IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
AT MELBOURNE
RETAIL TENANCIES LIST

No. of 2014

IN THE MATTER of s. 11A of the *Small Business Commissioner Act 2003*, and

IN THE MATTER of the referral of matters for an advisory opinion to the Victorian Civil and Administrative Tribunal pursuant to s. 125 of the *Victorian Civil and Administrative Act 1998*

GEOFFREY MARTIN BROWNE (in his capacity as THE SMALL BUSINESS COMMISSIONER)

Applicant

OUTLINE OF SUBMISSIONS ON BEHALF OF THE SMALL BUSINESS COMMISSIONER REQUESTING AN ADVISORY OPINION

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A. INTRODUCTION

1. By an Application dated 15 May 2014, the Small Business Commissioner (**Commissioner**) has referred certain matters to the Tribunal pursuant to s. 11A(1) of the *Small Business Commissioner Act 2003* (***SBC Act***) seeking an advisory opinion (**Referred Matters**).

B. THE TRIBUNAL'S POWER TO GIVE AN ADVISORY OPINION

B.1 BASIS OF THE TRIBUNAL'S POWER

2. The Tribunal's power to provide an advisory opinion in relation to the Referred Matters is conferred by s. 125 of the *Victorian Civil and Administrative Tribunal Act 1998* (***VCAT Act***) and s. 11A(1) of the *SBC Act.*

3. Section 125 of the *VCAT Act* stipulates that an 'enabling enactment' may provide for the Tribunal to give an advisory opinion on any matter or question referred to it in accordance with the enabling enactment. An 'enabling enactment' is defined in s. 3 of the *VCAT Act* as any 'enactment' by or under which jurisdiction is conferred on the Tribunal, and that definition incorporates the s. 3 definition of 'enactment' which includes an Act or subordinate instrument.

4. The *SBC Act* is an 'enabling enactment' which confers jurisdiction on the Tribunal. In particular, s. 11A(1) of that Act provides that the Commissioner may refer a matter to the Tribunal for an advisory opinion under s. 125 of the *VCAT Act*. The Explanatory Memorandum to the *Small Business Commissioner Amendment Bill 2013* indicated that the insertion of s. 11A into the *SBC Act* was to provide the Commissioner with a basis to seek advisory opinions regarding 'matters that may have broader relevance and application to small businesses under the relevant legislation under which the Commissioner exercises her or his functions and powers.'[1]

5. The Commissioner's functions under the *SBC Act* include facilitating and encouraging the fair treatment of small businesses in their commercial dealings with other businesses in the marketplace (s. 5(2)(a)) and promoting informed decision-making by small businesses to minimise disputes with other businesses (s. 5(2)(b)). The Commissioner has the power to do all things necessary or convenient in connection with the performance of those functions (s. 5(4)). These functions and powers are directed towards the *SBC Act's* purpose stated at s. 1 of establishing an

[1] Clause 9 to the Explanatory Memorandum to the *Small Business Commissioner Amendment Bill 2013.*

office to enhance the competitive and fair operating environment for small businesses in Victoria.

6. The Referred Matters are relevant to small businesses. In particular, an advisory opinion in relation to the Referred Matters will inform how the Commissioner may facilitate the resolution of disputes between retail tenants and landlords regarding ESM Compliance Costs by mediation, other appropriate forms of alternative dispute resolution, or by giving advice.

B.2 THE PUBLIC INTEREST

7. Before referring a matter to the Tribunal for an advisory opinion, s. 11A(3) of the *SBC Act* requires that the Commissioner is satisfied that referral is in the public interest. This reflects the legislative intention behind s. 11A of the *SBC Act*. As the Minister indicated in her second reading speech to the *Small Business Commissioner Amendment Bill 2013* which inserted that provision into the *SBC Act*, an advisory opinion from the Tribunal 'may have broader relevance to the small business sector' and will 'provide a means for promoting and communicating legal issues that may have broader relevance, should they arise from time to time.'[2]

8. The Commissioner is satisfied that it is in the public interest to refer the Referred Matters to the Tribunal for an advisory opinion.

