

**SMALL BUSINESS COMMISSIONER**

**Guidelines to the *Retail Leases Act 2003***

**Current Market Rent and Engaging  
Specialist Retail Valuers**

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## **1.0 About these Guidelines**

The *Retail Leases Act 2003* (as amended by the *Retail Leases (Amendment) Act 2005* and *Retail Leases Amendment Act 2012*) commenced operation on 1 May 2003. Also commencing on 1 May 2003, was the *Small Business Commissioner Act 2003* which established the Office of the Victorian Small Business Commissioner. The Commissioner has functions both under its own establishing Act and the *Retail Leases Act 2003* (the Act). The Act is complemented by the *Retail Leases Regulations 2013*.

Amongst other functions under the Act, the Commissioner has the function of preparing and publishing guidelines about retail leases (sub-section 84(1)(f)). These Guidelines are made with the aim of assisting the general understanding of the Act.

## **2.0 Interpretation**

In some instances, certain references, such as legislation, have been shortened in these Guidelines for ease of reading. The full reference can be found in the glossary section of the Guidelines (see paragraph 10.0). Where a reference to a lease is made in these Guidelines, that is taken to mean a reference to a retail premises lease unless otherwise indicated.

## **3.0 Important Disclaimer**

The opinions formed in these Guidelines are those of the Office of the Victorian Small Business Commissioner and of the named authors of this document and are not legally conclusive or binding on any person, corporation or authority or on any Court or the Victorian Civil and Administrative Tribunal (VCAT). They are intended to provide assistance and to be as accurate and informative as possible – but are necessarily directed to general questions and not particular circumstances. Consequently the Victorian Small Business Commissioner expressly disclaims all and any liability to any person in respect of anything, and of consequence of anything, done or omitted to be done by any person in reliance, whether wholly or partially, upon the contents of this publication. Readers are reminded that leasing and valuation law is complex and it is vital that professional advice from a competent person in this field is sought at the earliest opportunity.

## **4.0 Purpose of these Guidelines**

The purpose of these Guidelines is to assist understanding of provisions of the Act that impact on the rights and obligations of landlords and tenants in relation to the issues arising under retail premises leases in Victoria with respect to the

determination of current market rent by specialist retail valuers under the Act and the conditions of engagement of these valuers. These Guidelines may also assist landlords and tenants to understand their rights and obligations under similar legislative provisions, concerned with the *Retail Tenancies Act 1986* and the *Retail Tenancies Reform Act 1998*. Note that the date upon which the lease is entered into (as defined in the legislation) will determine which act is applicable to the lease.

## **5.0 Overview of rent review provisions under the Act**

Part 5, Division 3 (sections 35 to 38) of the Act regulates rent reviews under retail premises leases.

### **Requirements for a rent review provision**

Rent review provisions in a retail premises lease must state (see sub-section 35(1)):

- when rent reviews are to take place; and
- the basis or formula on which the reviews are to be made.

### **Basis or formula for rent review**

The basis or formula on which a rent review is to be made must be one of the following (see sub-section 35(2)) –

- a fixed percentage;
- an independently published index of prices or wages;
- a fixed annual amount;
- the current market rent of the retail premises; or
- a basis or formula prescribed by the Regulations.

No basis or formula has, as yet, been prescribed by the Regulations.

A provision in a retail premises lease that purports to preclude, or prevents or enables a person to prevent, the reduction of rent or to limit the extent to which rent is reduced is known as a “ratchet clause”. Ratchet clauses are void (see sub-section 35(3)).

However, this does not apply to:

- a rent review based on a fixed percentage, an independently published index of prices or wages or a fixed annual amount (see sub-section 35(4)(a)); or

- a prescribed basis or formula under the Regulations that is also a ratchet clause (see sub-section 35(4)(b)).

At this stage, no basis or formula is prescribed by the Regulations, so section 35(4)(b) is not operational.

### **When rent reviews are to take place**

A rent review is to be conducted as early as practicable within the time provided in the lease. If the landlord has not initiated the review within 90 days after the end of that time, the tenant may initiate the review (see sub-section 35(5)).

### **Certain rent review provisions void**

A rent review provision in a retail premises lease is void if it does not specify how the review is to be made (see sub-section 35(6)).

### **How rent is determined when a rent review provision is void or does not comply with sub-section 35(2)**

Sub-section 35(7) provides a means of determining the rent if:

- the basis or formula on which a rent review is to be made is not one of the bases or methods contained in sub-sections 35(2) (set out above); or
- the rent review provisions are void under sub-section 35(6);

That sub-section will apply if the retail premises lease provides for rent on any other basis, such as “open market rent”, “market rental value”, “fair rent”, “reasonable rent” or another basis not contained in sub-section 35(2).

