

# PERFORMANCE LEASING GUIDE AND MODEL CLAUSES

**BETTER BUILDING PERFORMANCE THROUGH TENANT-LANDLORD COLLABORATION**

## ACKNOWLEDGEMENTS

This guide and clauses are based on the Model Lease Clauses (2013) produced by Sparke Helmore Lawyers for Sydney's Better Buildings Partnership.

The relevant lease clauses have been adapted for the New Zealand market by DLA Piper (Justin March, Partner). The Energy Efficiency and Conservation Authority (EECA), the New Zealand Green Building Council (NZGBC), and DLA Piper New Zealand gratefully acknowledge permission from Sparke Helmore Lawyers and the Better Buildings Partnership to adapt and reproduce key elements of its leasing guide.

Thanks to:

**sparke**  
**HELMORE**  
LAWYERS



## DISCLAIMER

This publication is intended as a first point of reference and should not be relied on as a substitute for professional advice. Specialist legal advice should always be sought in relation to any particular circumstances and no liability will be accepted for any losses incurred by those relying solely on this publication.

## INTRODUCTION

# A HIGH-PERFORMING COMMERCIAL BUILDING BENEFITS BOTH LANDLORDS AND TENANTS.

Although we're seeing advances in management, technology and design, the best way to improved efficiency and productivity across a whole building is through collaboration: landlord, occupant and building manager working together. Performance leasing is an effective tool to help achieve this.

This leasing guide is designed to be a practical resource and toolkit to support collaboration. It offers example lease clauses to help improve building performance, bringing better workplace efficiency and productivity, lower outgoings, and higher asset value.

It aims to:

- educate landlords and tenants (and other stakeholders) about key aspects of building performance and how they can be managed
- address concerns that either party may have related to these clauses – including a discussion of mitigation strategies.

The model lease clauses contained here may be used with any agreement to lease or deed of lease – including the standard Auckland District Law Society Deed of Lease and the standard Property Council of New Zealand Deeds of Lease.

This guide represents a partnership between industry and government. It has been produced by DLA Piper New Zealand, the Energy Efficiency and Conservation Authority (EECA) and the New Zealand Green Building Council (NZGBC).

**“This guide represents a partnership between industry and government.”**

This guide presents a ‘menu’ of options – recognising that there is no one size fits all approach to leasing. The language used in the clauses may need to be adapted to fit the user’s deed of lease.



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**The Energy Efficiency and Conservation Authority (EECA)** is the Crown agency that encourages, supports, and promotes energy efficiency, energy conservation, and the use of renewable energy in New Zealand. Through EECA Business, we provide funding and support to promote good energy management in New Zealand businesses, helping them become more competitive and profitable by reducing their energy costs.



**The New Zealand Green Building Council (NZGBC)** is a not-for-profit industry organisation dedicated to ensuring New Zealanders live, work and play in a sustainable built environment. We do this through promoting the benefits of sustainable building, assisting the property and construction sector to acquire the right skills and knowledge, and motivating and rewarding the sustainable development and operation of buildings across New Zealand.

# GUIDE FOR USERS

## HOW TO USE THIS TOOL

1. Download the editable PDF to enable you to cut and paste the relevant clause into your own lease agreement.
2. You can also download a Microsoft® Word document of the clause you require by clicking on the  icon on the top right hand corner of each clause.
3. Choose the strength of the clauses using the drafting options denoted in red (e.g., reasonable endeavours/must).
4. Personalise and adapt to your individual preferences and circumstances.

## KEY TO HIGHLIGHTS

**Black** is insert

**Blue** is drafting note

**Red** is options

## NOTE TO USERS

- These clauses are designed as **standalone options** to help parties seeking to include more collaborative or performance-focused clauses in their lease.
- Clauses are numbered for ease of reference, but numbers should be amended as appropriate when inserted into your own lease.
- These clauses are **not mandatory** under any New Zealand legislation.
- There is **some repetition between clauses**. This is because clauses designed to be standalone may include overlapping subject matter.
- The list of clauses is **not exhaustive**; many other variations and combinations may also be possible.



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## A COOPERATION AND MANAGEMENT

A1 – Building Performance and Efficiency
A2 – Building Performance/Sustainability Committee
A3 – Building Management System
A4 – Metering
A5 – Alternative Transport Programme
A6 – Sustainable Procurement
A7 – Information

## B CONSUMPTION, WASTE AND RECYCLING

B1 – Works
B2 – Minimising Waste from Make Good
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## C SPECIFICATIONS AND STANDARDS

C1 – NABERSNZ Ratings
C2 – NABERSNZ (Simple)
C3 – Green Star
C4 – Operational Performance Standards

## D COMPLIANCE AND COSTS

D1 – Dispute Resolution
D2 – Assignment
D3 – Rent Review
D4 – On-sale of Utilities
D5 – Capital Works on Efficiency

### LEVEL OF COMMITMENT

GOOD PRACTICE BEST PRACTICE

X	X
X	X
	X
X	X
	X
	X
X	X

X	X
X	X
	X
X	X
X	X
X	X
X	X
	X

X	X
X	X
	X
X	X

X	X
X	X
X	X
	X
X	X

### BUILDING GRADE

A GRADE B GRADE C GRADE

X	X	X
X	X	X
X	X	
X	X	X
X	X	X
X		
X	X	X

X	X	X
X	X	
X		
X	X	X
X	X	X
X	X	
X	X	

X	X	
		X
X	X	
X	X	

X	X	X
X	X	X
X	X	X
X		
X	X	X

# USING THE CLAUSES

1. BUILDING PERFORMANCE AND EFFICIENCY				
OVERVIEW	CONCERN/RISK		MITIGATION	
These clauses may be used instead of or in addition to other clauses relating to building performance and efficiency.	Parties may be concerned that clauses relating to building performance and efficiency will result in significant costs and/or disruption to building operations.		These clauses compel cooperation but are limited by what is practical and reasonable. If costs or operations will be adversely affected by activities under these clauses they may not be enforced.	
NOTES	CLAUSE		CONCERN/RISK	MITIGATION
Applicable	1.1 Commitment The Landlord and the Tenant are each committed to managing and operating the building and the premises to promote energy efficiency and minimise the environmental impact of the use and occupation of the premises.		None noted	None noted

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1 Clause title and category

## 2 OVERVIEW

An overview will spell out general information about the clause and include links to further resources.

## 3 CONCERNS/RISKS

Concerns, risks or notes about the topic or specific clause details will be outlined often with an example. This includes common concerns that may not have an evidence-base.

## 4 MITIGATION

If concerns or risks are detailed, a high level mitigation will be proposed or comments may be provided if the concern has no evidence-base.

## 5 NOTES

Notes on specific clauses will give info about that clause and hyperlinks for more info.

## 6 CLAUSE

The clause content is designed to be selected, copied and pasted directly into a lease to be formatted. Legal advice will need to be sought to ensure the clause fits within your specific circumstances.

7 You can download a Microsoft® Word document of the clause you require by clicking on the icon on the top right hand corner of each clause.

8 Shading has been used in the model clauses to indicate drafting notes (eg. [drafting note:]). Brackets and shading have been used to indicate where the parties need to insert an agreed position (eg. [insert]) or where the parties need to select a choice between wording options (eg. [Option A / Option B]).

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## WHERE HIGHLIGHTING OCCURS IN THE CLAUSE, EITHER:

1) drafting notes need removed when copying and pasting into a lease eg. Alternative, OR, etc;

2) an insert is required, eg. [insert #] Star could become 5 Star;

3) a choice is required, eg. [must/may]. Choose one depending upon the level of commitment sought





# A COOPERATION AND MANAGEMENT

Jason Mann Photography

## OVERVIEW

These clauses may be used instead of or in addition to other clauses relating to building performance and efficiency.

## CONCERN/RISK

Parties may be concerned that clauses relating to building performance and efficiency will result in significant costs and/or disruption to building operations.

## MITIGATION

These clauses compel cooperation but are limited by what is practical and reasonable. If costs or operations will be adversely affected by activities under these clauses they may not be enforced.

## NOTES

Applicable

## CLAUSE

**1.1 Commitment**

The Landlord and the Tenant are each committed to managing and operating the building and the premises to promote energy efficiency and minimise the environmental impact of the use and occupation of the premises.




## CONCERN/RISK

None noted

## MITIGATION

None noted



NOTES	CLAUSE	CONCERN/RISK	MITIGATION
These are positive, high level commitments that can be placed in a lease document where more structured commitments may be problematic to agree.	<p><b>1.2 Cooperation</b></p> <p>(a) As part of their commitment in clause 1.1, the Landlord and the Tenant will cooperate with each other and act in good faith to:</p> <ul style="list-style-type: none"> <li>(i) positively contribute to the working environment of the occupants of the building and the premises;</li> <li>(ii) promote the efficient use of resources in the management and operation of the building services, the building and the premises; and</li> <li>(iii) improve and be accountable for energy efficiency in the premises and the building wherever possible.</li> </ul> <p>(b) In order to achieve the outcomes in clause 1.2(a), the Landlord and the Tenant will, wherever practicable and reasonable, cooperate with each other's initiatives to:</p> <ul style="list-style-type: none"> <li>(i) reduce energy consumption, water consumption and waste; and</li> <li>(ii) increase and improve recycling, having regard to: <ul style="list-style-type: none"> <li>(i) the extent of any works or operational change required to do so;</li> <li>(ii) the cost of such works or operational change; and</li> <li>(iii) the extent of interference to occupiers of the building arising from any such works or operational change.</li> </ul> </li> </ul>	 <p>Tenants may be concerned that the wording "must not do anything" is broad and will impose unforeseen obligations or costs on the Tenant.</p>	Listing specific activities that constitute interference may be more acceptable to a Tenant than a blanket statement.

