

RICS PRACTICE INFORMATION



Make good Australia

Australia

3rd edition, October 2023



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Glossary

The following definitions apply unless the context requires otherwise.

Term	Definition
Assessment of reversionary value	This assessment compares the value of the actual condition of the premises compared with the condition the premises is required to be in when all the repairing obligations in the lease have been met.
Building certifier	A consultant who is qualified and experienced in providing advice regarding building codes and regulations appropriate to a particular property. Building certifiers are typically able to certify works in accordance with the National Construction Code of Australia. In Australia, building certifiers are also known as building surveyors.
Building consultant	A suitably qualified and experienced building professional who understands the processes, procedures and laws involved with make good and can provide considered professional commercial advice. In the UK, building consultants are referred to as building surveyors.
Claim	A claim made by the lessor against the lessee in relation to make-good works under a lease may take the form of a claim for a financial payment (and is the lessor's assessment of their loss) or for the lessee to carry out the works required under the lease.
Claim letter	A letter from a lessor to a lessee setting out a claim.
Commercial property	In the context of this document, a non-residential property that is the subject of a lease between a landlord (lessor) and a tenant (lessee).
Costing	The process of putting a value to the work forming part of a claim.
Demised premises	The property to which a lessee has exclusive possession under a leasehold interest.
Final schedule	A schedule of make good, usually served no more than six months before the expiry of the lease (but may be served after expiry of the lease), in relation to work to be done to the premises at the expiry or the earlier termination of a lease to meet the lessee's make good obligations.
Greening make good	The process of reducing material waste at lease end and encouraging the use of existing fit-outs where possible.

Term	Definition
Interim schedule	A schedule of make good, detailing items of disrepair arising from the lessee's failure to comply with a repair covenant identified by the lessor during the term of the lease, and which the lessor requires to be remedied during the term of the lease.
Make good	Scope of works required to leave a demised premises in a condition consistent with compliance by a lessee with their lease end obligations.
Property professionals	All advisers in relation to matters affecting premises, including building consultants, commercial property managers, fund managers, chartered building surveyors and lawyers.
Reversionary value	The value of the premises when it reverts back to the lessor and when the lessee has met all of their repairing obligations.
Reversionary value diminution	The value difference between the actual condition of the premises when it reverts back to the lessor and the value where the lessee has met all of its repairing obligations, assuming that the condition is worse than that required under lease.
Schedule of condition	<p>In the context of make-good works, this means a schedule prepared at, or immediately prior to, the lease commencement and prior to any of the lessee's works being carried out (whether by the lessor or the lessee) and will usually:</p> <ul style="list-style-type: none"> • comprise a written description of each element of the premises • be accompanied by photographs and/ or drawings • record the standard of condition of the premises, including any relevant surrounding area • be issued to all parties with interests in the condition of the premises • if prepared at lease commencement, be signed by both parties to the lease and dated as an acceptance of it as a true record, and • if prepared at lease commencement, be appended to the signed lease document and then form part of the legal document.
Schedule of make good	A schedule documenting the state of repair of a premises or part of a premises, and the work required to take it to a condition that meets the lessee's obligations under their lease.

Term	Definition
Scott schedule	<p>In a make-good claim, this means a spreadsheet-type format for setting out the lease references, lease interpretations, descriptions of the parts of the premises, descriptions of works required to meet obligations and costs to meet those obligations. The responding lessee can use the Scott schedule format to detail their response to the claim and its costs, and their respective views.</p>
Superseded work	<p>Those works that a lessee is contractually required to undertake, but which are rebuilding considered valueless by other works such as a refurbishment undertaken by the lessor. The property professional preparing the schedule of make good needs to distinguish between items that will and will not be superseded. For example, if a wall needs to be replastered in fact and in accordance with the lease obligations, then this item will legitimately appear in the schedule of make good and be costed.</p> <p>The lessee's property professional may agree that it falls within the covenant to repair, and may agree with the costing. However, there may be an argument that because, for instance, the wall is due to be demolished or altered in some way by the lessor, the work of replastering is superseded or rendered valueless by the intention to alter or demolish the wall.</p>
Without prejudice	<p>This is a form of words put at the top of written correspondence in which an offer to settle a dispute, or an admission of liability, is made. Parties to a conversation or negotiation can also agree at the start of that conversation that the content of that conversation is 'without prejudice' if the conversation relates to an attempt to settle a dispute.</p> <p>The use of the term 'without prejudice' in communications endeavouring to settle a dispute indicates that a form of privilege attaches to the communication, and is used as a means to enable offers to be made to settle claims without fear that those communications will later be used by the other party as an admission of liability. The underlying policy behind the privilege that attaches to 'without prejudice' correspondence is that parties are encouraged as far as possible to freely negotiate their disputes in an attempt to settle them.</p>

Top ten checklist

- 1 Establish your knowledge of the condition of the premises at lease commencement.
 - a Is there a schedule of condition that was prepared at lease commencement?
 - b Are there any layout plans dating from the lessee's first occupation of the premises?
 - c Are there any side letters or licenses to alter relating to the condition of the premises at lease commencement and works undertaken by either party?
- 2 Know the law relating to any statutory limitations on claims for damages in the state or territory within which the property is located.
- 3 Read the lease and highlight important sections and words.
- 4 Inspect the premises once you know the lease covenants.
- 5 Try to find out the lessor's intentions for the premises.
- 6 Provide a fair and reasonable assessment of costs (do not exaggerate or inflate costs incorporated within the schedule).
- 7 Avoid misleading statements.
- 8 Be mindful of timing. Engage with the lessor/lessee at least 6–12 months in advance of lease expiry.
- 9 Encourage dialogue between the parties.
- 10 Minimise waste by the process of greening make good.

1 Introduction

This practice information document is written for any property professional involved in make-good works during or at the end of a lease term. It deals primarily with commercial office and industrial premises in Australia, providing advice to lessors and lessees regarding their legal obligations to repair, decorate or reinstate leased premises.

