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Five things to check before you sign

A guide for tenants taking a commercial or retail lease

Why these five

A lease is usually the second biggest commitment a small business makes, after the people it employs. Most tenants read the rent and the term, sign, and discover the rest of it years later, normally on the way out.

None of the five below is hidden. They are all sitting in the document. They just do not announce themselves, and every one of them can cost more than the rent.

1. Make good

What the clause does

Make good is your obligation to hand the premises back in a defined condition. The wording decides the size of the bill, and small differences in wording are worth a lot of money.

"Return to original condition" is the demanding version. It can mean stripping out fit-out you paid for, back to bare floor and plasterboard. "Good repair and condition" is a lower standard and usually does not require you to remove your fit-out at all. "Fair wear and tear excepted" limits you for ordinary deterioration from normal use.

What to do about it

Ask for a condition report or a fit-out schedule at the start, signed by both sides. Without one, "original condition" is whatever the landlord says it was five years ago, and you are arguing from memory.

Ask whether a cash settlement is acceptable instead of physical works. It very often is, because the landlord may be planning a refit anyway. That conversation goes better six months before the lease ends than six days.

2. Outgoings

What you are agreeing to

In a net lease, outgoings sit on top of the base rent: rates, insurance, management, maintenance, sometimes land tax. The number moves every year and you do not control it.

In a NSW retail lease, several of these are void

If your lease is a retail lease under the NSW Act, the landlord cannot recover capital costs of the building, depreciation, or interest on its own borrowings, and cannot charge key money or its own lease preparation costs. You are not liable for any outgoing at all unless the lease sets out which outgoings are recoverable, how they are calculated and apportioned, and how they are recovered.

Land tax in NSW is a common misunderstanding. It is not prohibited in a retail lease. It is capped: your share is limited to the tax that would have been payable if the land were the only land the landlord owned. That is often far less than the landlord's real bill, and the difference is worth checking every year.

What to ask for

Last year's actual outgoings, not just the estimate. A cap on management fees. And in a retail lease, the itemised written estimate the Act entitles you to.

3. The personal guarantee

If your company signs the lease, the landlord will almost certainly ask you to guarantee it personally. That is normal. The scope is negotiable, and the scope is what matters.

- Does it cover only rent, or everything, including make good and outgoings?
- Is there a cap, in dollars or in months?
- Does it end if the lease is assigned, or does it follow you to a tenant you have never met?
- Would a bank guarantee or a security deposit do instead?

A guarantee that survives assignment is the one that catches people. You sell the business, you hand over the keys, and three years later the landlord calls you about someone else's arrears.

4. Rent reviews

Work out, before you sign, what your rent is in year three and year five under each review mechanism. Do the arithmetic. A 4 per cent fixed increase compounds to a lot more than most tenants picture.

Then look at what happens on a market review. In a NSW retail lease, a clause that stops the rent going down on a market review is void, and so is a clause that lets the landlord pick whichever review method gives the higher number. In a commercial lease that is not a retail lease, both are permitted and both are common.

5. Options and getting out

The option

An option to renew is a right with a deadline attached. Miss the window and it is usually gone, whatever the reason. Check three things: the notice period, whether being in breach at the time blocks you from exercising, and how the rent for the new term is set.

Put the date in your calendar the day you sign, with a reminder months ahead of the window, not on the day it opens.

Getting out early

There is no general right to walk away. What you have is what the lease gives you: an assignment or sublease clause, a break right, a demolition clause. Read the assignment clause carefully, because it is the exit most tenants actually use, and the conditions attached to it decide whether the exit works.

Before you sign, in one line each

- Get the make good standard defined and the condition recorded.
- Ask for last year's actual outgoings and check what the law lets them charge.
- Negotiate the scope of any personal guarantee, especially on assignment.
- Do the arithmetic on the rent in year five.
- Diarise the option window the day you sign.

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.