregarded by other lawyers).

Amongst other items, our extensive report covers:

- a detailed description of documentation review and searches carried out;
- analysis of the key commercial terms in the contract, service contracts, chain arrangements, franchise agreements, and issues to look out for;

- a meticulous review of the lease for motels / caravan parks involving a leasehold interest;
- a dedicated review of liquor and food licence requirements (if appropriate), and vendor compliance with the requirements of these licences;
- a thorough investigation of intellectual property issues relating to the business including website domain ownership, business name transfer, trademarks, phone and facsimile continuity and postal address; and
- planning and classification matters and searches on the selling entities.

CONTRACT POINTERS

- Your lawyer will generally be in close contact with the agent, your accountant and your finance broker / financier throughout the entire transaction. Nevertheless, keep your lawyer informed about the outcome of onsite inspections, any hurdles encountered with your financing, or personal circumstances which your lawyer should be aware.
- Do not rely solely on your lawyer's legal due diligence report. Make sure you read all of the attachments in full, including the motel or caravan park lease for leasehold purchases.
- Consider carefully any recommendations in the report. Matters which may not concern you may concern the majority of the market. This will almost inevitably present you with issues when you go to sell.

3. Finance Approval

As a specialist provider to the motel industry, we can put you in touch with dedicated accommodation sector finance brokers and banks. Like the accounting and legal industries, financing the motel and caravan park industries is a niche area, requiring an exceptional knowledge of its commercial drivers. You cannot expect to approach your local banker in the hope that he or she can write a loan for you that is competitive and considers the unique nature of the business you are looking to acquire. Using a non specialist lender who does not understand how accommodation sector funding works can also jeopardise the transaction settling, exposing you to potential costs and contract default.

Applying - Aside from demonstrating your usual finance credentials, your motel / caravan park sector specialist financier will normally require a valuation of the business and/or freehold, a copy of an industry recognised accountant's verification report and a copy of an industry recognised lawyer's legal due diligence report prior to being able to submit your application for credit approval. Once all this information is to hand, approvals are often determined within 5 working days.

CONTRACT POINTERS

- Funding pre-qualification is inexpensive and an important step to consider prior to proceeding to contract. This is particularly important if you are looking to borrow against existing property assets or refinancing;
- Discuss with your broker the likely costs associated with obtaining finance;
- Supply financials and other records promptly when requested by your finance broker or bank to ensure contract dates can be met;
- With the assistance of your lawyer, be aware of the bank's loan conditions precedent (before settlement) and subsequent (after settlement) prior to confirming satisfactory finance under the Contract.

Loan Amount - Although each bank's lending criteria differs depending on the location and nature of a motel, as a rule of thumb (and subject to debt serviceability and experience), banks will typically advance on a 65% loan to value ratio for freehold interests, and 50% of the valuation of going concern leasehold business. In some cases, a specialist broker can access greater gearing for experienced operators.

Loan Term - The term of the loan is generally dictated by the balance term remaining on the motel / caravan park lease, or 15 years, whichever is the lesser. This is a crucial consideration for highly geared purchasers with a short balance term remaining on the motel or caravan park lease. It is also a reason why prospective selling moteliere and operators should top up their lease where possible to ensure it remains above this 15 year threshold.

Bank Security - For leasehold interests, the financier's security tends to be in the form of a charge over your lease. This is accompanied by a deed between the landlord and the financier allowing the financier right of entry in the event that the tenant defaults under the motel lease or fails to meet its loan repayments to the bank. For freehold interests, the bank will take a mortgage akin to any other commercial property lending scenario, accompanied by a registered interest over the motel business.

Costs - In terms of upfront costs, you will be expected to bear the bank's valuation costs and the preparation of its security documentation. This is in addition to any application or loan approval fees the bank may charge.

After Settlement - Most motel and caravan park funders will require you to report to them at regular intervals after settlement as to performance and profitability key indicators. These are typically known as conditions subsequent. For leasehold operators, funders may also have additional insurance requirements above those noted in the lease. Your funder will normally provide you with merchant facilities and other banking products to ensure continuity in business operations.

