

AUSTRALIA — LEASES

A lease may be granted for a **term of years** (or part of a year), as a **tenancy for life**, as a **periodical tenancy** (year to year, month to month, week to week), or even as a **tenancy at will**. Also, a **tenancy at sufferance** may come into existence if a tenant holds over at the end of the lease. The lease can be for any period or time, provided the period is certain or capable of being made certain and is less than that held by the grantor. A **perpetual lease** (one granted to last indefinitely) is void (with a few exceptions for **Crown land**). In addition, there are a number of forms of tenure that have been granted in respect of Crown land (**pastoral lease, conditional purchase** or 'purchase tenure', perpetual lease (although such forms of tenure are not necessarily leases in the strict sense)).

The right to extract oil, gas and minerals is usually the subject of a separate agreement and mining and petroleum leases are subject to separate statutory rights which vary between jurisdictions.

Typical commercial lease terms and conditions:

Term	<p>A lease agreement may be entered into for any period of time, either for a defined (or definable) term or periodically.</p> <p>Typically 3 to 5 years (longer terms for larger tenants).</p>
Termination	<p>A lease may be terminated in accordance with the terms of the lease agreement or as agreed by the parties. A lease for a definite period of time may not be terminated until the end of that period, unless there is an express break clause. If there is no provision to the contrary 30-days notice is required by either party at the end of the term.</p> <p>There is not statutory security of tenure in respect of commercial leases.</p>
Rent	<p>Payable in A\$. Generally monthly in advance.</p> <p>There are no rent controls for a commercial lease; although some jurisdictions have restrictions on ratchet clauses (upwards only rent reviews). A period of notice is prescribed in all jurisdictions for a rent increase and as a rule no increase can be demanded for 12 months from the agreement of a new rate.</p>
Measuring basis	net lettable area (NLA)*
Rent revision	<p>Annual indexation increases are normal, based on the index agreed by parties. At the end of the terms the parties are free to negotiate new terms. Long-term leases commonly provide for a rent review to market rent at regular stages (e.g. a 15-year lease may contain such a provision after five and ten years).</p>
Right to renew	<p>As agreed on grant of lease. No statutory right of renewal.</p>
Security deposit	<p>1–3 months, cash or bank guarantee.</p>
Repair	<p>The tenant is generally responsible for all repairs to the demised premises, except in the case of a short lease. Repair to the common parts is normally carried out by the landlord and recharged to the tenant either directly or as part of the operating expenses. Structural repair is generally paid by landlord.</p>

**Service charges/
Operating expenses** Commercial leases are normally ‘net’ or ‘net net’ with all repairs, operating expenses and the cost of insurance being payable by the tenant, either directly or by recharge through the operating expenses. (Also see ‘Retail’ below for recovery from retail tenants.)

An advanced service charge is normally payable based on the budget estimate at the start of the lease. At the end of the financial year reconciliation is made between the advanced charge paid and the actual expenses and the future annual cost is adjusted accordingly.

**Assignment/
subletting** Tenant’s assignment or subletting normally requires L’s written consent. The lease commonly provides that the landlord’s consent will not be unreasonably withheld (if there is no such provision there is no statutory provision to that effect as in English law). An express **restraint on alienation** will be construed against the tenant. Landlord is usually free to assign his interest.

Insurance Normally the responsibility of the landlord and the premium is recharged to the tenant. Tenant normally required to insure such items as glass windows or doors, fixture, and to carry **public liability insurance** in the name of both parties.

**Alteration/
Improvement** Generally require the L’s approval. The lease commonly provides that the landlord’s consent to improvements will not be unreasonably withheld (except matters that affect the structure or major services). (In some jurisdictions, there is a statutory provision to the same effect.) Generally, it is not unreasonable for the landlord to require the tenant meet the cost of the approval, reinstatement the premises the end of the lease, and pay compensation for any diminution of the landlord’s interest in the property or neighbouring property.

Unless there is an agreement to the contrary, as a general rule, any item permanently fixed to land becomes a part thereof and may be retained by landlord. Alternatively, the landlord may require reinstatement.

Formalities In most cases, a lease for more than three year should be in **writing** and in most jurisdictions should be registered. A lease that is writing, even if grated for a shorter term, is commonly registered to provide protection against a change in the ownership or a mortgage of the land.

Agent’s fees 0.5% - 3.0% (subject to negotiation)

Legal expenses Around 1% (depending on size and nature of transaction)

*Exact method of measurement vary from country to country (the most common methods are: The Royal Institution of Chartered Surveyors, *Code of Measuring Practice: A Guide for Property Professionals* (6th ed. London: 2007).

The **Property Council of Australia** (www.propertyoz.com.au) also publishes its *Method of Measurement for Lettable Area*. The 2008 version provides guidelines for measuring floor space in leased premises. The guidelines, covering office, industrial and retail premises, aim to provide consistency by documenting a defined approach to floor space measurement that is both practical and cost effective.

Reference may also be made to the Building Owners and Managers Association International (BOMA) (www.boma.org), *Standard Method for Measuring Floor Area in Office Buildings* (Washington, DC: 1996), which uses the term **rentable area (RA)** for office buildings. This has the same meaning as NLA in the Property Council publication.

The above are intended only as a guide to common lease terms. Professional advice should be obtained in any particular case.

Office

The prime office locations are:

Sydney	Phillip Street/Macquarie Street (CBD)
Melbourne	Collins Street (CBD)
Brisbane	Eagle Street/Queen Street (CBD)
Adelaide	King William Street/North Terrace
Perth	King Street/William Street/Hay Street (CBD)

Retail

The prime retail locations are:

Sydney	Elizabeth Street (CBD)
Melbourne	Bourke Street Mall (CBD)
Brisbane	Queen Street/Edward Street (CBD)
Adelaide	Rundle Mall (CBD)
Perth	Hay Street (CBD)

Several jurisdictions have laws that apply to a **retail tenancy** or 'retail lease'. These laws require the landlord to ensure that the tenant is provided with a clear indication of the terms of the lease. The information provided includes the right to a 'disclosure statement' in a prescribed form. This disclosure is separate from the lease and must clearly set out its principal terms and conditions and details of the outgoings that are to be recharged to the tenant. Also, a statement may be required setting out the means for dispute resolution.

In all States, except Tasmania, certain terms are implied into such lease (such as a right not to have customer access impeded), unless there is an express provision to the contrary. Some jurisdictions provide that a retail tenant must be given the right to a lease for a minimum term of five years.

In some States the land tax cannot be recharged to the tenant.

In several jurisdictions, if there is a break clause for demolition or development, the landlord must provide the tenant with details of the planned work and notice must then be given in accordance with statutory provisions. There may be provisions for the payment of compensation.

Terms in **bold** are defined and explained in the Encyclopedia of Real Estate Terms (Third Edition hardcopy and ONLINE) <<http://realestatedefined.com>>

This information is intended as an introductory guide and is intended to point out issues that may be of interest to a foreign investor.

It does not constitute legal advice and should not be relied on as such. Professional advice is recommended on any issue referred to herein.

Further information may be found in our **Bibliography**.

Also, please see [Disclaimer](#).

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