If sub-section 35(7) applies, then the rent is to be:

- as agreed between the landlord and the tenant (see sub-section 35(7)(a)); or
- if the parties do not agree within 30 days of either party giving notice specifying an amount of rent for the review, the current market rent as determined by specialist retail valuer who must be appointed by the Small Business Commissioner (see sub-section 35(7)(b)).

No provision is made under section 35(7) for the appointment of a specialist retail valuer by agreement between the parties.

### **Costs of valuation**

The landlord and the tenant pay the costs of the valuation in equal shares (see sub-section 35(8)).

## **Extended application of the market review provisions of the Act**

Generally, the Act applies to retail premises leases entered into or renewed after 1 May 2003 (see Part 3 of the Act).

However the market review provisions of the Act also apply to (see section 36):

- the determination on a review conducted after 1 May 2003 of the commencing rent for the renewed term of a retail premises lease that was entered into before that date; and
- to any subsequent review of the rent payable under the renewed lease if the Act would have applied to it had the lease been entered into after 1 May 2003.

If the lease is within section 36 and the rent is reviewed to the current market rent, the rent is reviewed in accordance with section 37 (see the note to sub-section 35(2)).

## **Rent reviews based on current market rent**

When the retail premises lease provides for a current market rent review, section 37 applies.

Section 37 is discussed in further detail below.

## **Confidentiality of information supplied to a valuer**

Information provided to a specialist retail valuer for the purpose of determining the current market review under section 37 is confidential and may only be divulged in specified circumstances (see sub-sections 38(1) and (2)).

It is an offence for a valuer to divulge that information in breach of section 38 (see sub-section 38(1)), and a specialist retail valuer may be liable to pay compensation for any loss or damage as a result of that information being used, communicated or divulged (see sub-sections 38(3) to (4)).

The unreasonable use of trading or turnover figures in the course of negotiations may amount to unconscionable conduct by a landlord or a tenant under sub-sections 77(2)(m) and 78(2)(m) respectively. However, that use is entirely distinct and separate from the use of trading figures in the course of a determination of the current market rent by a specialist retail valuer to the extent indicated by these guidelines.

## **6.0 Section 37 – Rent reviews based on current market rent**

### **6.1 Overview of section 37**

Section 37 of the Act applies to a “retail premises lease” which provides for a market rent review.

#### **What are retail premises?**

The criteria for determining whether the premises are “retail premises” are set out in section 4 of the Act. Subject to some exceptions, premises will be “retail premises” if, under the terms of the lease, the premises are used or are to be used wholly or predominantly for the sale or hire of goods by retail or the retail provisions of services (see sub-section 4(1)(a)).

For further discussion on the meaning of “retail premises”, refer to ‘*Guidelines to the Retail Leases Act 2003: What are “Retail Premises”?*’ available from the website of the Office of the Small Business Commissioner.

#### **Provisions in section 37 are part of a retail premises lease**

A retail premises lease that provides for a rent review to be made on the basis of the current market rent of the premises is “taken to provide” as set out in sub-section 37(2) to (6) (see sub-section 37(1)).

If a retail premises lease contains any terms that are inconsistent with anything in the Act, then those terms will be void to the extent that they are contrary to, or inconsistent with, the provisions of the Act, including anything that the lease is taken to include or provide because of a provision of the Act (see section 94).

These statutory provisions apply to the exclusion of any provisions of the lease which are contrary to or inconsistent with these provisions of the Act (see sub-section 94(1)).

However, sub-section 37(2)(a) allows the specialist retail valuer to have regard to the provisions of the lease, so the valuer can look to other provisions of the rent review clause that are not inconsistent with subsections 37(2) to (6).

## **When do the current market rent provisions apply?**

The current market rent provisions apply in limited circumstances. These are discussed in detail in 6.2 below.

### **Current market rent**

The meaning of current market rent is set out in sub-section 37(2) and is discussed in detail in 6.3 to 6.9 below.

### **Appointment of a specialist retail valuer**

If the lease provides for a current market rent and the landlord and tenant cannot agree on the amount of the rent, it is to be determined by a specialist retail valuer appointed by agreement or by the Commissioner (see sub-section 37(3)).

Refer to the discussion above under 5.0 “How rent is determined when a rent review provision is void or does not comply with sub-section 35(2)” if the specialist retail valuer is appointed under s 35(7).

### **Information relevant to the valuation**

The landlord must within 14 days after a request from the specialist retail valuer supply the valuer with relevant information about leases for retail premises located in the same building or retail shopping centre to assist the valuer to determine the current market rent (see sub-section 37(4)). A penalty applies if the landlord fails to provide that information.

