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NEWS

Can a lease fall in and out of the Retail Leases Act?

Real Estate partner Mark Lyons says landlords in Victoria need to consider whether the Retail Leases Act (Act) may have ceased to apply to their retail leases and the consequences following a recent decision of the Victorian Civil and Administrative Tribunal (VCAT).

WHAT YOU NEED TO KNOW

It was the widely accepted view that a lease governed by the Act at commencement continued to be subject to the Act for the entire term of the lease despite any change in circumstance that would exclude the lease if it existed at commencement. This view reflects the current guidelines published by the Small Business Commissioner of Victoria about what constitutes retail premises.

However, a recent VCAT decision casts doubt on the accepted view. VCAT has now said a retail lease may cease to be governed by the Act if one of the statutory exclusions becomes applicable during the term, for example, if the lease is assigned to a listed company.

WHEN DOES THE ACT APPLY?

The Act only applies to a lease if the premises are "retail premises" when the lease is entered into or renewed.

In a recent case, VCAT considered whether a lease entered into in December 2006 was a retail lease. It seemed the parties did not initially treat it as a retail lease and the tenant paid land tax until December 2014. It subsequently instituted legal proceedings to recover all land tax paid on the basis the lease was subject to the Act and recovery of land tax was therefore prohibited.

The tenant claimed the first year's occupancy costs under the lease should exclude GST and were therefore less than \$1 million (the threshold occupancy costs which, if exceeded, exclude the Act).

VCAT said the Act did not apply at the time the lease was entered into because GST should be included in calculating the occupancy costs (ie the occupancy costs exceeded \$1 million). It should be noted the legislation was amended in April 2013 to exclude GST from the calculation of 'occupancy costs' so the impact of that part of VCAT's decision will only affect certain leases entered into before that date, and many of those claims will be wholly or partly barred by the Statute of Limitations.

VCAT looked at whether a lease which fell within the definition of retail premises when the lease commenced (because occupancy costs were less than \$1 million) could subsequently fall outside the Act during the term of the lease (eg because occupancy costs increased to over \$1 million).

VCAT said:

- The Act prevents late entry into the Act. If the premises are not retail premises at the time the lease is entered into (or renewed), then the premises cannot subsequently become retail premises during the term (eg if the occupancy costs later reduce to under \$1 million).
 - The Act does not prevent a late exit from the Act during the term. For example, if the occupancy costs were under \$1 million when the parties entered into the lease, then the premises fall within the definition of retail premises. However, if the occupancy costs increase to over \$1 million during the term, then the premises no longer fall within the definition of retail premises and the Act ceases to apply.
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HOW DOES THIS IMPACT YOU?

It is unclear at this point whether VCAT's decision will be followed. At the date of writing this article, the Small Business Commissioner of Victoria has not updated its guidelines to take VCAT's decision into account.

However, landlords should consider whether any leases have fallen out of the Act during the term (eg if a tenant company is now publicly listed). If the Act has ceased to apply then, subject to the drafting of the particular provisions of the lease, it may put the landlord in a more advantageous position (eg allowing recovery of land tax, permitting ratcheted market reviews, and allowing recovery of additional maintenance costs).

Our [Real Estate lawyers](#) can help with any queries you may have and we will keep you up to date with further developments.

Authors



MARK LYONS

Partner