It deals with every stage of involvement in the make-good process, including:

- taking instructions and clarifying terms of engagement
- determining the different types of schedule and when they might be served
- understanding the different roles in which the property professional might be required to act
- preparing the layout and content of a schedule of make good
- understanding the obligations in the lease
- quantifying the claim and preparing an assessment of costs, and
- providing advice regarding the preferred timetable for serving notices and ongoing dialogue, responses and meetings.

This practice information was written by experienced RICS practitioners and Australian-based property lawyers. The intent of the practice information is to:

- clarify the process of make good to encourage an early settlement between lessor and lessee
- encourage property professionals to note and understand the exact provisions of the lease
- reinforce the need for professional objectivity
- encourage property professionals to act in accordance with best practice procedures
- enable parties to a lease to avoid litigation by following a structured process to agree a claim or to support the efficient management of proceedings where litigation cannot be avoided, and
- encourage waste reduction from the make good process.

2 What is 'make good'?

Make good, or dilapidations as it is called in the UK and from where the majority of make-good precedents come, refers to the process at the expiration or determination of a commercial property lease where the lessee is required to hand back the premises they have leased in a particular condition.

Make good is based on contract law, with the contract, usually between the lessor and lessee, being the lease and other associated documents. It is the enforcement of a lessee's obligations, as contained in a lease, regarding the removal of the lessee's fixtures, and the repair and redecoration of the demised premises at lease expiry when the demised premises reverts to the lessor.

The quantity or value of make good is generally based on the cost of undertaking the works required to put the demised premises into the condition required to comply with the lessee's obligations. In many instances, but not always, it is based on changes made to the premises, or works or repairs required under the lease that have not been carried out.

Make good can also be an assessment of the reduction in the value of the demised premises given its actual condition and a hypothetical value assuming the premises is in a condition consistent with the full compliance with the lessee's obligations.

The make good claim is made in a schedule of make good. A make good claim:

- is an alleged breach of contract
- is the enforcement of the lessee's lease obligations
- should be a statement of fact setting out the breaches of the relevant lease obligations as evident from the property professionals' inspection, which may include cost estimates to undertake the works required to remedy the identified breaches, and
- should set out the claim for damage.

The claim is generally set out in a schedule that lists the clauses alleged to have been breached, a description of the breaches, a description of the works required to remedy the breaches and the associated costs. This is typically converted into a Scott schedule for the purpose of negotiations between the parties (see Appendices D and E for an example).

The claim is generally based on the cost of works to remedy the identified breaches of the lessee's obligations. It may also include professional fees and loss of rent if the make good works are not completed during the lease term.

The claim may be:

- interim, prepared during the term of the lease and referring to breaches of the lessee's obligations applying during the lease term
- terminal, prepared close to lease expiry and referring to the breaches of the lessee's obligations applying at lease expiry, or
- final, a version of the terminal schedule of make good at or after lease expiry, reflecting any works the tenant may have implemented to comply with their obligations prior to lease expiry.

2.1 Waste

In make good law, the changes made to the tenancy during the lease term are called **waste**. There are two main types of waste:

- voluntary waste, which is caused by the action of the tenant, and
- permissive waste, which is caused by neglect (e.g. roof leaks).

The remedy for waste is an action for damages, and the damage must be substantial and capable of assessment. The party that sustains the damage must make a claim.

Make good of fit-out generally falls into the category of voluntary waste.

Where whole premises are leased and the tenant is responsible for the maintenance of the exterior of the building, the lessee may have a responsibility to keep the envelope of the building in good repair.

2.2 The schedule of make good

The purpose of a schedule of make good is to identify and set out alleged breaches of a lessee's obligations contained in a lease. It is the schedule of make good that is served on the lessee by the lessor.

The preparation of a schedule of make good supports a set of procedures that, when employed correctly, can better serve lessors and lessees under their leases.

For simplicity, this best practice information is drafted in the context of a **terminal schedule**: a schedule prepared in respect of works to be done at the expiry or earlier termination of a lease. However, the principles identified are to some extent applicable to schedules of make good at all stages of a lease, and with respect to any negotiations in relation to a lessee's obligations to repair and maintain.

Lessees should be encouraged to be aware of and manage their responsibilities for end-of-lease make good throughout a lease term; having good knowledge of the lessee's obligations and carrying out regular maintenance can greatly reduce the make-good work at lease end.

Sometimes a lessor will use an interim schedule of make good to encourage the lessee to maintain the building in accordance with their lease obligations during the lease term. Preparation of an interim schedule will provide visibility to both parties on works required to comply with a lessee's obligations during the lease term, thereby reducing the risk of a lessee failing to comply with their obligations at lease expiry. Interim schedules are particularly useful where a premises is heavily used or misused, in which case the schedule of make good can serve to inform the lessee of their liabilities should the misuse continue. It can also identify alterations or the installation of fixtures for which the lessor's approval has not been obtained, providing the parties with an opportunity to formalise an approval and the lessee's obligations in terms of reinstatement at lease expiry.

2.3 Timing

During the course of a lease term, the lessee will be able to repair, decorate and maintain the demised premises in accordance with their lease obligations. However, once the lease has ended and the lessee no longer has access to the premises, the only form of remedy to address make-good obligations is generally damages. The only exception to this is if the lessor agrees to grant the lessee access to the premises after the lease has expired to carry out the works and seeks orders that the lessee specifically performs the make-good obligations in the lease. It is far more common for lessors to seek damages from a lessee for a failure to comply with their make-good obligations.

It is therefore important that both parties enter into dialogue in good time before the end of the lease. In many cases, 6–12 months may be required, depending on the size of the premises, its condition and the complexity of the fit-out within the building. This will not only allow both parties to consider their position and allow reasoned consideration and establishment of the lessee's make-good liabilities and intentions, but it may also assist in avoiding friction between the parties. Sufficient time can also allow the lessee the opportunity to meet their obligations by carrying out the make-good works or agree a monetary settlement. Where there is insufficient time to carry out make-good works before lease expiry, the lessee is usually obliged to make a monetary settlement.

