



## LEGAL FORMS – WHAT’S NEW?

June 2006

### 5.5 – LIV COMMERCIAL LEASE OF REAL ESTATE

This standard precedent has been substantially revised and also updated to May 2006 to take account of changes required by the *Retail Leases (Amendment) Act 2005*. The main changes from the previous version of May 2003 are as follows:

#### LAYOUT AND SEQUENCE

The first thing to note is the changed sequence of pages. The main logo page is now intended to be the face of the document. However, most users will attach a cover sheet identifying the parties, the **premises** and the firm responsible for its preparation.

The main reason for changing the location of this page from being the cover of the printed booklet to the new position was a contribution of its impressive appearance and the fact that it contains important directions in relation to the completion of the lease.

It is intended that the sequence of the component parts be:

- the front cover identifying the parties, the **premises** and the firm;
- the main logo page;
- the schedule;
- the execution page;
- the booklet containing the words of grant and the lease conditions.

#### SCHEDULE

For reasons of copyright, quality assurance and the comfort of knowing, when acting for a tenant, that the lease conditions have not been changed, alterations to the standard text should never be made within the text itself, but rather should always be made as additional provisions in **item 22** of the schedule.

#### Changes to Schedule

- All schedule headings are bolded.
- The heading of **item 10** has been changed; it is no longer left to the drafter to specify particular expenses as they will be captured by the definition of **building outgoings** in clause 1.1. You will note that the definition lists the usual expenses that would normally be reimbursable by a tenant of standalone premises and, where the **premises** are only a part of the **lettable area** of the **building**, a number of other expenses that are usually reimbursable in part building leases:
  - **Item 10** consists of 2 alternatives (one of which must be deleted)

*Alternative 1* – the **premises** are the whole of the **building's lettable area** and the **tenant's** proportion is 100%.

*Alternative 2* – the **premises** are part of the **lettable area** of the **building**. Under Alternative 2, the relevant percentage of **lettable area** of the **premises** to **lettable area** of the **building** needs to be completed. Also, if the **Act** applies and management fees are to be charged, there are 2 amounts to be inserted: the management fee for the **building** and the amount applicable to the **premises**, (in each case, for the first **accounting period**).

- In **item 15**, there is a second reference and it relates to whether the parties consider the **Act** applies and, if they consider that it does not, why (refer clause 1.13).
- In **item 21**, which deals with the application of the mediation procedure, there is a direction to delete one alternative.
- The note to **item 21** directs the drafter's alteration to whether an additional provision should or should not be made an essential term (refer clause 7.5).

## **EXECUTION PAGE**

The execution page is a separate page and drafters should use the revised lease execution clauses provided.

## **BOOKLET CONTAINING LEASE CONDITIONS**

### **Grant and guarantor's agreement**

The words of grant and the **guarantor's** agreement to be bound by the **guarantor's** obligations are now incorporated in the booklet and precede the lease conditions.

### **Clause 1 - Definitions and interpretation**

- The first thing you will note is that defined terms appear in lower case bold (e.g. **tenant** and not **Tenant**). When completing the schedule or drafting additional provisions, you must treat defined terms in this way. If you create extra definitions in the additional provisions, they should also be represented in the same way.
- The following definitions are new or modified -
  - **accounting period:** modified to specify an "in default period"
  - **building:** modified to include **landlord's installations**
  - **building outgoings:** substantially changed. The first 4 categories of expense include those usually relevant to standalone premises and the next 3 are automatically included if the **premises** make up only part of the **lettable area** of the **building**. Other items can be added and items can be excluded by additional provision.
  - **building rules:** now include body corporate rules.
  - **Consumer Price Index:** moved from cl 18.

