**An overview of the Office of the Victorian Small Business Commissioner and *Retail Leases Act 2003***

**Legalwise Seminars 18 June 2015**

**Mark Schramm**

## 1. Introduction

The *Small Business Commissioner Act 2003* (SBC Act) established the Office of the Victorian Small Business Commissioner (VSBC) in May 2003, and gave general functions and powers to the VSBC, principally in the areas of mediation, investigation, representation and reporting.

The VSBC also has specific functions and powers (principally related to providing mediation services) under the *Owner Drivers and Forestry Contractors Act 2005*, *Farm Debt Mediation Act 2011*, *Transport (Compliance and Miscellaneous) Act 1983*, *Retail Leases Act 2003* (the RLA).

All references to sections in this paper are references to the RLA except where otherwise indicated.

## 2. Dispute Resolution Services

There is no definition of 'small business' in the RLA or any of the other abovementioned Acts. The Second Reading Speech to the RLA refers to protections being afforded to small and medium businesses.[1] Since establishment, the VSBC has not rejected any application for mediation from a business on the basis of its size.

General commercial disputes are capable of being mediated under the SBC Act and include disputes about:

- Licensing/agency agreements
- Distribution
- Partnerships
- Franchises
- Leases
- Supply chain

There are six compelling reasons to bring business disputes to the VSBC for resolution:

### 2.1 Quick, accessible, successful service

Mediations are usually scheduled four to six weeks from receipt of the application and earlier if urgent. The VSBC has achieved an 80% mediation success rate since

[1] Victorian Hansard, Second Reading, 27 February 2003, Small Business Commissioner Bill, Legislative Assembly, Hon. J Brumby.

commencement (82.7% -2013/14). While most mediations are held in the VSBC's Melbourne office, other locations can be arranged to suit the parties.

### 2.2 No cost or low cost

The VSBC resolves 25% - 35% of disputes at no cost to the parties prior to a formal mediation. There is no application fee for lodging a dispute with the Office. Where a matter goes to mediation, each party pays only $195[2] per session. Parties may be represented or unrepresented.

### 2.3 Maintaining business relationships

A benefit of mediation is that parties can reach a mutually agreed resolution. This is far more likely to enable a business relationship to continue compared with an arbitrated outcome made many months after the original dispute arises, which can often result in a "win-lose" scenario.

### 2.4 Creative outcomes

The mediation process and outcome is not constrained by the initial claims and counter-claims of the parties. An experienced mediator will search for elements of a settlement which may not have been on either party's radar and seek to address underlying issues. Often these underlying issues only emerge during mediation.

### 2.5 Independence

The VSBC, as a statutory appointee, is independent, and utilises experienced, independent mediators. The independence of the VSBC and the mediators utilised with the authority of Government is a key foundation of the dispute resolution process.

Overall customer satisfaction with mediations through the VSBC – rated by both applicants and respondents – is very high: 93.63% in 2013/14.

### 2.6 Avoiding potential for costs

For disputes under the RLA that proceed to the Victorian Civil and Administrative Tribunal (VCAT) the general rule is that each party bears its own costs [s.92(1)]. However, refusal to participate in the VSBC mediation process may be taken into consideration by VCAT in determining whether to award costs under s.92(2)(b). Costs may also be awarded under s.92(2)(a) where a party has conducted the proceeding '*in a*

[2] $95 per party for *Owner Drivers and Forestry Contractors Act 2005* disputes. These amounts are subject to change.

*vexatious way that unnecessarily disadvantaged the other party to the proceeding*'- see for example *T.B.T (Victoria) Pty Ltd v Trombone Investments Pty Ltd*[3] where costs were awarded on an indemnity basis for the reason that the applicant should have known that their claim was obviously untenable or manifestly groundless and that there was no material with which to support their allegations. Further, in *Elijoy Investments Pty Ltd v Hart Brothers Pty Ltd*[4] costs were awarded against the applicant tenant on the basis that it had unnecessarily sought to re-litigate a matter that had already been resolved, and in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd (Costs)*[5] costs were awarded against an applicant tenant on the basis that despite the tenant having successfully proven a breach of lease in a prior proceeding, the tenant had no basis for claiming damages since it was the tenant's related company that carried on business at the premises – not the tenant.