3 Preparing a make-good claim

3.1 Step 1: gathering information

In preparing the make-good claim, the building consultant is advised to approach the task in a structured and logical way. This may vary for differing buildings and circumstances, but is generally as follows.

Obtain copies of:

- the lease in its complete form
- associated plans and other attachments, coloured if originally coloured
- any deeds of variation to the lease
- scaled plans, coloured where appropriate
- licences or other consents for alterations, with plans and specifications
- any agreement for lease, if intended to survive the grant of the lease
- assignments and consents to assign
- licence agreements or subleases and the relevant consents
- side letters or other written agreements
- schedules of condition, together with appropriate photographs, or other documentation that establishes the condition of the premises at lease commencement
- schedules of fixtures and fittings
- any current planning consents or statutory notices relating to the premises or tenancy, and
- earlier leases for the same property and lessee.

3.2 Step 2: reviewing the lease terms

The building consultant is responsible for preparing an overview of the relevant documents and information on which they will base the claim. This is generally along the following lines.

- 1 Identify and accurately summarise all clauses in the lease that will, or may have, an impact on the obligations of the lessee in relation to the condition of the premises.
- 2 Note:
 - a lease commencement date
 - b date of termination and

- c any options for lease extensions or renewal.
- 3 Establish:
 - a the first occupation date and
 - b whether the lease has been extended or renewed.
 - 4 Note specific repair clauses, such as:
 - a carpet replacement
 - b repainting requirements and
 - c maintenance of lights.
 - 5 Note a lessee's obligations to remove fixtures and reinstate alterations, possibly to the base building.
 - 6 Subject to the complexity of the lease and circumstances, legal advice may need to be obtained to provide an opinion on the scope of each particular clause and interaction between such clauses, with reference to any underlying legal principles or laws. At this point, it is important to seek instructions as to any extraneous representations that have been made, or other agreements between the parties that may be relevant and may be considered when interpreting the lease provisions.

3.3 Step 3: is there a liability to reinstate?

Consider reinstatement of alterations that may require further review of the lease terms, and requesting any previous licences for alterations or similar approval documentation. It may be evident, either from the inspection of the premises or from the documentation, that the premises have been altered. In this case, consider whether and to what extent the lessee is obliged to reinstate the alterations.

3.4 Step 4: impact of statutory precedents

Review all relevant statute and legal precedents.

It is imperative that, at an early stage, due consideration is given by both parties to relevant statute and legal precedents that may affect the basis of their position.

3.5 Step 5: physical inspection of premises

When inspecting the premises:

- 1 Comply with the terms of the lease when making arrangements for access.
- 2 Undertake the inspection with a copy of any available schedule of condition for comparison with the physical state of the premises.

- 3 Retain site notes, measurements and/ or other transcriptions. Sketches with a north point should be made as required and photographs taken. Cross-reference those to the site notes, schedule and date.
- 4 Clearly identify all parts of the premises.
- 5 Identify alterations and improvements with cross-reference to licences and approvals where appropriate. In seeking to identify alterations, have regard to:
 - a obvious differences in construction and materials
 - b materials that are inconsistent with the age of the building
 - c parts of the premises that directly identify with the trade or occupation of the lessee (for example an extension constructed to store chemicals or keep produce cold)
 - d plans, photographs or other documentary evidence, and
 - e the existence of partitions and fit-out.
- 6 Obtain specialist input as required from a services consultant, structural engineer or environmental consultant.
- 7 Where further investigation or opening up is required, the agreement of the client and, where appropriate, the lessee should be obtained. It should be noted that if no defects are discovered, then the cost of specialist inspections are unlikely to be recoverable as part of the claim.

4 Preparing and costing the schedule

4.1 Step 1: choosing a format and setting out the schedule

A recommended form and a completed example of a terminal schedule of make good, along with that for a Scott schedule to facilitate negotiation between the parties, can be seen in Appendices D and E.

Schedules of make good are typically drafted in a table format. The lessor's building consultant typically completes the initial draft of the schedule of make good.

Typical column headings are as follows.

- 1 Item number.**
- 2 Lease clause references:** these are the lease clause and subclause numbers of the clauses that contain the lessee's obligations (there may be more than one reference for each breach).
- 3 Alleged breach:** this is a description of the defect, want of repair or damage that, in the lessor's building consultant's opinion, the lessee is obliged to rectify or make good.
- 4 Remedial works:** this describes the work that, in the lessor's building consultant's opinion, the lessee is obliged to carry out to fulfil their make-good obligation.
- 5 Lessor's costings:** these are the lessor's building consultant's opinions on the cost of works that will be required to carry out the remedial works.
- 6 Lessee's comments:** this column is filled out by the lessee's building consultant. In this column, the lessee can state whether they agree or disagree with the lessor's building consultant's statement, giving reasons why.
- 7 Lessee's costings:** in this column, the lessee's building consultant states the cost that they believe will be sufficient to carry out works to meet the lessee's repairing obligations.

As the document is completed by each party and responded to by the other, additional columns of comments and costs can be added on the right as negotiations proceed. The table will then provide a record of the progress, or lack of progress, of the negotiations and will also highlight the areas of greatest disagreement and claim.

4.2 Step 2: costing

The final schedule may need to be costed if it is anticipated that there will be a financial settlement in lieu of physical make good.

Costs should be estimated with due reference to reliable and appropriate cost information, for example:

- current professionally accepted recognised price books (to which the appropriate state/ regional variations should be applied)
- relevant and recent tender price information (on projects of a similar nature and size, and envisaged by the claim)
- the result of a competitive tender exercise (which could be conducted on the basis of a full specification of works derived from the schedule of make good), and
- engagement of a cost consultant to prepare the costs based on the schedule (if appropriate).

Note: Costs should not be exaggerated. Exaggerated claims can reflect badly on the building consultant if the matter proceeds to legal action.