NOTES	CLAUSE	CONCERN/RISK
None noted	<p><b>1.3 Action</b></p> <p>Without limiting the general commitments in clause 1.1 and clause 1.2, the Landlord and the Tenant will:</p> <p>(a) [not/use reasonable endeavours not to] do anything that decreases or adversely affects the energy efficiency and environmental performance of the building or the premises;</p> <p>(b) cooperate in all audits conducted or initiated by the other party or independent auditors and allow reasonable access to the premises and building to enable the gathering of information relating to the energy efficiency and environmental performance of the building or the premises, such information to be maintained as confidential unless the other party consents to its disclosure or disclosure is required by any statute, ordinance, regulation or by-law;</p> <p>(c) if the building has a Building Performance/Sustainability Committee in place, nominate a representative to participate in the Committee;</p> <p>(d) if the building or premises has a Building Performance/Sustainability Plan in place, [comply with/use reasonable endeavours to comply with] the Plan;</p> <p>(e) use reasonable endeavours to incorporate energy and water use performance criteria into fit-out design and equipment selection wherever practicable; and</p> <p>(f) [require/use reasonable endeavours to ensure] that cleaners engaged to service the building or premises, as the case may be:</p> <p>(i) use materials that release the lowest levels of volatile or toxic chemicals; and</p> <p>(ii) comply with any recycling programmes in place.</p>	None noted

OVERVIEW	CONCERN/RISK	MITIGATION
<p>A Building Performance or Building Sustainability Committee is a committee established to ensure that stakeholders in a building meet to discuss building performance and efficiency. The stakeholders can also use the forum to agree to a plan that seeks to improve the performance and efficiency of the building.</p>	<p>Parties may be concerned that implementing a Building Performance/Sustainability Committee will be costly and administratively burdensome.</p>	<p>Costs and administration of Building Performance/Sustainability Committees will change depending on the method of committee management that the parties agree to.</p> <p>Following are some examples of possible management methods:</p> <ul style="list-style-type: none"> <li>• Committee meetings that involve one-on-one meetings between the Landlord and the Tenant.</li> <li>• Committee meetings that involve meetings between the Landlord and all tenants of the building.</li> <li>• Incorporation of the Committee agenda items into the building management meetings that parties typically have each month or quarter.</li> </ul>

**As investors and occupants become more knowledgeable about and concerned with the environmental and social impacts of the built environment, buildings with better sustainability credentials enjoy increased marketability.**

The Business Case for Green Building – a review of the costs and benefits for developers, investors and occupants - World Green Building Council, Sept 2013

## DEFINITIONS

**The Building Performance/Sustainability Committee** means the management committee established by [the Landlord/this lease] which is comprised of representatives of:

- [the Landlord; and
- the Tenant

OR

- the Landlord;
- the Tenant; and
- other tenants in the building].

**Building Performance/Sustainability Plan** means the management plan entered into by the Committee that relates to the performance and efficiency of the building.

## CLAUSE

[Within [insert #] days of the commencement date, the Landlord and the Tenant will establish the [Building Performance/Sustainability] Committee that will operate for the term of the lease and any renewed term;



OR

The parties acknowledge that the building has a [Building Performance/Sustainability] Committee. Within [insert #] days of the commencement date, each party will notify to the other the name and contact details of that party's representative on the [Building Performance/Sustainability] Committee (which each party may update from time to time by written notice of the other party)]



## CONCERN/RISK

None noted

## MITIGATION

None noted



NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<b>1.2 Role</b>  <p>The parties acknowledge and agree that the Building Performance/Sustainability Committee's role is one of discussion, consultation and recommendation on issues related to:</p> <ul style="list-style-type: none"> <li>(a) energy efficiency;</li> <li>(b) environmental impact; and <ul style="list-style-type: none"> <li>(i) compliance with regulatory standards related to the design, construction, maintenance, management, use and occupation of the premises and building; and</li> <li>(ii) the Operational Performance Standards.</li> </ul> </li> </ul> <p>[Drafting note - Option (ii) refers to the Operational Performance Standards clause (see Section C (4)). If this clause is not being implemented, option (ii) should be removed.]</p>	None noted	None noted
None noted	<b>1.3 Meetings</b>  <ul style="list-style-type: none"> <li>(a) The Building Performance/Sustainability Committee will meet [quarterly/six-monthly/other] or as otherwise agreed by the parties for the purposes of addressing any matters or issues that arise under this lease.</li> <li>(b) The Building Performance/Sustainability Committee will produce and maintain for the term of the lease and any renewed term, written minutes of each meeting which will be approved and signed by the Building Performance/Sustainability Committee representatives within [insert#] days of each meeting.</li> </ul>	None noted	None noted

NOTES	CLAUSE	CONCERN/RISK
None noted	<p><b>1.4 Information</b></p> <p>(a) The parties [will / will use reasonable endeavours to] provide information to the Building Performance/ Sustainability Committee to assist it in fulfilling its role described in clause 1.2.</p> <p>(b) Information to be provided under clause 1.4(a) includes all plans, documents, maintenance contracts, specifications, maintenance reports and maintenance schedules (excluding information that is confidential to a party or cannot be disclosed by any statute, ordinance, regulation or by-law), that the parties have regarding:</p> <ul style="list-style-type: none"> <li>(i) electricity and gas (which shows consumption data);</li> <li>(ii) water consumption;</li> <li>(iii) material use;</li> <li>(iv) waste generation; and</li> <li>(v) waste management (including recycling), for the building and the premises.</li> </ul> <p>(c) The parties must keep all information provided under clause 1.4 secure and confidential except to the extent necessary:</p> <ul style="list-style-type: none"> <li>(i) to comply with any statute, ordinance, regulation or by-law; or</li> <li>(ii) to enable the parties to perform their roles and obligations under the lease;</li> <li>(iii) as required for any dispute resolution process in this lease; or</li> <li>(iv) if permitted by the other party, for other purposes, including corporate reporting or marketing.</li> </ul>	None noted

NOTES	CLAUSE	CONCERN/RISK
None noted	<p><b>1.5 Building Performance/Sustainability Plan</b></p> <p>(a) The Building Performance Committee [will/will use its reasonable endeavours to] agree on and sign a Building Performance/Sustainability Plan which supports and sets out strategies for the Building Performance/Sustainability Committee in fulfilling its role described in clause 1.2 [no less than once per annum/within the earlier of:</p> <p>(i) [insert#] months from the commencement date; and</p> <p>(ii) [insert#] months from the date of the previous [Building Performance/Sustainability] Plan].</p> <p>[Drafting note - 3 months is standard, however another time frame may be chosen]</p> <p>(b) The Building Performance Committee will review the Building Performance/Sustainability Plan from time to time but not less than once every [insert#] years and will refer any recommendations for amendment to the Landlord and the Tenant.</p>	None noted
None noted	<p><b>1.6 Costs</b></p> <p>The Landlord and the Tenant will bear their own costs in connection with the Building Performance/ Sustainability Committee and the Building Performance/Sustainability Plan.</p>	None noted

**“The benefit of having clear expectations about building performance at the very beginning of the landlord-tenant relationship is enormous. This underpins an open and collaborative relationship where both parties get value.”**



Justin March, Partner, DLA Piper New Zealand

## OVERVIEW

Building Management Systems offer feedback to occupants and managers on building performance, often in real-time, 15 or 30-minute intervals. This finer level of granularity of information arms tenants and building managers with the knowledge to understand their consumption and tune building systems.

## DEFINITIONS

**Building Management System** means the computer-based control system (including software and hardware) in the building that controls, monitors, optimises and reports on the building's mechanical and electrical equipment such as air conditioning, ventilation, lighting, power systems, fire systems, and security systems for comfort, safety and efficiency.

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<b>1.1 Operation and review</b>  <p>(a) The Landlord will [ensure/use reasonable endeavours to ensure] that the Building Management System is programmed to operate and operates to maximise the efficient supply of the building services to the premises and the building.</p> <p>(b) The Landlord [will/will use reasonable endeavours to] regularly review the programming and operation of the Building Management System for the purposes of clause 1.1(a).</p>	This clause may not be appropriate for buildings that do not have a Building Management System in place.	None noted
None noted	<b>1.2 Tenant to provide information</b>  <p>The Tenant will provide to the Landlord reasonable details of its hours of occupancy of the premises and its requirements for heating, lighting, ventilation and air conditioning services for the premises and will keep the Landlord informed of any changes in such requirements.</p>	Tenants may not agree to provide this due to the cost of providing the information.	If this requirement is explained to a tenant when the lease is first negotiated then it may lessen the likelihood of the tenant resisting this clause.

## OVERVIEW


Metering enables parties to identify their consumption of energy and water, including their total usage, and usage patterns and costs.

When parties meter energy and water they may be able to:

- identify opportunities for savings;
- use the information to better negotiate with and select service providers; and
- obtain NABERSNZ Tenancy and Base Building Ratings using accurate data.

To use the metering data for NABERSZ assessments the building meters must meet the requirements specified in *NABERSNZ Energy and Water for Office: Rules for Collecting and Using Data*: [www.nabersnz.govt.nz/resources](http://www.nabersnz.govt.nz/resources)

For more information, see: [www.nabersnz.govt.nz](http://www.nabersnz.govt.nz)

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<p><b>1.1 Separate metering</b></p> <p>The Landlord <b>[must/must use reasonable endeavours to]</b> ensure that from the commencement date and during the term of the lease and any renewed term (at the <b>[Landlord's/Tenant's]</b> cost:</p> <p>(a) the base building (including common areas) and the premises, are separately metered for:</p> <p><b>[Drafting note - choose all utilities that apply]</b></p> <p>(i) <b>electricity;</b></p> <p>(ii) <b>gas;</b></p> <p>(iii) <b>water; and</b></p> <p>(b) metering equipment has an accuracy class suitable for customer billing and meets NABERSNZ requirements.</p>	 <p>Parties may be concerned about the costs of installing meters.</p>	<p>Parties should obtain estimates of metering costs before agreeing to install meters.</p> <p>Selecting the wording option 'reasonable endeavours' may mean that parties will not be bound to install metering if it will result in significant costs and/or disruption to operations.</p>


## OVERVIEW

Alternative transport programmes are programmes that facilitate, promote and encourage the regular building occupants and visitors to the building to use alternative transportation modes; for example, by:

- using public transport;
- walking to work; or
- cycling to work.

## DEFINITIONS

**Alternative Transport Programme** means a programme agreed between the parties that facilitates, promotes and encourages the use of alternative transportation modes by regular building occupants and visitors to the building.

