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# Retail leases in NSW

What the Retail Leases Act gives you, and what it quietly takes off the table

## Start here: is your lease actually a retail lease?

This matters more than anything else in this guide. The Act does not cover every shop, and the tests are not the ones people expect.

Two exclusions catch most arguments. A shop with a lettable area of **1,000 square metres or more** is outside the Act. So is a lease with a term of **25 years or more**, counting every option to renew. There are other exclusions, including a list of uses set out in a schedule to the Act, and premises used mainly to run a business on the landlord's behalf.

- There is **no rent threshold** in NSW. You may have read that leases under a certain rent are excluded. That is not the law here.
- Get this wrong and everything below is wrong too. If you are near the line on floor area, have someone measure it against the lease plan before you rely on any of this.

## Before you sign

### The landlord's disclosure statement, at least 7 days before

The landlord has to give you a disclosure statement in the prescribed form, and it has to arrive at least 7 days before the lease is entered into. That document is where the outgoings, the fit-out position and the centre information are meant to be spelled out.

If you never got one, or it was incomplete, or it was materially false or misleading when given, you can terminate the lease by written notice **within 6 months** of entering into it, and claim compensation for what it cost you to get in, including fit-out spend. There are limits: the landlord may resist termination where it acted honestly and reasonably and the disclosure was substantially complete. Six months is not long. If something in your disclosure statement turned out to be wrong, raise it early rather than living with it.

### You have to give one back

Within 7 days of receiving the landlord's statement, the tenant must give the landlord a completed lessee's disclosure statement in the prescribed form. It carries a penalty. It gets forgotten constantly, usually because everyone is focused on the lease itself.

### Undisclosed contributions are void

If the lease makes you pay for finishes, fixtures, fittings, equipment or services and that liability was not disclosed to you in the disclosure statement, the clause is void. Not reduced. Void.

### There is no cooling off period

NSW retail leases have none. The word does not appear in the Act. If someone tells you that you have a week to change your mind after signing, they are describing another state's rules or nothing at all. Once it is signed, you are in it.

## Money: what can and cannot be passed to you

The Act does not set your rent. What it does is knock out particular ways of charging you.

| The charge | Where you stand |
|---|---|
| Capital costs of the building | Void. You cannot be made to pay them |
| Depreciation | Void |
| Interest and charges on the landlord's own borrowings | Void |
| Key money, and the landlord's lease preparation costs | Prohibited, and recoverable if paid |
| Land tax | Recoverable, but capped. Your share is limited to what the tax would have been if that land were the only land the landlord owned, held outside a special trust and not by a non concessional company |
| Any outgoing at all | Only if the lease says which outgoings are recoverable, how they are worked out and apportioned, and how they are recovered. Advertising and promotion costs are not outgoings for this purpose |

The land tax line is the one people get wrong in both directions. It is not banned in NSW. It is limited, and the single holding basis usually produces a much smaller number than the landlord's actual assessment.

You are also entitled to a written estimate of the outgoings you contribute to, itemised the same way the disclosure form itemises them.

## Rent reviews

### The 12 month rule

The lease cannot change your base rent less than 12 months after the lease starts, or less than 12 months after the last change. That does not stop fixed increases: a lease can raise the rent by a set amount or a set percentage as often as it likes. The rule bites on reviews to market.

### Two methods, landlord's choice: void

A clause that lets one party pick which of two or more review methods applies on a given occasion is void, as is a clause that picks whichever method produces the higher rent. So the "greater of CPI or market" formula that turns up in commercial leases does not survive in a retail one.

### Ratchets are void here

Where a lease provides for a review that could send the rent down, such as a review to current market rent, any provision that prevents the rent decreasing, or limits how far it can decrease, is void. People often say ratchet clauses are only banned in Victoria. Read the section. They are void in NSW too.

### What current market rent means

Where the lease reviews to current market rent, the Act reads in a definition: the rent a willing landlord and a willing tenant would reasonably agree at arm's length, both acting knowledgeably and prudently. There is a process for appointing a valuer if you cannot agree.

## Three things landlords should have on their list

- **Registration.** If the lease runs for more than 3 years, or the parties agreed to register it, the landlord must lodge it for registration within 3 months of it coming back after the tenant signs. There is a penalty for missing it, and the clock can extend for delays outside your control, such as waiting on a mortgagee's consent.
- **Fit-out contributions.** If the tenant is to pay towards work you carry out to enable their fit-out, the maximum amount or the formula has to be agreed in writing before the lease is entered into. Agree it late and you may not recover it.
- **Disturbance.** The Act reads a compensation provision into every retail lease covering things like substantially blocking access to the shop or significantly disrupting trade. Redevelopment and works programmes are where this bites.

## If it goes wrong

Most retail lease disputes cannot go straight to court. The Act requires mediation first, and proceedings can only start once the Registrar certifies that mediation has failed, or the court is satisfied it is unlikely to resolve things. Retail tenancy claims are heard in the Tribunal.

In practice that is good news. Mediation resolves most of these, at a fraction of the cost, and it happens early enough that the commercial relationship can survive.

## The short version

- Check the floor area and the term first. If the Act does not apply, none of this does.
- Disclosure runs both ways, and both directions have deadlines measured in days.
- Several charges that look normal in a commercial lease are simply void in a retail one.
- No cooling off. Get the advice before you sign, not after.

### 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.*