4.3 Step 4: Carrying out the works

- If the lessee decides to carry out the make good work themselves, this needs to be carried out to the standard required under their make good obligations.
- When quotes are sought, base building contractors should be used for the major infrastructure within the building; this is particularly important for mechanical and fire.
- The scope of works should be agreed by both parties prior to commencement to ensure that the correct works are undertaken/paid for in lieu of any physical works.
- Works will normally need to be completed on or prior to the end of the lease. If not completed by that time, the lessee may be liable for 'hold over rent' while they either complete those works or the lessor completes those works on their behalf.

4.4 Step 3: Making the claim

The following steps are typically carried out:

- 1 The claim is quantified in a separate document, indicating how it is made up.
- 2 The final schedule is appended to the claim.
- 3 A summary of the figures that make up the claim is prepared, of which the total of the final schedule is only a part.
- 4 The claim is ideally set out on one sheet, which is expandable, so that the other party can provide corresponding figures.

- 5 Consider adding to the final schedule:
 - a fees for the preparation of the final schedule
 - b fees for the supervision of the work
 - c loss of rent
 - d loss of service charges and/or insurance premium
 - e fees in relation to negotiation of the final schedule
 - f solicitor's costs and interest (subject to consultation with the client's solicitor), and
 - g Goods and Services Tax (GST).

4.5 Other factors

In section 4.2 we note that NSW, Queensland and the Northern Territory have legislation to prevent a lessor claiming damages in excess of the loss they suffer as a result of a lessee's breach of their lease obligations (also see Table 1, *State variations in the law regarding reversionary value*). The building consultant may need to build a picture of the condition of the base building in comparison with similar space in that area or market to form a view on the lessor's likely intentions for the demised premises. This might be just the other floors in a commercial office building or a whole industrial building.

If other floors in this or other buildings have been upgraded recently, it may be a sign that the lessor intends to, or may need to, upgrade the floors when the current lessee has vacated.

In recent years, with the advent of [NABERS ratings](#) and [BEECs](#), upgrades to systems that affect energy consumption, such as air conditioning and lighting, have been done to many buildings to improve their energy efficiency. Floors that have not been upgraded for several years are very likely to be upgraded so that the overall building energy efficiency is improved to meet current market demand.

If other floors in the building have been upgraded, it is likely that, at the end of a five-or-more-year lease, the floors being inspected will need to be upgraded. Most buildings are upgraded at least every ten years.

Look at other floors in the building to build a picture of how the building has been upgraded.

Look at other buildings that would compete in the market to see whether they have been upgraded, and whether this building will need to be upgraded to maintain its marketing and rental position.

Check with the local council to see whether there are any development or building approvals for the building or floors in the building. These may be for redevelopment, or even partial refurbishment, as the building or floors being worked on could be listed for refurbishment.

The vacating lessee should not be expected to pay to refurbish the lessor's building if the lease does not require them to do so.

4.6 Fit-out ownership and responsibilities

It is important to understand where the ownership of the fit-out items lie, relative to lease obligations for repair, redecoration and reinstatement, regardless of who paid for the fit-out.

At times in the leasing cycle, lessors may provide lessees with certain incentives such as a physical fit-out, fit-out incentives or fit-out contributions.

A cash incentive to the lessee enters the lessee's books as income from which they procure and take ownership of the fit-out.

With fit-out contributions, the lessor may identify certain fit-out items for the contribution to cover that the lessor may then benefit from in terms of depreciation. Sometimes, to the surprise of the uninformed lessee, the lessor does not take responsibility for ownership and therefore this does not reduce the lessee's obligations for make good under the terms of the lease.

It is important for the building consultant to understand how the fit-out was procured and what constitutes the lessor's property and the lessee's property in relation to lease definitions, repairing and make good covenants.

5 Diminution and superseded works

5.1 What is reversionary value?

The reversionary value of the premises is defined as the value of the premises when it reverts back (returns) to the lessor and where the lessee has met all of their repairing obligations.

5.1.1 What constitutes damage to the reversion?

Damage to, or diminution of, the reversionary value is generally defined as the reduction in value of the premises caused by the lessee leaving the premises in worse condition than is required under the lessee's lease obligations. The diminution in the value of the lessor's reversionary interest in the premises is the difference between the reversionary value, assuming the lessee has complied with their repairing obligations under the lease, and the value of the premises in the condition in which it has been left at lease expiry. Where such valuations are complex, they may be undertaken by property valuers who specialise in reversionary value.

5.2 Diminution and superseded works

The lessor's intentions for the premises can reduce the lessee's repairing obligations.

In New South Wales, Queensland and the Northern Territory, there are statutory limits on the ability of the lessor to claim more than the amount by which the reversionary value of the premises has been reduced by the lessee, in relation to breaches of covenants to keep or put a premises in repair during, or at the termination of, a lease. The reversionary value is set by the repairing obligations contained in the lease, and where a lessee has met their obligations in full, there is no loss. (See Table 1, *State variations in the law regarding reversionary value.*)

For example, where the lessor has planned to demolish a premises or carry out structural alterations at or shortly after the termination of the lease, this may reduce their ability to claim loss in relation to covenants in the lease to keep or put the premises in repair. Development approvals are the best way to establish the landlord's intent in this respect. In the three jurisdictions previously mentioned, there is also a legislative cap on the amount of the damages that can be claimed for failure to comply with a repair covenant, this being the value by which the reversion is diminished owing to the breach of the repair covenant.

In relation to the application of these provisions, it is important to keep in mind that they only relate to covenants to keep or put a premises in repair. The classic example of a repair clause is to keep a premises in good repair during the term of the lease, having regard to its condition at the commencing date, and to put a premises in that condition at lease expiry. The statutory obligations set out here do not relate to other covenants, such as covenants to return a premises to base building condition, covenants to carry out specific works to a premises, or the obligation on a lessee not to carry out works to a premises without a lessor's consent to those works.