**3. What is a 'retail tenancy dispute'?**

The majority of the work performed by the VSBC is the provision of preliminary assistance and mediation under Part 10 of the RLA to resolve disputes between landlords and tenants of retail premises. Section 86 in Part 10 provides for the referral of a *retail tenancy dispute* to the VSBC for mediation. The office also provides guidance and information (but not legal advice) on the provisions of the RLA.

Section 81 provides that *retail tenancy dispute* means a dispute between a landlord and tenant or guarantor of a tenant's obligations arising under, or in relation to, a lease to which the RLA (or the *Retail Tenancies Act 1986* or *Retail Tenancies Reform Act 1998*) applies or applied, or under a lease providing for the occupation of retail premises to which none of those Acts apply or applied.

The definition of *retail tenancy dispute* is important since section 87(1) states:

> '*A retail tenancy dispute may only be the subject of proceedings before the Tribunal … if the Small Business Commissioner has certified in writing that mediation or another appropriate form of alternative dispute resolution has failed, or is unlikely, to resolve it'*.

Exemptions to this provision are provided in sections 87(1) and 89(4) of the Act:

[3] [2014] VCAT 25
[4] [2014] VCAT 321
[5] [2015] VCAT 596

- s.87(2): '*This section does not apply to proceedings for an order in the nature of an injunction'*. The case of *PB Hospitality Pty Ltd v Peto Bros Pty Ltd*[6] confirmed that orders sought compelling the landlord to deliver a signed renewal of lease and to consent to an assignment of lease, were orders in the nature of a mandatory injunction. A certificate pursuant to s.87 was therefore not required as a precondition to seeking such relief at VCAT.

- Whether a dispute is a *retail tenancy dispute* is also of importance since s.89(4) provides that such a dispute is not justiciable before a court or tribunal other than VCAT, other than a dispute concerning key-money (s.23), relief against forfeiture, unconscionable conduct (Part 9) or a dispute referred to in s.81(1A) (disputes between a landlord and guarantor of a tenant's obligation or person who has provided an indemnity to a landlord in respect of a tenant's obligation arising under a breach of lease).

**3.1 What is not a 'retail tenancy dispute'?**

Section 81(2) provides that a *retail tenancy dispute* does not include a dispute solely relating to the payment of rent or a dispute that is capable of being determined by a specialist retail valuer under ss.34, 35 or 37.

Given s.81(2) it might be thought that an applicant seeking recovery of rent alone would be well advised to pursue such a claim via a forum other than VCAT (e.g. the Magistrates Court). However the County Court in *Covarno Nominees v Melbourne Liquidation Centre Pty Ltd*[7] highlights that such a dispute can in fact constitute a retail tenancy dispute (and is therefore justiciable only by VCAT) by reason of the defence or counter-claim raising issues other than rent alone. Similarly in *Australian Liquor Marketers Pty Ltd v Twenty 12 Pty Ltd & Ors*[8] an application made in reliance on a guarantee and a loan agreement concerning the cost of fit-out was held to be a dispute in *relation to a retail premises lease* and therefore being a retail tenancy dispute the County Court had no jurisdiction to hear the matter in respect of the first defendant (the sub-tenant).

[6] [2013] VCAT (Unreported, 22 April 2013)
[7] [2012] VCC 1599
[8] [2014] VCC 688

## 4. The application process

An application for mediation can be completed and submitted online or by hard copy. The application form does not require exhaustive justification of the applicant's position. Although a detailed "statement of claim" may be submitted and can be useful, it is sufficient to commence the process with a general description of the dispute, such as "the roof is leaking and the landlord won't fix it" or "the tenant refuses to pay outgoings". Provision of copies of supporting documentation can also assist.

Following receipt of an application for mediation, the VSBC will seek to progress the resolution of the dispute via preliminary assistance, which generally involves obtaining further details from each party about their claims and seeking to resolve the dispute at that stage. If the dispute is not able to be progressed towards settlement the VSBC will attempt to set a date for mediation.