- **CPI review date:** new (refer cl. 2.1.1).
  - **fixed review date:** new (refer cl. 2.1.1).
  - **lettable area:** reference to PCA method.
  - **market review date:** new (refer cll. 2.1.1 and 11).
  - **review date:** new
  - **start of the lease:** moved from cl. 3.1.
  - **tenant's agents:** words "to the **premises**" added.
  - **valuer:** now includes reference to a specialist retail valuer where the **Act** applies.
- As the definitions section is now numbered 1.1, the interpretation provisions start at 1.2.
  - Cl. 1.11 deals with conflict between a lease condition and a schedule provision.
  - Cl. 1.12 includes the schedule as part of the lease.
  - Cl. 1.13 states the parties' understanding as to the application of the **Act** and requires completion of **item 15**.

#### **Clause 2 – Tenant's payment, use and insurance obligations**

- The headings and the lease conditions have been re-arranged so as to make the headings more accurately reflect the obligations grouped under them.
- The following sub-clauses are new or modified -
  - 2.1.2: previously 2.1.3
  - 2.1.3: previously 2.1.4
  - 2.1.4: previously 2.1.8 modified
  - 2.1.5: replaces 2.1.2, 2.1.5, 2.1.7 and 2.1.9
  - 2.1.6: previously 3.3.16
  - 2.1.7: previously 2.1.10
  - 2.1.8: previously 2.1.11 with (b), (c), (d) and (e) replacing the old (b) and (c)
  - 2.1.9: previously 2.1.12
  - 2.1.10: previously 2.1.13 with a cross reference to 3.3.2
  - 2.1.11: previously 3.3.17
  - 2.1.12: previously 2.1.6

- 2.1.13: new
- 2.2.1: previously 2.2.1 modified to exclude any warranty of suitability
- 2.2.8: slight modification
- 2.2.9: new
- 2.2.10: previously 2.2.9
- 2.2.11: previously 2.2.10
- 2.2.12: previously 2.2.11
- 2.2.13: previously 2.2.12
- 2.2.14: previously 2.2.13
- 2.3.1: modified to recognise that insurance cover for certain types of indemnity liability is not always available
- 2.3.2: reference to consent not being held unreasonably omitted, since covered by 9.1.

### **Clause 3 - Repairs, maintenance, fire prevention and requirements of authorities**

- The heading has changed.
- The following sub-clauses are new or modified -
  - 3.1: previously 3.2 but is now qualified by being made subject to 3.3
  - 3.2: previously 3.3
  - 3.2.5: previously 3.3.5 but the list ends with “sewerage installations”
  - 3.2.10: previously 3.3.10 but modified to reflect **Act** position
  - 3.2.11: previously 3.3.11 but omits the qualification which was unnecessary by virtue of 3.3.
  - old 3.3.11 omitted
  - 3.2.12: previously 3.3.13
  - 3.2.13: previously 3.3.14
  - 3.2.14: previously 3.3.15
  - 3.2.15: previously 3.3.18 but modified so as to apply only where the **premises** occupy all of the **lettable area** of the **building**
  - 3.3.2: previously 3.4.2 but (c) is modified and (d) is new.

#### **Clause 4 - Lease transfers and subletting**

The following sub-clauses are changed -

- 4.3.2: modified as to the information that the **landlord** can require when the **Act** does not apply
- 4.4: slight modifications to recognise that the “in default” provision of the **Act** only applies to transfers
- 4.5: wording change
- 4.7: wording change

#### **Clause 5 - General agreements between landlord and tenant**

The following sub-clauses are new or modified -

- 5.1.1: slight wording change
- 5.4: moved from old 20.7
- 5.4.1: previously 20.7.1 with added ability to require **tenant** to pay direct assessments to the assessing authority and to reimburse other **building outgoings** within 7 days of a request.
- 5.4.4: previously 20.7.4 but modified.
- 5.4.8: new, replaces words of apportionment in old 2.1.9.
- 5.5: new; on a transfer of the freehold, the transferor is released from obligations falling due for performance after the date of the instrument of transfer.