The case of *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8 considered some of these issues. This was a case relating to a lease taken by Tabcorp in Victoria, so it was not a jurisdiction where the legislation cited above is in force. The lease contained a common term providing the lessee could not make alterations to the demised premises without the approval of the lessor. Within six months of taking possession, Tabcorp demolished the foyer without the lessor's consent and carried out an expensive renovation to the foyer. The lessor, Bowen, brought an action for breach of the contractual term not to carry out works without their consent and sought to recover the costs of fully restoring the foyer to its previous state, on the basis that damages should place them in the position they were in, but for the breach of contract. Tabcorp argued the damages should be restricted to any diminution of the value of the building as a whole because of the breach of covenant, which is an argument analogous to the provisions of the legislation cited above. Tabcorp argued that, since there had been no significant loss to the value of the building in its entirety, the lessor should only be awarded nominal damages to reflect his actual losses. The High Court rejected this argument, and awarded damages to Bowen to restore the premises to the condition it was in originally. The High Court noted that Victoria was not a jurisdiction subject to the legislation cited above, but in any event said that if it were, that legislation would not apply, as an obligation not to carry out works without consent is not a repair covenant.

The building consultant or person preparing the claim is legally bound to act honestly and exercise due care in putting forward accurate information. Unless the consultant believes that, to the best of their knowledge, the lessee has obligations for particular works, the building consultant should not include them in the claim. For example, this may include items or works that would be superseded by any intended demolition, upgrade or structural alteration works that would replace those parts as part of a refurbishment at or shortly after the expiry of the lease. Including these could be found to be misleading or deceptive conduct.

Please note that in Australia, the law varies from state to state. Table 1 sets out the state variations.

Legislative provisions	Statutory restrictions on recovery by a landlord for breach of covenants to repair
NSW	<i>Conveyancing Act 1919, s.133A</i>
VIC	No equivalent provision
QLD	Property Law Act 1974, s.112
ACT	No equivalent provision
NT	Law of Property Act, s.123
SA	No equivalent provision
WA	No equivalent provision
TAS	No equivalent provision

Table 1: State variations in the law regarding reversionary value

6 Exaggeration and misleading statements

6.1 Acting professionally

The building consultant, while complying with their client's instructions, should ensure that any documents they issue do not contain statements or assertions that the building consultant knows, or ought to know, are not true, properly sustainable or arguable.

Building consultants should not allow a document that contains statements or assertions that they know, or ought to know, are not true, properly sustainable or arguable to be sent bearing their name or the name of their firm. A building consultant should give factual advice based upon a reasonable interpretation of the relevant lease obligations, even though the client might choose to ignore it.

If there is a concern as to the lessor's claim under the lease, whether in the body of the schedule of make good or a consequential loss, the building consultant should bring the matter to their client's attention and, if necessary, recommend that advice is sought from the client's solicitors.

7 Fair and reasonable claims

It is in both parties' interests to resolve the make good between themselves. However, there will be times when the parties cannot agree and matters will be escalated through legal action. It is therefore important that parties are able to justify their position to the court. They will need to prove that they have acted reasonably and fairly, and that their claim is not exaggerated.

7.1 Civil procedure rules

A building consultant dealing with a make good claim should be aware of civil procedure rules in the local jurisdiction.

Civil procedure rules generally encourage the parties to a dispute to exchange information and narrow the points of difference between them. The aim is to avoid litigation where possible and to support the efficient management of proceedings where litigation cannot be avoided.

While this document is not intended to deal exhaustively with pre-lease negotiations, it is recommended that the parties instruct their legal advisers as to their intentions in relation to responsibility for make good at lease end, and that the parties to a lease agree on the condition of the premises at the time the lease is entered into.

7.2 Dialogue/stocktake

The courts and RICS encourage dialogue between parties to a dispute. In order to achieve this, it is recommended that building consultants representing both parties meet during the course of the dispute in order to clarify the nature of the dispute and, if possible, to settle aspects of it.

Due to the high costs involved, it should be the parties' objective that the matter be settled prior to commencing proceedings if possible.

Where the dispute has not been resolved by dialogue, the building consultants should undertake, prior to the commencement of proceedings, a further review of their respective positions and ideally attend a meeting to see whether proceedings can be avoided, or at least the issues narrowed between them.

7.3 Court proceedings

Most make-good claims at the end of the term do not result in court proceedings; normally the matter will be settled between the parties. If proceedings do commence, the building consultant will need to take their lead from their client's solicitors. It is possible if

proceedings are commenced that the building consultant may be required to be an expert witness in the proceedings and prepare a report compliant with the expert witness code of conduct applicable in the relevant jurisdiction.

8 National Construction Code (NCC)/Approval of building works: statutory obligations and triggers for consent

All building works require a building permit unless they are exempt. Exemptions vary on a state-by-state basis. It is recommended that all professionals are up to date with the regulations and codes of the state in which they are operating. As an example, in Victoria a list of exemptions is provided in schedule 8 of the *Building Regulations 2006*.

Leases normally include covenants requiring the lessee to comply with and carry out works required by the provisions of any relevant statute or regulation.

The building consultant should consider not just the lease covenant but the actual provisions of relevant statutes or regulations that require certain works to be undertaken, or take advice on those provisions, if they believe they are relevant to the preparation of the schedule of make good.

There is a common misconception that physical make good works to bring the condition of a premises back to a base building or an open plan configuration, for example, do not require a building permit as the original configuration would have complied with a permit prior to the alterations being made. It is the building works that require the permit, rather than the state the premises are to be left in. Consideration should be given to the time it may take to obtain the necessary building permit when considering how long the make good works might take.

Consideration should be given to any works associated with:

- essential safety measures, including passive and active fire protection
- structural works
- where paths of travel to an exit may be altered
- where there may be an adverse effect on building occupants or the public
- access requirements beyond the street alignment
- anything that might require planning or heritage consent, and
- alterations to food premises.

9 Greening make good

Average lease terms are typically five years or less. This means that about 20% of office fit-outs are churned, demolished and refitted every year. In Australia, this represents up to five million square metres of office space per year. RICS encourages **greening make good** – the minimisation of waste at lease end.