The specialist retail valuer may seek to enforce that obligation under Part 10 of the Act (Dispute Resolution) (see sub-section 37(4)).

### **The valuer’s determination**

The requirements of the valuer’s determination are set out in sub-sections 37(5) to (7).

Those requirements are discussed further at 6.10 below.

## **6.2 When do the current market rent provisions apply?**

A retail premises lease will provide for a current market rent review if:

- the lease provides for a rent review to be made on the basis of the current market rent of the premises (see sub-section 37(1));
- sub-section 35(7)(b) applies (see 5.0, above); or

- a lease is extended under section 21 of the Act and no provision is made in the lease for a review of the rent payable in respect of the extended period (see section 21(7)). Section 21 of the Act states that the term of a retail premises lease and any options to renew must be at least 5 years.

Many retail premises leases purport to allow landlords or both landlords and tenants to specify market rent by notice to the other side. Such leases typically provide that if no objection is received within the defined period, the rent is deemed to be that in the notice. In some cases the lease provides that the parties are deemed to have agreed to the rent contained in that notice. However, such ‘deeming’ clauses are likely to be void.

In *Figgins Holdings Pty Ltd v Williamson Place Pty Ltd* [2010] VCAT 243, VCAT held that a notice deeming rent to be the current market rent was ineffective because it was inconsistent with the terms of the Act. VCAT also suggested that a notice creating a deemed agreement between the parties (as opposed to deemed rent) would be equally ineffective.

### 6.3 Determining current market rent

It is usual to include criteria in a lease, that are to be considered by a valuer when determining the current market rent. Sub-section 37(2) of the Act reflects this practice –

#### 37 *Rent reviews based on current market rent*

...

(2) *The current market rent is taken to be the rent obtainable at the time of the review in a free and open market between a willing landlord and willing tenant in an arm's length transaction having regard to these matters—*

- (a) *the provisions of the lease;*
- (b) *the rent that would reasonably be expected to be paid for the premises if they were unoccupied and offered for lease for the same, or a substantially similar, use to which the premises may be put under the lease;*
- (c) *the landlord's outgoings to the extent to which the tenant is liable to contribute to those outgoings;*

(d) *rent concessions and other benefits offered to prospective tenants of unoccupied retail premises—*

*but the current market rent is not to take into account the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings.*

...

This sub-section is intended to prevent a “sitting tenant” being disadvantaged if it has, by its own fit out, business acumen, standard of service and trading activity, enhanced the rental value of the premises, since a “sitting tenant” may be willing to pay a premium to keep the premises.

Broadly, this section requires the specialist retail valuer to disregard or discount any special effects caused by a particular tenant by requiring the specialist retail valuer to assume that a “hypothetical tenant” is seeking to rent the premises afresh. This eliminates those factors from consideration as far as possible – the hypothetical tenant would not be willing to pay a premium to keep the premises. This is discussed further under 6.4 and 6.5 below.

## **6.4 Goodwill**

The specialist retail valuer is required to disregard the value of the goodwill created by the tenant’s occupation of the premises.

Goodwill is a very difficult concept to define and there have been many attempts made by the courts to define it.

In *Hoogerdyk v Condon* (1990) 22 NSWLR 171, Young J considered the nature of goodwill (at 175-6):

*Goodwill includes every positive advantage that has been acquired in carrying out a business which would give a reasonable expectancy of preference in the face of competition ... There is some value in looking at the variety of elements which compose goodwill. These...will vary from business to business. There will be local goodwill represented by the fact that people will patronise the business nearest their home or place of business. There will be personal goodwill generated by the persons who in fact carry on the business. There will be goodwill or habit brought about by customers getting into the habit of buying things at a particular outlet and, unless something happens, they will continue to buy there because something equivalent to Newton’s law of motion, or*

*perhaps apathy, operates in favour of the trader. In more modern times it has been seen that having a name which is of good repute in the community generally will attract custom to a business. This, of course, has led to the practice of franchising so prevalent in the last decade or so. It must always be remembered, however, that all these aspects of goodwill attach to a particular business and one cannot consider goodwill apart from the business...It is also necessary to observe that goodwill can be enhanced, diminished or even extinguished by a number of factors, some of which are internal to the business and some of which are external. Personal goodwill can be lost simply by being rude or inattentive to customers. Goodwill of habit can be lost by a competitor fiercely publicising cut-rate prices or otherwise clearly providing a superior service at a cheaper rate.*

The High Court of Australia in *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 615 defined goodwill as:

*...the legal right or privilege to conduct business in substantially the same manner and by substantially the same means which in the past have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business.*

Goodwill is linked to the tenant's occupation of the premises.