If mediation does not succeed in resolving the dispute or if mediation cannot be arranged, the VSBC will issue a certificate pursuant to s.87(1).

## 5. *Retail Leases Act 2003* – Main Provisions, Tips & Traps

It is useful to examine the main provisions of the RLA in the context of the three phases of a lease – before, during and at the end of a retail lease.

### BEFORE THE LEASE

### 5.1 Application of the Act

Section 11(2) provides:

> '*Except as provided by Part 10 (Dispute Resolution) this Act only applies to a lease of premises if the premises are retail premises (as defined in section 4) at the time the lease is entered into or renewed'.*

Section 4 defines 'retail premises' in part 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*
>
> *(a) The sale or hire of goods by retail or the retail provision of services…'*

The key words used in s.4 are, '*under the terms of the lease … are used or are to be used wholly or predominantly [for retailing]'*. It is important that the lease is drawn

properly to make sure that if the parties intend the premises to be used for retailing, that the lease achieves this intention without ambiguity, since if the premises are to be used for retailing under the terms of the lease, then the RLA (and hence the rights and obligations imposed by the RLA) will apply to the lease.

The decision of the Supreme Court of Victoria in the case of *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor*[9] held that if the premises are used for the selling of a good or service to an 'ultimate consumer' they may be characterised as being retail premises. This is a very broad interpretation of 'retail premises'.

If under the terms of the lease the premises are to be used for retailing, but the parties seek to exclude the application of the RLA, the attempted exclusion would be void under s.94 which provides in part that a provision of a lease or agreement that purports to exclude a provision of the RLA is void.

The VSBC's May 2014 Guidelines on *What are Retail Premises?* includes further detail as to what does (and what does not) constitute retail premises.[10]

### 5.2 Lease or Licence?

The decision in *Ireland v Subway Systems Australia Pty Ltd & Anor*[11] demonstrates the importance of a correctly drawn agreement between the parties. The case considered whether an agreement drawn as a licence was in fact a lease. VCAT found it was a lease having regard to the intention of the parties which was inferred from a range of factors, including that the word 'sublet' was used in the document, there was a reference in the document to the landlord 'not trespassing' (it was noted that trespass can only apply where an interest in land is granted), and the parties had conducted themselves in a manner consistent with exclusive possession having been granted.

### 5.3 Pre-lease representations

Disputes lodged with the VSBC often concern allegations that various promises were made prior to lease entry, for example relating to traffic flow, repairs and promises to install signage. The practical lesson for landlords and tenants is that any pre-lease representations should be confirmed in writing.

---

[9] [2013] VSC 344. See also *Wang v Orion Holdings Australia Pty Ltd [2014] VCAT 812*
[10] http://www.vsbc.vic.gov.au/news-publication/guidelines-retail-premises/
[11] [2012] VCAT 1061

### 5.4 Inspection reports

Inspection reports are statutorily required for residential tenancy agreements but not for commercial tenancies. The experience of the VSBC is that many retail landlords and tenants do not observe this useful step in defining the condition of the premises at the start of the tenancy.

### 5.5 Length of lease/Options

For the tenant in particular, consideration should be given to what length of lease is required and whether any options for further terms under the lease are needed.

Under section 21, a tenant has the right to a minimum 5-year term (including any options). If the tenant wishes to waive their right to a five year lease, they can do so by obtaining a certificate of waiver from the VSBC and serving it on the landlord.

### 5.6 Rent increases and for further terms

The parties to the lease need to think about and agree on how the rent is to be determined during each year of each term and for further terms. Many tenants do not understand that when they agree on a lease containing an option for a further term, what they are agreeing to is a situation where they are likely to be required to exercise an option *before* being advised by the landlord of the proposed rent for the further term.

### 5.7 Outgoings must be specified

Section 39 provides in part that the tenant under a retail premises lease is not liable to pay an amount to the landlord in respect of outgoings (which are defined in s.3) except in accordance with provisions of the lease that specify the outgoings that are to be regarded as recoverable.

It is therefore important that the lease specifies each outgoing that the tenant must pay.