CLAUSE	CONCERN/RISK	MITIGATION
<p><b>1.1 Transport</b></p> <p>The Landlord and the Tenant will cooperate with each other and <b>[must/must use reasonable endeavours]</b> to:</p> <p>(a) prioritise spaces for:</p> <p>(i) on-site bicycle storage racks;</p> <p>(ii) showers and changing facilities for cyclists; and</p> <p>(iii) small cars, mopeds or motorbikes;</p> <p>(b) develop an Alternative Transport Programme; and</p> <p>(c) undertake transport modes surveys that assess the transport of the building's regular occupants.</p>	 <p>Parties may be concerned that the inclusion of a clause relating to alternative transport in a lease will result in increased costs for parties.</p>	<p>Selecting the wording option 'reasonable endeavours' may mean that parties will not be bound to implement strategies that will result in significant costs and/or disruption to operations.</p>



## OVERVIEW

Sustainable Procurement Frameworks are policies, procedures and processes that aim to improve the sustainability of the procurement of an organisation, including by minimising waste and encouraging the purchase of environmentally friendly and ethical products.

Examples of recognised standards for sustainable procurement include:

- The Australian and New Zealand Government Framework for Sustainable Procurement: [www.apcc.gov.au/SitePages/Procurement.aspx](http://www.apcc.gov.au/SitePages/Procurement.aspx); and
- British Standard 8903:2010.

## DEFINITIONS

**Sustainable Procurement Framework** means a procurement framework that encourages the purchase of only goods that are necessary and the procurement of goods and/or services that reduce the negative impacts and encourage positive outcomes for the environment, economy and society.

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
Note noted	<p><b>1.1 Sustainable procurement</b></p> <p>The [Landlord/Tenant] [has in place/will use reasonable endeavours to develop] a Sustainable Procurement Framework that applies to the [premises/base building/base building and premises] that meets industry recognised guidelines. The Sustainable Procurement Framework [includes/must include]:</p> <p>(a) policies relating to what sustainable procurement means to the Landlord;</p> <p>(b) processes that ensure that goods purchased for the [premises/base building/base building and premises] are selected with regard to the environmental and social practices of suppliers;</p> <p>(c) details on how purchasing of goods will be monitored, measured and reported for the [premises/base building/base building and premises]; and</p> <p>(d) strategies to reduce the amount of goods purchased for the [premises/base building/base building and premises].</p>	<p>Parties may be concerned that changing processes to meet the requirements of a Sustainable Procurement Framework will result in operational and increased product costs.</p> <p>Parties that do not have a Sustainable Procurement Framework in place may be concerned that the development and implementation of a Sustainable Procurement Framework will result in costs.</p>	<p>Organisations that undertake analysis of procurement processes and develop a Sustainable Procurement Framework are likely to benefit from:</p> <ul style="list-style-type: none"> <li>• cost savings due to identified opportunities (for example, by bulk purchasing);</li> <li>• an enhanced reputation as a responsible corporate citizen; or</li> <li>• avoiding risks created by dealing with unethical companies.</li> </ul> <p>Selecting the wording option 'reasonable endeavours' may mean that parties will not be bound to implement strategies that will result in significant costs and/or disruption to operations.</p>

## OVERVIEW

Data sharing and reporting are important to enable parties to identify and understand how their building is operating.

Reporting obligations ensure that data is maintained and shared.

Good recordkeeping and sharing information will help parties to make informed choices about environmental strategies likely to have the most positive effect.

## NOTES

Note noted

## CLAUSE

### 1.1 Data sharing

- (a) Each party **[will/will use reasonable endeavours to]** provide the other with information relating to the energy efficiency and sustainability of the premises and building.
- (b) Information to be provided under clause 1.2(a) includes all plans, documents, maintenance contracts, specifications, maintenance reports and maintenance schedules (excluding information that is confidential to a party or cannot be disclosed by any statute, ordinance, regulation or by-law) that the parties have regarding:
- (i) electricity and gas (which shows consumption data);
  - (ii) water consumption;
  - (iii) material use;
  - (iv) waste generation; and
  - (v) waste management, including recycling, for the building and the premises.
- (c) The parties must keep all information provided under clause 1 secure and confidential except to the extent necessary:
- (i) to comply with any statute, ordinance, regulation or by-law; or
  - (ii) to enable the parties to perform their roles and obligations under the lease;
  - (iii) as required for any dispute resolution process in this lease; or
  - (iv) if permitted by the other party, for other purposes, including, corporate reporting or marketing.



CONCERN/RISK	MITIGATION
Parties may be reluctant to share information with each other due to the perceived confidential nature of the information and the cost of collating and providing that information.	<p>The clause does not require the parties to share confidential information but, where they choose, it also requires that the recipient keeps the information confidential.</p> <p>If it is made clear to the parties upfront that the reason for sharing the information is to improve the performance of the building then the parties may be more prepared to share information due to the potential cost savings and positive effect on the environment.</p>

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**“The idea of a ‘split incentive’ when it comes to building performance is increasingly outdated. Operating commercial buildings as efficiently as possible provides significant benefit to both landlords and tenants. A collaborative partnership is the best way to achieve this objective.”**

Lincoln Fraser, Development Director, Newcrest

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<p><b>1.2 Required reports</b></p> <p>(a) The Landlord and the Tenant agree to provide (within the nominated timeframes) the energy, water and waste data information (which shows consumption data and cost) for the premises and the building reports to each other by [insert date].</p> <p>(b) The Landlord and the Tenant agree to provide updated reports to each other no less than [insert#] per [month/quarter/year].</p> <p>(c) Reports provided under clause 1.2(b) must include:</p> <ul style="list-style-type: none"> <li>(i) a reasonably detailed assessment or description of the progress and performance of the [party/parties] against any relevant targets, strategies or plans;</li> <li>(ii) descriptions of how the progress and performance was monitored over the relevant reporting period;</li> <li>(iii) if progress or performance has not met (or is likely not to meet) a reasonable target, strategy or plan explain why and how the failure may be remedied or performance improved;</li> <li>(iv) new, updated or revised targets, strategies and plan is more or a confirmation of the existing targets, strategies and plans for the next reporting period with supporting reasoning;</li> <li>(v) cost savings achieved for that reporting period; and</li> <li>(vi) any other relevant information.</li> </ul>	None noted	The Landlord may consider producing a pro-forma report for the Tenant during lease negotiations so the Tenant is aware of the information required at the outset.

NOTES	CLAUSE	CONCERN/RISK
None noted	<b>1.3 Costs</b> The Landlord and the Tenant will bear their own costs in connection with the provision of data and reports under clause 1.	None noted

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**“Taking steps to ensure a better-run, more energy efficient office building means satisfied tenants, lower operating costs, and reduced maintenance. These benefits accrue year on year, which can have a very significant impact on asset value and the bottom line.”**

Mike Underhill, Chief Executive, EECA





## **B** CONSUMPTION, WASTE AND RECYCLING

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<p><b>1.1 Commitment</b></p> <p>(a) When the Tenant fits out the premises or carries out any works to the premises or the Landlord carries out any works to the building, the party carrying out the works:</p> <p>(i) [must not/must use reasonable endeavours not to] interfere with or affect any performance rating, NABERSNZ rating or Green Star rating for the premises or the building;</p> <p>(ii) [must/must use reasonable endeavours to] minimise the environmental impact of its activities and engage in appropriate consultations in relation to those activities to assist it in doing so;</p> <p>(iii) [must/must use reasonable endeavours to] source and use sustainable, environmentally friendly, reused, recycled or refurbished products and energy efficient materials;</p> <p>(iv) [must/must use reasonable endeavours to] use materials and configure the fitout to minimise the reliance on air conditioning;</p> <p>(v) [must/must use reasonable endeavours to] minimise energy consumption and waste in carrying out the works; and</p> <p>(vi) [must/must use reasonable endeavours to] consider (acting reasonably) the recommendations and suggestions of the other party to comply with this clause taking into account their economic or practical feasibility.</p> <p>(b) The party carrying out the works must ensure any contractors it engages to carry out the works comply with the standards set out under clause 1.1(a).</p>	None noted	Landlords may consider including this clause in their fitout guidelines rather than in the body of the lease. If they do so, then they must make sure the lease contains a clause that requires the Tenant to comply with the Landlord's fitout guidelines.





NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<b>1.2 Tenant's fitout and alterations</b>  The Tenant must ensure that any works to the premises, including fitout of the premises, do not interfere with the sub-metering configuration of the premises.	None noted	None noted

**“ Building performance is important to both landlords and tenants. For landlords, it’s about ensuring quality of the asset and improving value. For tenants it’s about the quality of the workplace, ensuring its healthy and encouraging wellbeing.”**

Alex Cutler, Chief Executive, NZGBC

## OVERVIEW

Clauses around make good can result in the minimisation of financial and resource waste that often occurs at the end of the lease.

## DEFINITIONS


**Make Good means** [insert definition].

[Drafting note - the definition of make good will vary according to the lease and commercial negotiations]

**Make Good Price** means the amount determined by clause 1.3(a) or clause 1.3(c) (as the case may be).

**Make Good Period** means the period during which the Make Good is to be carried out.

**Re-letting Period** means [insert date prior to the expiry of the lease].

NOTES	CLAUSE	CONCERN/RISK
None noted	<b>1.1 Commitment</b> The Landlord and the Tenant commit to using reasonable endeavours to minimise waste from the fitout of the premises. 	None noted

**BRANZ** estimates construction and demolition waste accounts for up to 50% of all waste to landfills in New Zealand. That equates to around 1.7 million tonnes of waste, much of which can be reduced or recycled.