9. First, the Referred Matters relate to the operation of commercial leases and leases subject to the *Retail Leases Act*. It is in the public interest that parties to those leases, which generally involve the conduct of small businesses, have some measure of certainty regarding potential matters likely to arise, without resorting to litigation. However, as detailed below, the Referred Matters are the subject of different views expressed by leading practitioners in the field of retail and commercial tenancy law and in the Tribunal's decisions. An advisory opinion from the Tribunal in relation to the Referred Matters will provide some guidance regarding these issues, and is therefore clearly in the public interest.

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[2] Victoria, *Parliamentary Debates*, Legislative Assembly, 11 December 2013, 4524 (Louise Asher, Minister for Innovation, Services and Small Business).

10. Secondly, the affidavit of Mark Schramm, a Senior Manager at the Office of the Victorian Small Business Commissioner (**Commissioner's Office**), has been filed in this Application on behalf of the Commissioner. Mr Schramm is the holder of a delegation of the Commissioner's powers under s. 11 of the *SBC Act*. He relevantly deposes that:

    (a) the Commissioner's Office receives a large number of queries from landlords, tenants, legal practitioners and real estate agents concerning retail tenancy issues and related legislation (paragraph 9);

    (b) in the 2012/13 financial year the Commissioner's Office received 1,103 applications to mediate retail tenancy disputes and 7,545 telephone inquiries for preliminary assistance concerning issues arising out of retail or commercial leases (paragraph 10);

    (c) between November 2012 and April 2014, shortly after the Commissioner's Officer started using a new telephone number via the Business Victoria Contact Centre, it received approximately 500 telephone inquiries concerning commercial lease repairs and maintenance issues (paragraph 11);

    (d) the Commissioner's Office educates and guides the commercial tenancy sector by way of educational seminars, presentations at business functions, and via its website, and the information provided in those forums relates in part to the Referred Matters (paragraph 12); and

    (e) landlords and tenants have difficulty understanding their payment obligations regarding the maintenance of a building's 'essential safety measures', and this issue is often the subject of questions at presentations and seminars the Commissioner's Office conducts (paragraph 13).

11. Accordingly, Mr Schramm deposes that the Commissioner has informed him that:

    (a) it is desirable to clarify landlords and tenants' payment obligations regarding the maintenance of a building's 'essential safety measures' (paragraph 14);

    (b) an advisory opinion in relation to the Referred Matters is likely to:

        (i) assist to prevent disputes arising in relation to those issues;

(ii) reduce the number of disputes referred to the Commissioner's Office; and

(iii) reduce the number of applications filed with the Tribunal (paragraph 24); and

(c) the Tribunal's advisory opinion in relation to the Referred Matters will be reflected in any advice or information the Commissioner provides to landlords and tenants concerning those issues, including by potentially providing a copy of the advisory opinion to them.

B.3 THE CONSTITUTION AND ADVISORY OPINIONS

12. The Tribunal's power to give advisory opinions pursuant to s. 125 of the *VCAT Act* and s. 11A of the *SBC Act* does not infringe the constitutional stipulation that federal judicial power may only be exercised with respect to a 'matter' regarding an immediate right, duty or liability.[3] There are three reasons for this:

(a) firstly, the Tribunal is a statutory body that exercises the powers conferred upon it by statute.[4] It is not a judicial body, and therefore does not exercise judicial power when applying those powers,[5] let alone federal judicial power;

(b) secondly, the prohibition against State courts giving advisory opinions is not absolute. For example, in *Mellifont v Attorney-General (Queensland)*[6] the High Court upheld the validity of a provision authorising Queensland's Attorney-General to refer points of law which had arisen at trial for the Court of Criminal Appeal's consideration or opinion. The plurality judgment recognised that this mechanism was 'a standard procedure for correcting error of law in criminal proceedings without exposing the accused

[3] See, for example, *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265, *Fencott v Muller* (1983) 152 CLR 570, 608; *Grollo v Palmer* (1995) 184 CLR 348, 391 and *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, [242].

[4] *Cooper v Borondarra City Council* [2001] VCAT 2429, [24] and *Krocka* [2003] VCAT 1526.

