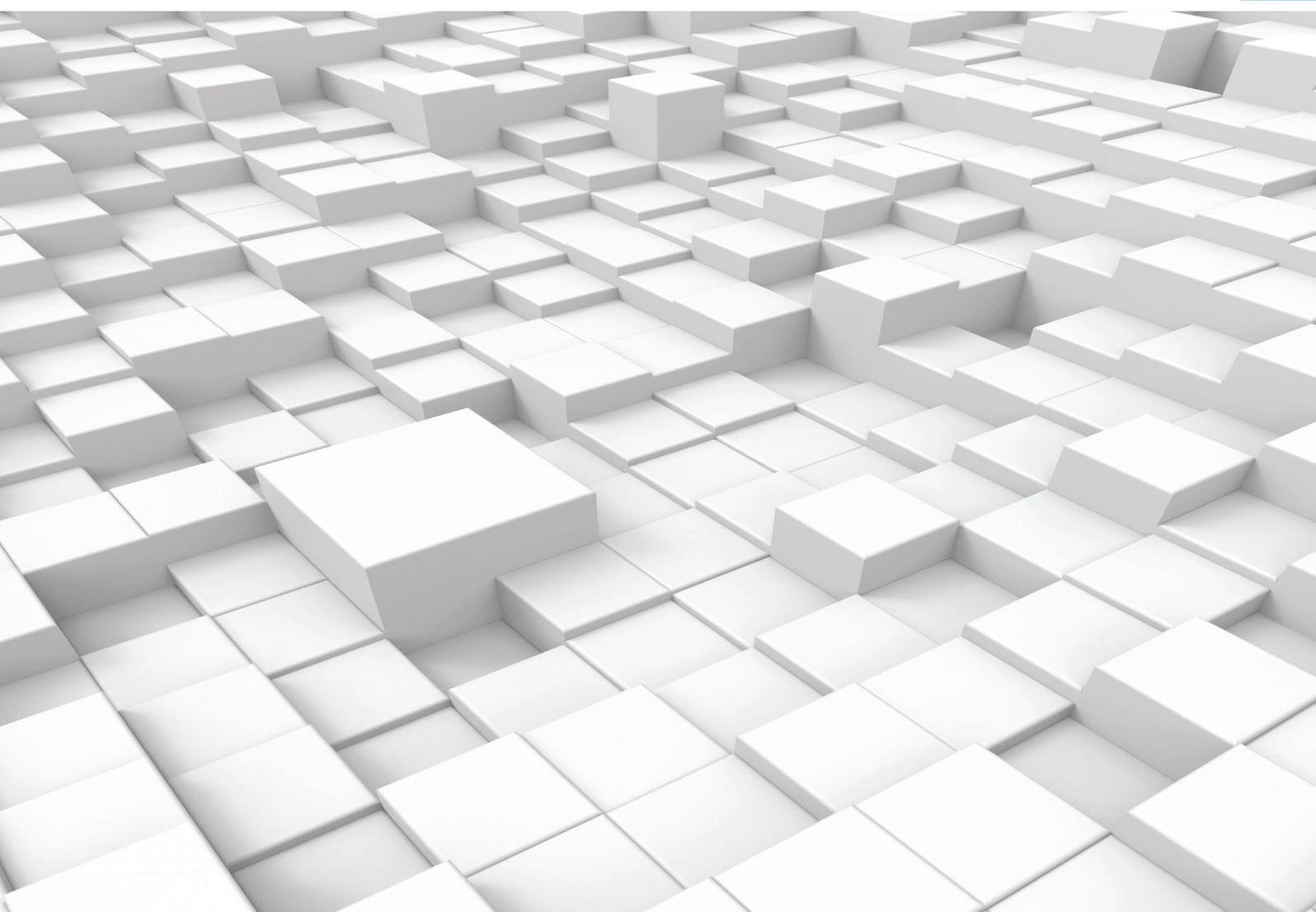




RICS professional standards and guidance, Australia

# Make good guide

2nd edition, July 2017



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RICS guidance note, Australia

2nd edition, July 2017



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# RICS professional standards and guidance

## RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations that in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the guidance note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this guidance note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each member to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this guidance note, they should do so only for good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice.

Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In some cases there may be existing national standards that may take precedence over this guidance note. National standards can be defined as professional standards that are either prescribed in law or federal/local legislation, or developed in collaboration with other relevant bodies.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

This guidance note is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to establish if any changes in case law or legislation after the publication date have an impact on the guidance or information in this document.