NOTES	CLAUSE	CONCERN/RISK
None noted	<p><b>1.2 No reinstatement</b></p> <p>The Tenant must not be required to reinstate any fitout or alterations that have been carried out with the consent of the Landlord during the term of the lease and any renewed term and which improve the energy or water efficiency of the premises unless such reinstatement is reasonably required by the Landlord to improve its ability to re-let the premises after the expiry or earlier termination of the lease.</p> 	<p>The Tenant may incur costs if the Landlord requires it to reinstate the premises to its original state prior to the lease.</p> <p>This clause creates the potential for tenants to save on fitout costs. Many standard Make Good clauses do not provide such an option and mandate that tenants must reinstate their premises, regardless of any operational benefits to the Landlord.</p> <p>The clause still provides for a fall back position of the Landlord retaining the money paid by the Tenant for the cost of the Make Good works if a new tenant cannot be found to take over the existing fitout.</p>

## NOTES

None noted

## CLAUSE

**1.3 Costing Make Good**

- (a) At least [insert #] [weeks/months] prior to the expiry of the lease the parties must meet and cooperate in good faith to agree a fixed price to undertake and complete the Make Good works during the Make Good Period acceptable to the Landlord and the Tenant.
- (b) The Make Good Price must itemise in as much detail as is practicable the individual costs of each component of the Make Good.
- (c) If the parties do not reach agreement within [insert #] days of meeting, then [either party may refer the matter for resolution by an expert appointed under the lease/the Tenant will be required to reinstate the premises in accordance with the Make Good clause under the lease, having regard to clause 1.2].
- (d) The Tenant must pay the Make Good Price to the Landlord within [insert #] days of the Landlord providing a tax invoice to the Tenant for the Make Good Price to be held by the Landlord on trust on behalf of both parties for distribution in accordance with clause 1.4.



## CONCERN/RISK


None noted

NOTES	CLAUSE	CONCERN/RISK
None noted	<p><b>1.4 Re-use of fitout</b></p> <p>(a) During the Re-letting Period, the Landlord must use its reasonable endeavours to secure a new tenant to lease the premises with as much of the Tenant's fitout remaining in the premises as possible.</p> <p>(b) If the Landlord secures a new tenant for the premises and that new tenant agrees to utilise the whole or part of the existing fitout in the premises, the Landlord:</p> <ul style="list-style-type: none"> <li>(i) will refund to the Tenant, within [insert #] days of entering into a binding agreement with the new tenant, an amount equal to the Make Good Price less the cost of Make Good of those items that the new tenant does not require be removed from the premises; and</li> <li>(ii) the Landlord may retain the balance of the Make Good Price after deducting the amount referred to in clause 1.4(i).</li> </ul> <p>(c) If the Landlord does not secure a new tenant for the premises during the Re-letting Period, the Landlord may [retain the Make Good Price/refund to the Tenant the Make Good Price and require that the Tenant carries out the Make Good works in accordance with the lease].</p> <p>[Drafting note - delete (d) if the Landlord elects to have the Tenant carry out the Make Good Works]</p> <p>(d) At the end of the Re-letting Period the Tenant is released in full from its Make Good obligations under the lease.</p>	None noted



## OVERVIEW

Cleaning products and waste from cleaning services have the potential to have a significant impact on the environment.

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<p><b>1.1 Cleaning contracts</b></p> <p>The Landlord and the Tenant as the case may be [must/ must use reasonable endeavours to] ensure that its cleaning contracts (and, where relevant, cleaning contract s entered into by any sub-tenant) require cleaners to comply with any building waste strategies or energy or water reduction strategies as relevant and use, where possible, products that are:</p> <ul style="list-style-type: none"><li>(a) natural;</li><li>(b) solvent free; and</li><li>(c) hydrocarbon free.</li></ul>	 <p>Parties may be concerned about the costs of requiring cleaners to comply with this clause.</p>	<p>Many cleaners now use products that are more sustainable as standard practice so requiring these to be used may not result in increased costs.</p> <p>Selecting the wording option 'reasonable endeavours' may mean that parties will not be bound to require cleaners to comply with this clause if it will result in significant costs and/or disruption to operations.</p>




## OVERVIEW

Given that work carried out in premises is likely to be done by external contractors, it is important for landlords and tenants to make sure the actions of those contractors are aligned with the parties' commitments to environmental performance in the lease.

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<p><b>1.1 Operations and maintenance</b></p> <p>The Landlord and the Tenant, to the extent applicable, will ensure that all maintenance contracts for the base building or premises services include:</p> <p>(a) requirements that the Base Building or premises services must perform in a way that will not adversely impact upon any existing NABERSNZ Rating or existing Green Star Rating or any Target NABERSNZ Rating or Target Green Star Rating; and</p> <p>(b) reasonable warranties by the contractor and supplier that support and do not hinder the ability of the Tenant or Landlord to obtain or maintain any existing NABERSNZ rating or existing Green Star Rating or any Target NABERSNZ Rating or Target Green Star Rating; a requirement that maintenance contractors at all times maintain and regularly provide manuals and other information relevant to the maintenance and performance of the Base Building or building services.</p>	<p>Parties may be concerned that the commercial in confidence details will be disclosed if contracts are shared.</p>	<p>This clause does not require contracts to be shared. Although, if a party requires evidence that this clause has been complied with, commercially sensitive parts of the contract may be redacted.</p>

## OVERVIEW

These are simple clauses that state the parties' commitment to improving energy efficiency and/or using energy from renewable sources.

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<b>1.1 Minimisation of energy consumption</b>  <p>The Landlord and the Tenant commit to using reasonable endeavours to minimise the energy consumption of the Base Building and the premises.</p>	None noted	None noted
NOTES	CLAUSE	CONCERN/RISK	
None noted	<b>1.2 Energy monitoring and reporting</b>  <p>(a) The Landlord and the Tenant agree to regular monitoring of energy consumption and greenhouse gas emissions of the Base Building and the premises.</p> <p>(b) The Landlord and the Tenant will provide reports containing details of the energy consumption and greenhouse gas emissions of the Base Building or premises to the other party each [month/quarter].</p>	None noted	
NOTES	CLAUSE		
None noted	<b>1.3 Reduction of carbon intensity</b>  <p>The parties [may/will] purchase or use [insert a percentage, as agreed between the parties], of renewable electricity to reduce the carbon intensity of the Base Building or premises.</p>		

**EECA recommends setting temperature bands for heating and cooling between 20°C and 24°C, so in the comfortable zone between the two settings, neither system runs.**

## OVERVIEW

This is a simple clause that states the parties' commitment to reducing water consumption.

NOTES	CLAUSE	CONCERN/RISK
None noted	<p><b>1.1 Water consumption and reporting</b></p> <p>(a) The Landlord and the Tenant commit to using reasonable endeavours to minimise the water consumption of the Base Building and the premises.</p> <p>(b) The Tenant commits to using reasonable endeavours to cooperate with any water management strategies in place for the Base Building.</p> <p>(c) The Landlord and the Tenant agree to regular monitoring of water consumption of the Base Building and the premises.</p> <p>(d) The Landlord and Tenant will provide reports containing details of the water consumption of the Base Building and the premises to the other party each [month/quarter].</p>	None noted

**A 2011 study of water use in 93 office buildings in Auckland and Wellington, showed Auckland buildings' median water use was lower than Wellington's. While building managers in both cities paid for incoming potable water by the cubic metre, Auckland also paid for outgoing wastewater. In terms of the water bill, this was 71% more.**

BRANZ, Build Magazine 125, 2011 - <http://www.buildmagazine.org.nz>

## OVERVIEW

This is a simple clause that states the parties' commitment to reducing waste.

NOTES	CLAUSE	CONCERN/RISK
None noted	<p><b>1.1 Waste minimisation and reporting</b></p> <p>(a) The Landlord and the Tenant commit to using reasonable endeavours to minimise the amount of waste going to landfill and maximise waste recycling from the operations of the Base Building and the premises.</p> <p>(b) The Tenant commits to using reasonable endeavours to cooperate with any waste management strategies in place for the Base Building.</p> <p>(c) The Landlord and the Tenant agree to regular monitoring of waste from the Base Building and the premises.</p> <p>(d) The Landlord and the Tenant will provide reports containing details of the waste of the Base Building or premises to the other party each [month/quarter].</p>	None noted


**Productivity improvements of 8-11% are not uncommon as a result of better air quality (indicated by low concentrations of CO<sub>2</sub> and high ventilation rates).**

*Health, Wellbeing and Productivity in Offices - World Green Building Council, Sept 2014*

## OVERVIEW

Clean air in the workplace can provide significant health benefits for employees and improve employee efficiency and productivity. The World Green Building Council's *The Business Case for Green Building* uses 15 independent studies to evidence up to 11% improvement from good indoor environment

([www.worldgbc.org/activities/business-case/](http://www.worldgbc.org/activities/business-case/)).

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<b>1.1 Quality of indoor air</b>  <p>(a) The Landlord and the Tenant [will/will use its reasonable endeavours to] install monitoring systems to monitor the quality of air, including levels of carbon monoxide, and outdoor air intake to the occupied parts of the Base Building and premises.</p> <p>(b) The Landlord and the Tenant will provide reports containing details of the indoor air quality of the Base Building or premises to the other party each [month/quarter].</p> <p>(c) The Landlord and the Tenant [will/will use its reasonable endeavours to] reduce pollutants entering the Base Building and premises.</p>	Parties may be concerned with the cost of monitoring indoor air quality.	Any costs of monitoring or improving indoor air quality may be justified by studies that show it results in higher levels of employee health, leading to increased attendance at work.