### 5.8 Copy of lease and disclosure statement

Section 17 provides that the landlord must give the tenant a disclosure statement and copy of the proposed lease at least 7 days before entering into the lease. Failure to provide the disclosure statement allows the tenant to give the landlord a notice, no earlier than 7 days and no later than 90 days after entering the lease, informing the landlord of the failure to provide the statement. If such notice is given, the tenant may withhold payment of the rent until the day on which the landlord provides the disclosure

statement. Section 26, which requires a disclosure statement upon renewal, contains a similar provision.

The *Retail Leases Regulations 2013* (the Regulations), contain four forms of disclosure statements, for:

(1) Retail premises not located in retail shopping centres (Schedule 1);

(2) Retail premises located in shopping centres (Schedule 2);

(3) Renewal of lease (Schedule 3); and

(4) Assignment of lease where the premises will be used for an ongoing business (Schedule 4).

The forms of disclosure (see for example 17.2, Schedule 1) require a landlord to disclose '*…any alteration or demolition works, planned or known to the landlord…to land adjacent to or in close proximity to the premises or building…*'. The extent to which a landlord needs to conduct searches to satisfy this disclosure requirement is unclear.

A failure to provide a materially complete disclosure statement may allow the tenant to give a notice of termination within 28 days after being given the statement, pursuant to s.17(5)(a).

### 5.9 Information brochure

Section 15 (as amended in November 2012) requires a landlord or prospective landlord to give the tenant a copy of the proposed lease and information brochure explaining the role of the VSBC at the commencement of negotiations for a lease (not renewal). The section provides for a penalty of 50 penalty units for non-compliance.

## DURING THE LEASE

### 5.10 Outgoings estimates before and annually

In addition to the requirements of s.39, s.46 provides that 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. The tenant must be given the estimate before the lease is entered into and 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.

The purpose of an estimate is to inform the tenant of likely costs throughout the lease term.

Section 46(4) provides that 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 s.46, until the tenant is given that estimate.

The application of s.46 was considered in *Market Ring Write Services Pty Ltd v Dudson*[12] and *Richmond Football Club v Verraty Pty Ltd*[13]. VCAT, in applying *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd*[14], held that the tenant's claim for return of outgoings on the basis that an estimate of outgoings had not been provided failed, as the tenants had received good consideration for the money paid in respect of outgoings.

However, in *WROB Pty Ltd v Hunt & Ors*[15] in applying s.46(4) the landlord was unsuccessful in claiming unpaid council and water rates from the tenant, for the reason that the tenant had not been provided the estimate of outgoings.

The question arises as to the tenant's remedies in the event of an inaccurate estimate. Claims for misleading and deceptive conduct under s.18 of the *Australian Consumer Law* have formed the basis for VSBC mediations. It may be arguable that if an estimate is so inaccurate as to be meaningless, it may not constitute an estimate for the purpose of s.46.

### 5.11 Audited statement of outgoings

Section 47 provides that the landlord must give the tenant a written statement of expenditure on outgoings within 3 months of each of the landlord's accounting periods during the lease. The statement must be prepared in accordance with accounting standards made by the Australian Accounting Standards Board and be accompanied by a registered company auditor's report except in relation to outgoings listed in s.47(6) (GST, water, sewerage, rates & charges, insurance, fire services levy and owners' corporation fees), and provided also that the tenant is given copies of assessments or receipts for those outgoings. The latter two additional categories of outgoings (fire services levy and owner's corporation fees) were prescribed by the 2013 Regulations.

[12] [2013] VCAT 546
[13] [2011] VCAT 2104
[14] [2006] VSCA 6
[15] [2010] VCAT 245

### 5.12 Transferring/Assigning the lease

The assignment of a retail premises lease can create problems for tenants where the requirements of the RLA are not observed.

The process for assigning a retail lease is contained in s.61 and in summary requires the tenant to give the proposed assignee a copy of any disclosure statement in the assignor's possession and then to apply to the landlord in writing for consent.