## Document status defined

RICS produces a range of professional standards, guidance and information documents. These have been defined in the table below. This document is a guidance note.

## Publications status

Type of document	Definition	Status
<b>Standard</b>		
International standard	An international high-level principle-based standard developed in collaboration with other relevant bodies.	<b>Mandatory.</b>
<b>Professional statement</b>		
RICS professional statement (PS)	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to.  This term also encompasses practice statements, Red Book professional standards, global valuation practice statements, regulatory rules, RICS Rules of Conduct and government codes of practice.	<b>Mandatory.</b>
<b>Guidance and information</b>		
RICS code of practice	Document approved by RICS, and endorsed by another professional body/stakeholder, that provides users with recommendations for accepted good practice as followed by conscientious practitioners.	Mandatory or recommended good practice (will be confirmed in the document itself).  Usual principles apply in cases of negligence if best practice is not followed.
RICS guidance note (GN)	Document that provides users with recommendations or approach for accepted good practice as followed by competent and conscientious practitioners.	Recommended best practice.  Usual principles apply in cases of negligence if best practice is not followed.
RICS information paper (IP)	Practice-based information that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended best practice.  Usual principles apply in cases of negligence if technical information is known in the market.
RICS insight	Issues-based input that provides users with the latest information. This term encompasses thought leadership papers, market updates, topical items of interest, white papers, futures, reports and news alerts.	Information only.
RICS economic / market report	A document usually based on a survey of members, or a document highlighting economic trends.	Information only.
RICS consumer guide	A document designed solely for use by consumers, providing some limited technical advice.	Information only.
Research	An independent peer-reviewed arm's-length research document designed to inform members, market professionals, end users and other stakeholders.	Information only.

# Prologue

This guidance note 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 and industrial premises within Australia, providing advice to lessors and lessees in regard to 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
- quantifying the claim and preparing an assessment of costs and
- providing advice regarding the preferred timetable for serving of notices and ongoing dialogue, responses and meetings.

This guidance note was written by experienced RICS practitioners and Australian-based property lawyers. The intent of the guidance note 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 and
- 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.

This updated edition has been written to apply to the Australian property market.

## Top ten checklist

- 1 Establish your knowledge of the condition of the premises at lease commencement. Is there a schedule of condition that was prepared at lease commencement?
- 2 Know the law for reversionary value in the state in 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 Avoid exaggerating costs in a 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 The lessee should not pay for the lessor's refurbishment of the premises.
- 10 Minimise waste by the process of greening make good.

# Glossary

The following definitions apply unless the context requires otherwise.

**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.

**Building certifier:** A consultant who is qualified and experienced to provide advice in regard to the building regulations appropriate to a particular property. Building certifiers are typically able to certify works in accordance with the Building Code of Australia. In Australia, building certifiers are also known 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 its 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.

**Costing:** The process of putting a value to the work forming part of a claim.

**Dilapidations (use of the term):** In Australia, the term 'schedule of dilapidations' is often misused to mean a schedule of condition (see below). Therefore, in Australia, the expression 'schedule of make good' (also see below) is also used.

**Diminution assessment:** An assessment of the value of the reversionary interest. Under statute the diminution in value of the reversion may form the upper limit of a claim for damages on the basis that, in some jurisdictions, a lessor cannot recover for breach of a covenant to repair beyond the loss to its reversionary interest. The assessment compares the value of the actual condition of the premises compared with the condition the premises is required to be in when all of the repairing obligations in the lease have been met.

**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.

**Greening make good:** RICS produced its *Greening make good Australia* guidance to encourage better standards of sustainable performance, to reduce material waste and to encourage the use of existing fit outs where possible. It sets out methods for improvement and contains a draft make-good deed to encourage fit out reuse.

**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:** A state of disrepair in a premises, or a condition of that premises that requires work to rectify it, where there is a legal liability to remedy, or undertake, that work.

**Make-good protocol:** Pre-action protocol for claims for damages in relation to the physical state of commercial property at the termination of a tenancy.

**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 where the lessee has met all its 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. See also diminution assessment (above).

**Schedule of condition:** 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:

- comprise a written description of each element of the premises
- be accompanied by photographs or drawings
- record the standard of condition of the premises, including any relevant surrounding area
- will 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 will 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.

**Scott schedule:** 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 obligations. The responding

lessee can use the Scott schedule format to detail their response to the claim and its costs, and their respective views.