**An analysis of 24 studies on the relationship between workplace temperature and staff performance indicated a 10% reduction in performance at both 30°C and 15°C, compared with a baseline between 21°C and 23°C.**

NOTES	CLAUSE	CONCERN/RISK
None noted	<p><b>1.2 Hazardous materials</b></p> <p>(a) The Landlord will obtain a hazardous materials report of the building every [insert #] years. The report will assess the levels of the following in the building:</p> <ul style="list-style-type: none"> <li>(i) asbestos;</li> <li>(ii) synthetic mineral fibres;</li> <li>(iii) lead; and</li> <li>(iv) polychlorinated biphenyls.</li> </ul> <p>(b) The Landlord [will/will use its reasonable endeavours to] have hazardous</p>	None noted

NOTES	CLAUSE
None noted	<p><b>1.3 Building comfort levels</b></p> <p>(a) The Tenant and the Landlord:</p> <ul style="list-style-type: none"> <li>(i) [will/will use its reasonable endeavours to] implement a process to measure, monitor and manage lighting levels, including levels of natural daylight, in regular occupied parts of the Base Building and premises;</li> <li>(ii) [will/will use its reasonable endeavours to] implement a process to measure, monitor and manage thermal comfort levels, including temperature, relative humidity and air speed in regularly occupied parts of the Base Building and premises;</li> <li>(iii) [will/will use its reasonable endeavours to] implement a process to measure, monitor and manage acoustic levels of regularly occupied parts of the Base Building and premises; and</li> <li>(iv) [will/will use its reasonable endeavours to] carry out surveys every [quarter/year] that assess the comfort and satisfaction of occupants with the indoor air quality, thermal comfort and acoustics of the Base Building and premises. Surveys are to be provided to the other party within [insert #] days of the survey being completed.</li> </ul>





# C SPECIFICATIONS AND STANDARDS

OVERVIEW	CONCERN/RISK	MITIGATION
<p>NABERSNZ is a scheme to measure and rate the operational energy performance of existing buildings and tenancies. NABERSNZ Ratings are an essential tool for benchmarking and tracking energy performance over time. NABERSNZ Ratings are available for tenancies, base buildings and whole buildings.</p> <p>NABERSNZ uses 12 months of measured energy data to compare the performance of a building or tenancy to benchmarks that represent the performance of other comparable buildings. NABERSNZ then provides a rating ranging from 1 star (poor performance) to 6 stars (aspirational performance). Ratings are valid for 12 months.</p> <p>For more information about NABERSNZ Ratings, go to: <a href="http://www.nabersnz.govt.nz">www.nabersnz.govt.nz</a></p>	<p>Parties may be concerned about the costs of obtaining a NABERSNZ Rating assessment or the capital costs of upgrading a building or tenancy to achieve a target NABERSNZ Rating.</p> <p>Parties may be reluctant to commit to target NABERSNZ Ratings due to concerns surrounding costs if target ratings are not achieved.</p> <p>The ability for landlords and tenants to deliver absolute performance ratings may be hampered by factors beyond their immediate control.</p> <p>For example:</p> <ul style="list-style-type: none"> <li>• severe weather patterns;</li> <li>• vacancy risk, and</li> <li>• tenant operations.</li> </ul>	<p>Parties should note that significant improvements in NABERSNZ Ratings may be achieved by operational changes to buildings.</p> <p>Consequences of failing to meet a NABERSNZ Rating commitment can be adjusted to suit the parties' risk profiles.</p> <p>Examples of consequences for failure to meet a NABERSNZ Rating target are:</p> <ul style="list-style-type: none"> <li>• costs for failure to meet a target;</li> <li>• dispute resolution; and</li> <li>• reduction in rent.</li> </ul> <p>The parties may agree to target ratings on a good faith basis (for example, by choosing a 'reasonable endeavours' commitment). Parties should ensure that they are aware of the requirements relating to NABERSNZ Ratings before agreeing to achieve target NABERSNZ Ratings.</p>

[Drafting note: Delete ratings that do not apply from the definitions and adjust clauses which use the definitions as applicable under the Lease.]

[Drafting note: If the Target NABERSNZ Rating is the same as the current NABERSNZ rating, the relevant definition of the existing NABERS rating (being the Current Base Building NABERSNZ Rating, Current Tenancy NABERSNZ Rating or Current Whole Building NABERSNZ rating) will need to be deleted.]

## DEFINITIONS

**Adjusted NABERSNZ Rating** means a rating under NABERSNZ being an adjustment to a target NABERSNZ Rating.

**Base Building** means the structure, roof, external walls of the building and base building services as defined in the document *NABERSNZ Energy and Water for Office: Rules for Collecting and Using Data* ([www.nabersnz.govt.nz](http://www.nabersnz.govt.nz)) but does not include any tenancy allocated services, facilities or fitout as defined in the NABERSNZ Rules.

[Drafting note: If the building is a new building, or has undergone major refurbishment, a Base Building NABERSNZ Rating may not be able to be obtained until certain criteria have been fulfilled.]

**Base Building NABERSNZ Rating** means a current, Certified NABERSNZ energy rating for the base building.

[Drafting note: If the building is a new building, or has undergone major refurbishment, a Current Base Building NABERSNZ Rating may not be able to be obtained until certain criteria have been fulfilled.]

**Current Base Building NABERSNZ Rating** means a [insert #] star Certified NABERSNZ energy rating for the base building.

[Drafting note: A Current Tenancy NABERSNZ Rating may only be relevant if the Tenant is an existing Tenant.]

**Current Tenancy NABERSNZ Rating** means a [insert #] star Certified NABERSNZ energy rating for the premises.

[Drafting note: If the building is a new building, or has undergone major refurbishment, a Current Whole Building NABERSNZ Rating may not be able to be obtained until certain criteria have been fulfilled.]

**Current Whole Building NABERSNZ Rating** means a [insert #] star Certified NABERSNZ energy rating for the whole building.

**NABERSNZ** means the National Australian Built Environment Rating System owned by the NSW Office of Environment and Heritage (or by any successor or other body administering NABERS from time to time) and licensed to the Energy Efficiency and Conservation Authority (EECA) in New Zealand and administered on behalf of EECA by the New Zealand Green Building Council (NZGBC) in the form in which it applies at the commencement date.

**Target Base Building NABERSNZ Rating** means a [insert #] star Certified NABERSNZ energy rating for the base building.

**Target NABERSNZ Rating** means:

- (b) a Target Base Building NABERSNZ Rating;
- (c) a Target Tenancy NABERSNZ Rating; or
- (d) a Target Whole Building NABERSNZ Rating, as adjusted in accordance with clause 1.4.

## DEFINITIONS

**Target Base Building NABERSNZ Rating** means a [insert #] star Certified NABERSNZ energy rating for the base building.

**Target Whole Building NABERSNZ Rating** means a [insert #] star Certified NABERSNZ energy rating for the whole building.

**Tenancy NABERSNZ Rating** means a current Certified NABERSNZ energy rating for the tenancy.

**Whole Building** means the whole building and includes the base building and any tenanted areas within the building, including the premises.

[Drafting note: If the building is a new building, or has undergone major refurbishment, a Whole Building NABERSNZ Rating may not be able to be obtained until certain criteria have been fulfilled.]

**Whole Building NABERSNZ Rating** means a current Certified NABERSNZ Energy rating for the whole building.

## NOTES

Base Building NABERSNZ Ratings assess the energy performance of the central services of the building during the rating period.

Base building areas may include:

common areas (for example, lift lobbies, foyers, plant rooms and common area toilets);

- lifts and escalators;
- air conditioning and ventilation, including base building services to meet normal requirements and centralised supplementary services provided for tenants.

Often tenants and landlords advertise the NABERSNZ Rating of a base building to demonstrate their commitment to sustainability.

## CLAUSE

## 1.1 Base Building NABERSNZ Rating



[Drafting note: Delete (a) if the building does not have a Current Base Building NABERSNZ Rating or if the Current Base Building NABERSNZ Rating is the same as the Target Base Building NABERSNZ Rating.]

[Drafting note: if you select (a) and (b) consider selecting the option “must” under clause (a).]

- (a) Subject to clause 1.1(b), the Landlord [will/will use its reasonable endeavours to] ensure that the Current Base Building NABERSNZ Rating is maintained for the term.
- (b) The Landlord [will/will use its reasonable endeavours to] ensure that the Target Base Building NABERSNZ Rating is:
  - (i) if not achieved at the commencement date, achieved by [insert date]; and
  - (ii) maintained for the term.
- (c) The Landlord [will/will use reasonable endeavours to] obtain a Base Building NABERSNZ Rating on an annual basis and deliver to the Tenant a copy of an accredited Base Building NABERSNZ Rating certificate no less than once per annum during the term.
- (d) The Tenant:
  - (i) must comply with the Landlord’s reasonable requirements in relation to maintaining a Base Building NABERSNZ Rating (including the Current Base Building NABERSNZ Rating and the Target Base Building NABERSNZ Rating); and
  - (ii) [must not/must use reasonable endeavours not to] do: [anything to interfere with the Base Building NABERSNZ Rating].

OR

any of the following:

[list specific actions that the Tenants must not do which may affect the Base Building NABERSNZ Rating]

1.

## CONCERN/RISK

Clause 1.1(a) and 1.1(b) – Landlords may be reluctant to commit to Target Base Building NABERSNZ Ratings due to concerns surrounding costs if target ratings are not achieved.

The ability for landlords to deliver absolute performance ratings may be hampered by factors beyond their immediate control.

For example:

- severe weather patterns;
- vacancy risk; and
- tenant operations.

Clause 1.1(c) - some clauses requiring the provision of NABERSNZ Rating certificates to tenants are drafted relative to the commencing date of leases. This may result in a practically difficult situation for landlords with large numbers of tenants.

Clause 1.1(d) – Tenants may be concerned that the wording ‘must not do anything to interfere with the Base Building NABERSNZ Rating’ is broad and may impose unforeseen obligations or costs on the Tenant.

## MITIGATION

Clause 1.1(a) and 1.1(b) – The level of risk associated with commitments to Base Building NABERSNZ Ratings will be determined by the mechanisms under the lease.

If the wording ‘will use reasonable endeavours to’ is selected and the Landlord does not achieve a Base Building NABERSNZ Rating but has undertaken all reasonable steps to attain the rating, the Landlord may not be subject to consequences for its failure.

Consider specifying exactly what constitutes ‘reasonable endeavours’ to provide further clarity under the lease.

For example, the Landlord may be required to obtain a report from an independent expert confirming the steps that the Landlord has taken and that such steps either constitute all reasonable endeavours, or what additional steps need to be undertaken.

Clause 1.1(c) – This clause is drafted so that the Landlord may present NABERSNZ Rating certificates to all of its tenants at the one time.

The result is that the Tenant receives the information on an annual basis and the paperwork for the Landlord is minimised.

Clause 1.1(d) – Tenants may impact the Base Building NABERSNZ Rating if they alter their use of base building services such as connecting equipment to the base building electricity supply. These types of actions are usually covered in standard lease clauses.



