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Devil is in the detail when exercising an option to renew a commercial lease

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Many commercial leases contain an option to renew for the tenant (lessee) which must be exercised by giving notice in writing to the landlord (lessor) within a time frame. A South Australian dispute around service of an option to renew highlights the importance of understanding the finer details of your commercial lease.

There is clear law that if notice to exercise an option to renew a commercial (including retail) lease is not given by the due date, the tenant loses the right to renew. Amongst other requirements, a lease will also contain provisions about how an option to renew is to be served on the landlord.

Tenants must study those provisions carefully when proposing to give a notice.

Many leases do not contain provisions dealing with service by email (even if the parties are communicating by email).

There are provisions in the *Electronic Communications Act 2000* which may assist in giving notice by email but unless clearly spelt out in the lease, there is room for argument.

Dispute between publicans and their landlord

A media report of a dispute over the giving of a notice, and in particular the method of giving notice, to exercise an option to renew the lease for a hotel in Adelaide highlights some issues.

The tenant had a right of renewal for 5 years. There was a time frame in which they could give a “notice in writing”, and a request to renew was given within that period. That is, the lessee exercised their option within the relevant timeframes – this was never in dispute.

Although the notice was said to be posted (via Australia Post) to the last known place of business or residence of the landlord, that is disputed.

It is also alleged that the notice was given to a concierge at the landlord's building address. This is also disputed.

ASIC records of the corporate landlord of the hotel show different addresses for the registered office and the principal place of business, which is not uncommon.

At the time of writing this article the dispute is ongoing, however, the lessee and landlord have come to an arrangement for the lessee to maintain current operations of the hotel until the dispute is finalised in court.

Understanding your obligations when exercising an option to renew your commercial lease

Tenants wishing to exercise a right of renewal must study the lease terms carefully and comply with the express terms set out, both as to time **and** as to method of service.

An acknowledgement of receipt of your written communication exercising your option should be obtained or detailed records of the service maintained to be produced in any later dispute.

In order to ensure the method of service of an option to renew is valid, we strongly recommend:

- Confirming the correct address for service; and
- Use a registered courier service for delivery and require a confirmation of delivery in writing; or
- Use Australia Post's "registered delivery" service with signature required; or
- Hand delivery of your notice and require a signature on delivery; or
- If permitted, transmit by email to an email address shown in the lease document and get an acknowledgement of receipt.

Get help from a commercial lawyer

It remains to be seen how this current case will play out in the court system.

If you find yourself in a similar situation, or you have any other issues related to your commercial or retail lease, you should seek legal advice early from an experienced commercial lawyer. The sooner you act, the more options we have to help you resolve a dispute.

Contact Daenke Lawyers

08 7477 8440

reception@daenkelawyers.com.au

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