**Superseded work:** Those works which are overtaken by the probable occurrence of another, such as a substantial refurbishment. The property professional assessing diminution in the value of the lessor's reversion 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. The lessee's premises 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 by the intention to alter or demolish the wall.

**Without prejudice:** 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.

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 should be encouraged as far as possible to freely negotiate their disputes in an attempt to settle them.

# 1 What is 'make good'?

Make good, or dilapidations as it is called in the UK and from where a lot of make-good precedents come, refers to the process at expiration or determination of a lease or tenure of a commercial property lease where the lessee is required to hand back the premises they are vacating in a particular condition. It is the exercising of a lessor's rights in regard to reinstatement when the premises revert to the lessor.

Make good is based on contract law, with the contract, usually between the lessor and lessee, being the lease and other associated documents.

The quantity or value of make good is generally based on the condition of the premises at the expiration compared with the condition in which it must be handed back to the lessor as stipulated in the lease. 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.

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 repairing obligations
- should be a statement of fact setting out the breaches of the covenants of repair, which should be able to be seen and quantified and
- should set out the claims for damage.

The claim is generally set out in a Scott schedule (see Appendix D and E for an example) which lists the clause alleged to have been breached, a description of the breach, a description of the works required to remedy the breach and the costs.

The claim is generally based on the cost of works to address the breaches and/or the loss in the value to the lessor.

The claim may be:

- interim, i.e. during the term of the lease when things can change or
- final, at or after lease end, when nothing can change.

It is the view of RICS that the object of a well-constructed make-good clause in a lease is the overriding principle that neither party shall gain an advantage at the termination of the lease.

## 1.1 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 (i.e. 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 buildings are leased and the tenant is responsible for the maintenance of the exterior of the building, they may have a responsibility to keep the envelope of the building in good repair.

## 1.2 The schedule of make good

The purpose of a schedule of make good is to identify and set out alleged breaches of covenants 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 which, when employed correctly, can better serve lessors and lessees under their leases.

For simplicity, this best practice guidance note is drafted in the context of a 'final schedule'; that is, 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. This can be achieved by the lessee carrying out an assessment of their make-good obligations during the course of the term. The preparation of an interim schedule will enable the lessee to comply with their repairing obligations during the term and reduce the risk of defaulting on their lease obligations. 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 if the misuse continues.

## 1.3 Timing

During the course of a lease term the lessee will be able to repair, decorate and maintain the demise 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 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 perform 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 lease end. In many cases, 6-12 months may be required, depending on the size of the premises and likely complexity that the condition of the fit out and building will bring. 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, it may also assist in avoiding friction between the parties. Sufficient time can also allow the lessee time to choose to meet their obligations by carrying out the make-good works or to make a monetary settlement. Where there is insufficient time to carry out make-good works, the lessee is usually obliged to make a monetary settlement.

## 2 Preparing a make-good claim

### 2.1 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.

### 2.2 Step 2: reviewing the lease terms

The building consultant should prepare 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 which 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 and
  - (b) date of termination.
- 3 Establish:
  - (a) the first occupation date and
  - (b) if the lease has been renewed.
- 4 Note specific repair clauses, such as:

- (a) carpet replacement
  - (b) repainting requirements and
  - (c) maintenance of lights.
- 5 Subject to the complexity of the lease and circumstances, legal advice may need to be obtained to provide an opinion in relation to the scope of each particular clause and interaction between such clauses with reference to any underlying legal principles or laws. At this point instructions should also be sought as to any extraneous representations that have been made or other agreements between the parties which may be relevant and may be considered when interpreting the lease provisions.

### 2.3 Step 3: is there a liability to reinstate?

Consider reinstatement of alterations which may require further review of the lease terms. 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.

### 2.4 Step 4: impact of statutory precedents

Review all statutory and legal precedence.

It is imperative that due consideration is given by both parties to statutory and legal precedents which may affect the basis of their position at an early stage. An indicative review of related legislative matters on a state-by-state basis is included in Appendix G.

### 2.5 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 to hand for comparison with the physical state of the premises.
- 3 Retain site notes, measurements 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 which are inconsistent with the age of the building
  - (c) parts of the premises which 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
  - (e) the existence of partitions and fitting out and
  - (f) any improvements that could increase the value of the premises.
- 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. If no defects are discovered, then the cost of specialist inspections will not be recoverable.

## 3 Preparing and costing the schedule

### 3.1 Step 1: choosing a format and setting out the schedule

A recommended form and a completed example of a final schedule, in the form of a Scott schedule, can be seen in Appendices D and E.