[5] *Johndahl Nominees Pty Ltd v Commissioner of State Revenue* (1999) 16 VAR 112, 115.

[6] (1991) 173 CLR 289.

to double jeopardy' while having as its purpose the obtaining of 'a correct statement of the law so that it would be applied correctly in future cases'[7];

(c) thirdly, advisory opinions are, in part, analogous to 'declarations of inconsistent interpretation' issued under s. 36(2) of the *Charter of Human Rights and Responsibilities Act 2006* (***Charter***). A majority of the High Court in *Momcilovic v The Queen*[8] upheld the validity of that arrangement so far as it involved the Victorian Supreme Court's exercise of State judicial power.[9] A Court's power under the *Charter* to issue declarations of inconsistent interpretation and the Tribunal's power under the *VCAT Act* and the *SBC Act* to give advisory opinions allow for considered views to be provided regarding the interpretation and application of particular statutes. Further, any advisory opinion the Tribunal delivers will have a similar effect to a 'declaration of inconsistent interpretation' which, pursuant to s. 36(5) of the *Charter*, does not affect the validity, operation or enforcement of the statutory provision in question, and does not create in any person a legal right or give rise to a civil cause of action.

C. THE REFERRED MATTERS

C.1 THE LEGISLATIVE REGIME

13. 'Essential safety measures' for the purposes of the *Building Regulations 2006* are the fire, lift safety and health items installed or constructed in buildings. They include traditional building fire services such as sprinklers and mechanical services, and passive fire safety mechanisms such as fire doors, fire-rated structures and other building infrastructure items such as paths of travel to exits.[10]

14. The *Building Regulations 2006* (***Building Regulations***) provide that a building's owner is responsible for maintaining that building's 'essential safety measures'

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[7] *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289, 305.

[8] (2011) 245 CLR 1.

[9] (2011) 245 CLR 1, [97] (per French CJ), [600] (per Crennan and Kiefel JJ) and [661] (per Bell J).

[10] Building Commission, *Essential Safety Measures Maintenance Manual* (4th edition) 7.

(Regulations 1205 and 1217) and for preparing an 'annual essential safety measures report' (Regulations 1208 and 1214).

15. If a building owner fails 'to carry out any work or do any other thing' required of it under the *Building Act 1993* (***Building Act***) or the *Building Regulations*, then s. 251(1) of the *Building Act* permits that building's occupier to carry out that work or to do that thing. The occupier may then recover the expenses it necessarily incurs doing so as a debt due from the owner, or deduct those expenses or set them off against any rent payable to the building owner (s. 251(2)). These provisions apply despite any covenant or agreement to the contrary between the building owner and occupier (s. 251(6)).

16. The Referred Matters concern the interaction between an owner landlord's obligations to maintain a building's 'essential safety measures' and s. 251 of the *Building Act.*

C.2 PASSING ON ESM COMPLIANCE COSTS TO TENANTS

17. In an article published in the *Law Institute Journal* in April 2012, Norman Mermelstein and the late Michael Redfern concluded that owner landlords cannot pass on the ESM Compliance Costs they incur to tenants.[11]

18. This conclusion was informed by Deputy President Macnamara's decision in *Chen v Panmure Hotel Pty Ltd*[12] (***Chen***). In that case the owner landlord had not carried out the work required to comply with her obligations under the *Building Act* and the *Building Regulations*, including the installation of hard-wired smoke detectors. That obligation was imposed upon the 'owner of the building' by Regulation 709(8) of the *Building Regulations*. The landlord sought a determination requiring the tenant to carry out that work having regard to the terms of the lease obliging the tenant to comply with all legislative requirements 'affecting or relating to the premises', except to the extent they involved structural repairs.

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[11] Norman Mermelstein and Michael Redfern, 'Tenants beware: Don't get hit by safety maintenance costs' (2012) 86(4) *Law Institute Journal* 28.

[12] [2007] VCAT 2464.