#### **Clause 6 - Landlord’s obligations**

The following sub-clauses have changed -

- 6.2: wording change
- 6.4: wording changes to include **landlord’s installations**, to relate the condition of the **premises** to the **start of the lease** and to exclude items of **tenant** responsibility under 3.1, 3.2 and 3.3
- old 6.5 omitted as superfluous

#### **Clause 7 - Events of default and landlord’s rights**

The following sub-clauses are new or changed:-

- 7.1: the first line has been changed so that a physical re-entry is not necessary for termination
- 7.1.1: wording change including omission of reference to common law demand (refer 2.1.1)
- 7.1.3: old 7.1.3 (e) omitted.
- 7.1.7: the period of 7 days increased to 14.
- 7.2: expanded wording.

- 7.4: new, expands the protection given to the **tenant** by the old 7.1.1 by requiring a formal notice to be given, similar to that required where s. 146 of the *Property Law Act 1958* applies.
- 7.5: previously 7.4, the number of clauses characterised as “essential” is reduced.
- 7.6: previously 7.5, expanded wording.
- 7.7: previously 7.6.

### **Clause 8 - Destruction or damage**

There are no material changes apart from the omission of the old 8.6 which was superfluous.

### **Clause 9 - Consents and warranties by the parties**

No changes.

### **Clause 10 - Overholding and abandonment of the premises**

The following changes have been made -

- 10.1.2: amended to make it clear that the notice may expire on any day of the month
- 10.2.2(c): slight wording change.

### **Clause 11 - Rent reviews to market**

The following changes have been made -

- 11.1.3: the references to “specialist retail valuer” have been omitted
- 11.1.4: the old 11.1.4(c) to (h) have been omitted and, whether or not the **Act** applies, the **valuer** is to make the determination in accordance with the valuation criteria in s. 37(2) of the **Act**
- the old 11.1.5 underpinning provision has been omitted and, consequently, the old 11.1.6 was not required
- 11.1.5: previously 11.1.7
- 11.5: changed so that a rent review started late will only be effective from the date on which it is started.

### **Clause 12 - Further term(s)**

The only change is to the wording of the first line of 12.1.

### **Clause 13 - Security deposit**

The following changes have been made-

- The reference to the **Act**, which was superfluous has been omitted.
- 13.3: the security deposit can also be used on the happening of any of the events in 7.1.
- 13.4: slight change in wording.
- 13.6: new, relates to where there is a transfer of the freehold.

**Clause 14 - Notices**

No changes.

**Clause 15 - Obligations of guarantor(s) under guarantee and indemnity**

The following changes have been made -

- 15.1.3: words added after “**tenant**” to refer to renewed terms and overholding
- 15.2.4: expanded wording
- 15.2.5: new, relates to the transfer of the freehold.

**Clause 16 - Dispute resolution**

No changes.

**Clause 17 - GST**

No changes.

**Clause 18 - Consumer Price Index**

The following changes have been made -

- The old 18.1 has been omitted.
- 18.2: “CPIB” and “CPIA” have been changed to reduce the risk of confusing which is which
- 18.2: previously 18.3
- 18.3: previously 18.4
- 18.4: previously 18.6, but changed to refer to the President of the Australian Property Institute.
- 18.5: previously 18.6.

**Clause 19 - If premises only part of lettable area of the building**

The following changes have been made –

- 19.1: previously 20.1, wording change
- 19.2: previously 20.2
- 19.3: previously 20.3
- 19.4: previously 20.4
- 19.5: previously 20.5
- 19.5: previously 20.6
- the old 20.7 has been moved to 5.4.

**Clause 20 - Additional provisions**

No change apart from re-positioning and re-numbering from 19 to 20.

## **NOTICES**

1. Notice of date after which option cannot be exercised.
2. Notice of **landlord's** intention to offer a renewal of lease.
3. Notice of **landlord's** intention not to offer a renewal of lease.

No changes have been made to these forms.

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