



## Retail Leases: Update & Recent Cases

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Foley's List

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## [Topics]

- What is a Retail Lease? – a quick update.
- The ability to charge and recover outgoings.
- The changing *use* during the term of a Retail Lease.
- Repudiation of a Retail Lease.

## [What is a Retail Lease?]

A lease will be governed by the RLA if it is a lease of a retail premises.

The RLA defines retail premises as:

*"premises, not including any area intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for the sale or hire of goods by retail or the retail provision of services..."*

[s.4(1)]

## [What is a Retail Lease?]

*CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd* [2017] VSC 23

- The test to determine whether the sale of goods or supply of services is retail for the purposes of the RLA 2003 remains the '*ultimate consumer*' test from *Wellington Union Life Insurance Society Limited* [1991] 1 VR 333.
- The RLA 2003 can apply to premises from which goods or services are supplied business-to-business - if those goods or services are supplied to the ultimate consumer of those services or are used as an input into the second business, rather than re-supplied.
- Unless another statutory exclusion applies, warehousing and logistics businesses are likely to be treated as retail premises.
- The reach of the '*ultimate consumer*' test is broad.

# [What is a Retail Lease?]

## *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd [2017] VSCA 178*

- In applying the ultimate consumer test it is necessary for courts to undertake a thorough examination of the nature of the goods or services being provided.
- The Court of Appeal summarised its reasoning as follows:

*"the concept of the 'retail provision of services' in the Retail Leases Act and its predecessor legislation [...] involves close consideration of the service that is offered, whether a fee is paid, whether it is a service that is generally available to anyone who is willing to pay the fee and whether the persons who use the service are the 'ultimate consumer'. On one view, to talk of an ultimate consumer of services may appear strained. Most services that are purchased are not susceptible to being passed on to a third person. This may be contrasted with a sale of goods where the difference between wholesale and retail is easily discernible. Nevertheless, the authorities that apply an ultimate consumer test as one indicia of the retail provision of services, are of long standing."*[23]

- The Court of Appeal expressly rejected the submission by the Landlord that retail premises should be limited to premises from which a tenant supplies goods or services to "non-commercial" users.

# [What is a Retail Lease?]

*Compare:*

*Bulk Powders Pty Ltd v Seicon Pty Ltd (Building and Property) [2018] VCAT 2000;*

*Koga Nominees Pty Ltd v Locsam Australia Pty Ltd & Ors [2018] VSC 455*

- Common to both decisions (and to *CB Cold Storage*), is that a court will look at all relevant circumstances in determining whether the Act applies.
- In particular, if at the time a lease is entered into, the "permitted use" on its face appears to allow retailing and:
  - the premises are used for a retail use; or
  - it is anticipated that the premises will be used for a retail,

then a prohibition in the lease attempting to prevent the RLA from applying, is unlikely to be effective.

# [Outgoings: Charging & recovering]

## *RLA: Section 46*

Section 46 of the RLA states that (emphasis added):

...

- (2) The landlord must give the tenant a written estimate of the outgoings to which the tenant is liable to contribute under the lease that itemises those outgoings.*
- (3) The tenant must be given the estimate of outgoings—
  - (a) before the lease is entered into; and*
  - (b) in respect of each of the landlord's accounting periods during the term of the lease, at least one month before the start of that period.**
- (4) The tenant is not liable to contribute to any outgoings of which an estimate is required to be given to the tenant as set out in this section until the tenant is given that estimate.*

## [Outgoings: Charging & recovering]

### *Phillips v Abel (Building and Property) [2019] VCAT 1031*

- The landlord (respondent) leased a rural property to the tenant (applicant). The tenant conducted a business from the premises which involved extracting and selling sand to its customers.
- VCAT held that the premises were 'retail premises' within the meaning of the RLA, and therefore held that the RLA applied to the lease.
- The landlord had failed to provide a statement of outgoings to the tenant and later sought to recover outgoings once a statement was given.

# [Outgoings: Charging & recovering]

## Tenant's Submissions

- Not liable to pay outgoings because the landlord had not given him a written and itemised estimate of the outgoings to which he was liable to contribute under the lease, as required by section 46(2) of the RLA.
- Section 46(4) of the RLA provides that a tenant is not liable to contribute to any outgoings of which an estimate is required to be given to the tenant, until the tenant is given that estimate.
- Belatedly serving a statement of outgoings would not revive or establish any entitlement to claim unpaid outgoings which accrued prior to service of the statement, but rather, would only have effect on the tenant's obligation to pay outgoings from that time on.

## Landlord's Submissions

- The landlord conceded that because of the application of the RLA, the tenant was not required to pay outgoings until he was provided with the statement.
- However, he argued that once given, the obligation to pay outgoings incurred prior to the delivery of the statement was revived or established.

## [Outgoings: Charging & recovering]

### *Phillips v Abel (Building and Property) [2019] VCAT 1031*

[65] ... I am of the opinion that the purpose of s46(4) would be rendered somewhat otiose if the Landlord's interpretation of the provision was accepted. The corollary is that an interpretation which does not revive an entitlement to claim outgoings incurred prior to the giving of the statement of outgoings best accords with the main purpose of the RLA; namely, to enhance the certainty and fairness of leasing arrangements. In my view, this is best achieved by construing the provision against the Landlord, given that he ultimately has control over this situation. If outgoings are not paid because the Landlord has failed to give the Tenant a statement of outgoings, then that situation is easily remedied by the provision of a statement of outgoings. The landlord is only penalised to the extent that it continues to fail to comply with its obligations under the RLA.