A landlord can only withhold consent on the grounds in s.60. While the grounds for withholding consent appear to involve the landlord's subjective view as to whether consent will be granted, it appears that objective considerations of reasonableness are to be implied into s.60. See for example *AAMR Hospitality Group Pty Ltd v Goodpar Pty Ltd*[16] where it was held that in view of the protective nature of the RLA, the words 'reasonably' or 'acting reasonably' should be read into s.60(1)(b).[17] Similarly in *Nanjor Pty Ltd v Golden Pearl Holdings Pty Ltd*[18] the VCAT found that the landlord had acted reasonably in withholding consent to transfer the lease on the basis that the proposed assignee did not have sufficient business experience or financial resources.

Section 61(6) provides that if the landlord has not, within 28 days after a request for assignment was made, given written notice consenting or withholding consent, the landlord will be taken to have consented to the assignment.

Section 62 provides in part that if the tenant (assignor) gives the landlord and proposed assignee a copy of a disclosure statement in accordance with s.61(5A), the tenant will avoid liability to perform any obligations under the lease or pay any amounts owing by the proposed assignee. This applies where the assignment is in relation to the sale of an ongoing business.

The VSBC's information sheet on *Assignment of a Retail Premises Lease* provides further detail in this area.[19]

[16] VCAT Unreported 13 Feb 2009
[17] Affirmed in *Villa v Emaan Pty Ltd* [2014] VCAT 274
[18] [2014] VCAT 453
[19] http://www.vsbc.vic.gov.au/news-publication/information-sheet-assigning-retail-premises-lease/

### 5.13 Key-money

An issue of concern for tenants occurs when a landlord or agent seeks a percentage of rent or a flat fee as a condition of consenting to an assignment of lease or sub-lease.

Key-money is defined in s.3 to include money that a tenant is to pay in consideration of consent being given to an assignment or sub-lease, that amounts to a premium in that there is no real or true consideration given for the payment of that money.

Section 23 states that key-money is prohibited, but key-money does not include recovery of costs from the tenant, which the landlord reasonably incurred in connection with an assignment or sub-lease, of investigating a proposed assignee or sub-tenant and obtaining any necessary consents to the assignment or sub-lease.

Section 51 states that a landlord cannot recover the landlord's expenses in connection with a new lease but this does not prevent a landlord from claiming the reasonable legal or other expenses incurred by the landlord in connection with an assignment of the lease or sub-lease, including investigating a proposed assignee or sub-tenant and obtaining any necessary consents to the assignment.

The view of the VSBC is that charging a percentage of rent or a flat fee may bear no relationship to the work actually performed in connection with the assignment, and as such there is a risk that charging on such a basis may constitute key-money and/or constitute costs not 'reasonably incurred'.

### 5.14 Exercise of option

Many retail leases contain an option for a further lease term.

Section 28 provides that if the lease contains an option, the landlord must notify the tenant in writing of the date after which the option is no longer exercisable, at least six months and no more than 12 months before that date, but is not required to do so if the tenant exercises or purports to exercise the option. A difficulty for landlords can be that if these requirements are not met, the lease is taken to provide that the exercise date is instead six months after the landlord notifies the tenant as required, and the lease continues on the same terms and conditions until that date.

Tenants often confuse the requirement to exercise an option without condition, by making an offer as to rent in conjunction with the purported exercise, or do not clearly exercise the option.

In *South Yarra Colonnade Pty Ltd v Designbuilt Industries Pty Ltd & Ors*[20] the tenant wrote to the landlord stating '*We write to advise you of our intention to exercise our lease option…*'. The Tribunal, however, held that this amounted only to a statement of future intention notwithstanding that the landlord's agent had acknowledged the letter as an exercise of option.

A further issue is that it is the experience of the VSBC that tenants often are unaware that their lease requires them to exercise an option *prior* to the landlord being required to notify the tenant of the proposed market rent for the renewed term. Such uncertainty is a potential source of conflict between retail tenants and landlords. Ensuring the tenant understands this requirement and enters into early rent negotiations can avoid conflict.

### 5.15 Market rent reviews and the appointment of specialist retail valuers

The VSBC has the function to appoint a specialist retail valuer ("SRV") to determine a dispute about rent under ss.34(2), 35(7) and 37(3). Section 37 is the main focus of activity in this area and applies where a lease provides for a market rent to be determined (usually upon the exercise of an option) and s.37(3) applies when the parties cannot agree on rent.