NOTES	CLAUSE
<p>NABERSNZ Tenancy Ratings assess the energy performance of a premises during a rating period.</p> <p>Tenants often advertise the NABERSNZ Rating of a tenancy to demonstrate their commitment to sustainability. Landlords are less likely to advertise individual Tenancy NABERSNZ Ratings unless it is in the context of a whole building rating.</p> <p>Landlords may find it useful to encourage and recommend NABERSNZ Tenancy Ratings in fitout guides.</p>	<div data-bbox="1877 331 1944 411" data-label="Image"></div> <p><b>1.2 Tenancy NABERSNZ Rating</b></p> <p>[Drafting note: Delete (a) if the building does not have a Current Tenancy NABERSNZ Rating or if the Current Tenancy NABERSNZ Rating is the same as the Target Tenancy NABERSNZ Rating.]</p> <p>[Drafting note: if you select (a) and (b) consider selecting the option “must” under clause (a).]</p> <p>(a) (a) Subject to clause 1.2b, the Tenant [will/will use its reasonable endeavours to] ensure that the Current Tenancy NABERSNZ Rating is maintained for the term of the lease and any renewed term.</p> <p>(b) The Tenant [will/will use its reasonable endeavours to] ensure that the Target Tenancy NABERSNZ Rating is:</p> <ul style="list-style-type: none"> <li>(i) achieved by [insert date]; and</li> <li>(ii) maintained for the term of the lease and any renewed term.</li> </ul> <p>(c) The Tenant will obtain a Tenancy NABERSNZ Rating on an annual basis and deliver to the Landlord a copy of an accredited Tenancy NABERSNZ Rating certificate no less than once per annum during the term of the lease and any renewed term.</p> <p>(d) The Landlord [must not/must use reasonable endeavours not to] do anything to interfere with a Tenancy NABERSNZ Rating (including the Current Tenancy NABERSNZ Rating and Target Tenancy NABERSNZ Rating), unless such action is necessary to protect the building services or the building.</p>

Concerns, risks and mitigations relating to this clause are outlined on the following page.

**NABERSNZ** was adapted from the Australian scheme **NABERS**, and introduced to New Zealand in 2013. Experience in Australia shows those buildings that use **NABERS** consistently to rate energy efficiency, have improved energy use by an average 29% over eight ratings.





## CONCERN/RISK

Clauses 1.2(a) and (b) – Tenants may be reluctant to commit to Target Tenancy NABERSNZ Ratings due to concerns surrounding costs if target ratings are not achieved.

The ability for tenants to deliver absolute performance ratings may be hampered by factors beyond their immediate control.

For example:

- in-house data centres;
- HVAC; and
- inefficient lighting operations.

Clause 1.2(d) – Landlords may be concerned that the wording ‘must not do anything to interfere with the Tenancy NABERSNZ Rating’ is broad and may hamper the Landlord in dealing with its building or prevent them from maintaining their asset.

## MITIGATION

Clauses 1.2(a) and (b) – The level of risk associated with commitments to Tenancy NABERSNZ Ratings will be determined by the mechanisms under the lease.

If the wording ‘will use reasonable endeavours to’ is selected and the Tenant does not achieve a Tenancy NABERSNZ Rating but has undertaken all reasonable steps to attain the rating, the Tenant may not be subject to consequences for its failure.

Consider specifying exactly what constitutes ‘reasonable endeavours’ to provide further clarity under the lease.

For example, the Tenant may be required to obtain a report from an independent expert confirming the steps that the Tenant has taken and that such steps either constitute all reasonable endeavours, or what additional steps need to be undertaken.

Clause 1.2(d) – The Landlord’s risk is mitigated by the wording ‘unless such action is necessary to protect the building services or the building’.

**“NABERSNZ gave us a clear, unbiased view on how well our tenancy uses energy. It’s assurance that we’re providing a comfortable well-run site – and if we want to reduce energy costs further, we know where to focus.”**

*Brian Jones, Director, Hampton Jones, (4 star ‘excellent’ NABERSNZ tenancy rating, Auckland 2014)*

NOTES	CLAUSE
<p>A Whole Building NABERSNZ Rating is an assessment of the energy performance of the base building and tenancy combined. Parties may wish to obtain a Whole Building NABERSNZ Rating if a building does not have sufficient metering in place for base building and tenancy NABERSNZ Ratings. Alternatively, the Landlord and the Tenant may be interested in assessing the performance of the building on a holistic basis.</p> <p>A Landlord may require a Tenant with control over a whole building to obtain and maintain a Whole Building NABERSNZ Rating to enable the Landlord to report on the performance of its asset.</p>	<div data-bbox="1877 331 1944 411" data-label="Image"></div> <p>[Drafting note: Whole Building NABERSNZ Ratings are more often obtained by Landlords. However where a Tenant has leased a whole building and has control over the base building the Tenant may obtain a Whole Building NABERSNZ rating. In this instance, replace the references in this clause to “Landlord” with “Tenant”.]</p> <p><b>1.3 Whole Building NABERSNZ Rating</b></p> <p>[Drafting note: Delete (a) if the building does not have a Current Whole Building NABERSNZ Rating or if the Current Whole Building NABERSNZ Rating is the same as the Target Whole Building NABERSNZ Rating.]</p> <p>[Drafting note: if you select (a) and (b) consider selecting the option “must” under clause (a)]</p> <p>(a) Subject to clause 1.3(b), the Landlord [will/will use its reasonable endeavours to] ensure that the Current Whole Building NABERSNZ Rating is maintained for the term of the lease and any renewed term.</p> <p>(b) The Landlord [will/will use its reasonable endeavours to] ensure that the Target Whole Building NABERSNZ Rating is:</p> <ul style="list-style-type: none"> <li>(i) achieved by [insert date]; and</li> <li>(ii) maintained for the term of the lease and any renewed term.</li> </ul> <p>(c) The Landlord [will/will use its reasonable endeavours to] obtain a Whole Building NABERSNZ Rating on an annual basis and deliver to the Tenant a copy of an accredited Whole Building NABERSNZ Rating certificate no less than once per annum during the term of the lease and any renewed term.</p> <p>(d) The Tenant:</p> <ul style="list-style-type: none"> <li>(i) must comply with the Landlord’s reasonable requirements in relation to maintaining a Whole Building NABERSNZ Rating (including the Current Whole Building NABERSNZ Rating and the Target Whole Building NABERSNZ Rating); and</li> <li>(ii) [must not/must use its reasonable endeavours not to] do: <ul style="list-style-type: none"> <li>[anything to interfere with the Whole Building NABERSNZ Rating unless such action is necessary to protect the building services or the building.]</li> </ul> </li> </ul> <p>OR</p> <p>any of the following:</p> <p>[list specific actions that the Tenant must not do which may affect the Whole Building NABERSNZ Rating]</p>

## CONCERN/RISK

Clauses 1.3(a) and (b) – Landlords and tenants may be reluctant to commit to Target NABERSNZ Ratings due to concerns surrounding costs if target ratings are not achieved.

The ability for landlords to deliver absolute performance ratings may be hampered by factors beyond their immediate control.

For example:

- severe weather patterns;
- vacancy risk; and
- tenant operations.

Clause 1.3(c) – Some clauses requiring the provision of NABERSNZ Rating certificates to tenants are drafted relative to the commencing date of leases. This may result in a practically difficult situation for landlords with large numbers of tenants.

Clause 1.3(d) – Tenants may be concerned that the wording ‘must not do anything to interfere with the Whole Building NABERSNZ Rating’ is broad and will impose unforeseen obligations or costs on the Tenant.

Landlords may be concerned that the wording ‘must not do anything to interfere with the Whole Building NABERSNZ Rating’ is broad and may hamper the Landlord in dealing with its building or prevent them from maintaining their asset.

## MITIGATION

Clauses 1.3(a) and (b) – The level of risk associated with commitments to Whole Building NABERSNZ Ratings will be determined by the mechanisms under the lease.

If the wording ‘will use reasonable endeavours to’ is selected and the landlord and/or tenant does not achieve a Whole Building NABERSNZ Rating but has undertaken all reasonable steps to attain the rating, the landlord and/or tenant may not be subject to consequences for its failure.

Consider specifying exactly what constitutes “reasonable endeavours” to provide further clarity under the lease.

For example, the landlord and/or tenant may be required to obtain a report from an independent expert confirming the steps taken and that such steps either constitute all reasonable endeavours, or, what additional steps need to be undertaken.


Clause 1.3(c) – This clause is drafted so that the landlord may deliver the Whole Building NABERSNZ Rating certificates to all of its tenants at the one time.

The result is that the tenant receives the information on an annual basis and the paperwork for the landlord is minimised.

Clause 1.3(d) – If tenants interfere with a Whole Building NABERSNZ Rating they may be engaging in activities which are in conflict with their permitted use of the building such as installing unauthorised equipment.