Schedules of make good are typically drafted in a spreadsheet or table format. The lessor's building consultant completed 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 **Breach complained of:** this is a description of the defect, want of repair or damage which, 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 opinion of 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 to the right.

Note: Further lessee and lessor columns 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.

### 3.2 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.

Costing should be done 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) and
- 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).

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

### 3.3 Step 3: making the claim

The following steps should be carried out:

- 1 The claim should be quantified in a separate document indicating how it is made up.
- 2 The final schedule should be appended to the claim.
- 3 A summary of the figures which make up the claim should be prepared, of which the total of the final schedule is only a part.
- 4 The claim should be 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) GST (goods and services tax).

### 3.4 Other factors

In NSW, Queensland and the Northern Territory, you need to build a picture of the condition of the base building compared with others in that area or market. This might be just the floors in a commercial building or a whole industrial building. Knowing the condition of other buildings competing in the market can help you establish the reversionary value for the demise.

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 left.

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 if they have been upgraded, and whether this building will need to be upgraded to maintain its marketing and rental position.

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

Check with the local council to see if there are any development approvals (DAs) or complying development certificates (CDCs) for the building. These may be for redevelopment, or even partial refurbishment, as the building or floors being worked on could be listed for refurbishment.

Ask local agents if the space is coming up for lease. If so, it is very likely that the lessor will want the space to be promoted in the market, and there may even be a leasing brochure that describes the future condition of the premises.

### 3.5 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 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 which 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.

The lease, asset register and schedule of condition should align in this regard and provide clarity.

## 4 Diminution of value/reversionary value

### 4.1 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 its repairing obligations.

#### 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 what is required under the lessee's obligations in their lease. The damage of the reversion is the difference between the reversionary value as defined in the lease and the reduced value of the premises in the condition in which it has been left.

In the UK, there is a reasonably clear understanding that the reversionary value of a tenancy at lease end can be affected and potentially reduced by the actions of proposed actions of the lessor, e.g. the lessor's intention to refurbish can mean that the lessee's obligations to, say, replace damaged ceiling tiles, is superseded by the lessor's intention to completely replace the ceiling as part of their refurbishment. The lessor has effectively reduced the lessee's obligations through their intentions for the premises.

Please note: In Australia the law varies from state to state. Table 1 sets out the state variations.

### 4.2 Diminution and superseded works

In NSW, Queensland and the Northern Territory there are 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. 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. Where the lessor has planned imminent upgrades or refurbishments, they may reduce their ability to claim loss.

The lessor's intentions for the premises can reduce the lessee's repairing obligations. For example, where a lessor proposes to upgrade the ceiling and lighting in a tenancy once the lessee has moved out, the law in NSW, Queensland and the Northern Territory could prevent the lessor from claiming that the existing ceiling and lights need to be put back into a particular condition, e.g. as new, if it was new at the commencement of the existing lease, as it is now going to be replaced during the lessor's refurbishment of the premises. In this case, the lessor's intention to refurbish can be said to have superseded the lessee's repairing obligations.

Therefore, in these states and territory, where there is no loss to the lessor, the lessee cannot be expected to contribute towards the lessor's building upgrade. The building consultant or person preparing the claim is bound to act honestly, both in law and, as a member of RICS, by the professional standards of RICS. Unless the consultant believes that, to the best of their knowledge, the lessee has obligations for particular works, then 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 upgrade or alteration works which would replace those parts as part of a refurbishment as soon as the existing lessee vacates the premises. Including these could be found to be misleading or dishonest conduct.

**Table 1: State variations in the law regarding reversionary value**

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

## 5 Exaggeration and misleading statements

### 5.1 The building consultant's endorsement statement

RICS protocol requires that the schedule of make good should be endorsed by the building consultant preparing it. The endorsement can be given either by the building consultant in their own name or by the building consultant signing in their own name stating that they do so 'for and on behalf of XXX firm or company', if appropriate.

That document can be held out as the product of the building consultant applying their training, knowledge and expertise to the matter. The building consultant, while complying with their client's instructions, should ensure that any such document does not contain statements or assertions that the building consultant knows, or ought to know, are not true or 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 or properly sustainable or arguable to be sent bearing their name or the name of their firm. A building consultant should give proper advice, even though the client might choose to ignore it.

