

COMMERCIAL & RETAIL LEASING BULLETIN

REPAIRS & MAINTENANCE UNDER THE RETAIL LEASES ACT 2003 (VIC): WHO IS RESPONSIBLE & WHO HAS TO PAY?

All clients, whether landlord or tenant, always ask the same question when the issue of repairs and maintenance of the premises arises: who is responsible and who has to pay?

The repairs and maintenance provision in the Act (**section 52**) makes it clear whose responsibility it is to undertake certain repairs by prescribing statutory provisions that will be applicable to all retail premises leases (notwithstanding any other provisions contained in the lease).

A. GENERAL RULE: SECTION 52 (2)

Section 52 (2) of the Act provides that the landlord is responsible for maintaining the premises in a condition that is consistent with the condition of the premises when the lease was entered into.

The Act even goes to the extent of stating the obligation relating to the repair and maintenance of:

- the structure of the premises (e.g. walls and roof);
- the fixtures in the premises (e.g. items belonging to the landlord such as built-in shelving and partitioning);
- the plant and equipment at the premises (e.g. air-conditioning unit and alarm system); and
- the appliances, fittings and fixtures provided by the landlord under the lease relating to the gas, electricity, water, drainage or other services (e.g. powerboards, water pipes and hot water system).

B. EXCEPTION TO GENERAL RULE: SECTION 52 (3)

The landlord's obligation to repair is limited by **section 52 (3)**. It provides that the landlord is not responsible for maintaining those items in **section 52 (2)** if:

- the need for repairs arises out of the misuse by the tenant; or
- the tenant is entitled or required to remove such item at the end of the lease.

In effect, the Act relieves the landlord of the obligation to repair where such repair is required due to the tenant's fault or negligence, or where the repair is to the tenant's own fixtures and fittings.

C. URGENT REPAIRS: SECTION 52 (4)

The Act recognises the need for urgent repair in order to ensure that the tenant may enjoy the premises and continue with its business without interference.

The Act provides that if urgent repairs are required, then the tenant needs to be able to fix or remedy the damage or fault to minimise any loss of its business (or earnings) as a result. One good example is the type of severe damages caused by unusually strong winds in recent years.

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Section 52 (4) allows the tenant to carry out or arrange for urgent repairs for those damages or faults for which the landlord is responsible under the Act or the lease provided that:

- such repair is necessary to fix damage that has substantial effect on the tenant's business at the premises; and
- the tenant is unable to get the landlord or the landlord's agent to carry out the repairs despite having taken reasonable steps to arrange for the landlord to do so.

As the provision requires the tenant to take reasonable steps to inform the landlord of the need of repairs, a prudent tenant should document those efforts amidst the urgency and haste required by the situation by way of file note or memo on telephone conversations or messages, or an email that clearly states the repairs required and the timeframe preferred by the tenant.

There is an obligation on the tenant to ensure that the landlord receives written notice and their costs within 14 days after the repairs have been carried out.

It would be sufficient to satisfy the tenant's statutory obligations by providing the landlord with:

- a statement as to why the repairs were required;
- details of the time/date and possible cause of the damage; and
- a copy of the tax invoice issued by the persons undertaking the repairs.

Although the Act requires the landlord to reimburse the tenant for the reasonable costs of the repairs, it does not provide a time limit on the landlord to reimburse the tenant for the cost of repairs.

It is important for tenants to remember that they must not deduct the cost of repairs from the rent and/or outgoings by way of adjustment without obtaining the landlord's prior consent. Otherwise, the tenant will be in breach of an essential term of the lease, which is to pay rent as and when it falls due.

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CONDITION REPORTS

In determining the extent of the landlord's responsibility for repairs and maintenance under the lease, it is important that a Condition Report of the premises be prepared by both the landlord and the tenant as at the date the lease was entered into (in accordance with the wording of **section 52 (2)** of the Act).

The Condition Report represents an acknowledged description of the condition and statement of position of the premises at the time the lease was entered into.

In effect, once it is signed, a Condition Report will be conclusive evidence of the state of repair or the condition of the premises which the parties will be able to rely upon in the following events:-

- when the need for repairs arises during the lease;

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- at the expiration of the lease when the tenant is required to make good the premises to a condition as at the commencement of the tenant's occupancy.

Condition Reports should be prepared at the commencement of the lease, at each renewal of the lease, on transfer/assignment of the lease and at the expiration of the lease.

From our experience, many repair disputes can be avoided if the parties to the lease put in place a Condition Report in respect of the premises which is signed by everyone at all appropriate times.

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BEWARE: THE IMPLICATION OF THE XIAO DECISION ON THE LANDLORD OF RETAIL PREMISES

Section 28 (1) of *Retail Leases Act 2003* (Vic) provides that:

"If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the landlord must notify the tenant in writing of the date after which the option is no longer exercisable -

- (a) *at least 6 months; and*
- (b) *no more than 12 months -*

before that date but is not required to do so if the tenant exercises, or purports to exercise, the option before being notified of the date."

If a landlord fails to notify its tenant, the tenant's entitlement to exercise the option and the term of the lease (if it has elapsed) continue until 6 months after the landlord fulfils its statutory obligation.

The recent Supreme Court decision of *Xiao v Perpetual Trustee Company Ltd & Anor [2008] VSR 412* has serious consequences for landlords of retail premises.

Whilst the decision in *Xiao* has imposed onerous requirements on landlords of retail premises, it has also provided the landlords with further guidance on their obligation to notify tenants of the expiry of an option to renew leases regulated by the Act. In brief:-

1. The landlords or their managing agents must ensure that the tenants actually receive the notice provided under **section 28 (1)**. They must also be able to prove receipt if necessary.
2. The notice must clearly and correctly state the date after which the option to renew is no longer exercisable.
3. An ineffective notice could result in an extension in the term of a lease, or the expiry date of an option, up to 6 months after the landlord effectively notifies the tenant.

In light of the decision in *Xiao*, we advise that when giving the notice under **section 28 (1)**, landlords or their managing agents should obtain confirmation that the notice is received by the tenant by:

- personally serving written notice and making a diary note of the service;
- obtaining written confirmation of receipt from the tenant (by requiring the tenant to sign and return an Acknowledgement as contained in the notice); and

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- verbally confirming receipt by the tenant of the notice and making a diary note of the conversation (and perhaps following it up in writing).

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ALERT: IMPORTANT CHANGES TO STAMP DUTY ON LEASE

Recent amendments to the *Duties Act 2000* (Vic) affect transactions involving leases and transaction where there is a change in beneficial ownership of dutiable property in Victoria.

Further information on imposition of duty on leasing matter can be found in our *Taxation Bulletin: Duties Amendment Act 2009* (Vic).

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WANT TO KNOW MORE?

We are ready to assist with any queries that you may have with respect to leasing.

For more information regarding this Bulletin or assistance with any leasing matter, please do not hesitate to contact Jeannette Eid or Derrick Ting and their team.

Although all care and skill has been used in the preparation of this article, it is intended only as general commentary and should not be relied upon as a substitute for legal advice.