The Leasing Lawyer
theleasinglawyer.com.au

Six clauses that protect your asset

A guide for landlords letting commercial or retail premises

What this covers

Rent and term get the attention. The six clauses below decide whether you can actually enforce the lease when a tenant stops paying, and what condition your building is in when they leave.

These are the provisions most often left vague, or left to a form that was drafted for a different property.

1. Make good

A clause saying the tenant will "return the premises to their original condition" sounds complete. At the end of the lease it is the beginning of an argument, because nobody recorded what the original condition was.

- Say what work is required, to what standard, and by when.
- Say whether the fit-out comes out or stays.
- Record the condition at the start, with photographs and a signed schedule attached to the lease.
- Deal with what happens if the tenant does nothing: a right to do the work and recover the cost, and whether you can claim rent for the period the work takes.

Without a condition record you negotiate from a weak position on the day you get the keys back, and the tenant knows it.

2. Default and termination

Your right to end the lease for non payment depends on following the process the lease sets out. If that process is silent or ambiguous, you lose weeks at exactly the point where weeks cost money.

Set out the notice, the period the tenant has to fix the problem, and the termination right, and make sure the three work together rather than contradicting each other. If the lease is a retail lease, the legislation adds steps of its own that override what the lease says, so build the clause knowing that.

3. Assignment and subletting

This is the clause that decides who ends up in your building.

- What triggers the need for your consent, including a change of control of a corporate tenant.
- What the tenant has to give you: financials, trading history, references, details of the proposed use.
- The grounds on which you can withhold consent.
- Whether the outgoing tenant and its guarantors stay on the hook.

- A deed of covenant from the incoming tenant, which only happens if the lease requires it.

A tenant that can assign freely can hand your premises to a business you would never have signed.

4. Rent review

Market rent reviews are contested more than any other review. Address the mechanics before the lease is signed, not when the review falls due.

Say how market rent is determined, who appoints the valuer, who pays for the valuation, and what happens if the parties cannot agree. Then check the review clause against the type of lease. Retail leases in NSW knock out several arrangements that are perfectly ordinary in a commercial lease: a clause letting one side choose between review methods, a clause picking whichever method gives the higher rent, and a clause preventing the rent falling on a market review are all void in a retail lease. A commercial lease can do all three.

5. Options to renew

An option is a right you have already granted. The conditions attached to it are the only control you keep.

- The notice window, expressed as dates, not vaguely.
- Whether a tenant in breach can still exercise it.
- How the rent for the renewed term is set.
- Whether the guarantee carries into the new term. It often does not, unless you say so.

6. The guarantee

A guarantee from the directors of a corporate tenant is standard. Whether it is worth anything depends on drafting you can do in a paragraph.

Question	Why it matters
Does it cover all money owed, or only rent?	A rent only guarantee is worth little when the real loss is make good
Is it capped?	A cap is negotiable, but know you have agreed one
Does it survive assignment?	If not, your security disappears on a transfer you consented to
Is it a guarantee, an indemnity, or both?	An indemnity survives situations where a guarantee can fail
Who has actually signed?	A guarantee signed by a company related to the tenant may add nothing at all

Two practical points

- **If the lease runs for more than 3 years and it is a retail shop lease in NSW, you have to lodge it for registration within 3 months** of it coming back after the tenant signs. There is a penalty for missing it. Diarise it at signing.

- **Security is not one thing.** A bank guarantee, a security deposit and a personal guarantee do different work and fail in different ways. Most landlords should hold more than one, and should know what triggers a call on each.

Book a free 30 minute call

We will read your lease and tell you where you stand. No charge for the call.

https://calendar.app.google/ZhB6srn7B9dYTavP7

General information only, current at the date below. It is not legal advice and no one should act on it without advice about their own lease.