#### 5.1.1 NSW, Queensland and the Northern Territory requirements

Where a schedule of make good is prepared after the lease end date, the building consultant should ask the lessor to confirm in writing what their intentions are for the property before making the endorsement.

Where a schedule of make good is prepared before the lease end date, the lessor's intentions, or anticipated intentions, on the lease end date may not be known. If the lessor's intentions are not known, the building consultant will, of course, only be able to endorse the make good to the extent that the information is provided to them and relied upon.

In giving an endorsement, the building consultant should make reference to any relevant information provided. This can include listing the documentation upon which the assessment was based, reports by other parties and of correspondence from the lessor in response to enquiries made.

#### 5.1.2 General requirements

Before giving the endorsement, if there is a concern as to the lessor's entitlement under the lease to pursue an item, whether in the body of the schedule of make good or a consequential loss item, 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.

#### Example of an endorsement statement

This schedule has been prepared by [name and firm], following an inspection of the premises [address of premises]. The weather at the time of the inspection was [ ].

The schedule records the works required to be undertaken to the premises in order that they are put into the condition required by the following documentation:

- [Insert lease details]
- [Insert agreement to lease details]
- [Reference correspondence from the lessor in response to enquiry].

The following schedule contains:

- reference to the specific lease under which the obligation arises
- the breach complained of
- the remedial works suggested by the building consultant, as suitable for remedying the breach complained of and
- the building consultant's view of the cost of the works.

The schedule contains the true views of [name and firm], being the building consultant appointed to prepare the schedule.

[insert signature]

[Insert date]

## 6 Quantified demand

The purpose of the statement of quantified demand is to enable the lessee to understand the lessor's claim as fully as possible. It is to be sent within the same timescale for sending the lessee the schedule of make good and the figures set out in the quantified demand are restricted to the lessor's likely loss.

The protocol does not prescribe who should prepare the quantified demand in any given case. In practice, it will often be the building consultant who prepares the schedule of dilapidations and who gives the building consultant's endorsement. The building consultant may require input from the lessor's other advisers (e.g. the lessor's valuer) and it is important that the building consultant understands the limits of their own professional expertise when preparing the quantified demand.

The protocol does not prescribe a specific format for the quantified demand but the building consultant preparing the quantified demand should have regard to this guidance and that:

- the full amount of what the lessor is seeking in damages is to be set out clearly
- the principles of damages should be fully understood by the building consultant before preparing the quantified demand
- any consequential losses claimed as damages are to be quantified and substantiated, and the building consultant is required to explain the legal basis for the recovery of those losses
- where the quantum of any part of the content is unknown at the time of serving the quantified demand, it is a matter of judgment for the person preparing the document how to deal with this and
- evidence of each item should, where possible, be identified.

The burden is on the lessor to only claim for the loss they have legitimately suffered (or will suffer). In appraising that likely loss before making a claim, they must give proper and competent consideration not only to their intentions to do the works, but also to issues of proportionality, reasonableness and diminution in value (even if they do not need necessarily to go to the lengths of commissioning a detailed diminution valuation).

### 6.1 Lessee's endorsement

In making a response to the quantified demand, a lessee (or their building consultant), is now required to make an endorsement which confirms that, in their opinion:

- the works detailed in the response are all that were reasonably required for the lessee to remedy the alleged breaches of its covenants or obligations

- any costs set out in the response are reasonably payable for such works and
- account has been taken of what the lessee, or their building consultant, reasonably believes to be the lessor's intentions for the property.

### 6.2 Reinstatement

Where building consultants seek reinstatement in a schedule of make good they will, of course, refer to the relevant clause of the lease or licence for alterations. The requirement to reinstate is often only triggered by the serving of a notice, as prescribed in the lease or licence. However, many building consultants include reinstatement works in their schedule of make good without giving any thought as to whether they will actually be required.

Section 3.2 of the protocol now requires the building consultant to specifically identify in the schedule of dilapidations (where appropriate) any notices served by the lessor requiring reinstatement works to be undertaken.

### 6.3 Protocol

A building consultant dealing with a dilapidations claim should be aware of civil procedure rules in the local jurisdiction, and at the end of the term, should be aware of the protocol. This particularly applies to a make-good claim at the end of the term.

Civil procedure rules generally encourage the parties to a dispute to exchange full information before proceedings are issued, to enable the parties to avoid litigation where possible and to support the efficient management of proceedings where litigation cannot be avoided. These objectives are addressed by way of pre-action protocols. Building consultants should follow the protocol and direct their client's attention to it.