19. Deputy President Macnamara declined to make that determination on the basis that, even if a determination was made requiring the tenant to install that smoke detector, the tenant could still recover from the landlord the costs of doing so under s. 251 of the *Building Act*. The Deputy President therefore concluded that

> '[i]t would … be inconsistent with the law's abhorrence for circuity … to make an order which purports to impose the obligation of carrying out these works upon the lessee when the *Building Act* itself has clearly imposed the obligation upon the lessor and given the lessee the right to recover the cost of carrying out the works as against the lessor despite any provision in the lease to the contrary.'[13]

20. The conclusion Messrs Mermelstein and Redfern drew from the Deputy President's reasons in *Chen* was contested by Robert Hay, barrister, in his October 2012 paper entitled 'Essential services and the recovery of expenses'. Mr Hay argued instead that '*Chen* does not support a general proposition that a landlord cannot recover its costs incurred in complying with the *Building Act*' and contended that the Tribunal in *Chen* 'did no more than apply s. 251 of the *Building Act*'. That provision was enlivened when the landlord failed to carry out the required work, and the landlord was precluded from relying on the terms of her lease with the tenant to defeat its operation.[14]

21. While the Tribunal's decision in *Chen* prevents landlords from relying on a term of their lease to defeat their payment obligations for ESM Compliance Costs under s. 251 of the *Building Act*, its decision in *McIntyre v Kucminska Holding Pty Ltd*[15] (***McIntyre***) recognises that landlords may contractually allocate to tenants responsibility for performing those works, but not the cost of performing them.

22. The tenant in *McIntyre* argued that the 'essential safety measures' at the leased premises did not comply with the *Building Regulations*. The landlord argued that the parties' lease placed responsibility on the tenant for repairing and maintaining

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[13] [2007] VCAT 2464, [38].

[14] Robert Hay, 'Essential services and the recovery of expenses' (October 2012), [19].

[15] [2012] VCAT 1766.

the premises' 'essential safety measures'. Senior Member Riegler concluded that s. 251 of the *Building Act* 'does not necessarily prohibit' a landlord from placing those obligations on a tenant, 'save and except that the Landlord must reimburse the Tenant for the costs associated therewith, failing which the Tenant is entitled to set-off [sic] those costs against rent due and payable under the lease.'[16] To this extent Senior Member Riegler considered the parties' contractual and statutory obligations capable of sitting 'side-by-side.'[17]

23. In reaching this conclusion the Senior Member contrasted the circumstances in *McIntyre* with those in *Chen*. In *Chen* the tenant sought a declaration to be relieved of the obligation to carry out essential safety measures. In contrast, in *McIntyre* the applicants sought damages on the basis that the landlord's failure to provide fire safety equipment prevented them using the demised premises to operate their business.[18]

24. *Chen* and *McIntyre* may also be contrasted having regard to the language of the Regulations in issue. As Senior Member Riegler noted in *McIntyre*, Regulation 1217 of the *Building Regulations* does not prescribe that the owners of land must be the entities that carry out the required work. Instead, the Regulation requires that owners 'must ensure' it occurs.[19] In contrast, and as Deputy President Macnamara noted in *Chen*,[20] Regulation 709(8) of the *Building Regulations*, which was in issue in that case, specified that it 'must be complied with by the owner of the building.' An 'owner' was defined in Regulation 706 in a manner which precluded that term from encompassing the respondent tenant.[21]

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[16] [2012] VCAT 1766, [69].

[17] [2012] VCAT 1766, [71].

[18] [2012] VCAT 1766, [65]-[66].

[19] [2012] VCAT 1766, [69].

[20] *Chen v Panmure Hotel Pty Ltd* [2007] VCAT 2464, [38].

[21] *Chen v Panmure Hotel Pty Ltd* [2007] VCAT 2464, [38].