Clause 1.3(d) – The landlord’s risk is mitigated by the wording “unless such action is necessary to protect the building services or the building”

NOTES	CLAUSE	NOTES
<p>This clause creates a mechanism for the parties to adjust NABERSNZ Ratings where parties have acted in good faith and undertaken reasonable efforts to obtain a Target NABERSNZ Rating.</p> <p>When deciding whether to use this clause, parties should determine their expectations in relation to the other party achieving a NABERSNZ Rating.</p> <p>For example,</p> <ul style="list-style-type: none"> <li>• A tenant moving into a building because it expects the landlord to achieve a Base Building NABERSNZ Rating may not want to agree to this clause.</li> <li>• A landlord may find this clause acceptable if it satisfied that the tenant will use its best endeavours to obtain a Tenancy NABERSNZ Rating.</li> </ul>	<p><b>1.4 Adjusted NABERSNZ Rating</b></p> <p>(a) If a party reasonably believes that the Target NABERSNZ Rating for which it is responsible cannot be achieved then provided:</p> <ul style="list-style-type: none"> <li>(i) that party gives written notice to the other party stating the reasons why the Target NABERSNZ Rating cannot be achieved and requesting an Adjusted NABERSNZ Rating (Adjustment Notice);</li> <li>(ii) that party has taken all reasonable measures to achieve the Target NABERSNZ Rating;</li> <li>(iii) the inability to achieve the Target NABERSNZ Rating is not due to any misrepresentation regarding the condition or capacity or the building, the building services or the premises or deterioration in or failure of relevant parts of the building, the building services or the premises or to activities in the building or the premises; and</li> <li>(iv) that party, or the parties together, has or have exhausted all reasonable avenues to achieve the Target NABERSNZ Rating, the Adjusted NABERSNZ Rating will become the Target NABERSNZ Rating.</li> </ul> <p>(b) Once the Adjustment Notice is given, the other party may agree to the request for an Adjusted NABERSNZ Rating in writing within [insert #] days.</p> <p>(c) If the other party does not accept the request for an Adjusted NABERSNZ Rating, or respond within the time period in clause 1.4(b), the request may be referred by either or both parties for resolution by an expert appointed under the processes in the Lease.</p>	<p>None noted</p>

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
Alternative “light” NABERSNZ clause.	<b>1.1 NABERSNZ Ratings</b>  <p>(a) The [Landlord/Tenant] may at its cost establish (where applicable) NABERSNZ certification for the [building/premises], and will endeavour to continually improve the building’s NABERSNZ Rating.</p> <p>(b) The [Landlord/Tenant] will keep the other party informed of the NABERSNZ Rating of the [building/premises] and of any initiatives being considered by the Landlord, from time to time, to improve the energy performance of the [building/premises].</p>	This clause enables parties to state their intention to obtain a NABERSNZ Rating, but does not impose any consequences for failure to meet a NABERSNZ Rating.	None noted

**“In New Zealand, commercial buildings use one-fifth of the nation’s electricity, so it is crucial that we are able to measure our performance and track improvement. NABERSNZ allows us to do that. It also helps us to benchmark against others and importantly, improve our brand and reputation.”**

*Tony Arnel, Global Director of Sustainability, Norman Disney & Young (4 star ‘excellent’ NABERSNZ tenancy rating, Auckland 2015)*

OVERVIEW	CONCERN/RISK	MITIGATION
<p>The New Zealand Green Building Council (NZGBC) is an industry body that defines best practice in environmental sustainability for building design, construction and performance. Green Star rates buildings across a range of environmental criteria and provides the ability to capture many tenant and landlord priorities within a streamlined star rating. Higher-rated buildings boast lower operating costs, greater tenant attraction and retention, healthier workplaces and enhanced marketability and corporate social responsibility.</p> <p>For more information on Green Star, go to: <a href="http://www.nzgbc.org.nz">www.nzgbc.org.nz</a></p>	<p>Parties may be concerned that achieving Green Star Ratings will result in considerable expenses being incurred.</p>	<p>Parties should seek advice in relation to the potential costs of obtaining a Green Star Rating and align any commitments to delivery with this advice.</p> <p>By selecting 'reasonable endeavours' options, parties may not be bound to implement Green Star strategies that will result in significant costs and/or disruption to building operations.</p>

**Administered by the New Zealand Green Building Council, Green Star is New Zealand's rating tool for commercial building sustainability. Ratings range from 4 Green Star (best practice) to 6 Green Star (world excellence). Green Star ratings can be achieved for new building projects, refurbishments, and interior fit-outs.**

[www.nzgbc.org.nz/greenstar](http://www.nzgbc.org.nz/greenstar)



## DEFINITIONS

**Green Star Office Design Rating** means a [insert #] Green Star – Office Design [insert version #] Rating certified by the NZGBC.

**Green Star Office Built Rating** means a [insert #] Green Star – Office Built [insert version #] Rating certified by the NZGBC.

**Green Star Office Interiors Rating** means a [insert #] Green Star – Office Interiors [insert version #] Rating certified by the NZGBC.

[Drafting note: A Target Green Star Design or Built Rating may apply to an existing building, as well as to a new building]

**Target Green Star Office Design Rating** means a [insert #] Green Star – Office Design [insert version #] Rating certified by the NZGBC.

**Target Green Star Office Built Rating** means a [insert #] Green Star – Office Built [insert version #] Rating certified by the NZGBC.

[Drafting note: A Target Green Star Interiors Rating may apply to an upgrade of an existing fitout, including following a lease renewal, as well as to a new fitout]

**Target Green Star Office Interiors Rating** means a [insert #] Green Star – Office Interiors [insert version #] Rating certified by the NZGBC.

**NZGBC** means the New Zealand Green Building Council.

## NOTES

Green Star Office Design and Built Rating tools evaluate the environmental potential of the design of commercial offices (base buildings) for both new and refurbished projects.

Green Star – Office Built Rating tools assess the delivery of the same design criteria as in Green Star Office Design, but at practical completion.

## CLAUSE

### 1.1 Green Star Office Design and Built Ratings

[Drafting note: A Landlord can obtain a Green Star Office Design Rating (clause 1.1(a)) or a Green Star Office Built Rating (clause 1.1 (b)) or both a Green Star Office Design Rating and a Green Star Office Built Rating. Delete one of the below clauses if required.]

- (a) The Landlord [will/will use its reasonable endeavours to] obtain a Green Star Office Design Rating by [insert date] and deliver to the Tenant a copy of the Green Star Office Design Rating certificate within [insert #] days of obtaining the certificate.
- (b) The Landlord [will/will use its reasonable endeavours to] obtain a Green Star Office Built Rating by [insert date] and deliver to the Tenant a copy of the Green Star Office Built Rating certificate within [insert #] days of obtaining the certificate.





NOTES	CLAUSE	CONCERN/RISK
Landlords may include requirements for tenants to obtain Green Star Interior Ratings in fitout guides.	<p><b>1.2 Green Star Office Interiors Rating</b></p> <p>(a) The Tenant [will/will use its reasonable endeavours to] ensure that Target Green Star Office Interiors Rating is achieved by [insert date].</p> <p>(b) The Tenant will obtain a Green Star Office Interiors Rating by [insert date] and deliver to the Landlord a copy of the Green Star Office Interiors Rating certificate within [insert #] days of obtaining the certificate.</p> <p>(c) The Landlord must comply with the Tenant's reasonable requirements in relation to obtaining the Target Green Star Office Interiors Rating.</p>	None noted

**“Research shows us that a better performing asset has better occupancy, which of course is of great importance to the landlord community.”**

*Amanda Steele, CBRE Pacific Head of Sustainability and Co-Chair Tenants' Working Group, Better Buildings Partnership, Sydney*

## OVERVIEW

Operational performance standards enable a positive framework for collaborating to improve the building for the benefit of both the landlord and tenants over prescriptive measures such as temperature set points. For example, parties may use this clause to set out a process for determining what constitutes thermal comfort, in accordance with tenants' needs.

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<p><b>1.1 Landlord to comply</b></p> <p>Subject to clause 1.3, the Landlord <b>[must/must use its reasonable endeavours to]</b> provide and operate the building services at all times in accordance with the higher of the:</p> <p>(a) requirements and standards specified in Schedule <b>[insert Schedule prepared by Landlord]</b> (Operational Performance Standards); and</p> <p>(b) any relevant New Zealand Standards.</p> <p><b>[Drafting note - Operational Performance Standards may cover issues such as thermal comfort and lighting levels]</b></p>	<p>The Tenant may be concerned that the Landlord will operate the building at conditions that are uncomfortable.</p>	<p>The Tenant should have input into the Operational Performance Standards Schedule.</p>

**According to EECA estimates, up to a third of office buildings in New Zealand have heating, ventilation and air conditioning (HVAC) systems that ‘fight’ each other as they try to heat and cool the same space at the same time. This can double HVAC energy use.**

NOTES	CLAUSE	CONCERN/RISK
<p>Metering and monitoring are critical in reducing energy consumption. This clause enables tenants to obtain the information they need to lower electricity and other costs and improve indoor environment.</p> <p>Clause 1.2(a) – This may include equipment to monitor:</p> <ul style="list-style-type: none"> <li>• carbon dioxide concentrations;</li> <li>• air speed;</li> <li>• humidity;</li> <li>• particulate matter;</li> <li>• airborne microbials; or</li> <li>• ambient sound levels.</li> </ul>	<p><b>1.2 Monitor performance</b></p> <p>(a) With the Landlord's permission (which must not be unreasonably withheld), the Tenant may install within the premises equipment to monitor the Landlord's compliance with clause 1.1(a).</p> <p>(b) The Landlord must produce to the Tenant, when requested, the Landlord's records relating to the operation and performance of the building services including confirmation that the building's heating, cooling and ventilation system and Building Management System have been tuned, commissioned and tested for contaminants in accordance with a regular maintenance programme.</p>	<p>None noted</p>

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
<p>None noted</p>	<p><b>1.3 Tenant's actions</b></p> <p>(a) The Tenant must not do [anything that affects or prevents the building standards from meeting the Operational Performance Standards.</p> <p>(b) OR</p> <p>(c) any of the following:</p> <p>(i) list specific actions that the Tenant must not do which may affect the Operational Performance Standards.]</p>	<p>Tenants may be concerned that the wording 'must not do anything' is broad and will impose unforeseen obligations or costs on the Tenant.</p>	<p>Listing specific activities that constitute interference may be more acceptable to a tenant than a blanket statement.</p>

A photograph of a modern building with a glass facade and a courtyard. The building has a white, perforated facade. The courtyard is paved with grey stone tiles and features outdoor seating with tables and chairs. A person is walking in the courtyard. The text "D COMPLIANCE AND COSTS" is overlaid on the image in a green box.



## D COMPLIANCE AND COSTS

## OVERVIEW

Dispute resolution clauses dictate the consequences for failure to achieve performance lease provisions. These can be placed in a schedule with specific clauses, be made to apply only to specific clauses or apply to the lease as a whole.

How parties use dispute clauses will vary depending on the importance that the other party meet the obligations outlined in the specific clauses to which they relate.

A series of dispute clauses have been provided to show some of the types of clauses that may be used.