4. Landlord Consent

Once the purchaser has confirmed satisfactory accounting verification, legal due diligence and finance (and paid balance deposits if any), the vendor knows that it has a deal and the contract is commonly noted as 'being unconditional'. This is because the remaining conditions of licence transfer and landlord consent are outside the ultimate control of the purchaser (and its advisors).

Landlord consent is a significant part of what makes a motel or caravan park transaction different to many other types of business purchases. In virtually all instances, the freehold owner of the motel is entitled to satisfy itself as to the credentials of the purchaser prior to granting its consent to the assignment of the lease from the vendor to the purchaser. Exactly how extensive or protracted the landlord and its advisors make this process is variable. Generally the lease will only provide that the landlord cannot unreasonably refuse or delay its consent.

Demonstrating Credentials - The lawyers take care of the negotiation of the deed consenting to the assignment of the lease. That leaves the purchaser to focus on substantiating their credentials and financial position to the landlord. Ordinarily a landlord will require the following:

- Resume highlighting past business experience and qualifications. A business plan can also be helpful if this is your first motel and caravan park;
- Two business/trade references and two character references – these need not be any more than a single page and should include contact details. A letter from your accountant is often a good reference, as are references from business associates, people with whom you have had credit with in the past, or friends of good standing in the community;
- Evidence of financial standing, generally in the form of a statement of assets and liabilities, and a copy of your approval letter from the financier; and
- Police check of any directors or persons to be involved in the operation of the business (these are now relatively quick and inexpensive to obtain).

Right of Entry Deed - If your bank is taking security over the leasehold interest, it will generally also require the landlord to consent to the mortgaging of the lease, and execute a right of entry deed. This deed records the landlord's agreement to notify your financier of any default, and allows your financier to take possession and operate of the business should you fail to make your repayments under the loan. This document is relatively standard and except in limited cases, is usually finalised quickly and concurrently with the landlord's consent to the assignment of the lease.

CONTRACT POINTERS

- Get your resumes and references in order before you proceed to contract. You will be busy enough without worrying about them at the back end of the transaction. Your credential documentation for your financier can often be replicated easily for the landlord.
- Make yourself available to meet with the landlord as and when they require. By all means take a holiday before you take over the business, but don't let this jeopardise the timeliness of landlord consent and cause delays to the settlement date.



5. Licences

Whilst there is no particular licence required to operate a motel or caravan park, most businesses include either the provision of cooked meals or the supply of liquor or both. In such instances, the contract is generally conditional upon the transfer of the liquor licence to the purchaser and the purchaser obtaining a food licence.

Liquor Licence - Of all the steps in purchasing the motel or caravan park, the transfer of the State Government administered liquor licence often takes the greatest length of time. This is largely due to government department transfer processing times rather than the work necessary to achieve the transfer.

As a result, it is critical that the purchaser's lawyer obtains the transfer consent paperwork from the vendor as soon as the contract has been entered into. That way, the application for the transfer of the liquor licence can be lodged as soon as the purchaser has completed their necessary training. You may also need to complete the responsible service of alcohol course depending on your past experience.

Food Licence - Food licences are issued and monitored at a Local Government issue. Accordingly, every local authority has a slightly different mechanism and paperwork for being issued with a food licence. Some authorities will transfer licences, whilst other authorities will insist on the issue of a new licence. Regardless, the obtaining of a food licence is generally a procedural exercise although it is important to familiarise yourself with the requirements of the licence and the inspection timeframes.

CONTRACT POINTERS

- Do some homework early in the search for a motel as to what training you require to satisfy the criteria for the liquor licence. There is no requirement for you to have entered into a contract to purchase a motel before you can complete the training course.
- Follow up the submission of transfer of licence paperwork as soon as the contract is entered into.
- Regular persistence in chasing the relevant authorities can often see your application moved closer to 'the top of the pile' and ensure settlement is not delayed whilst a transfer or issue of a licence is awaited.

