



LEGAL FORMS – WHAT’S NEW?

May 2009

5.5 – LIV COMMERCIAL LEASE OF REAL ESTATE

There have been some amendments to this standard precedent up to May 2009. The changes from the previous version of October 2007 are set out below.

MAIN LOGO PAGE

The following amendments have been made to the main logo page:

- The words “October 2007” on the main logo page have been replaced with the words “May 2009” to identify the document as the May 2009 revision; and
- The “Important Notice To The Person Preparing This Lease” has been amended to include a reference to the new warranty in clause 21 of the lease.

FOOTERS

The words “May 2009 revision” have been inserted as a footer on the bottom right hand corner of all components of the lease; namely:

- the main logo page;
- the schedule;
- the execution page; and
- the booklet containing the words of grant and the lease conditions.

SCHEDULE

The following amendments have been made to the schedule:

- The “Important Notice To The Person Completing this Schedule” has been amended to include a reference to the new warranty in clause 21 of the lease; and
- Item 16 has been amended to enable review date(s) during any further term(s) to be specified.

NOTICES

A landlord’s obligation in sub-s28(1) of the *Retail Leases Act 2003* to notify the tenant in writing of the date after which the option is no longer exercisable was considered in *Xiao v Perpetual Trustee Company and Anor* [2008] VSC 412. A practice note was prepared by Sam Hopper of the Law Institute of Victoria’s Leases Committee which is annexed and marked “A”.

In light of the practice issues arising from that decision, the document titled, “NOTICE OF DATE AFTER WHICH OPTION CANNOT BE EXERCISED” has been amended as follows:

- the document is now titled, “NOTIFICATION OF DATE AFTER WHICH OPTION CANNOT BE EXERCISED”;



- on the fourth line, the words “TAKE NOTICE” have been replaced with the words “THE LANDLORD notifies you”;
- The tenant’s acknowledgement no longer refers to receipt of the “notice”, and now provides that “The tenant acknowledges having received this notification”. The date of receipt of the notification is then to be inserted by the tenant. In addition to insertion of the date of receipt of the notification, the date of the tenant’s acknowledgement also needs to be inserted.
- In note 2, the word “notice” has been replaced with the word “notification”; and
- In note 3, there is a direction to refer to *Xiao v Perpetual Trustee Company and Anor* [2008] VSC 412 in relation to the need to ensure that the notification actually comes to the notice of the tenant not less than 6 months before the date specified in the notification.

BOOKLET CONTAINING LEASE CONDITIONS

Index

An index has been inserted for ease of reference to lease conditions. The index should be inserted immediately before the lease conditions.

Clause 1.1

The following amendments have been made to clause 1.1:

- The dot point components of defined terms have been replaced with alphabetical and roman numerical references;
- All references to “body corporate” have been replaced with references to “owners corporation”;
- A definition of “permitted use” has been inserted which links to the use specified in item 15 of the schedule to the lease; and
- An interpretation aid in relation to the expression “include” has been inserted.

Clause 2.1.6

Clause 2.1.6 has been amended to require the tenant to pay or reimburse all insurance premiums which are paid “or payable” by the landlord as a result of the tenant’s use of the premises. Therefore, increases in insurance premiums which are payable but not yet paid by the landlord are now captured by clause 2.1.6.

Clause 2.3.3

Previous clause 2.3.3, which provided that the tenant must “ensure that each insurance policy requires the insurer to give 21 days’ written notice of cancellation to the landlord before cancelling or refusing to renew the policy”, has been deleted.

Previous clause 2.3.4, which requires that the tenant must “produce satisfactory evidence of insurance cover on written request by the landlord”, has been renumbered as clause 2.3.3.



Clause 3.2.1

The wording of clause 3.2.1 has been slightly revised, and now requires the tenant to “repaint or refinish all painted or finished surfaces”. Also, clause 3.2.1 has been amended to provide that the obligation must be undertaken once every 5 years during the term and any further term “viewed as one continuous period”.

Clause 5.1.4

On the first line of clause 5.1.4, the reference to “tenant’s installation” has been replaced with a reference to “tenant’s installations”. This is simply a grammatical correction.

Clause 7.5

Clause 7.5 now refers to the following clauses as essential terms:

- clause 2.1.5 (tenant’s obligation to pay building outgoings);
- clause 2.1.6 (tenant’s obligation to pay or reimburse increases in insurance premiums);
- clause 2.1.10 (tenant’s obligation to comply with all laws relating to use or occupation of the premises); and
- clause 2.1.11 (tenant’s obligation to carry on the business of the permitted use efficiently, keep the premises open during business hours and not suspend or discontinue operation of the business).

Clause 21

A new clause 21 has been inserted which requires the landlord to warrant that clauses 1 to 20 appearing in the lease are identical to clauses 1 to 20 of the copyright Law Institute of Victoria Lease of Real Estate May 2009 revision. The landlord is also required to warrant that any modifications to clauses 1 to 20 are set out as additional provisions in item 22 of the lease schedule.



**PRACTICE NOTE – XIAO V PERPETUAL TRUSTEE COMPANY LTD & ANOR
[2008] VSC 412**

The Supreme Court has provided guidance to landlords and their solicitors on compliance with s 28(1) of the *Retail Leases Act 2003* (Vic) (**RLA 2003**). The case also reminds practitioners to keep proper records of correspondence.

If a retail premises lease contains an option exercisable by the tenant, s 28(1) of the RLA 2003 requires the landlord to ‘*notify*’ the tenant in writing of the date after which the option is no longer exercisable at least six and no more than twelve months before that date.

In *Xiao v Perpetual Trustee Company Ltd & Anor* [2008] VSC 412, the landlord sent a letter to the tenant dated 4 December 2007 stating that 3 June 2008 was the last date for exercising his option. The managing agent directed the letter to be sent by both ordinary and registered post. The tenant said he never received the letter sent by ordinary post and collected the registered post letter on 31 December 2007.

The Court found that:

- (a) the letter was not sent by ordinary pre-paid post, partly because the file copy of that letter was incomplete;
- (b) the notice was invalid because the notice period was less than six months;
- (c) the RLA 2003 does not rescue a defective notice by extending time for exercise of the option to six months from receipt of the letter;
- (d) the word ‘*notify*’ in s 28(1) requires landlords to make ‘*the prescribed information available to the tenant through physical supply of the written document containing the relevant information such that it is actually provided to and received by the tenant*’; and
- (e) merely complying with deemed service or notice provisions in the lease, the RLA 2003 or the *Interpretation of Legislation Act 1984* (Vic) is insufficient.

When giving notice under s 28(1) of the RLA 2003, practitioners and landlords are advised to confirm that written notice is received by the tenant by one or all of the following:

- (a) personally serving written notice;
- (b) obtaining written confirmation of receipt from the tenant; and/or
- (c) verbally confirming receipt by the tenant and making a diary note of the conversation.

The Court did not comment on notifying corporations. It is prudent to undertake one or all of the above with the tenant’s director or usual contact person rather than serving notice at the tenant’s registered office.

The equivalent sections in the *Retail Tenancies Reform Act 1998* (Vic) and the *Retail Tenancies Reform Act 1986* (Vic) contain the word ‘*notify*’. However, sections requiring landlords to give tenants notice of their intention concerning renewal or termination if the



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tenant does not have an option are drafted differently and do not contain the word '*notify*'.

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