Make goods can result in 'triple waste', where:

- the outgoing lessee makes good their fit-out in accordance with their lease obligations and materials are thrown away
- the lessor refurbishes the space to bring it to modern lettable standard obligations and more materials are thrown away, and
- the incoming lessee fits it out, making changes and removing some of the new fixtures and finishes, and even more materials are thrown away.

By careful and thoughtful planning with a view to reducing waste, generally led by the lessee or lessor, there are great opportunities to save materials and avoid some of the waste and cost. RICS suggests that to reduce the need to make good for environmental initiatives, lessees should follow the advice in this section.

9.1 Assessing the premises before signing a lease

When assessing the premises prior to signing a lease, it should be established whether there are finishes or services that may be altered when the fit-out is undertaken.

Proposed changes should be discussed with the lessor. Agreement may be reached to share some costs, particularly if the equipment wanted in the premises could be seen as an improvement. This is typically the case with upgrades of light fittings, for example.

Agreement should be sought to ensure these improvements will be excluded from make-good claims. It should also be ensured that the lease term is long enough or contains lease options for any improvements and changes to bring positive returns.

9.2 Planning a fit-out

The impact of the fit-out on the base building could be minimised in the following ways:

- 1 By trying to avoid the removal or the replacement of the base lessor's equipment such as flooring and ceilings. Freestanding systems should be used where possible so that their fixings do not damage the base building.
- 2 By making the fit-out more open plan, which involves fewer changes to the building services.

- 3 By considering wireless data systems, which dramatically reduces the cabling waste and can be taken away.
- 4 By considering a lease-integrated fit-out. This is where the lessee installs the ceiling and carpet to suit their needs, as they are likely to have continuing use. The rent should be adjusted accordingly to factor in the lower costs to the lessor (or other appropriate concession provided to the lessee). The lease should record the agreement that if a suitable quality of ceiling or carpet is installed, it will not need to be removed at the lease end.
- 5 If it is proposed to use materials that require the removal of lessor finishes, e.g. stone wall panelling, consider mounting it on panels that can be installed over the top of the base building finishes and later removed. If it needs to be refurbished or revamped during the term of the lease, this can simply be lifted off and the new ones dropped in place. The lessee's interior designers may need some guidance in this.
- 6 Consider using carpet tiles that can be mixed and matched to suit a changing office, and define reception and breakout spaces through colour or pattern changes. Some carpet tile companies also commit to taking back their product at the end of a lease. This works well if the fit-out is shell and core.
- 7 The use of lightweight workstations that can be relocated within the office, or can even be moved to a new location at lease end.
- 8 It should be remembered a make good needs to allow an appropriate amount of time to be completed. The lessor's permission for alteration works should be sought and liability for making good should be borne in mind.
- 9 Try to use part or all of a pre-existing fit-out to minimise environmental impact.

For further information on sustainable make good, please consult the RICS Australia team.

10 Schedules of condition

Most leases refer to the lessee's obligations to repair, keep and/or maintain the premises to a particular condition. There is generally a requirement to reinstate the premises back to the original or improved condition, depending on the lessee's obligations.

It is typical for leases to refer to the condition that the demised premises were in at lease commencement, to qualify the lessee's repairing obligations. It is therefore prudent that the condition of the premises is recorded accurately at the commencement of the lease.

10.1 What is a schedule of condition?

A schedule of condition is a document that describes the condition of the premises at the commencement of the lease, or at a particular time in the term of the lease. It is usually a combination of descriptions of the various parts and areas of the leased premises, together with photographs to show the condition.

The usual purpose of a schedule of condition when attached to a lease is to clarify the condition of the premises at a particular time, typically to benchmark their condition at lease commencement.

A well-prepared schedule of condition will assist all parties in establishing the condition of the premises at lease commencement, and then by reviewing the premises at lease end will establish what has changed and to what extent.

It will give both general descriptions and photos, as well as details and photos of specific defects.

Schedules of condition are based on a visual inspection only of the property, or parts of the property, and typically record the element of structure being reviewed and a description of the condition of that element, supported by a photographic record. It is quite normal for a schedule of condition to be extensive and cover even minor items of disrepair and defects.

10.2 Benefits of a schedule of condition

During lease negotiations, it is increasingly common for lessors and lessees to engage a qualified building consultant to prepare an independent schedule of condition. This will be agreed by the parties and attached to the lease as a record of the premises at the time of lease commencement.

Lease agreements are becoming increasingly complex, particularly when premises have, for example:

- a new fit-out

- new or refurbished premises, particularly if the lessee is to complete an extensive fit-out
- an integrated fit-out
- pre-existing improvements that could be defined as either lessor's or lessee's fixtures and fittings, such as partitions, and
- subleased space.

Essentially, where there is, or may be, any doubt as to what the extent of the make-good obligations may be at lease end, a schedule of condition can provide both parties to the lease with a clear understanding of the condition at commencement.

Furthermore, lease terms are often agreed on the basis that the lessee is responsible for keeping the building in no better condition than exists at the commencement of the lease.

A schedule of condition benefits both parties. From a lessor's perspective, a schedule of condition is useful to ascertain whether or not the lessee has complied with their responsibilities.

From the lessee's point of view, a schedule of condition is necessary to ensure that the lessor does not require the lessee to bring the property to higher standards than existed at lease commencement.

Even where a lessor does not agree to having a schedule of condition prepared and/or attached to the lease, the lessee is strongly advised to have their own schedule prepared by a professional building consultant, who can vouch for it being a true record of the condition of the premises at that time. The more detail the better, particularly when the building has been occupied before and has some damage, or where poor-quality materials have been used.

The schedule of condition helps to reduce the potential for dispute and associated costs at lease termination, benefitting both parties.