There are two kinds of goodwill implicitly recognised by sub-section 37(2). These are:

- *locational goodwill*: the goodwill that attaches to the premises itself and is not the result of some special work by or a special feature of the tenant; and
- *tenant's goodwill*: the goodwill that is the result of the tenant's occupation over time, its hard work, industry and good name and its fixtures and fittings.

Locational goodwill would normally be taken into account by the specialist retail valuer when determining the current market rent for the premises. The value of locational goodwill would normally be reflected in the rent paid in other comparable premises.

The special effects of the tenant's goodwill cannot be taken into account by the specialist retail valuer. The special effects of the tenant's goodwill are discounted by assuming that a "hypothetical tenant" is leasing the premises.

## ***Examples***

### **Tenant's goodwill must be excluded**

- *A tenant leases a shop selling sporting goods. The tenant is partly owned by a celebrity footballer who significantly increases trade to the shop. In valuing the current market rent, the specialist retail valuer should disregard the special effects of the celebrity footballer as those effects are unique to the tenant.*
- *A tenant pays for pamphlets to be circulated through the neighbourhood advertising its business. As a result, more people come to this tenant's shop than to any other shop in the retail shopping centre. The effects of the advertising campaign should be disregarded by the specialist retail valuer in determining the current market rent for the shop.*

### **Locational goodwill would normally be considered**

- *A tenant occupies a shop in a retail shopping centre. Centre management engages a celebrity football player to promote the centre as a whole, increasing trade at the centre. The specialist retail valuer would normally take into account the effects of all of the landlord's marketing activities, including the effect of that celebrity football player, in assessing the current market rent for the shop. Those effects would normally be reflected in the rent for comparable premises within the centre.*
- *A tenant occupies a shop in a prominent position in a retail shopping centre. As a result of its location, the shop attracts more passing traffic than any other shop in the centre. The specialist retail valuer would normally take that into account in determining the current market rent.*
- *The specialist retail valuer would normally have regard to the particular services or atmosphere provided by the retail premises where that service or atmosphere does not result from the actual tenant's occupation.*

For further discussion see: Reynolds and Fetherstonhaugh, *Handbook of Rent Review* (Sweet and Maxwell, loose-leaf) at [6.3.15]; *Crutwell v Lye* (1810) 34 ER 129 at 134; *Hoogerdyk v Condon*, above; and *FCT v Murry* (1998) 193 CLR 605 at 616; *IRC v Muller & Co's Margarine Ltd* [1901] AC 217 at 223-224 and 238-239; *FCT v Williamson* (1943) 67 CLR 561 at 564; *Prudential Assurance Co Ltd v Grand Metropolitan Estate Ltd* [1993] 32 EG 74; *My Kinda Town Ltd v Castlebrook Properties Ltd* [1986] 1 EGLR 121 (Ch D).

## 6.5 “Unoccupied” Premises

By remaining in the existing premises, a “sitting tenant” will avoid relocation costs, advertising, directory entries and any decrease in trade as a result of the start up time at the new premises. Consequently, a “sitting tenant” might be willing to pay a premium to keep the premises and so give the landlord a windfall gain.

Assuming that a “hypothetical tenant” wants to lease the premises afresh eliminates these effects.

The concept of the ‘hypothetical tenant’ requires an assumption by the valuer that the premises are presently unoccupied and available for lease for their permitted purpose under the lease – even though the premises may not actually be empty.

The valuer is required to determine the “*current market rent*”. “*Market rent*” is defined as:

*...the estimated amount for which a property, or space within a property, should lease on the date of valuation between a willing lessor and a willing lessee on appropriate lease terms in an arm’s –length transaction, after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion.*

(See *Australian and New Zealand Valuation and Property Standards* (Australian Property Institute), section 6.2.2, paragraph 3.1.10.1.)

That definition should be seen as a guide to the general principles applied in s 37(2). However, the provisions of the act must be applied.

If the tenant has sub-let the premises, the specialist retail valuer should assume that the sub-lease is in place (Handbook of Rent Review paragraph 6.3.12; see also *Daejan Investments Ltd v Cornwall Coast Country Club* [1985] 1 EGLR 77 (Ch D)).

### **Examples**

- *A tenant has occupied the same bakery for thirty years. It has been so successful that it is the only bakery operating in the neighbourhood. The tenant’s trade would be significantly reduced if it moved to another property and it would cost a significant amount of money to fit out a new shop. Consequently, this tenant would be willing to pay a premium to keep the shop. The specialist*

*retail valuer may not take this into account when determining the current market rent for the shop.*

- *A tenant occupies a shop in a shopping centre operating a bakery. The shop was already fitted out as a bakery when the tenant moved in. It is a term of the lease that this shop would be the only bakery in the centre. As a result, a tenant may be willing to pay a premium to secure this shop. The specialist retail valuer may take this into account in determining the current market rent.*

## **6.6 Trading history of premises**

When determining the current market rent, a valuer should first consider whether there are any other premises that are comparable retail premises. In looking at comparable premises, he or she should examine the other leases and consider:

- the rent;
- the outgoings;
- any other amounts payable by the tenant;
- the permitted use; and
- any distinguishing features of the land, building or location.