[69] ... I accept the Tenant's submission as to the proper interpretation of s 46(4), which I consider best reflects the main purpose of the RLA. As indicated above, the provision is intended to self-regulate compliance with s46. To the extent that it imposes a burden on a landlord in not being able to recover outgoings, that burden is mitigated or extinguished once a landlord complies with its obligations under the RLA. In my view, that best reflects striking a balance between the interests of tenants and landlords and importantly, enhances the certainty and fairness of retail leasing arrangements between landlords and tenants.

[70] Accordingly... giving notice under s46(2) of the RLA does not revive or establish liability for outgoings previously incurred.

## [Changing nature of a Retail Lease]

*Richmond Football Club Ltd v Verraty Pty Ltd [2019] VSC 597*

- At VCAT, the landlord (Verrarty) sought orders declaring that the RLA does not apply to a lease on the basis that occupancy costs exceeded \$1 million. The tenant (Richmond Football Club) argued that section 11 of the RLA was to be interpreted on the basis that the only time a lease is assessed as being a lease to which the RLA applies is at the commencement date of the lease.
- Senior Member Forde rejected that argument and stated:

*If a lease at any stage falls outside of the definition of a retail premises lease, then on the plain and unambiguous wording of s 11 of the RLA, it is no longer subject to the RLA.*

## [Changing nature of a Retail lease]

### *Richmond Football Club Ltd v Verraty Pty Ltd [2019] VSC 597*

[62] *For these reasons, I am of the opinion that neither the provisions of the RLA nor their context nor the overall purpose of the legislation support the position put by the Landlord. In my view, the interpretation it would put on s 11(2) would produce a situation completely at odds with a main purpose of certainty and fairness of retail leasing arrangements. Moreover, it would produce significant uncertainty both with respect to whether or not the legislative regime under the RLA applies at any particular time to a lease which was a “retail premises lease” at its commencement or renewal, and also significant uncertainty in relation to the consequences of its application and non-application in the event that “jumping out” and “jumping in” were conceivable under this legislation.....*

[71] *As I have found that s 11(2), properly construed, does not allow for the fluctuating application of the RLA as contended for by the Landlord, the issue does not arise. It follows that, once the Act applies to a lease, its provisions avoiding inconsistent provisions in a “retail premises lease” apply to that lease for the remainder of its term. Whether or not this position continues in the event of its renewal is another question, and not one which is raised on this appeal. Nevertheless, doubts that may arise in relation to the possibility of renewal of a lease to which the provisions of the Act have applied.....*

## [Repudiation of a Retail Lease]

### *Red Pepper Property Group Pty Ltd v S 3 Sth Melb Pty Ltd [2019] VSC 41*

- The tenant (S 3 Sth Melb Pty Ltd) and the landlord (Red Pepper Property Group Pty Ltd) entered into a lease of retail premises as a pilates and barre studio in South Melbourne.
- The lease contained, amongst others, the following relevant special conditions relating to the air conditioning unit:
  - the landlord would install air conditioning to service the premises;
  - the tenant was responsible for taking out a maintenance contract on the air conditioning and having it serviced every 6 months; and
  - provided the tenant had complied with its obligation to take out a maintenance contract and have the air conditioning unit serviced every 6 months, the landlord was responsible for any capital repairs.
- The parties also agreed to recommission the existing air conditioning unit.

## [Repudiation of a Retail Lease]

*Red Pepper Property Group Pty Ltd v S 3 Sth Melb Pty Ltd* [2019] VSC 41

- At first instance, VCAT determined that the landlord had a continuing obligation to maintain the air conditioning unit and that its failure to provide the air conditioning was a fundamental breach of the lease.
- As a result, VCAT held that the landlord repudiated the lease.

## [Repudiation of a Retail Lease]

*Red Pepper Property Group Pty Ltd v S 3 Sth Melb Pty Ltd* [2019] VSC 41

- The landlord's obligation to install air conditioning was not an ongoing obligation under the lease. Instead, the landlord's obligation pursuant to the special conditions was to install the air conditioning unit at or within a reasonable time after the commencement of the lease and did not require a new air conditioner unit to be installed.
- Had the parties intended for a new unit to be installed, that ought to have been specified in the lease.
- There was no specific time within which the landlord was required to comply with the obligation to install the air conditioning. The failure of a landlord to fix a minor repair is not a serious matter which justifies repudiation of a lease, particularly when the tenant could have easily repaired the air conditioning unit and claimed the cost from the landlord.
- A landlord's obligation to repair does not arise until the tenant notifies the landlord and that such notice must specify the nature of the defect and why it is the landlord's obligation to repair it.
- The tenant's failure to take out a maintenance contract in relation to the air conditioning amounted to the tenant not being willing or able to perform the lease and disentitled the tenant from relying upon any breach by the landlord.

## [Summary]

- Look to the ultimate consumer test when determining if the RLA applies. Pay careful attention to the facts of each tenancy.
- Be sure to keep up to date with Outgoing Statement requirements – failure to provide a notice will result in an inability for the landlord to recoup outgoings.
- A retail lease is defined at the commencement of the term and does not change if the Act ceases to apply during the term (query renewal periods).
- When considering repudiatory conduct - careful attention needs to be had to the obligations of the parties and the Special Conditions of a lease, including notice requirements.

## [Questions & Contact]

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