25. Sam Hopper, barrister, has provided further reasons in support of the Tribunal's conclusion in *McIntyre* in his October 2013 article published in the *Law Institute Journal*.[22] Those reasons include:

    (a) section 251 of the *Building Act* is only engaged when a landlord fails to comply with its obligations. Where a tenant is contractually required to comply with those obligations on a landlord's behalf, then s. 251 is only engaged when the tenant fails to comply with its contractual obligations. It may be more appropriate for a tenant to 'miss out given that, in this situation, the problem is triggered by the tenant's breach of contract';

    (b) it appears that Parliament's 'main concern' was to ensure the necessary work is carried out 'in the most efficient way possible.' This can be satisfied without restricting the parties' ability to make enforceable bargains about the costs of carrying out that work in a manner which would otherwise infringe their freedom of contract;

    (c) the location of s. 251 in the *Building Act's* scheme suggests it is intended to operate as a form of 'self-help' such that occupants have a summary method of enforcing that Act and the *Building Regulations'* requirements, and to penalise delinquent property owners; and

    (d) the parliamentary debates regarding the *Building Bill 1993* do not indicate that the resulting Act was intended to operate as a form of consumer protection legislation or had the intention to restrict the parties' ability to allocate the risk of complying with its requirements.

26. Pending this area of the law being clarified, Mr Hopper recommended two approaches landlords may consider implementing to protect their position. The first involves landlords assuming the risk of complying with the *Building Act* and the *Building Regulations*, but in exchange for receiving a higher rent or some other consideration. He notes, however, that this may be 'unpalatable' to some landlords. The second approach involves landlords complying with their obligations under the

[22] Sam Hopper, 'A need to resection' (2013) 87(10) *Law Institute Journal* 36.

Building Act and the *Building Regulations* and, whilst recognising the risks associated with it, passing on the resulting costs to tenants as outgoings.

C.3 PASSING ON ESM COMPLIANCE COSTS TO TENANTS AS OUTGOINGS UNDER RETAIL PREMISES LEASES

27. Section 52 of the *Retail Leases Act* incorporates a term into 'retail premises leases' stipulating that landlords are responsible for maintaining various aspects of the retail premises in a condition consistent with that when the applicable lease was entered into. Those aspects include the premises' structure, fixtures, plant and equipment, and the appliances, fixtures and fittings provided by the landlord under the lease relating to gas, electricity, water, drainage or other services. While landlords may recover from tenants outgoings for non-capital expenses (s. 39), landlords cannot recover from tenants capital costs (s. 41) or the expenses they incur in complying with the Act (s. 51(1)(c)).

28. Messrs Mermelstein and Redfern's April 2012 article considered the interaction between an owner landlord's obligations to maintain a building's 'essential safety measures' and these provisions of the *Retail Leases Act*. The authors concluded that owner landlords cannot pass their ESM Compliance Costs to tenants as outgoings under a retail premises lease. To the extent those costs fall outside the scope of s. 52 of the *Retail Leases Act* and relate to non-capital works, the authors argued that s. 251 of the *Building Act* will 'override' s. 39 of the *Retail Leases Act*, which would otherwise have provided a basis for landlords to recover those costs as outgoings.[23]

29. This conclusion was partly derived from the Tribunal's decision in *Chen*. The authors regarded that decision as extending the protection given to tenants under retail premises leases because 's. 251 of the *Building Act* applies to all matters

[23] Norman Mermelstein and Michael Redfern, 'Tenants beware: Don't get hit by safety maintenance costs' (2012) 86(4) *Law Institute Journal* 28.

required of a landlord under the *Building Act* irrespective of the condition at the time of the commencement of the current lease.'[24]

30. The authors' analysis also referred to the Tribunal's decision in *Café Dansk Pty Ltd v Shiel*[25] (***Café Dansk***). In that case Deputy President Macnamara considered the note inserted into s. 52 of the *Retail Leases Act* by a 2005 amendment. That note referred to the regulation of a landlord's ability to recover outgoings under s. 39, and the s. 41 prohibition against landlords recovering capital costs from tenants. It was suggested this note clarified that landlords could recover from tenants the costs they incur when maintaining structures, fixtures, plant, equipment and appliances in good repair, except to the extent those costs include capital costs or urgent repairs.

