

# LANDLORD CHEAT SHEET FOR NZ LEASING TERMS

This cheat sheet explains a number of key clauses and gives practical tips to help avoid disputes, including:

- notifying the tenant of any intended works
- make good payments
- limiting the scope of clawback clauses
- notifying the tenant that the bank guarantee is irrevocable
- negotiating a higher bank guarantee
- introducing guidelines to collect information from a new tenant efficiently.

## QUIET ENJOYMENT CLAUSE



A landlord cannot interfere with the tenant's use and occupation of the premises, for example, by:

- erecting scaffolding that interrupts customer-flow to the tenant's shop;
- neglecting to repair a leaking roof; or
- commencing construction works near the tenant's shop.

If the landlord fails to give you a Disclosure Statement or gives you an incomplete or incorrect one, you may have the right to terminate the lease within six months of signing it.

### Notify the tenant of any intended works

We encourage landlords to notify their tenant verbally, and in writing through the disclosure statement, of any renovations they intend to complete before the tenant signs the lease. This applies to potential new renovations to a shopping centre or building work that will occur near the tenant's premises.

## MAKE GOOD OBLIGATIONS AND CLAUSES



While the Landlord is responsible for maintaining the exterior of the building, the tenant is responsible for ensuring the the interior of the building is kept clean and in good repair. A make good clause requires the tenant to restore the interior of the premises to the condition specified in the lease. For the majority of retail leases, this means 'base standards' or a 'bare shell' and involves removing the fit-out in preparation for the landlord's next tenant.

Challenging retail conditions are leading to a period of reinvention in the leasing space. Newly vacant spaces are allowing both landlords and tenants to experiment with more service-based stores as well as pop-up concepts.

But despite this, landlords and tenants are still entering into leasing agreements. In our experience, a number of key clauses create headaches for landlords. We have set these out below, alongside some practical tips to help avoid future disputes.

Unless the lease states otherwise, a tenant must comply with a make good clause even where the landlord has paid for the fit-out as a lease incentive. Landlords must ensure that they specify the condition to which the tenant must restore the premises.

### Make good payments

Landlords can choose to allow the tenant to pay a make good payment instead of carrying out their make good obligations.

This alternative allows the landlord to decide what parts of the fit-out to keep for an incoming tenant, especially if the new tenant has similar fit-out requirements.

## CLAWBACK PROVISIONS



Landlords typically offer tenants an incentive to sign a new lease, such as a contribution to their fit-out costs or rent-free periods. The lease can require the tenant to repay the incentive if the tenant assigns the lease (i.e. transfers) or defaults on the lease (e.g. stops paying rent). This is also known as a clawback clause.

However, recent court decisions suggest that this type of clause is unenforceable if the intention is to excessively penalise the tenant.

### Limit the scope of clawback clauses

Landlords should review their clawback provision to ensure it provides adequate security for a tenant's default under the lease, but does not excessively penalise the tenant for terminating the lease early.

Landlords can also structure the incentive as a loan to the tenant for the fit-out cost. It is important that the tenant understands that if they vacate the premises, they must repay the loan.

## BANK GUARANTEES



Landlords may choose to obtain a bank guarantee of at least three months rent to protect their interests, for example, if a tenant leaves the premises early or damages the premises. It is important that this is documented in the lease terms as the standard provisions of lease agreements do not provide for this.

Most New Zealand banks take two to four weeks to prepare and provide a bank guarantee. To minimise delay, we recommend landlords and leasing agents provide the tenant with the following information:

- the purpose of the bank guarantee;
- who the bank guarantee will be made in favour of (i.e. the landlord); and
- when the bank guarantee expires

### Notify the tenant that the bank guarantee is irrevocable

An irrevocable bank guarantee ensures that the bank guarantee is still valid if the tenant either:

- remains in the premises beyond the lease term (for example, by exercising an option to renew the lease); or
- takes longer to complete their make good obligations.

## PERSONAL GUARANTEES



It is standard practice to insist that the directors of a tenant company provide a personal guarantee upon signing a new lease.

This means the guarantor is personally responsible for the lease if the tenant's company runs into difficulties with their business and cannot meet their obligations under the lease.

### Negotiate a higher bank guarantee

If a tenant is reluctant to provide a personal guarantee, landlords can instead ask the tenant to provide the equivalent of six to nine months rent as a bank guarantee.

However, it is recommended that the landlord requires a personal guarantee under the lease, providing additional security should the tenant's company not meet their lease obligations.

## ASSIGNING THE LEASE



A lease assignment occurs when a current tenant transfers the lease to a new tenant, for example, through a sale of business. Under a standard sale of business agreement, the agreement is conditional on the landlord consenting to the lease's assignment.

Usually, the landlord must consent to the transfer if the new tenant is respectable, responsible and has the financial resources to meet the lease's commitments. They can only refuse in limited circumstances, for example, if the new tenant:

- has no previous business experience;
- has no assets and high debt; or
- wants to change the terms of the existing lease.

### Introduce guidelines to collect information from a new tenant efficiently

Landlords should have guidelines in place setting out what information they need from a prospective new tenant, for example:

- business references relevant to the industry related to the use of the premises;
- tax returns or bank statements; and
- trading references from suppliers.

## LEASE OFFER CHECKLIST

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Before offering a tenant a lease agreement, check that you have:

- ☐ included all formulas for calculating outgoings and rent increases
- ☐ set out what events will trigger the repayment of a lease incentive
- ☐ recorded any terms related to a lease
- ☐ an incentive or rent-free period (including recovering part of the incentive if the tenant breaches the lease)
- ☐ documented any intended renovations to the shopping centre clearly
- ☐ provided the tenant with your requirements for insurance policies and the bank guarantee
- ☐ clearly set out the commercial terms in the term sheet to minimise the lease negotiation process

## HOW LEGALVISION CAN HELP

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If you have any questions about your rights under a lease or have concerns about your lease, LegalVision's leasing lawyers can provide further assistance.

Call us on 0800 005 570 or visit our website: [legalvision.co.nz](https://legalvision.co.nz)