



BANK GUARANTEES: ENSURING YOUR LEASE SECURITY GIVES YOU GOOD SECURITY?

Landlords frequently rely on a bank guarantee as security to ensure tenants comply with their obligations under a lease. Care must be taken to ensure that such bank guarantee is an effective security and cannot be challenged by either the tenant or the bank when the time comes for the landlord to call upon the security.

The following should be considered when accepting a bank guarantee as security to ensure that the security held is effective and capable of being called on by the landlord:-

- Unconditional – the bank guarantee should provide an 'unconditional undertaking' by the bank to pay the guaranteed amount stipulated in the bank guarantee to the landlord if demand is made. The guarantee should not be conditional.
- Australian bank – the bank guarantee should be from an Australian trading bank with an Australian trading licence. If not, the landlord may have difficulty claiming on the bank guarantee if the bank is overseas with no offices or direct contact in Australia.
- Customer – the party for whom the bank guarantee is provided should be the tenant.
- Favouree – the bank guarantee should clearly identify the landlord as the favouree, specifying the name of the landlord and the ACN for corporate landlords.
- Description – an area where a lot of issues arise is where the purpose of the bank guarantee is not clearly expressed. A bank guarantee given under a lease should cover 'all of the tenants obligations' in respect of the premises, which should be clearly identified as being pursuant to the lease and any associated obligations e.g. under a carpark licence, seating area licence or storage licence. The description should not be limited to rent under the lease as this will limit the landlord's ability to call on the bank guarantee to enforce any of the tenant's other obligations.
- Assignable – the bank guarantee should be capable of assignment to allow the guarantee to be transferred by the landlord to a purchaser of the freehold if such a transaction occurs during the term of the lease.
- Expiry Date – it is preferable that a bank guarantee not contain an expiry date. In recent years some banks have altered their standard practice and now require an expiry date to be inserted in all bank guarantees. If the customer is unable to negotiate to remove this requirement then the expiry date of the bank guarantee should be for as long as possible after the expiry date of the lease, to ensure that the guarantee covers any period of make good by the tenant and any holding over periods.
- Amount – the amount of the guarantee should be as per the lease and printed clearly in the documentation. When specifying the amount of the guarantee in the lease the bank guarantee should refer to either a fixed amount or if referring to an amount by reference to a particular number of months' rent the reference should be inclusive of rent, outgoings, any promotional levies and GST.

It is vital that landlords and their solicitor carefully review the terms of any bank guarantee prior to accepting the document to ensure that any problems are avoided if the undesirable circumstances arise and the landlord is required to call on the bank guarantee.

If you are a landlord or a tenant and have an issue with bank guarantees or a lease generally, please [contact](#) a member of our Commercial Team to discuss.