31. The Deputy President rejected this suggestion with reference to Dr Croft's 'sceptical views'[26] expressed in his text, *Retail Leases Victoria*. There, amongst other provisions, Dr Croft noted the protection s. 51(1)(c) provides tenants against landlords attempting to recover from them the costs they incur when complying with the *Retail Leases Act*. Further, s. 94 of the *Retail Leases Act* renders void any attempt to exclude or vary those requirements in the parties' retail premises lease. From this the Deputy President concluded that

> '[i]t would … make a mockery of s 52 if Parliament having allocated the responsibility for certain repairs to the landlord, the landlord could then send the bill to the tenant for the cost of carrying out those repairs.'[27]

32. In contrast, Mr Hay's October 2012 paper disagreed with Messrs Mermelstein and Redfern's conclusions for two reasons:

    (a) in the first place, while regarding *Café Dansk* as correctly decided, Mr Hay suggested that the argument supporting a landlord's right to recover from

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[24] Norman Mermelstein and Michael Redfern, 'Tenants beware: Don't get hit by safety maintenance costs' (2012) 86(4) *Law Institute Journal* 28.

[25] [2009] VCAT 36.

[26] [2009] VCAT 36, [44].

[27] [2009] VCAT 36, [44].

tenants the costs of complying with s. 52 of the *Retail Leases Act* is not as 'flimsy' as the Deputy President conveyed. In particular, Mr Hay referred to the Explanatory Memorandum to the *Retail Leases (Amendment) Act 2005* which incorporated the note to s. 52 into the *Retail Leases Act*. The Explanatory Memorandum indicated the note's effect was to 'clarify' that, while landlords are responsible for arranging and carrying out the repairs required by s. 52(2), those cost may be passed on to tenants as recoverable outgoings under the parties' leases (except for any capital costs or the cost of urgent repairs).[28]

The alternative view is that, while s. 52 of the *Retail Leases Act* constitutes part of that provision,[29] it does not clearly clarify that these costs are recoverable as outgoings in the manner the explanatory memorandum suggests. In particular, it is questionable whether that note's references to ss. 39 and 41 are sufficiently clear to displace Parliament's intention that landlords must perform certain maintenance and repair work (s. 52), landlords may not transfer the costs associated with that work to tenants (s. 51(1)(c)) and any attempt to exclude or vary those requirements in the parties' retail premises lease is void (s. 94). While the explanatory memorandum may provide some contextual guidance as to that note's purpose, the language Parliament has actually used 'is the surest guide to legislative intention';[30]

(b) secondly, Mr Hay argues that *Café Dansk* is of limited relevance to the question whether landlords may recover ESM Compliance Costs from tenants. This is because:

(i) the *Building Act* and *Retail Leases Act* have a different focus. While the *Building Act* is concerned with 'the safety of persons using

[28] Clause 25 to the Explanatory Memorandum to the *Retail Leases (Amendment) Bill 2005*.

[29] Section 36(3A) of the *Interpretation of Legislation Act 1984*.

[30] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [47] and *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257, [39].

buildings', the *Retail Leases Act* is concerned 'to provide some balance between the rights of landlords and tenants';[31]

(ii) the *Building Act* 'says nothing about the allocation of costs for complying with the Act', and this may be contrasted with the *Retail Leases Act* which 'contains detail provisions about outgoings.'[32]

33. Further, Mr Hay argues that a landlords' ability to pass on ESM Compliance Costs is not unfair to tenants. This is because tenants often renovate demised premises or construct buildings on land subject to a long-term lease. Mr Hay questions why, in those situations, landlords should be responsible for the associated ESM Compliance Costs.

C.4 PASSING ON THE COSTS OF MAINTENANCE AND REPAIRS TO TENANTS AS OUTGOINGS UNDER A RETAIL PREMISES LEASE

34. Finally, it is submitted that any consideration of the application of ss. 51, 52 and 94 of the *Retail Leases Act* with respect to a leased premise's 'essential safety measures' should also take into account their application with respect to other maintenance or repair work landlords perform, which is unrelated to a leased premise's 'essential safety measures'.

