

ARBITRATION

APPENDIX 1

MODEL RENT REVIEW CLAUSE

RENT REVIEW

34. (1) For the purposes of this clause:

(a) 'Review Date' means a date inserted in Item 9 of Schedule 1; and

(b) 'Rent Period' means the period commencing on a Review Date and ending on:

(i) the day before the following Review Date; or

(ii) the end of this Lease (and for the purposes of this paragraph "this Lease" includes a further term granted pursuant to Clause 36).

which ever first occurs.

(2) Not earlier than three (3) months before a Rent Period and not later than the end of a Rent Period either the Lessee or the Lessor may give notice to the other party of the new rental it proposes be paid by the Lessee during that Rent Period (or the balance of that Rent Period unexpired at the date of such notice as the case may be).

(3) If the party receiving the notice referred to in sub-clause (2) does not notify the other party of its acceptance of the proposed new rental within sixty (60) days after receipt of the notice referred to in sub-clause (2), the rent will be determined by an expert who will be appointed and make the determination in accordance with sub-clause (4).

(4) The following provisions will apply to the appointment of and determination by an expert for the purposes of sub-clause (3) and 'where incorporated by reference elsewhere in this Lease:

(a) the expert will be a member of the South Australian Division of the Australian Institute of Valuers and Land Economists Incorporated with not less than five (5) years experience as a valuer the last two (2) years of which include valuations of commercial premises in the town or city in which the premises are located;

(b) where the parties fail to agree upon an expert within fourteen (14) days after the expiry of the period referred to in sub-clause (3) the expert will be appointed on a written request by either party, by the President or the senior official for the time being of the South Australian Division of the Australian Institute of Valuers and Land Economists Incorporated or if there is no such body in existence at the time of such request the expert will be appointed by the senior official for the time being of an equivalent body.

(c) In making a determination the expert shall be deemed to be acting as an expert and not as an arbitrator and the laws of the State of South Australia from time to time in force relating to arbitration shall not apply;

(d) The fees and expenses of the expert including the nomination of the expert shall be borne and paid by the parties in equal shares notwithstanding the result of any such determination;

(e) In making a determination a valuer shall accept written representations from either party received within thirty (30) days of the valuer's appointment or nomination and shall provide the parties with a written statement of reasons for such determination,

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(f) In determining a proper rent for the premises upon review of rent under this Lease the expert shall as nearly as possible determine the open market rental value on the date when that rent is to apply for the premises assuming that:

(i) the Lessor is a willing but not anxious Lessor and the Lessee is a willing but not anxious Lessee;

(ii) that the term of the Lease is to be regarded as equivalent to the original tenure of the Lease;

and taking account of:

(iii) the market rental evidence (other than rental values which have been escalated to a predetermined amount or in accordance with movements in the consumer price or any other index) at the Review Date or as near as possible to the Review Date in respect of any comparable premises in the town or city within which the building is situated whether such value is determined in respect of new lettings with vacant possession or in respect of occupied premises;

(iv) the permitted use of the premises under the Lease as defined in Item 14 of Schedule 1,

(v) the period which will elapse between the Review Date and the next Review Date or, if there is no further Review Date, the expiration of the term of this Lease,

(vi) the increased value of the premises occasioned by the Lessor re-painting or re-carpeting the premises pursuant to its covenant to that effect under Clause 26 (PROVIDED that nothing in this clause shall be construed as requiring the Lessee to reimburse the Lessor for the cost of such re-painting or re-carpeting);

(vii) restriction on user, assignment or sub-letting; and

(viii) the terms and conditions generally of this Lease.

(ix) any rent free period, financial contribution (including the payment or provision of any fitout) or other concession customarily or likely to be offered to new tenants of vacant premises and regarding such incentives as defacto rent reductions to be converted into a periodic equivalent over the term of any such lease and deducted from the rent nominated under the lease as payable by the Lessee in order to arrive at the effective rent for the term of the Lease;

(x) any rent free period, financial contribution (including the payment or provision of any fitout) or other concession given to the Lessee by the Lessor and regarding such incentive as a de-facto rent reduction to be converted into a periodic equivalent over the term of the Lease and deducted from the Rent nominated under the Lease as payable by the Lessee in order to arrive at the effective rent for the term of this Lease,

but not taking into account:

(xi) the adverse affect upon the condition or rental value of the premises of any breach by the Lessee of any provision of the Lease,

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(xii) any fittings and other improvements installed in or made to the premises by or for the Lessee its sub-tenants or their respective predecessors in title during the term of this Lease or during any period of occupation prior thereto,

(xiii) any increase in value in the premises as a result of any structural alterations or other voluntary improvements made to the premises or building (including installation of equipment) by the Lessor at its discretion for any reason, (except any carried out at the prior request of the Lessee to the cost of which the Lessee has not contributed either by way of service charge or otherwise);

(xiv) any special interest of the Lessee, its subtenants or their respective predecessors in title including the fact that the Lessee is a sitting tenant;

(xv) goodwill occasioned by the Lessee, its sub-tenants or their respective predecessors in title;

(xvi) areas other than the net lettable area; and

(xvii) any naming rights which the Lessee may have in respect of the building.

(5) (a) Where the valuer fails to make a determination under sub-clause (4) within two (2) months from the date of the valuer's appointment or nomination under subclause (4), a party may request the President or the senior official for the time being of the South Australian Division of the Australian Institute of Valuers and Land Economists Incorporated to nominate another valuer to make a determination under sub-clause (3).

(b) A valuer nominated under sub-clause 5(a) shall be deemed to have been nominated under sub-clause (3) and make the determination in accordance with sub-clauses (4) and (6)..

(6) The rent fixed under this clause (whether by agreement or determination) will be payable:

(a) in the case where the notice referred to in sub-clause (2) is given to the receiving party within three (3) months after the beginning of the Rent Period, from the beginning of the relevant Rent Period; and

(b) in any other case, from the beginning of the relevant Rent Period or the date of the notice whichever is the later.

RESOLUTION OF DISPUTES

35. (1) Any dispute between the Lessor and the Lessee which:

(a) arises under Clauses 7,17, 22, 23, 24 or 31;

(b) relates to the destruction of or damage to the premises, the building or fittings in the building or the maintenance or repair thereof; or

(c) relates to health or safety,

may be referred by either the Lessor or the Lessee for determination in writing to a qualified and experienced person appointed in the manner set out in sub-clause (2) who shall act as an expert and not as an arbitrator and the written determination of such person will be conclusive and binding on the parties.

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(2) The Lessor and the Lessee shall reach agreement as to the appointment of an independent expert in the relevant field within seven (7) working days of the dispute referred to in sub-clause 35(1) and failing agreement either the Lessor or the Lessee may refer the matter to the Chairperson of The Institute of Arbitrators Australia South Australian Chapter (or if there is no Chairperson the senior office bearer) for appointment of such expert and a production of this Clause 35 shall be conclusive evidence of such authority to appoint.

(3) The Lessor and the Lessee will share equally the fees and expenses of an expert appointed in accordance with sub-clause (1) but will otherwise bear their own costs in relation to the dispute.

(4) Any dispute arising between the Lessor and the Lessee in respect of the review of rent or in relation to any other matter relating to the Lease to which sub-clause (1) does not apply and which is not resolved by the parties within two (2) months of the dispute arising will be referred for determination, at the request of either party, to a person acting as an expert and not as an arbitrator who will be appointed (and make any rent determination) in accordance with sub-clause 34(4) and the written determination of such an expert will be conclusive and binding on the parties.

(5) Both parties will have the right to make submissions either orally or in writing to an expert appointed under this clause or Clause 34 in making a determination such an expert will have regard to those submissions and will provide the parties with a statement of reasons in writing for reaching the determination.

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35.55

Arbitration agreement — disputes under a lease¹

THIS AGREEMENT is made the _____ day of _____ 19____

BETWEEN: AB of [address] ('the landlord')

AND: CD of [address] ('the tenant').

WHEREAS:

- A. By lease made the _____ day of _____ 19____ between the landlord and the tenant the landlord demised to the tenant a house situate at 47 Watmore Drive, Surrey Hills in the state of Victoria for a term of 10 years commencing on the _____ day of _____ 19____ at the yearly rent of \$_____ and subject to the terms contained in the lease.
- B. The lease expired [*by effluxion of time or by notice to quit*] on the _____ day of _____ 19____,
- C. Disputes have arisen between the parties in connection with alleged breaches of the several terms contained in the lease and as to mutual claims by the parties against each other arising out of the lease and in particular the landlord claims damages against the tenant for not yielding up the house and building in good repair.