Comparables are the primary consideration when determining the current market rent. However, some premises cannot easily be compared with other properties because they are unique, have special distinguishing features or have a permitted use that prevents them from being easily compared with others. Examples include:

- hotels;
- gaming venues;
- service stations;
- theatres;
- racecourses;
- car dealerships;
- premises with specific planning or licensing approval; and
- geographically isolated premises.

Sometimes a comparison of rent paid for similar premises on a square metre by square metre basis leads to wildly varied results.

In those circumstances, valuers may be able to consider the trading history of the premises when determining the current market rent. However, use of the trading figures should only be used in exceptional circumstances and when comparables are not available. In such circumstances, the specialist retail valuer must exercise caution when establishing the correctness or otherwise of trading figures and the appropriate percentage to apply to such trading figures. The use of trading figures may be affected by the decision in *Serene Hotels Pty Ltd v Epping Hotels Pty Ltd* [2014] VCAT 97.

The valuer decides how much weight to attach to those trading figures.

Some people think that taking trading figures into account in determining the current market rent is unfair because:

- the landlord is rewarded for the successful tenant's hard work; and
- an unsuccessful tenant pays less rent and the landlord suffers.

However:

- if there are not enough comparable premises available, the valuer must have some basis for determining the current market rent. The tenant's trading figures provide that basis;
- when there are no comparable premises available, a potential tenant of the premises (a "hypothetical tenant") is likely to ask what trade takes place at the proposed premises. Consequently, when the valuer looks at the trading figures, he or she is applying the same reasoning process as a prospective tenant would; and
- the potentially unfair effects of this approach are overcome by assuming that the business at the premises is operated by "average competent management". This is similar to the "hypothetical tenant" discussed above. It allows the specialist retail valuer to discount the special effects of a particularly efficient or attractive tenant and to ignore the effects of a particularly inefficient tenant or one with a particularly bad reputation.

It may be thought that using the tenant's trading figures offends the rule that the specialist retail valuer must assume that the premises are unoccupied. However, if there are not enough comparable premises, reference to the tenant's trading figures provides to the specialist retail valuer a guide to the potential of the premises for the particular permitted use and a basis on which to make the valuation and reduces the risk of inconsistent determinations of the current market rent.

### *Examples*

- *A tenant operates an abattoir and retail butcher. There are other abattoirs licensed in the State, but they are all substantially larger, and conduct exclusively wholesale businesses. The specialist retail valuer may, in the absence of sufficient comparables, take the tenant's trading figures into account in determining the current market rent for the premises.*
- *A tenant occupies a hotel and gaming venue. The tenant recruits a retired actor as maitre d' for the venue. As a result, trade at the premises increases substantially. In determining the current market rent, the specialist retail valuer may look at the hotel's trading figures, but should discount the effects of the retired actor.*
- *A tenant took an assignment of a lease of a pub that had operated at a loss. When the new tenant took over, the profits of the business increased substantially. A review of the pub's books and records shows that the former tenant was operating the business very inefficiently and the new tenant was operating the business in an ordinary, competent manner. The specialist retail valuer may take the tenant's trading figures into account when determining the current market rent for the premises.*
- *A tenant has been operating a theatre under a long-term lease. The lease is due for its first market review at the end of the 20<sup>th</sup> year of the lease and does not have another market review for another 10 years. The business operated very profitably for the first 19 years, after which the business changed hands. Under the new management, the costs increased and trade reduced substantially and it appears that the theatre is not being managed competently. The specialist retail valuer may take the tenant's trading figures into account in determining the current market rent, but should assume that the theatre is managed by average competent management and not reduce the rent on account of any incompetence by the new management.*

For further discussion see: *Cartwright v Sculcoates Union* (1900) AC 150; *Devonport; ex parte Ferrall & Ors* [1949] SR (Tas) 165; *Halsbury's Laws of England* (4<sup>th</sup> ed) Vol 39, p 114, paragraphs 132 and 133; *Harewood Hotels Ltd v Harris* [1958] 1 WLR 108; *Cooper v City of Perth* [1960] 7 LGRA 369; *W J Barton Ltd v Long Acre Securities Ltd* [1982] 1 WLR 398; *Cornwall Coast Country Club v Cardgrange Ltd* [1987] 1 EGLR 146; (1987) 282 EG 1664; *Temple & Crook Ltd v Capital & Counties Property Co Ltd* [1990] 2 EGLR 129; *Modick R C Ltd v Mahoney* [1992] 1 NZLR 150.