If court proceedings are commenced, the court may be invited by any party to treat the standards set out in this note as the normal reasonable approach to pre-action conduct when the court considers issues of costs and other sanctions. When doing so, the court should be concerned with substantial compliance and not minor departures from the suggested protocol, e.g. failure by a short period to provide relevant information. The court may also be invited by the parties to consider the effect of non-compliance on the other party when deciding whether to impose sanctions.

While this guidance note 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.

### **6.3.1 Dialogue/stocktake**

The courts and RICS encourage dialogue between parties to a dispute. In order to achieve this, it is recommended that building consultants of like disciplines should 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 instead of tried, if at all possible.

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

### **6.3.2 Court proceedings**

Most make-good claims at the end of the term do not result in proceedings being issued. Normally, the matter can be settled between the parties without that step being taken. Should matters go so far, however, once proceedings are issued, the building consultant will need to take their lead from their client's solicitors.

## 7 BCA/CDC: statutory obligations and triggers for consent

Leases normally include covenants requiring the lessee to comply with and carry out works required by the provisions of any relevant statute or regulation. Many statutory obligations arise only in respect of occupied premises and are not often applicable retrospectively. The building consultant should consider not just the lease covenant but the actual provisions of the relevant statute or regulation, or take advice on those provisions, if they believe they are relevant to the instructions.

When scheduling the physical works required to meet the make-good obligations of the lease, the building consultant will need to consider whether the works trigger the need for any statutory consents, such as a building permit, planning or heritage consent. Furthermore, it should be considered whether the costs for such compliance are to be included within the built-up rates and/or the quantified claim.

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 they are operating in. As an example, in Victoria, a list of exemptions is provided in schedule 8 of the *Building Regulations 2006*.

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.

In terms of make good in commercial property, it is likely that some form of permit or certificate is required and a building certifier should be consulted when required.

Consideration should be given to any works associated with:

- essential safety measures
- structural works, where floor areas might be increased or decreased
- 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 and
- anything that might require planning or heritage consent.

## 8 Greening make good

Average lease terms are about five years and this means that about 20 per cent of offices are churned, demolished and refitted every year. In Australia, this would represent up to five million square metres of office space per year. RICS encourages the minimising of waste when making good and provides guidance under the banner of greening make good.

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 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. RICS suggests that to reduce the need to make good for environmental initiatives, lessees should follow the following guidance.

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

### 8.2 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. Free-standing 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 less changes to the building services.

- 3 By considering wireless data systems, which dramatically reduce 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, which 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 Carpet tiles that can be mixed and matched to suit a changing office, and define reception and break-out spaces through colour or pattern changes, should be considered. Some carpet tile companies also commit to take back their product at the end of a lease. This works well if the fit out is shell and core.
- 7 It should be remembered a make good needs to allow an appropriate amount of time to complete. The lessor's permission for alteration works should be sought and liability for making good should be borne in mind.
- 8 Second-hand fit outs to minimise environmental impact should be used or premises should be sought where the previous lessees' fit out remains and can be reused.

For further information on sustainable make good, please consult the RICS *Greening make good Australia* guidance.

## 9 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.

In almost every case the lease will refer to the condition that the premises were in when the lessee's lease commenced and require make-good work to be carried out to meet the lessee's repairing obligations. It is therefore imperative that the condition of the premises is recorded accurately at the commencement of the lease.

### 9.1 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.

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 by how much.

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

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.

### 9.2 Why undertake an ongoing 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 which 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 benefit from, 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 should be prepared so that both parties to the lease have 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.