10.3 Preparing a schedule of condition

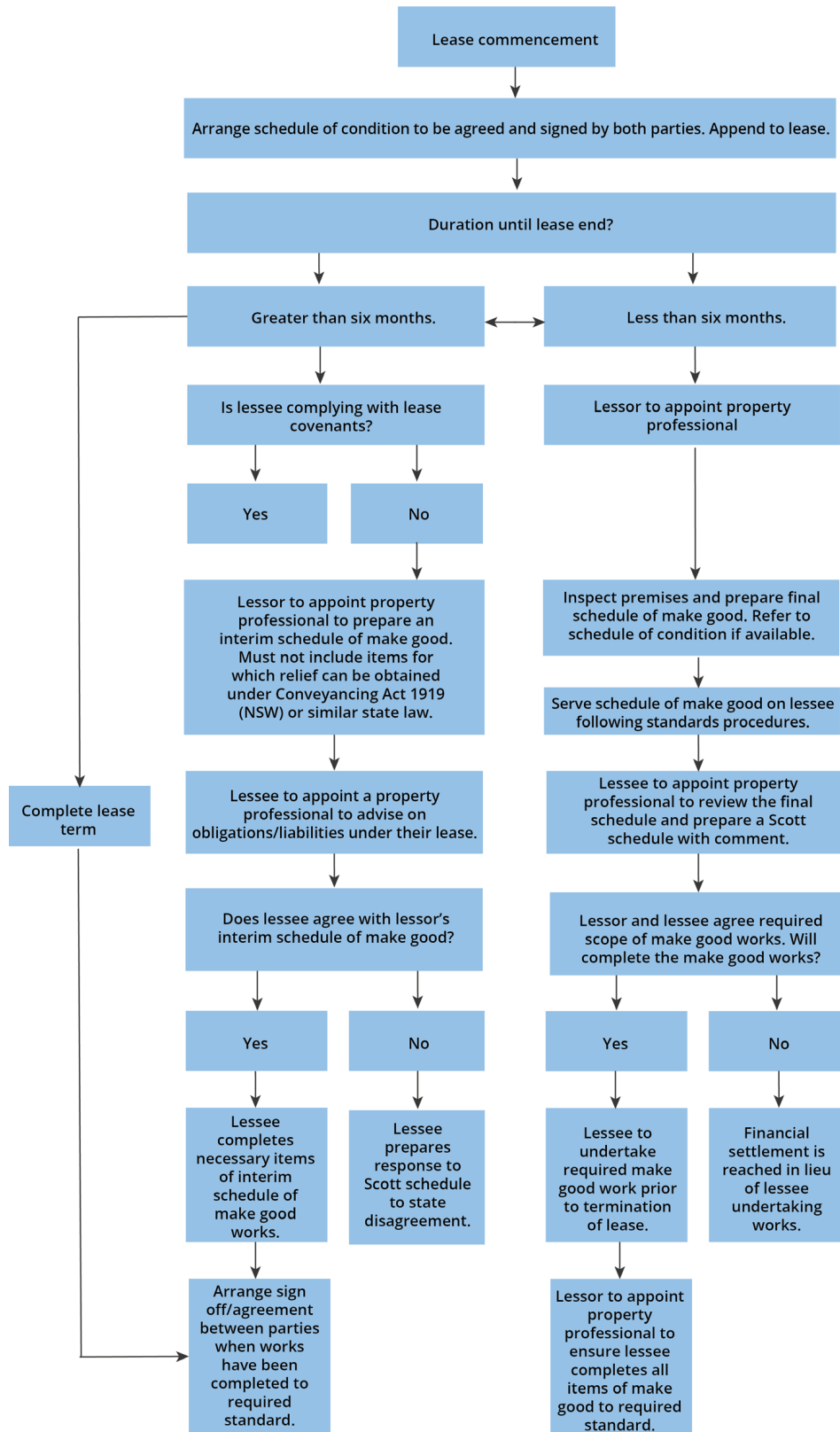
The preparation of a schedule of condition will typically include the following:

- a review of the nature of the legal agreement(s) to assess the context of the report and the nature of the documentation required
- a thorough inspection of the land and buildings forming the premises, identifying areas that could not be accessed or where access was restricted
- a detailed record of the condition of the various areas of the premises, identifying all defects and poor-quality materials. This can include referenced photographs and, ideally, marked-up plans showing the location of defects and subject and direction of photographs, and
- a record of the date of the inspection.

Arrange for agreement of the schedule of condition between the parties and facilitate formal execution of the acknowledgment page.

To reduce the likelihood of disputes occurring between lessors and lessees at lease end, the preparation and agreement of a schedule of condition should be actively encouraged by all parties to a lease.

Appendix A The make-good process



Appendix B Checklist for preparation of final schedule and management of make-good negotiations in commercial and industrial leasing

Note: The following checklist should be read together with this practice information, which provides a more detailed guide to the make-good negotiation process. The checklist is a guide only and is not intended to be exhaustive or to be construed as advice.

Take instructions from lessor or lessee

Gather information:

- the lease in its complete form with all plans and other attachments, coloured if original coloured
- any deeds of variation
- scaled plans, coloured where appropriate
- licences or other consents for alterations, with plans and specifications
- any agreement for lease, if intended to survive the grant of the lease
- assignments and consent to assign
- licence agreements or subleases and the relevant consents
- side letter or other written agreements
- schedules of condition, together with appropriate photographs, or other documentation that establishes the condition (of the premises) at lease commencement
- schedules of fixtures and fittings
- any current planning consents or statutory notices relating to the premises

Review the lease terms, in particular mechanisms governing dispute resolution

Consider if reinstatement or alterations are required

Inspect the premises:

- obtain the consent of lessor/lessee to inspect (if necessary)
- retain site notes
- obtain input from service consultants, engineers, environmental consultants, etc.
- choose the type of final schedule layout, i.e. a Scott schedule

Complete the final schedule

Cost the final schedule

Quantify the claim

Append the final schedule to the claim

Include in the claim letter:

- the lessor's full name and address
- the lessee's full name and address
- a clear summary of the facts
- the final schedule referred to above
- any documents relied upon or required by these notes
- the date

Undertake diminution assessment if required:

- record of service claim
- date of service of claim on lessee/lessor
- date of service on lessee's/lessor's solicitor
- date of response
- date of dialogue/negotiation

Record of documents disclosed

Stocktake of unresolved issues

Execute deed recording the terms of any settlement

Appendix C Serving a make-good notice and schedule

The following is an example of a notice and make-good schedule served by a lessor on their lessee.

