

COMMERCIAL & RETAIL LEASING UPDATE

ISSUE 4, MARCH 2010

“IT’S JUST A STANDARD LEASE ISN’T IT?”

I have heard the question in the headline several times in the past fortnight from people on both sides of the landlord/tenant divide.

The purpose of this article is to briefly discuss:-

- The fact that there is no such thing as a “standard lease”;
- some of the different types of leases; and
- some common problems which are best avoided in the lease preparation and finalisation process.

Hopefully this information will be a resource for agents, landlords and tenants to help them get “*bang for their buck*” when leases need to be prepared and finalised.

1. THE “REIQ STANDARD” LEASES

The closest thing to a “standard lease” is the REIQ “*Commercial Tenancy Agreement*” (8 pages long) and “*Lease for a Retail Shop*” (14 pages long). They are usually produced by letting agents on the parties’ instructions.

A Swiss army knife will never be a scalpel or a machete. If you need to complete a particular task like performing surgery or cutting down a tree the pocketknife will not be ideal; however if you want something lightweight and ready for a number of simple jobs the pocketknife/REIQ Lease is a handy instrument.

Many letting agents, landlords and tenants are already aware of the limitations of the REIQ documents. Some of the drawbacks are summarised below:-

- A limited palette of enforcement rights for landlords;
- Security bond and rent review clauses which can be less than ideal;
- Limited flexibility for rent reviews and other matters. The person completing the forms sometimes needs an abundance of creativity to successfully achieve the intended result within the limited confines of the forms;
- Documents not capable of registration in the Land Titles Office.

Despite these drawbacks, most will agree that the right circumstances to use the REIQ documents are for short leases involving small amounts of rent. If the parties are only contemplating \$7,000.00 per year in rent they are often unwilling to collectively spend \$500.00- \$2,000.00 on a better lease document.

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The REIQ Lease will usually be better than no lease agreement at all.

These REIQ documents have numerous limitations, many of which are clearly acknowledged on the first page of each lease. It is not the purpose of this article to criticise the REIQ lease documents as they fill a particular niche.

The key is for all parties (letting agents, landlords, tenants and solicitors) to be aware of the REIQ lease limitations and make an informed decision about using them.

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2. REGISTERABLE LEASE (using Titles Office Forms 7 & 20)

A lease on Titles Office Forms 7 & 20 is usually prepared by (or originally sourced from) a solicitor and is capable of registration in the Titles Office if completed correctly.

There are no standard terms constituting the content of this type of lease; however there are usually consistent themes. In our experience these leases can range in length from 15 to 75 pages. Approximately 30 pages is common.

While this style of lease will usually be better adapted to the circumstances of the particular landlord and tenant; it is important to watch for common errors. Some of these are summarised below:-

- **“Ratchet clauses” in retail leases.** A clause which says “the rent can never decrease” is potentially a major problem in a retail lease because rent reviews can be made invalid.
- **The correct Land Title and party information on Page 1.** The advantage of a registrable lease can be lost if there are fundamental errors on the Form 7.
- **Effective rent reviews.** The rent review clauses (and their cross-referencing to other information in the lease) needs to be checked to make sure that it is effective. We have seen a number of leases which inadvertently refer to the wrong items/clauses or have CPI review formulas where the basic mathematics does not work. A sharp tenant can try to take advantage of such technicalities.

There are also a number of general matters of form and substance which should be considered:-

- **Difficult language and layout.** A number of older lease precedents are written in overly complicated language. A lease is a functional document and it should be written in plain English.
- **Excessive Length.** When it comes to lease clauses Landlords and their advisers should avoid the assumption that “some is good, therefore more is better”. Sometimes the circumstances warrant a long and detailed document however a 75-100 page lease for a simple commercial tenancy is completely overboard. The disadvantages are often excessive transactional costs and delays as both parties wrestle with an unwieldy document.





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- **Too much content for the situation.** A well-drafted lease will not contain too many clauses which are irrelevant to the needs of the landlord and tenant. If there is no car parking, lifts or Percentage Rent payable these clauses can be deleted entirely to keep the document short.
- **General unreasonableness.** While most leases are an exercise in listing the landlord's rights; if this exercise goes too far and the document is manifestly unreasonable this will simply prolong or disrupt negotiations and potentially undo the letting agent's hard work. A lease should be "firm but fair".
- **Excessive reliance on other documents.** Occasionally a party will want to "piggy back" a new lease relationship onto an existing lease document with minor amendments. Presumably this is to save time or money in the initial stages.

In our opinion this is best avoided as little time or money is actually saved at the outset and considerable wastage and confusion is the likely result for the balance of the lease term. Consider a lease where one must refer to the terms of:-

- (i) the brief main lease;
- (ii) a different registered lease for most of the clauses; and
- (iii) a Form 13 amendment (eg. to record an exercised option).

This sort of mess requires a "lawyer's picnic" just to extract simple answers for the parties.

- **Overly aggressive indemnities and releases.** This will be the topic a subsequent Commercial & Retail Leasing Update however; in summary an overly aggressive indemnity or release looks good for the landlord "on paper" but can have serious repercussions for the tenant's insurance which can ultimately affect the landlord.

In our opinion it is a lot better to have basic indemnities and releases (which remain within the bounds of ordinary legal liability) and allow each parties' insurer to do its job. Thankfully some newer leases being produced are following this sensible trend.

3. RECOMMENDATIONS FOR LANDLORDS

Where practical, landlords should have a lease document drawn up for their particular circumstances which adheres to the general principles discussed above.

If the landlord has multiple tenancies (especially in the same complex) there is a lot to be said for a consistent lease document for all tenants with individual tailoring where required.

Sometimes even consistent key dates can reduce the administrative workload (eg. all CPI reviews for all tenants on 1 July each year).

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4. RECOMMENDATIONS FOR TENANTS

There is no such thing as a “standard lease”, so you cannot assume that the document will meet your requirements simply because it looks orthodox and/or is described as “standard”.

We recommend that tenants engage a lawyer to be a second set of technical eyes to review the document presented by the landlord. Often simple (but potentially significant) errors will be detected and changed by mutual agreement.

If there are more serious issues in the draft lease, you will have a chance to discuss these with your lawyer and work out your negotiation strategy.

In our opinion the time and money spent finalising a suitable lease document at the start of the tenancy can save thousands of dollars and significant stress when issues come to a head later.

Julian Creagh
Solicitor
Quinn & Scattini

This update is for your information and interest only. It is not intended to be comprehensive, and it **does not constitute and must not be relied on as legal advice**. You must seek specific advice tailored to your circumstances.

If you would like to ask any questions about this or any other leasing issue Julian may be contacted on (07) 3221 1838 between 8:00am and 5:30pm Monday to Friday or on email jcreagh@quinnscattini.com.au

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Level 28 Central Plaza One
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