



## LEGAL FORMS – WHAT’S NEW?

November 2012

### 5.5 – LIV COMMERCIAL LEASE OF REAL ESTATE

The latest revision of the LIV Lease of Real Estate introduces a number of changes some of which are quite significant. The changes from the previous version of May 2009 are set out below.

#### Lease schedule and notices

- There is a notification at the foot of the cover page alerting readers to the need to refer to the *Retail Leases Act 2003* (Vic) (the Act), if the lease is a retail lease, since the Act includes important rights and obligations that are not set out in the lease.
- The notice of landlord's intention not to offer a lease renewal now requires the date on which the lease term will end to be specified so as to comply with sub-s64(4)(b) of the Act.

#### Lease conditions

##### **Clause 1.1 Building outgoings**

- In the opening paragraph, there is an exclusion of capital expenses and expenses whose recovery would be contrary to law (for example, expenses reimbursed by the landlord to the tenant where the tenant has carried out works under the *Building Act 1993* (Vic) that the landlord was required to carry out but failed to do so).
- Sub-paragraph (c) now includes the costs of complying with the requirements of authorities (this is subject to the exclusion noted above).
- The words excluding items excluded by the Act are now covered by the opening paragraph.

##### **Clause 1.6 Interpretation**

The wording dealing with multiple parties has been changed but the change is one of style rather than substance.

##### **Clause 2.1 Rent and outgoings**

- Clause 2.1.1 – Words excluding set-off have been included; note, however, that this exclusion may still have to give way to overriding statutory provisions (such as under certain provisions of the *Building Act 1993* (Vic)).
- Clause 2.1.5 – The wording has been revised slightly but the change is one of style rather than substance.

##### **Clause 3 Repairs, works etc**

- Clause 3.1.2 – Compliance with notice and requirements that legislation makes the responsibility of the landlord is excluded.
- Clause 3.3.3 - Works that legislation requires the landlord to carry out are excluded.



#### **Clause 4 Transfers & subletting**

- Clause 4.4.1 – The landlord will only be deemed to have consented where the tenant has complied with its obligations under s61 of the Act.
- Clause 4.7 – The word ‘entirely’ has been omitted as unnecessary.

#### **Clause 5 General agreements**

- Clauses 5.1.3 and 5.1.4 – The *Landlord and Tenant Act 1958* (Vic) has been repealed effective 1 September 2012 and the statutory provisions dealing with tenant’s property remaining on premises after the end of the lease are now contained in Part 4.2 of *Australian Consumer Law and Fair Trading Act 2012* (Vic). Consequently, the old lease provisions dealing with tenant’s property remaining on the premises have been replaced by provisions that take account of the new regime. Although the operation of Part 4.2 can be excluded or modified by agreement of the parties, the parties’ ability to exclude or modify it would presumably be limited to goods belonging to the tenant and would not enable the parties to agree on a treatment of goods belonging to third parties that was inconsistent with Part 4.2; therefore, that Part will still govern the treatment of goods belonging to third parties.
- Clause 5.4.6 – The wording has been changed to follow more closely the wording of the Act.

#### **Clause 7 Default**

- Clause 7.1.1 – This provision has now been amended so that an event of default exists the first day after the rent falls due. Under the previous revision of the lease, where a tenant defaulted in payment of rent, the landlord had to give 14 days’ written notice before termination but could not do so until the rent had been overdue for 14 days so, in practice, a tenant could count on having at least 28 days before termination. Under the revised provision, the landlord will still have to give 14 days’ written notice of its intention to terminate for non-payment of rent but will be able to do so the day after the rent falls due.
- Clause 7.4 - In *NR Reid & Co Pty Ltd v Pencarl Pty Ltd* [2011] VCAT 2241, VCAT held that the bankruptcy of a guarantor was not an event to which s146 of the *Property Law Act 1958* (Vic) extended and, consequently, the landlord could terminate without having to serve a notice under that section. The new wording requires a notice to be given before termination under clause 7.1 in relation to any event to which s146 does not extend.

#### **Clause 9 Consents and warranties**

- Clauses 9.1 and 9.2 – These clauses have been made subject to the Act.



**Clause 12 Further term(s)**

- Clause 12.2.2 – The first day of a renewal term is made a review date to make clauses 12 and 11 more complementary. So, even if the first day of the renewal term is not specified as a market review date in item 16(a) of the lease schedule, clause 12.2.2 will treat it as if it had been specified.
- Clause 12.2.3 – The change seeks to revive, for a renewal term, any provision that might earlier have been severed from the lease because it offended a statutory provision where that provision is not applicable at the renewal date.

**Clause 13 Security deposit**

- Clause 13.2 – This provision has been amended to make it clearer that investment of a security deposit is not discretionary.

**Clause 15 Guarantee and indemnity**

- Clause 15.6 – The events referred to in clauses 7.1.5 and 7.1.6 have been made breaches of essential terms of the lease.