NOTES	CLAUSE	CONCERN/RISK
None noted	<b>1.1 No breach of the lease</b> A breach of [clauses [insert clause numbers] /this schedule] will not constitute a breach of the lease. 	None noted
None noted	<b>1.2 Failure of parties to meet obligations</b> (a) If a party fails to meet an obligation under [clauses [insert clause numbers] /this schedule], a party may deliver to the other a notice outlining the nature of the failure and a time period within which it must be rectified. (b) If the failure is not rectified within the time period stated under the notice, the party may issue a second notice requiring that the parties meet within [insert #] days to agree on a plan to rectify the failure ( <b>Remedial Plan</b> ). [Drafting note - most leases contain their own dispute resolution clauses. This clause allows a party to refer to the dispute resolution clause in the lease or use the drafting provided in clauses 1.3] (c) If the parties fail to agree a Remedial Plan or fail to meet in accordance with clause 1.2(b), either party may [refer the matter for resolution in accordance with [insert clause number] /refer the matter to an expert agreed by the parties or, failing agreement of the parties, an expert appointed or recommended by the Arbitrators and Mediators Institute of New Zealand Inc.]. 	None noted

NOTES	CLAUSE	CONCERN/RISK
None noted	<p><b>1.3 Expert determination – non-binding</b></p> <p>The parties agree that the expert:</p> <ul style="list-style-type: none"> <li>(a) acts as an expert and not as an arbitrator; and</li> <li>(b) may decide on the rules of conduct and enquire into the dispute as the expert thinks fit, including hearing representations and taking advice from people the expert considers appropriate; and</li> <li>(c) must give written reasons for its decision.</li> <li>(d) <b>OR</b></li> </ul> <p><b>1.3 Expert determination – binding within threshold</b></p> <ul style="list-style-type: none"> <li>(a) The parties agree that the expert's decision will be final and binding on the parties except: <ul style="list-style-type: none"> <li>(i) in the case of manifest error or law; or</li> <li>(ii) where: <ul style="list-style-type: none"> <li>the monetary amount claimed by a party or determined by the expert is more than \$[insert amount];</li> <li>the determination concerns a matter other than a monetary amount.</li> </ul> </li> </ul> </li> </ul> <p>If the decision of the expert is not binding in accordance with clause 1.3 then [insert possible further action including the ability for a party to commence court proceedings]</p>	None noted
None noted	<p><b>1.4 Costs of expert determination</b></p> <p>The parties will bear their own costs in connection with expert determination.</p>	None noted



## OVERVIEW

Some of the performance lease clauses may be personal commitments between the parties that sign the lease. If the lease is ever transferred it may be necessary to ensure that the incoming tenant commits to the performance lease clauses.

NOTES	CLAUSE	CONCERN/RISK
None noted	<p><b>1.1 Assignment</b></p> <p>If the Tenant assigns or transfers this lease, then the Tenant [must/will encourage] the assignee or transferee to enter into a deed with the Landlord in which the assignee or transferee agrees to comply with [clauses [insert clause numbers] /this Schedule].</p>	None noted

**“This type of long-term investment works out for everyone: it creates savings for our tenants, recycles an iconic heritage building, and adds value to our investment in the building. This project is very much in line with Argosy strategy. The focus on expectations of a key tenant added significantly to the investment.”**

*Saatyesh Bhana, Property Asset Manager, Argosy  
5 Green Star Built rating and 4 star 'excellent' NABERSNZ rating, Te Puni Kōkiri House, Wellington*



## OVERVIEW


Rent review clauses typically include a list of factors that may be taken into account when the rent of a building or premises is reviewed. This list may include factors that relate to the energy and environmental performance of the building or premises.

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<p><b>1.1 Factors to be taken into account</b></p> <p>(a) Whether a party has achieved a Target NABERSNZ Rating during the term and how long it has been maintained for during the term.</p> <p>(b) Whether a party has achieved a NABERSNZ Rating higher than a Target NABERSNZ Rating during the term and how long it has been maintained for during the term.</p>	None noted	None noted

**New Zealand's commercial buildings account for about 9% of annual energy use - worth around \$1.7 billion every year. Highly efficient commercial buildings can use 70% less energy than the average building.**

## OVERVIEW

In the event that a building begins to generate or capture its own electricity, gas or water (including recycled water) it is important that tenants are able to purchase this from the landlord under the lease.

NOTES	CLAUSE	CONCERN/RISK	MITIGATION
None noted	<p><b>1.1 On-sale of utilities</b></p> <p>If the Landlord offers to supply any utilities (including water, electricity and gas) to the Tenant:</p> <p>(a) the Tenant may elect to purchase utilities from the Landlord;</p> <p>(b) the price to be charged for the supply of utilities will be [the maximum allowable amount under applicable legislation/\$ [insert rate]];</p> <p>(c) the Landlord [will/will not] impose any charge for access to the Landlord's internal utility networks;</p> <p>(d) the Tenant must pay the Landlord for the utilities within [insert #] days of the Tenant being billed by the Landlord; and</p> <p>(e) if the Tenant defaults in payment of any account rendered by the Landlord for any utility, the Landlord may (in addition to any other rights) disconnect the supply of the utility. The reasonable cost of the disconnection and of any reconnection of the utility will be payable immediately on demand.</p>	 <p>Tenants may be concerned that the Landlord will require them to purchase utilities at a higher cost than they would need to pay if obtaining utilities directly from a supplier.</p>	<p>This clause is drafted in a way that ensures that tenants will not be required to pay an amount over the market rate available to them.</p> <p>Note: Tenants may also be protected from being required to pay more than the available retail market rate.</p>

## OVERVIEW

Outgoings clauses typically exclude the passing on of costs for capital upgrades to tenants. However, if the benefit to the tenant of the capital upgrade outweighs the upfront cost, tenants may wish to have the option to have capital upgrade carried out.

This clause may be, for example, used for upgrade works designed to achieve, improve or maintain NABERSNZ Ratings or to increase the energy efficiency of a building.

It should be noted that there may be tax implications for both the landlord and the tenant and specialist tax advice should be sought.

## DEFINITION

*NABERSNZ Upgrade Works* means upgrade works designed to enable or improve the NABERSNZ Rating of a building/premises. These upgrade works could include additional metering, lighting upgrades etc.

### NOTES

None noted

### CLAUSE

#### 1.1 Timing of capital upgrade works

The Landlord must carry out the capital upgrade works by [insert date].

OR

The Landlord may carry out the NABERSNZ upgrade works during the term of the lease or any renewed term.



None noted

#### 1.2 No claims or demands for loss or damage as result of capital upgrade works

(a) The Landlord [must not/must use its reasonable endeavours not to] interfere with the Tenant's business and quiet enjoyment of the premises when carrying out the capital upgrade works.

(b) Subject to the Landlord complying with clause 1.3(a), the Tenant will not make any claim or demand any compensation for interference with the Tenant's business and quiet enjoyment of the premises as a result of the NABERSNZ upgrade works.



## CLAUSE

[Drafting note - this clause should accompany a works clause that sets out the works that a landlord intends to carry out to improve the efficiency of the building. This clause deals with how the costs of those works are distributed between the Landlord and the Tenant]



### 1.3 Payment for capital works with efficiency benefit

[Drafting note - clause (a) - (c) provide for the Tenant to make a monetary contribution to the Landlord towards the costs of the capital upgrade works either after or before the works are carried out and recover that cost over the term of the lease or any renewed term by reducing or capping the Tenants outgoings payments to the Landlord.]

- (a) The Tenant agrees to contribute to the costs of capital upgrades to the building that result in increased building efficiency by making the Capital Works Payment to the Landlord, [if an independently audited costs estimate prepared by an independent qualified surveyor shows that such upgrades will result in a costs savings to the Tenant over the term equal to or in excess of the cost to the Tenant/with the Tenant's prior consent].
- (b) The parties agree that the Tenant will be required to make the Capital Works Payment to the Landlord when the Landlord has satisfied the following conditions:

[Drafting note - consider whether the Tenant is to make the payment to the Landlord before or after the works have been carried out.]

If before the works have been carried out, then consider the following conditions by way of example:

- (i) the Landlord has entered into a contract with a builder to construct the works;
- (ii) the Landlord has provided to the Tenant an independently audited report from a qualified quantity surveyor demonstrating the projected cost savings to the Tenant as a result of the Landlord carrying out works exceed the Capital Works Payment;
- (iii) the Landlord provides to the Tenant a valid GST tax invoice addressed to the Tenant for the Capital Works Payment;

If after the works have been carried out then consider the following conditions:

- (i) the Landlord provides a certificate from the Landlord's architect or quantity surveyor verifying that the works have been carried out;
- (ii) the Landlord provides a certificate verifying the value of works that are the subject of the Capital Works Payment; and
- (iii) the Landlord provides to the Tenant a valid GST tax invoice addressed to the Tenant for the Capital Works Payment.

[Drafting note - the following clause (c) provides for the Tenant to be reimbursed for the costs of the Capital Works Payment by recovering the cost via a reduction in outgoings over the Term or a period during the term of the lease or any renewed term.]

Concerns, risks and mitigations relating to this clause are outlined on the following page.

## CLAUSE

(c) In consideration for the Tenant paying the Capital Works Payment to the Landlord, the outgoings payable by the Tenant in clause [insert] will be capped at an amount of \$[insert] per annum for the [insert period].

[Drafting note - if the Tenant is reluctant to make an upfront payment to the Landlord in return for projected future cost savings then this clause (d) allows the Landlord to fund the works by retaining the savings by reducing outgoings as a result of the capital upgrade works instead of passing them on to the Tenant.]

(d) The Tenant agrees that the Landlord may recover the costs of capital upgrades that result in increased building efficiency from the Tenant over the term of the lease or any renewed term by retaining the outgoings amount saved as a result of the capital upgrade(s).

## CONCERN/RISK

Tenants may be reluctant to commit to paying for capital upgrade works which are not ordinarily a cost under commercial leases.

Tenants may also be concerned that estimates of savings will not be achieved by updated works.

## MITIGATION

This clause is drafted in a way that means the Tenants will only be liable to pay for the upgrade if the benefit outweighs the cost.

By using the drafting of clause 1.3(d) the Tenants will not bear any risk of the upgrade works not achieving the intended savings.

Landlords can pass risks of not achieving upgrade targets on to service providers by including in contracts requirements that efficiency outcomes be achieved. For example, requirements that parties achieve NABERSNZ Targets.

## CITATION

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+64 4 470 2200  
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