## 6.7 Confidentiality of trading information

Some English cases suggest that financial information should not be taken into account by a valuer where that information is not available in the open market. This is because those figures could not have influenced the “hypothetical tenant” if they were not publicly available (see *ARC v Schofield* [1990] 38 EG 113; *Cornwall Coast v Cardgrange* [1987] 1 EGLR 146; (1987) 282 EG 1664; see also *Duvan Estates Ltd v Rossette Sunshine Savouries Ltd* [1982] 1 EGLR 20; *Electricity Supply v London Club* [1988] 34 EG 71; and *Lynall v Inland Revenue Commrs* [1972] AC 680 (HL)).

The better approach in Australia is that trading figures can be used even if they are confidential because:

- the tenant’s financial information is a relevant consideration for the specialist retail valuer where there are insufficient comparable properties available, and may also be an aspect that goes to the comparability or non-comparability of premises;
- there are sophisticated networks which enable specialist retail valuers to obtain a significant amount of this information even if it is not otherwise generally available, so the information is in fact used in the market for the purpose of advising potential landlords and tenants;
- there are some other English authorities and commentaries which suggest a different approach in England (see *South Tyneside v Wickes Building Supplies* [2004] EWHC 2428 (Comm), *Reynolds and Featherstonhaugh* at [7.7.1] to [7.7.6]). The New Zealand courts have allowed confidential financial information to be used when valuing a lease (see *Modick RC Ltd v Mahoney* [1992] 1 NZLR 150); and
- it is artificial to suppose that a “hypothetical tenant” seeking to lease premises would regard an assessment of likely trading performance as an irrelevant consideration with respect to rental that tenant would be prepared to pay.

## 6.8 Disregard of the tenant’s fittings and fixtures

Sub-section 37(2) requires the current market rent to be determined without taking into account the tenant’s fixtures and fittings. This reflects a provision commonly found in leases.

The meaning of ‘fixtures’ and ‘fittings’ is not defined in the Act. Landlords and tenants should look to the terms of the lease to determine whether fittings and fixtures belong to the tenant and make submissions to the specialist retail valuer before the current market rent is determined. If necessary, legal advice should be sought.

## **6.9 Tenant’s improvements**

Tenant’s improvements are not considered in section 37(2) of the Act. However, sub-section 37(2)(a) allows a specialist retail valuer to look to the provisions of the lease when considering the current market rent. The valuer should have regard to the provisions of the lease as to the ownership of improvements when determining the current market rent.

(For example, see *Bretair Pty Ltd v Lenro Properties Pty Ltd* [2004] VCAT 1192.)

## **6.10 The valuer’s determination**

In determining the amount of the rent, the specialist retail valuer must take into account the matters set out in sub-section 37(2) (see sub-section 37(5)).

The valuation must be in writing, contain detailed reasons for the specialist retail valuer’s determination and specify the matters to which the specialist retail valuer had regard in making the determination (see sub-section 37(6)).

Generally:

- a determination of the market rent by a valuer is binding unless it is affected by fraud or dishonesty or is not made in accordance with the express or implied terms of the lease (including those implied by the Act); and
- it will be difficult, and usually impossible, to imply a term that a valuation can be set aside on the ground of the valuer’s mistake or because the valuation was unreasonable;

(see *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 (CA) at 335-6).

VCAT has held that a determination of the current market rent under a retail premises lease was invalid and not binding on the parties on the following grounds:

- the valuer did not fully comply with the ‘unoccupied’ requirement. Actual and real or meaningful regard must be had to that provision and merely ‘paying lip-service’ will not suffice; and
- the valuer did not comply strictly with other requirements under the terms of the lease;

(see *Salem Enterprises Pty Ltd v CSJ Food Enterprises Pty Ltd* [2008] VCAT 320, though in the context of unusual circumstances; the Commissioner is informed that the VCAT did not hear submissions or evidence from the specialist retail valuer before that decision was made).

The specialist retail valuer must carry out the valuation within 45 days after accepting the appointment, or within such longer period as may be agreed between the landlord and tenant, or if there is no agreement, as determined in writing by the Commissioner (see sub-section 37(7)(a)).

#### **6.11 Costs of determination of current market rent**

If the landlord and tenant cannot agree on the amount of the rent, then a specialist retail valuer is appointed to determine the current market rent. The specialist retail valuer is to be appointed by the landlord and tenant or, if they cannot agree, then by the Commissioner. The landlord and the tenant must pay the costs of the valuation in equal shares (see sub-sections 37(3) and (8)).