E SETTLEMENT

Once all the conditions in the contract are satisfied, arrangements are made for settlement.

As purchaser, you will be onsite in the week leading up to settlement to manage handover and learn the ins and outs of operating that particular motel or caravan park. Keys, access passes, wholesaler arrangements, and adjusting on forward bookings all need to be covered during this time. The assistance you receive from the vendor prior to settlement is likely to be of superior quality than that provided after settlement.

On the morning of settlement (or the evening before) you will also have the joint task of carrying out a stocktake of consumables in the motel. The agreed stock amount is then payable by the purchaser to the vendor on settlement, unless it exceeds the maximum stock amount noted in the contract (in which case you can elect to reduce the stock to be acquired so as not to exceed this amount).

Like most other property purchases, you are personally responsible for switching over the phones, electricity, gas and other service accounts with the relevant providers.

Your lawyers and bank will, in the days leading up to settlement, be busily finalising all the paperwork and logistics associated with the movement of money from the purchaser to the vendor. Settlement itself is actually quite a fast process, often taking less than 30 minutes. In exchange for cheques, ownership documentation is first handed to the lawyers for the purchaser, and then onto the purchaser's bank to be held as security for their loan.

Once settlement has been confirmed, the motel or caravan park is officially the purchaser's. The purchaser will therefore be entitled to all takings from and including the day of settlement. The vendor generally remains available to the purchaser to provide final assistance and tuition. The vendor's role thereafter is to provide any post contact assistance set out in the contract such as being available for queries in the week following settlement. The vendor must also observe any restraint from competing with the business it has just sold, for the period and geographical territory set out in the contract. This ensures that maximum goodwill is preserved for the purchaser.

Your financier should also be followed up to ensure your merchant facilities are in place and operational in time for settlement.

Following settlement, a bound document folder will be provided to you by our office for your quick reference and for tax and other record keeping purposes.



F FINAL THOUGHTS

A handbook such as this is no substitute for getting the right legal advice for your personal circumstances and the motel or caravan park you are considering. It is very important that you seek, consider and act upon the advice of your specialist legal, accounting and finance advisors. Of course, our team of legal specialists are always very happy to alleviate any concerns prior to you making an offer and our actual engagement.

Otherwise, we hope you have received value from this handbook and take this opportunity to express our best wishes as you embark on the rewarding journey towards the ownership of your desired accommodation industry business.



Liability limited by a scheme approved under the professional standards legislation

UNDERSTANDING A MOTEL / CARAVAN PARK LEASE

As the cornerstone of your relationship with the landlord, the lease is the most important document for a leasehold motelier or caravan park operator. It is also a very often misunderstood document, notwithstanding that it is capable of adding or reducing hundreds of thousands of dollars to the value of the motel or caravan park operation.

As part of our extensive legal due diligence, we thoroughly review every clause in the lease and report to you on our analysis of the key commercial items contained within it and their impact on your re-sale prospects.

Term

Whilst rent may be the most obvious lease provision to a purchaser, the term of the lease normally has the greatest impact upon the value of a leasehold motel or caravan park.

The term of the lease can either be stated as a set number of years from commencement, or more commonly via an original term accompanied by sometimes as many as five further option terms of five years each (which you may see recorded as a 5 x 5 x 5 x 5 x 5 lease). Option terms in theory provide flexibility for a tenant who may not want to commit for the full term. The reality of course is that unless the business is failing to generate a profit, it would almost always be commercially senseless to fail to exercise an option. A landlord may also view option terms as another means of keeping the tenant accountable. Typically a landlord is not obliged to recognise the exercise of an option by the tenant if the tenant is in default (for example, behind on rent).

Any term in excess of fifteen (15) years will not normally impact upon the financing of the business (as banks tend to structure their business loan out over a maximum of 15 years). From a tenant's perspective, it is therefore always best to pursue a top up of the balance lease term before it drops below this threshold as it may hinder the ability to sell. Advice should be taken prior to negotiating an increased term with a landlord, who may be eager to work on an industry formula for determining the value of each additional year added to the lease.

