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## **FAQ's Retail & Commercial Lease guide for Landlord's & Tenants**

### **1. What is a Lease?**

A lease is a detailed document setting out the relationship between landlord and tenant.

A lease will contain key information such as the amount of rent and the length of the term (and any options).

The lease document will also contain clauses that deal with other events such as default by the tenant, installing & removing the fitout, etc.

### **2. Why should I engage a lawyer to assist with a new lease?**

The average lease is between 30 and 70 pages long. Some of the lease clauses will be relatively standard while other clauses may be unusual and detrimental to you.

In addition, many short "standard form" leases are unsuitable for the parties' requirements and do not contain important elements.

Your Quinn & Scattini leasing lawyer has experience with many leases and will be able to explain to you the important clauses and advise you of any undesirable clauses which should be amended.

If you have any specific requirements your lawyer can ensure that these are inserted into the lease.

Your leasing lawyer can engage in negotiation on your behalf as to any changes that you require and also assist in the finalisation of the technical requirements of your leasing relationship.

### 3. Is my lease a “Retail Shop Lease” any why does that matter?

A lease will be a “Retail Shop Lease” if it meets the criteria set out in the *Retail Shop Leases Act* (“the Act”).

If you are a retail tenant you will gain additional rights and protection under the Act providing that certain criteria are met.

If you are a landlord you have a number of important obligations and limits under the Act which, if breached, can result in severe consequences (e.g. the tenant walking away in the first 6 months of the lease, your annual rent increases being ineffective, etc.).

Your Quinn & Scattini leasing lawyer will be able to assist with these important matters.

### 4. What are the main steps when parties enter into a lease?

The main steps when a landlord and tenant enter into a lease are set out in the table below:-

Stage	Description	Comments
<b><i>Preliminary negotiations</i></b>	Tenant and letting-agent/ landlord engage in preliminary negotiations regarding the availability of premises, the proposed rental amount, term and options etc.	
<b><i>Signing the “Agreement to Lease”</i></b>	<p>The landlord or its agent prepares a 2–4 page “Agreement to Lease” document setting out the important terms of the lease which landlord and tenant sign.</p> <p>This is usually prepared in anticipation of a formal full lease being prepared and signed.</p>	<p>We recommend that you obtain legal advice on an “Agreement to Lease” before you sign it.</p> <p>Depending on the wording you could find yourself already bound to a Lease before the formal document is even produced.</p> <p>Likewise, a landlord could find itself bound to grant a lease to a tenant earlier than intended.</p>

<b>Landlord submits draft Lease</b>	The landlord's solicitors will provide the tenant (or its solicitor) with its draft lease and other requirements for review.	The tenant's solicitor will review the lease at this stage and advise the tenant of important clauses, including those that may require further negotiations.
<b>Negotiation phase</b>	<p>The tenants' solicitor advises the landlord's solicitors of the changes the tenant requires to the lease.</p> <p>The landlord's solicitor advises what requested changes are acceptable and what changes are rejected.</p> <p>Negotiation continues until there is an agreed form of lease.</p>	<p>If the lease is "Retail" the landlord will also need to submit a "Lessor Disclosure Statement" which applies to the final version of the lease.</p> <p>The Tenant will also need to meet its disclosure obligations under the Act.</p>
<b>Execution and finalisation of Lease</b>	<p>The tenant signs 3 copies of the lease and submits these to the landlord (along with the landlord's other requirements - e.g. insurance, security bond etc.).</p> <p>The landlord then signs the lease in triplicate and returns one copy of the tenant.</p>	A Landlord will often grant access to the premises at this stage.
<b>Register Lease</b>	<p>The lease is registered with the Land Titles Office.</p> <p>Often this will require preparation of a Survey Plan in registrable form at the tenant's cost.</p>	Registration of the lease is recommended to protect the tenant's interests, although it is not compulsory.

## 5. What important factors should I consider when negotiating a lease?

The following are examples of important factors that the landlord and tenant must consider when negotiating their lease:-

Factor	Comment
<b>Term &amp; Options</b>	The mix of term of options (combined with other factors such as