Preamble and lease summary:

Details of the premises:

This schedule has been prepared by
upon the instructions of

It was prepared following inspection of the
premises known as on .

It records the works required to be done to the premises in order that they are put into the condition the premises should have been put if the lessee has complied with their covenants contained within their lease of the premises dated .

The covenants of the lease that the lessee should have complied with are as follows:

The following schedule contains:

- reference to the specific clause (quoted above) under which the repairing obligation arises
- the breach complained of
- the remedial works suggested by the lessors' property professional, being the property professional appointed/employed by the lessor to prepare the schedule.

On receipt of this schedule, the lessee should respond to enable the lessor to understand clearly the lessee's views on each item of the claim.

Appendix D Example of a Scott schedule

Item number	Clause number	Breach complained of	Remedial works required	Lessee's budget (\$)	Lessee's comments on		Lessor's comments on	
					Breach and remedy	Cost (\$)	Breach and remedy	Cost (\$)
External areas and balconies								
Main roof								
2	Clauses 7.7(h), 8.1, 14.1	Six number satellite dishes and concrete plinths installed on roof.	Remove satellite dishes and concrete plinths from roof. Remove all associated cabling, ducts, etc. Make good any damage to the base building and reinstate waterproofing where damaged or potentially damaged.	\$28,824				
3	Clauses 7.7(h), 8.1, 14.1	Three small satellite dishes installed on roof plant room.	Remove satellite dishes together with all associated cabling, ducts, etc. Fully patch and repair openings, core holes, penetrations, etc. to match surrounding material in structural performance, fire-rating performance and appearance.	\$2,862				

Item number	Clause number	Breach complained of	Remedial works required	Lessee's budget (\$)	Lessee's comments on		Lessor's comments on	
					Breach and remedy	Cost (\$)	Breach and remedy	Cost (\$)
6	Clauses 8.1, 8.5(b) (vii), 14.1, 14.2, 14.6 (a) (ii)	Lessee-installed air conditioning equipment	Remove lessee-installed air conditioning units together with associated cabling, pipework and ductwork. Fully patch and repair openings, core holes, penetrations, etc. to match surrounding material in structural performance, fire-rating performance and appearance.	\$3,780				
Internally: Level 2								
50	Clauses 8.1, 14.1, 14.2	Lessee's furniture, fittings and equipment installed in office areas.	Remove all furniture, fittings and equipment. On completion, make good all areas disturbed or damaged to match surrounding surfaces. Floor bolts to be fully removed (not ground off) and the holes filled with a material that matches the surrounding concrete floor in colour, texture and hardness.	\$8,985				
59	Clauses 8.1, 8.5(b) (vii), 14.1, 14.2	Chain wire and steel tube storage areas installed in car park.	Remove shelving, support posts and framing, chain wire, gates, doors, etc. and make good. Floor bolts to be fully removed (not ground off) and the holes filled with a material that matches the surrounding concrete floor in colour, texture and hardness.	\$842				

Item number	Clause number	Breach complained of	Remedial works required	Lessee's budget (\$)	Lessee's comments on		Lessor's comments on	
					Breach and remedy	Cost (\$)	Breach and remedy	Cost (\$)
Internally: Level 1								
68	Clauses 8.1, 8.5(b)(vii), 14.6(a)(ii)	Additional switchboard installed and original switchboard altered.	Remove lessee-installed switchboard and reinstall original equipment. Reconfigure cabling to suit, remove all redundant cabling and support. Fully patch and repair openings, core holes, penetrations, etc. to match surrounding material in structural performance, fire-rating performance and appearance.	\$1,123				
72	Clauses 8.1, 8.5(b)(vii), 14.6(a)(ii)	Lessee-installed UPS.	Remove lessee-installed UPS and associated cabling and equipment. Fully patch and repair openings, core holes, penetrations, etc. to match surrounding material in structural performance, fire-rating performance and appearance.	\$2,240				
77	Clauses 8.1, 8.5(b)(vii), 14.1, 14.2	Block-walled rooms installed.	Remove block-walled rooms and patch after removal of block walls.	\$13,011				

Item number	Clause number	Breach complained of	Remedial works required	Lessee's budget (\$)	Lessee's comments on		Lessor's comments on	
					Breach and remedy	Cost (\$)	Breach and remedy	Cost (\$)
78	Clause 14.2	Premises need to be cleaned.	Generally on completion of all make-good works, clean premises including walls, floor, soffit, etc.	\$1,728				
Service works								
79	Clauses 8.1, 8.5(b) (vii), 14.1, 14.2	Electrical system altered to suit lessee requirements.	Reconfigure lights and power to original layout. Replace switchboard and reconfigure power. Include temporary power while electrical works are in progress. Include electrical engineer to provide electrical consultancy advice.	\$311,688				
General works								
82	Clauses 8.1, 8.5(b) (vii), 14.1, 14.2	Make-good work is required in the building.	Site management/manager, equipment hire to carry out the reinstatement works. Includes small cherry picker, large and small scissorlift, forklift, float, mobile scaffold, truck, high pressure gear, small tools, etc.	\$14,483				
			Subtotal cost for reinstatement works (exc. GST):	\$1,272,080				

Delivering confidence

We are RICS. Everything we do is designed to effect positive change in the built and natural environments. Through our respected global standards, leading professional progression and our trusted data and insight, we promote and enforce the highest professional standards in the development and management of land, real estate, construction and infrastructure. Our work with others provides a foundation for confident markets, pioneers better places to live and work and is a force for positive social impact.

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