35. This broader application of a landlord's maintenance and repair obligations can and not infrequently arises in the following two situations:

(a) Where a landlord incurs costs repairing or replacing an item of plant and equipment, or appliances, fittings and fixtures relating to the leased premise's services provided under the lease by the landlord, and the landlord seeks to recover the costs it has incurred in doing so from the tenant as a recoverable outgoing under the retail premises lease;

(b) Where a landlord seeks to enforce the term of a retail premises lease obliging its tenant to implement and maintain, and bear the cost of implementing and maintaining, a maintenance program using suitably

[31] Robert Hay, 'Essential services and the recovery of expenses' (2012), 12.

[32] Robert Hay, 'Essential services and the recovery of expenses' (2012), 13.

qualified contractors for specified plant and equipment, or appliances, fittings and fixtures relating to the leased premise's services provided under the lease by the landlord.

36. If the Tribunal's reasons in *Café Dansk* govern this broader range of circumstances then a single approach to ss. 51, 52 and 94 of the *Retail Leases Act* will invariably result. The same analysis will operate irrespective of whether the non-capital maintenance work which is governed by s. 52 of the *Retail Leases Act* concerns a leased premise's 'essential safety measures' or not. Alternatively, if Messrs Mermelstein and Redfern's reasoning is preferred, then a distinction will arise in relation to a landlord's ability to transfer to its tenant the cost of performing certain non-capital maintenance work, where the landlord is in a position to do so by the terms of the lease. Where that work concerns a leased premise's 'essential safety measures', then s. 251 of the *Building Act* will preclude a landlord from recovering those costs. In other instances a landlord's ability to transfer responsibility for covering those costs will be governed by the proper construction of ss. 51, 52 and 94 of the *Retail Leases Act*.

C.5 MATTERS FOR THE TRIBUNAL'S ADVISORY OPINION

37. In consequence of the aforesaid, the Commissioner refers the following matters to the Tribunal for an Advisory Opinion:

(1) whether a landlord may enforce against a tenant a contractual obligation in a commercial lease stipulating that the tenant is obliged to provide or maintain the leased property's 'essential safety measures'(**ESM)**, in satisfaction of the landlord's obligations under the *Building Act* or the *Building Regulations* to ensure that any ESM required to be provided are maintained in a state which ensures that the ESM is able to fulfil its purpose (**the appropriate state**);

(2) whether s. 251 of the *Building* Act:

(a) prohibits a landlord from recovering from a tenant the ESM Compliance Costs incurred when a tenant breaches a contractual

obligation to maintain a leased property's 'essential safety measures' in the appropriate state;

(b) requires that a landlord reimburse to the tenant the ESM Compliance Costs incurred by a tenant in compliance with a contractual obligation in a lease stipulating that the tenant is to maintain a leased property's 'essential safety measures' in the appropriate state;

(c) entitles a tenant to deduct the ESM Compliance Costs from, or set them off against any rent due or to become due to the landlord;

(3) where non-capital ESM Compliance Costs incurred by a landlord to ensure that any ESM works required to be provided are maintained in the appropriate state, are also specified as recoverable outgoings under a retail premises lease, but there is no obligation on the tenant to undertake the ESM works, whether s. 251 of the *Building Act* takes precedence over s. 39 of the *Retail Leases* Act, such that:

(a) a landlord cannot recover the ESM Compliance Costs as recoverable outgoings against a tenant;

(b) a tenant can recover from a landlord, or set off against any rent due or to become due to the landlord, any ESM Compliance Costs paid to the landlord as recoverable outgoings;

(4) having regard to the operation of s. 251 of the *Building Act* and the provisions of the *Retail Leases Act*, whether a tenant to a retail premises lease is entitled to deduct any ESM Compliance Costs incurred by the tenant from, or set them off against, any rent due or to become due to the landlord, in relation to ESM works undertaken by the tenant and/or costs incurred by the tenant, where there are contractual obligations in a retail premises lease requiring such works to be done, or entitling the landlord to recover the cost of such works as a recoverable outgoing;

(5) in what circumstances, if any, can a landlord recover from the tenant the cost of maintenance and repairs to the retail premises, or to the landlord's installations in the retail premises as recoverable outgoings, having regard to the operation of sections 51, 52 and 94 of the RLA.

George H Golvan

Brian Mason

15 May 2014