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| **PRESENCE TEST** | | **FURTHER INSTRUCTION** | |  |
| Does the lease encourage, facilitate or require the parties to upgrade the building or premises to improve the efficiency or environmental performance of the building during the term? | | Clauses could relate to:   * cooperation between the parties to facilitate the carrying out of works designed to improve the efficiency or environmental sustainability of the building * the design of any works so as not to interfere with the building’s performance (such as for NABERS or Green Star) * works being built from recycled materials * the minimisation of waste from works * if a party caries out works to improve the efficiency or environmental sustainability of the building it will not constitute an interference with quiet enjoyment | |  |
| **OVERVIEW** | |  | |  |
| Outgoings clauses typically exclude the passing on of costs for capital upgrades to tenants. This clause enables a landlord to enter into an Environmental Upgrade Agreement (EUA) and pass costs on to tenants under the machanisims in the EUA if the capital upgrade outweighs the upfront cost. | |  | |  |
| **DEFINITIONS** |  | |  | |
| Environmental Upgrade Agreement means an agreement in accordance with the Local Government Amendment (Environmental Upgrade Agreements) Act 2010 (NSW). | |  | |  |

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| **SAMPLE CLAUSES** |  |  |

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| NOTES | CLAUSE | CONCERN/RISK | MITIGATION |
| none noted | 1.1 Environmental Upgrade Agreements   1. The Landlord may carry out capital upgrades on the Building which are subject to an Environmental Upgrade Agreement. 2. Any amounts recoverable from the Tenant by the Landlord for works carried out under an Environmental Upgrade Agreement must not exceed a reasonable estimate of the cost savings to be made by the Tenant as a consequence of the works.   [Drafting note - This clause may be drafted as part of an outgoings clause or as a standalone provision.] | Tenants may be reluctant to commit to paying for capital upgrade works which are not ordinarily a cost under commercial leases. | The Local Government Amendment (Environmental Upgrade Agreements) Act 2010 (NSW) provides that tenants are liable to pay for capital costs under an Environmental Upgrade Agreement if the benefit to the Tenant outweighs the cost within the term of the lease. |

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| NOTES | CLAUSE | CONCERN/RISK | MITIGATION |
| The clause could 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 | 1.2 Ability to Carry Out Capital Upgrade works   1. The Landlord may carry out capital upgrades to the Building designed to improve the efficiency or environmental sustainability of the building or premises (Capital Upgrades). 2. If the Landlord carries out Capital Upgrades:    1. 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 Upgrades; and    2. subject to the Landlord complying with clause 2.3(b)(i), 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 Capital Upgrades. 3. The Tenant may carry out capital upgrades to the Premises designed to improve the efficiency or environmental sustainability of the premises (Premises Upgrade) provided that it complies with the provisions of the Lease when doing so. The Landlord will not unreasonably withhold approval to a request by the Tenant to carry out a Premises Upgrade. 4. If the Landlord carries out Capital Upgrades, the Tenant will contribute towards the cost of the Capital Upgrade provided that the amount payable by the Tenant must not exceed a reasonable estimate of the cost savings to be made by the Tenant as a consequence of the Capital Upgrades. | none noted | none noted |