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

### 9.3 What is involved in preparing a schedule of condition?

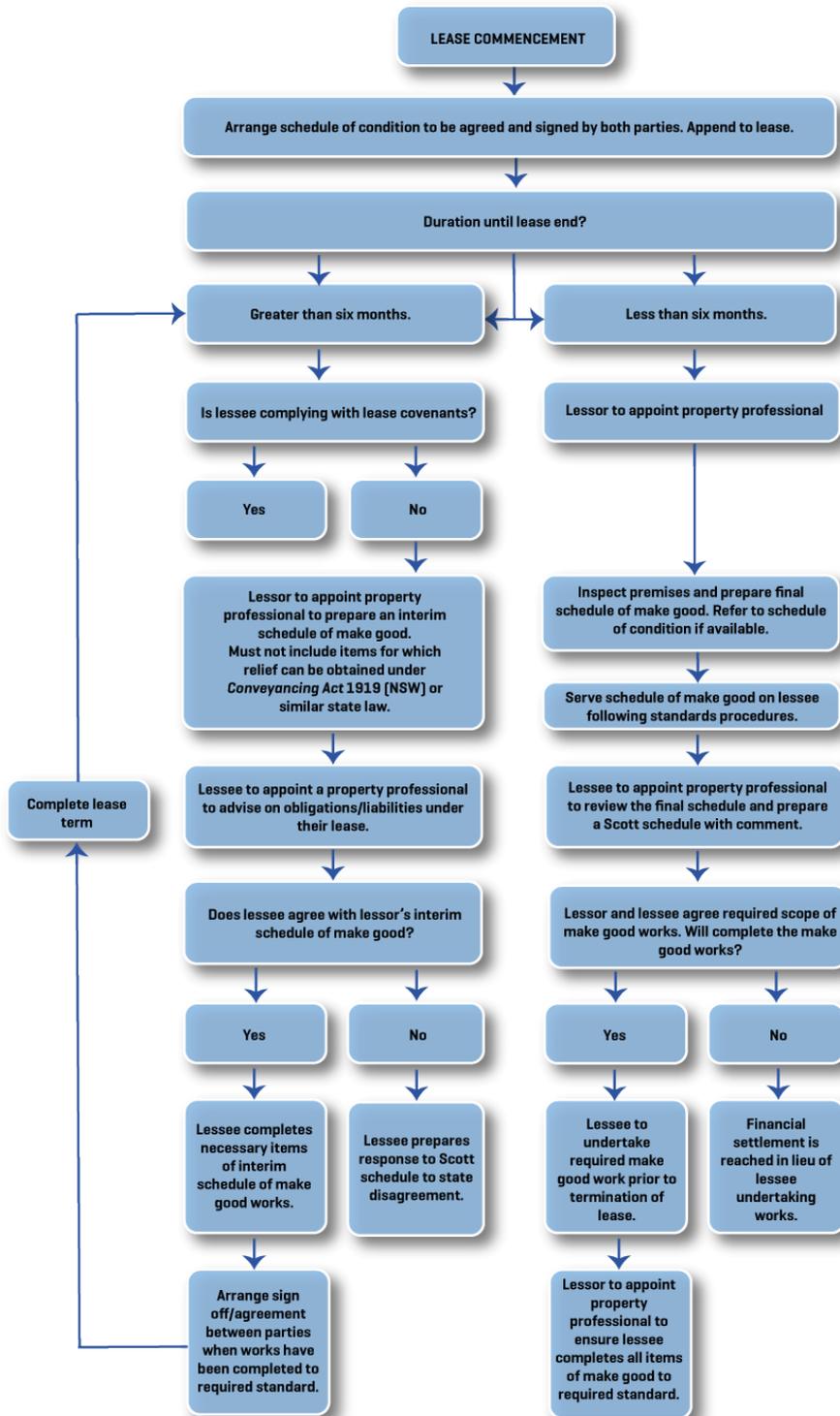
The preparation of a schedule of condition will typically include the following:

- 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
- a record of the condition of the various areas of the premises, identifying all defects. This should 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 guidance note which provides a more detailed guide to the make-good negotiation process. The checklist, as with the guidance note, is a guide only and is not intended to be exhaustive. Nor is the checklist 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: Example of a make-good schedule

[Preamble and lease summary]

### **[The premises]**

This schedule has been prepared by [name, individual and firm], upon the instructions of [name the lessee]. It was prepared following [name, i.e. same name as above]'s inspection of the premises known as [premises] on [date].

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 in if the lessee [name] had complied with their covenants contained within their lease of the premises dated [ ].

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

[Set out clause number of the lease and quote the clause verbatim].

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 lessee's property professional [name, i.e. same name as above] as suitable for remedying the breach complained of
- the lessee's view on the cost of the works.

The schedule contains the true views of [name, i.e. the same name as above], being the property professional appointed/employed by the lessee to prepare the schedule.

Upon receipt of this schedule, the lessee should respond as required by the protocol to enable the lessor to understand clearly the lessee's views on each item of the claim.

# Appendix D: Recommended form of the Scott schedule

## Notes

- 1 All quoted quantities are approximate only and the lessee is to satisfy themselves of the requirements in order to fulfil the specific make-good obligation.
- 2 All works are to be coordinated and undertaken in accordance with the property's fit-out guide and building rules as stipulated by the lessor.
- 3 The references to lease clauses are for guidance only; the lease should be read in full and assessment of responsibilities made accordingly.