If either a landlord or tenant refuses to pay their share of the valuation, then either the landlord, the tenant or the specialist retail valuer may apply to VCAT under s 89 of the Act for an order for the payment of the disputed amount. For further discussion on the dispute resolution process, see 8.0 below.

## **7.0 Valuer’s Indemnity**

It has become common practice for valuers to require an indemnity provision in the terms of their engagement, whether they are appointed by an agreement between the parties or in the absence of agreement by the Commissioner under sub-sections 37(3) and 35(7)(b) of the Act.

An individual, such as a specialist retail valuer, carrying out a statutory dispute resolution function under the Act should be protected from liability in the same way as arbitrators, mediators and others exercising judicial or quasi-judicial functions.

Accordingly, the Commissioner regards it as appropriate for a specialist retail valuer to include a provision, to the like effect of the following, in his or her contract of engagement:

***RELEASE***

*The landlord and the tenant jointly and severally agree to release and forever discharge the valuer from all claims, suits, actions, damages, demands, costs and expenses of every description whatsoever (whether at common law, in equity or under any statute and including a claim in negligence) and however so arising which the landlord and tenant (whether collectively, or individually) may have had, may now have or but for this clause may have at any time against the valuer for or in respect of or arising out of or in connection with or in consequence of the appointment of the valuer as a determining valuer in respect of a rent review for the property or arising out of or in connection with that determination.*

***INDEMNITY***

*The landlord and the tenant jointly and severally indemnify and keep indemnified the valuer against any and all liabilities, claims, actions, suits, proceedings, demands, losses, damages, costs, fees, expenses incurred for or in respect of or arising out of or in connection with or in consequence of the appointment of the valuer as a determining valuer in respect of a rent review for the Property or arising out of or in connection with the determination of current market rent.*

*Without limiting and in addition to the clause above, the landlord and the tenant jointly and severally agree to indemnify the valuer from:*

- (a) any costs incurred for legal advice reasonably obtained by the valuer in connection with or in furtherance of the determination of the current market rent;*
- (b) any common law or statutory liability that relates to that determination, including liability for negligence;*
- (c) all liability for legal costs and expenses incurred on a solicitor and/or own client basis for any proceedings the valuer may be obliged to defend or required to appear in respect of or arising out of or in connection with or in consequence of the appointment of the valuer as a determining valuer in respect of a rent review for the leased property or arising out of or in connection with that determination.*

The Victorian Court of Appeal has considered whether a release and indemnity was appropriate when engaging an expert under a dispute resolution clause in *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd [2009] VSCA 308*. In that case, arbitrators appointed under a lease had refused to take instructions to act as expert in the determination if the release was not signed. The Court of Appeal found that there was an implied term that the landlord and tenant would act reasonably to give effect to the agreement, that the expert's immunity was reasonable and that the parties must sign it.

Although the context is slightly different, in the Commissioner's view the principle behind that decision is applicable to the appointment of a specialist retail valuer.

## 8.0 Dispute resolution

If the landlord and the tenant have a dispute relating to the review of rent under Part 5, Division 3 that is not capable of being resolved by the specialist retail valuer, then the landlord, the tenant or the specialist retail valuer may apply to VCAT for resolution of the dispute under section 89 of the Act.

Unless an injunction is sought, an application to VCAT for resolution of a retail tenancies dispute can only be brought if the Commissioner has certified that mediation or another appropriate form of alternative dispute resolution has failed, or is unlikely, to resolve the dispute (see section 87). This usually means that the parties need to attend mediation at the Office of the Small Business Commissioner.