Permitted use

The permitted use set out in a motel or caravan park lease can be more influential than you may think. Do you have the right to operate a conference facility or a kiosk / coffee shop? Is this use consistent with the planning and building approval? These are items closely reviewed as part of our standard due diligence.

Rent and Rent Review

From a purchaser's perspective, the importance of rent is only outshone by the balance term remaining on the lease. You can expect your motel or caravan park rent to be payable by equal monthly instalments in advance.

The manner in which rent is reviewed differs from lease to lease, although by far the most common method of review is adjusting the rent in accordance with movement in the Consumer Price Index (CPI). CPI is a government statistic measuring the rise (or fall) in cost of living across numerous different categories as wide ranging as fuel to bananas.

Whilst nevertheless arising in many leases, market reviews and other subjective increases at the discretion of the landlord should be avoided where possible (note however attitudes and expectations differ on this point depending on the location of the motel / caravan park). Most market reviews also operate solely in favour of the landlord, meaning they are virtually a no win situation for the leasehold owner.

Outgoings

Motel leases can go to painstaking levels to describe the outgoings and services associated with the land and the operation of the motel that are payable by the tenant.

Generally any costs associated with owning the land are payable by the tenant. This can include the landlord's land tax (following the removal of the restriction that previously forbade landlords from recovering this charge from tenants).

APPENDIX – UNDERSTANDING A MOTEL / CARAVAN PARK LEASE

Assignment

The landlord is entitled to satisfy itself that the prospective buyer complies with the qualification criteria set out in the lease. It is almost always the tenant's responsibility to ensure the person to whom it sells complies, although it must be pointed out that the landlord (and its financier) cannot unreasonably withhold their consent to the assignment. It is important that these provisions are suitable for a motel / caravan park arrangement. There should also be an obligation on a landlord to not unreasonably withhold its consent to the mortgaging of the leasehold interest by the tenant.

First right of refusal

Most leases will include a condition on assignment that the landlord must first be offered the opportunity to acquire the business on terms no less favourable than those entered into with a prospective purchaser. Quite often, the offer need only be held open for 14 days.

You can also expect there to be a reverse provision – allowing a tenant the first opportunity to purchase the freehold if the landlord chooses to sell.

Rights of surrender and demolition clauses

These types of provisions are dangerous unless accompanied by certain and valuation consideration passing from the landlord to the tenant if the landlord elects to redevelop the site. For example, a landlord may be required to pay twice market value to a tenant for exercising such a right, a big difference to a similar scenario in a retail shop or other commercial lease.

Maintenance and redecoration

In a motel setting, often the maintenance and repair obligations will link to the retention of the AAA star rating for the motel (assuming it is rated) and when the particular item requires replacement or updating. For self-rated motels, the maintenance and repair obligations are more ambiguous and subjective, instead relying on each party's interpretation of what being 'in good repair' and to a 'first class standard' may mean. To help overcome this subjectiveness, an unrated property may also have written into the lease that redecoration is to happen so many times within a set number of years.

Like regular commercial leases, the landlord carries the responsibility for most capital repairs (including all structural works). But unlike regular commercial leases, the responsibility for capital repairs is regularly shifted onto the tenant by the dedication of many items that an outsider would consider to be landlord property to instead be the property of the tenant. For example, modern leases will often provide that floor tiles and coverings, shower systems, vanities and built in cupboards are the property of the tenant and hence the obligation on the tenant to repair and replace.

Although it may seem strange, we prefer to see most of the repair obligations fall upon the tenant, as it allows the tenant to maintain control over the level, standard and timeliness of upkeep of the accommodation. This is important given the key link between the standard of the motel and the profitability of the business. As a leasehold operator, you do not want your business suffering because the landlord is slow or cutting corners in their maintenance of the motel.