IT IS AGREED between the parties:

1. All questions and differences between the parties touching the disputes and all other questions arising out of the lease or the tenancy previously subsisting between the parties are hereby referred to the award and final determination of XY (first arbitrator) and of VW (second arbitrator) of or in the case of their disagreement to an umpire to be appointed by them in writing immediately after they are themselves appointed and before they enter upon the consideration of the matters referred them. In this agreement the expression 'the arbitrators' shall include the umpire exercising his powers as such.
2. The award of the arbitrators or umpire shall be made in or before [date] or any later date which they may from time to time in writing determine.²
3. The parties will in all respects abide by and obey the directions and award of the arbitrators.
4. Each of the parties will do all acts necessary to enable the arbitrators to make their award and neither of them will wilfully or wrongfully do or cause to be done any act to delay or prevent the arbitrators from making their award and neither of them will wilfully or wrongfully do or cause to be done any act to delay or prevent the arbitrators from making their award and if either of the parties shall wilfully or wrongfully do or cause to be done any such act he shall pay to the other party such costs as the arbitrator may in writing declare to be reasonable.
5. The arbitrators shall have general authority to require from either of the parties such written statements and explanations and other information, evidenced by material that they may deem expedient for determining the matters in difference.
6. In case either party refuses or fails after reasonable notice to attend either personally or by counsel or solicitor before the arbitrators at a meeting at which they may appoint it shall be lawful for them to proceed ex parte.
7. The arbitrators may in their award direct either party to do or submit to any acts or to sign or execute any written instrument and in the latter event may direct by whom and at those expense the same shall be prepared and may name any counsel by whom the same shall be settled in case the parties cannot agree.

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IN WITNESS whereof the parties hereto have set their seals on the date first hereinbefore written.

SIGNED by the said AB)
in the presence of:)

.....
[Signature of witness]

SIGNED by the said CD)
in the presence of:)

.....
[Signature of witness]

Notes

1. For award, see Form 35.360
2. See Form 35.160.

35.360

Award — disputes under a lease¹

[Formal matters as in Form 35.315 as appropriate]

NOW WE XY AND VW AWARD AS FOLLOWS:

1. In respect of the breaches of the lease alleged to have been committed by the tenant:
(a) As to cl 2(4) of the lease (failure to yield up the house and buildings

and to keep the premises in good repair): we find that the tenant has committed breaches as set out in the Schedule.

- (b) As to cl 2(14) of the lease (failure to insure): we find no breach.
2. In respect of the allegation of the tenant that the landlord has failed to comply with the terms as to quiet enjoyment: we find no breach.
3. The tenant shall pay to the landlord the sum of \$4750 for breach of cl 2(4) of the lease.
4. [Costs — Form 35.395 as appropriate].
5. [Statement of reasons — Form 35.315 or 35.320].

[Date, signatures as Form 35.315].

SCHEDULE
Alleged breaches of cl 2(4)

<i>Item</i>	<i>Breach</i>	<i>Award</i>
1. Roof and spouting	Yes	\$2,200
2. Stained wallpaper	No	-
3. Dishwasher damaged	Yes	500
4. Damage to fences	Yes	<u>2,000</u>
		<u>\$4,750</u>

Notes

1. This award is made pursuant to the arbitration agreement, Form 35.55.

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Long form

[For alternative introductory clauses, see Form 35.1]

. . . the same shall be and is hereby referred to the arbitration of a single arbitrator to be appointed in the manner following. The party giving the notice ('the claimant') shall deliver to the other party ('the respondent') a written list of three proposed arbitrators setting out their names and addresses. The respondent must within fourteen days notify the claimant in writing which one (if any) of the proposed arbitrators he selects and that person shall be the single arbitrator. In the event that the respondent fails to notify in writing to the claimant his selection or where the respondent notifies the claimant in writing that he selects none of the proposed arbitrators then the single arbitrator shall be the President of the AB Institution or his nominee. . .

Building contract

If any dispute or difference whatever shall arise between the parties either during the progress of the works or after their completion with respect to or arising out of the works or the execution or maintenance of the works or the construction meaning and effect of this agreement then in any such case . . .