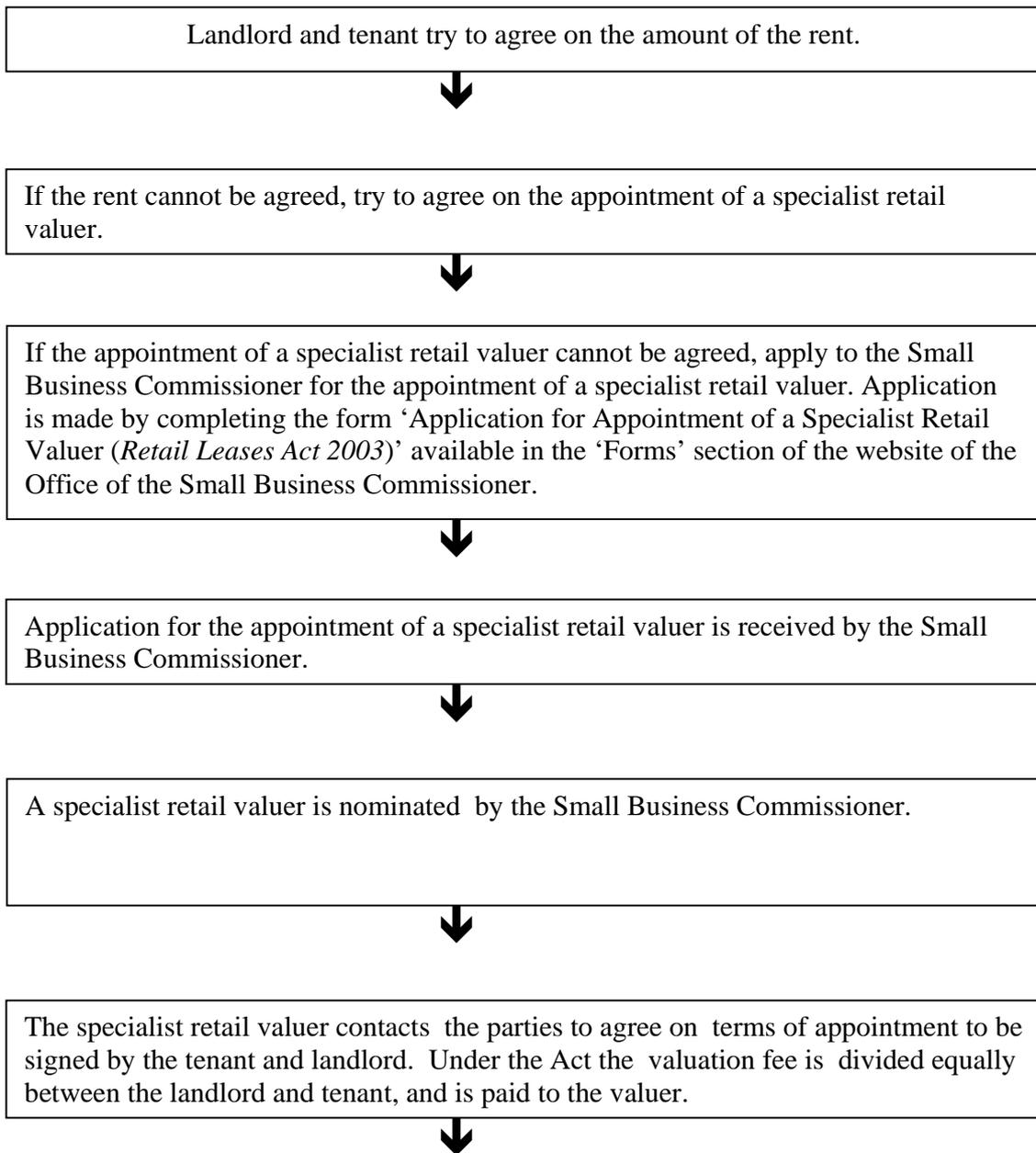
A dispute capable of being determined by a specialist retail valuer, and so outside the VCAT jurisdiction under Part 10 of the Act, is a dispute which primarily requires for its resolution the exercise of the expert skill and judgment of the valuer rather than the interpretation of the provisions of the Act and of any lease, though these matters may be subsidiary aspects of the valuer's work (see subsection 81(2)).

VCAT can hear and determine disputes between a landlord and a tenant. Seek independent legal advice if a dispute arises:

- between the landlord and the specialist retail valuer but *not* the tenant; or
- between the tenant and the specialist retail valuer, but *not* the landlord.

The Act defines the terms “landlord”, “tenant” and “lease” as including a former landlord, a former tenant and a former lease for the purposes of its dispute resolution provisions (see section 83).

## 9.0 Process of appointing a specialist retail valuer



The Small Business Commissioner appoints the specialist retail valuer who then has 45 days in which to complete the determination.

## 10.00 Glossary

In these Guidelines:

“**Commissioner**” means the Victorian Small Business Commissioner;

“**Lease**” means a retail premises lease unless otherwise indicated;

“**Regulations**” means the *Retail Leases Regulations 2013*.

“**the Act**” means the *Retail Leases Act 2003* (as amended by the *Retail Leases (Amendment) Act 2005* and *Retail Leases Amendment Act 2012*); and

“**Specialist retail valuer**” means –

- (a) for the purposes of a valuation relating to retail premises in a retail shopping centre (as defined in the Act), a valuer having not less than 5 years’ experience in valuing retail premises located in regional or sub-regional shopping centres; or
- (b) for the purposes of a valuation relating to any other retail premises, a valuer having not less than 5 years’ experience in valuing retail premises.

(see section 3 of the Act).

“**VCAT**” means the Victorian Civil and Administrative Tribunal.

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