Insurance

The lease will almost always requires you to hold (or reimburse the landlord) for public risk insurance, plate glass insurance, building insurance, landlord's loss of profits insurance, worker's compensation insurance and any other insurances reasonably required by the landlord. These insurances will also likely be a term of any finance approval.

Regardless of the wording in the lease or the finance letter of approval, it is recommended any purchaser seek specialist advice from an experienced insurer broker to ensure that sufficient policies of insurance are held to adequately cover all risks to which a motel or caravan park operator are exposed to in conducting their business. Any insurance policies relating to the business should also note the interest of the landlord and mortgagee.

Personal guarantees

With most leases operated through corporate entities (either in its own right or as trustee for a family trust), the landlord will almost always require personal guarantees from the principal directors and shareholders of the company. Should the company not be able to meet its obligations under the lease, then the landlord may look to the guarantors personally for any debts or breached covenants. This is especially important from a landlord perspective given rarely is a bond held like other shorter term tenancies.

As a purchaser, you should also be aware that the landlord is normally under no obligation to provide a release of your guarantee, even after the assignment of the lease to a party to whom you later sell the motel business to. This is an issue for almost every motel operator and another reason why a series of five year option terms are preferred over a straight 20-30 year lease term.

Restriction on Mortgaging your Interest

Most leases provide that a tenant cannot mortgage its interest in the lease in favour of its bank without the landlord's consent. It is therefore important to seek this consent and ideally pursue the landlord to include a provision in the lease whereby it cannot unreasonably withhold or delay its consent to your bank taking security over the leasehold interest.

Termination

If you default as a tenant under the lease, the landlord may attempt to terminate the lease and re-enter the premises or alternatively convert your lease to a month to month tenancy (subject to any right of entry requirements granted in favour of your bank). The landlord must comply with the Property Law Act 1974 in taking steps to terminate your lease. Unless stated otherwise, this includes providing you with a notice outlining the breach relied upon, and affording you a reasonable opportunity to remedy it (generally considered to be fourteen (14) days).

Of course, if the lease is terminated as a consequence of your default, the landlord may have a cause of action against you for the balance of rent under the lease and any other costs it sustains. In such circumstances, the landlord is generally obliged to take all reasonable circumstances to mitigate any loss sustained.



APPENDIX – UNDERSTANDING A MOTEL / CARAVAN PARK LEASE

End of lease procedures

In an era of long term leases and the financing of motel and caravan park purchases, the reality is it is extremely unlikely that a lease will expire. This is because a landlord and a tenant would usually negotiate a new lease well before the end of the lease term, to ensure the business' future saleability.

Strong consideration should nevertheless be given to end of lease procedures, as they can impact on sale prospects. Most leases will oblige the tenant to maintain the facility to ensure it continues to enjoy at least a certain star rating or standard.

With regards to the tenant's property, given much of it is impractical to remove (for example toilet cisterns, vanities and floor coverings), it is important the lease contains a condition that the landlord must purchase the tenant's property in the motel at the end of the lease. Such a clause should provide that if a price cannot be agreed, it will be determined by a valuer acting as an expert and not an arbitrator.

Most leases will also oblige a tenant to provide the most recent two years' trading figures at the end of the lease. This is a normal procedure to assist the landlord in marketing or valuing the motel for re-sale purposes.

GST

Since 2000, it has become vital for leases to include a GST recovery clause to ensure either party of the lease is not prejudiced by the imposition of this tax. Such a clause will also require the parties to be registered for GST. This is also a key criteria in enabling the motel to be sold as a going concern, relieving the need for the motel purchase price to have GST added to it.

FINAL POINTERS

- Together with the balance of the lease, each of the items briefly noted here contribute to the attractiveness of a lease to a potential purchaser.
- Entering into a lease which is not appealing to a potential purchaser can of course have dire consequences for resale value. Accordingly, it is essential to receive the right advice on any new lease or variation of an existing lease.
- As accommodation industry lawyers, we are of course very well placed to assist in this regard and would welcome the opportunity.

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