	<p>rent review) will be an important factor for landlord and tenant.</p> <p>A tenant will want the flexibility of a shorter term plus options while the landlord will want certainty in relation to the tenant's tenure and to ensure that the rent increases at an appropriate level throughout the life of the lease.</p>
<b>Rent Review</b>	<p>The 3 most common rent review methods are Consumer Price Index (CPI), Fixed Increase and market review.</p> <p>CPI market review will be variable depending on economic trends.</p> <p>Fixed increase will give certainty but may not be reflective of economic and market conditions.</p> <p>Market review allows the parties to adjust the rent in accordance with local conditions but can be a time-consuming, expensive and uncertain process.</p> <p>If the lease is "Retail" the tenant may have the right to obtain an early market review (before exercising its option). This can be an economic and business planning advantage for the tenant.</p> <p>Many leases have a CPI or Fixed review every year except for the first year of each option period which will normally have a Market review.</p>
<b>Security Bond/ Guarantees</b>	<p>A landlord will want the maximum available amount of security from a tenant to protect against default by the tenant.</p> <p>It is common for a landlord to demand a security bond or bank guarantee to the value of between 3 and 6 months rent plus other costs.</p> <p>If the tenant is a Pty Ltd company the landlord may ask for personal guarantees from the Directors. A personal guarantee will put the assets of the Directors at risk.</p>
<b>Fitout matters</b>	<p>The lease will contain important clauses regarding the tenant's initial fitout, further works during the lease and the tenant's requirements at the end of the lease.</p> <p>As fitting-out and reinstating premises can be expensive undertakings open to dispute it is important to ensure the parties' intentions are properly recorded in the lease.</p>
<b>Other matter</b>	<p>Your leasing lawyer will be able to discuss with you other important factors that apply to your situation.</p>

## 6. If the tenant breaches the lease, what is tenant's potential liability?

A tenant (and its guarantor/s if any) can be sued by the landlord for breaching a lease.

The "high water mark" of the tenant's potential liability is the sum of all of the rent that would be payable until the end of the lease. For example if the tenant breaches a 3 year lease at the end of the first year and the rent is \$100,000.00 per annum; the tenant could be sued for \$200,000.00 plus the landlord's other costs.

Depending on the circumstances the landlord could be required to mitigate (reduce) its loss by finding another tenant.

It is not common knowledge that if the tenant assigns the lease to a third party (for example upon selling the tenant's business) the old tenant will often remain liable for any subsequent default of the new tenant. This "assignee's liability" can be modified by the Act or by agreement depending on the circumstances.

Given the enormous financial consequences of breaching a lease it is important that both landlord and tenant get proper lease advice and take all available steps to minimise their risk.

For example, it is important that a landlord obtains a suitable level of security and has a workable lease document in the event of a tenant's default.

## 7. Important Terminology

<b>Word</b>	<b>Meaning</b>
<b><i>Lessee</i></b>	Tenant.
<b><i>Lessor</i></b>	Landlord.
<b><i>Assignment</i></b>	The tenant handing over the lease to a third-party tenant. Assignment most commonly occurs upon sale of the tenant's business to that third party. Assignment of a lease will require the landlord's consent.
<b><i>Assignor</i></b>	The tenant who wishes to assign his/her lease to a third party.
<b><i>Assignee</i></b>	The third party who takes over the tenant's obligations under a lease. Usually the business purchaser.
<b><i>Outgoings</i></b>	<p>The landlord's costs of the building and/or the land which are passed onto a tenant, often as a proportion of the tenant's share of the lettable area.</p> <p>For example; a shopping centre may have annual outgoings of \$1 million and a tenant's proportion of a lettable area may be 1% of a shopping centre. The tenant would have to contribute \$10,000.00 to the landlord's outgoings per year.</p>

<b>Net Lease</b>	A lease where outgoings must be paid in addition to rent.
<b>Gross Lease</b>	A lease where outgoings are included in rent.
<b>Option</b>	<p>A fixed renewal period exercisable by the tenant if certain criteria are met.</p> <p>For example if the lease has a 3-year term with a 3-year option the tenant will usually be able to exercise its option by written notice between 9 and 6 months before the end of the lease.</p> <p>Option–exercise timeframes are usually time-critical.</p> <p>In a “Retail” lease the landlord has an obligation to remind the Tenant of its option-exercise deadline.</p>

## 8. What legal costs are involved?

For landlords we quote a fixed fee for lease preparation and attending to the supporting documentation and other matters. If your lease is non-retail a landlord can pass lease preparation costs on to the tenant.

For tenants we quote a fixed fee for reviewing the lease and advising you on the important terms and any areas of concern. You must then decide what clauses (if any) you wish to negotiate with the landlord. We will usually issue a second bill at the end of the matter which is based on the number of changes you wish to request and the amount of work required to complete the negotiations.

If your premises are to be “retail” under the Act the landlord will be prevented from charging lease preparation costs to you.

While costs is an important factor to consider when commencing business with a new lease, we submit that money spent obtaining the best possible lease in your circumstances can be a source of significant advantage in the future. For example, a good lease can:-

- a. improve the value of your business or land when you wish to sell;
- b. minimise your long-term costs;
- c. minimise the potential for lease disputes; and
- d. ensure that you are in the best possible position in the event of tenant default.

## **9. What if I am already in a lease and require advice?**

Your Quinn & Scattini leasing lawyer will be able to review your current situation and advise you of your available choices, taking into account your lease, circumstances and the general law.

To discuss your leasing requirements, please telephone Julian Creagh on (07) 3221 1838 or email him at [jcreagh@quinnscattini.com.au](mailto:jcreagh@quinnscattini.com.au) between the hours of 8.00 am to 5.30 pm.