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 (\$)
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								

# Appendix E: 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 (\$)
<b>External areas and balconies</b>								
<b>Main roof</b>								
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				
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				
<b>Internally: Level 2</b>								
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				
<b>Internally: Level 1</b>								

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 (\$)
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				
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				
<b>Service works</b>								
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				
<b>General works</b>								
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				
			<b>Subtotal cost for reinstatement works [exc. GST]:</b>	<b>\$1,272,080</b>				

## Appendix F: Summary of claim

A document prepared for the purpose of, and complying with, best practice as outlined in this guidance note.

### Example

Item number	Description	Comment	Costing (\$)
121	Total claim for make-good works		\$642,841.00
122	Preliminaries		\$64,284.10
123	Overheads and profit		\$32,142.05
124		<b>Subtotal for cost of works:</b>	\$739,267.15
125	Cost of preparation of schedule of make good		\$TBC
126	Negotiation fees		\$TBC
127	Private Certifying Authority		included
128	Long service levy @ 0.35%		\$2,587.44
129	Project management fees		\$TBC
130	Loss of rent	[Based on 6 weeks to remove]	\$TBC
131	Loss of outgoings		\$TBC
132	Interest on finance for the works		\$TBC
133	GST		\$74,185.46
134	<b>Total:</b>		<b>\$816,040.04</b>

## Appendix G: State-by-state variations

Legislative provisions	Pre-litigation requirements/mediation in superior courts
NSW	<ul style="list-style-type: none"> <li>• <i>Civil Procedure Act 2005</i>: applies to civil claims in all courts [except small claims].</li> <li>• S.26: Court can refer to mediation.</li> <li>• <i>Uniform Civil Procedure Rules 2005</i>, Part 20: court may give directions regulating practice of ADR.</li> </ul>
VIC	<ul style="list-style-type: none"> <li>• <i>Civil Procedure Act 2010</i>: applies to all relevant civil proceedings except VCAT proceedings.</li> <li>• S.48 and s.66: court power to direct pre-trial procedures; may refer proceeding to appropriate ADR.</li> <li>• S.22: Party to which overarching obligation applies has duty to use reasonable endeavours to resolve dispute by ADR.</li> </ul>
QLD	<ul style="list-style-type: none"> <li>• <i>Civil Proceedings Act 2011</i> and <i>Uniform Civil Procedure Rules 1999</i>: applies to magistrates' court and above. <i>Civil Proceedings Act 2011</i>, Part 6: court may refer dispute to mediation or case appraisal.</li> <li>• <i>Uniform Civil Procedure Rules 1999</i>, Ch 9, Part 4: court can refer parties to ADR.</li> </ul>
ACT	<ul style="list-style-type: none"> <li>• <i>Court Procedures Rules 2006</i>: applies to magistrates' court and higher.</li> <li>• Ch 2, Part 2.11: court can refer proceeding for mediation or neutral evaluation.</li> <li>• <i>Court Procedures Rules 2006</i>, R. 1179: Court can order settlement conference or make referral to mediation or neutral evaluation.</li> </ul>
NT	<ul style="list-style-type: none"> <li>• <i>Supreme Court Rules</i>: case management generally.</li> <li>• Ch1 Order 48: court can order settlement conference or mediation.</li> </ul>
SA	<ul style="list-style-type: none"> <li>• <i>Supreme Court Act 1935</i>, s.65[1]: court can order mediation.</li> <li>• <i>Supreme Court Civil Rules 2006</i>: case management generally.</li> <li>• R.33: parties must offer to settle.</li> <li>• Ch. 7, Part 1: pre-action status hearing and settlement conference.</li> <li>• R.220: Court can appoint mediator in an action and refer for mediation.</li> </ul>
WA	<ul style="list-style-type: none"> <li>• <i>Rules of the Supreme Court 1971</i>: case management generally.</li> <li>• Order 4A, R.2: court can, by case management direction, order preliminary conference conducted by mediator for purpose of identifying, narrowing and resolving issues in dispute.</li> </ul>
TAS	<ul style="list-style-type: none"> <li>• <i>Alternative Dispute Resolution Act 2001</i>: court can order a matter to mediation or neutral evaluation whether or not parties consent; applies from magistrates' court upwards.</li> <li>• <i>Supreme Court Rules 2000</i>: case management generally.</li> <li>• R.5: Court can order mediation whether or not parties consent.</li> </ul>



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