The appointment by the VSBC of a SRV is a measure of last resort as s.37(3) requires the landlord and tenant to have disagreed on rent and disagreed on the appointment of a SRV.

The VSBC requires evidence that there has been disagreement on the appointment of a SRV and a copy of the lease as part of an application for appointment of a SRV. Following receipt of that information, the nomination of a SRV by either the Real Estate Institute of Victoria or the Australian Property Institute will be sought.

Once nominated, the SRV then enters into terms of engagement (fee, indemnity) with the parties and the VSBC then makes the formal appointment. Under s.37(7) the SRV has 45 days from accepting the appointment in which to complete the valuation. That time can be extended by agreement between the parties or failing agreement as determined by the VSBC.

Section 37(3) requires the parties to pay the costs of the valuation in equal shares.

[20] [2013] VCAT 266

Issues of interest in relation to appointment of SRVs include:

- **Delay by landlord in notifying rent increase**

Section 35(5) provides that a rent review is to be conducted as early as practicable within the time provided by the lease and if the landlord has not initiated the review within 90 days after the end of that time, the tenant may initiate the review.

In an objection to the appointment of a SRV by the VSBC, a tenant asserted that the effect of s.35(5) precluded the landlord from initiating a rent review, in circumstances where the landlord had delayed in initiating the review for 12 months.

The VSBC's view is that there are no inherent time constraints in ss.35 or 37. Rather, s.35(5) appears simply to be aimed at ensuring the tenant may initiate the review where the landlord does not.

- **Delay by tenant in disputing rent increase**

*Figgins Holdings Pty Ltd v Williamson Place Pty Ltd*[21] dealt with the issue of rent deeming provisions. The landlord asserted that as the tenant had agreed to the rent by not objecting to a notice of rent increase, there was no rent dispute and consequently s.37(3) could not operate to enable the appointment of a SRV. The Tribunal held that the rent deeming provision contained in the lease (i.e. that the tenant is taken to have agreed to the landlord's notice of rent increase unless objecting within 14 days) in this instance was void pursuant to s.94 as the provision was inconsistent with the application of s.37(3).[22]

- **Parties refusing to sign SRV agreement or indemnity and release**

The VSBC has encountered instances where upon the proposed appointment of the SRV, a party to the lease refuses to execute the SRV's terms of appointment. The decision in *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd*[23] may have resolved the issue where a party refuses to sign the SRV's terms of appointment. The Court of Appeal held that once there is an implied term that the expert is retained on reasonable terms to resolve the dispute between the parties, the execution of the expert's

[21] [2010] VCAT 243
[22] Section 94 renders a provision of a lease void to the extent it is contrary to or inconsistent with anything in the RLA.
[23] [2009] VSCA 308

retainer agreement is impliedly required by the agreement. The decision would appear to be directly applicable to the appointment of SRVs under the RLA.

Further information concerning the appointment of SRVs can be found on the VSBC's website at http://www.vsbc.vic.gov.au/who-we-help/retail-tenants-landlords/appointing-a-specialist-retail-valuer/.

### 5.16 Repairs and Maintenance

Section 52 requires the landlord to maintain the condition of the premises in a condition consistent with the condition of the premises when the retail premises lease was entered into. An issue for tenants to consider is that upon renewal of a lease, the standard of the premises will be 're-set' for the purposes of applying s.52 – upon renewal the standard of the premises may be different to that at the time of the original lease (see *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd (No.2*[24]*)* which affirmed *Ross-Hunt Pty Ltd v Cianjan Pty Ltd*[25] in this regard). In this event, the tenant may wish to ensure that repairs and maintenance issues are addressed prior to renewal.

The vexed issue arising in respect of s.52 repairs is whether the landlord can pass the cost of non-capital repairs to the tenant (s.41 renders void a provision in a lease requiring the tenant to pay capital costs).

While the note that appears at the end of s.52 (and the 2005 explanatory memorandum relating to the insertion of the note) appears to explain that the ability of the landlord to recover outgoings, including the cost of repairs is regulated by s.39, the Advisory Opinion by VCAT in *Small Business Commissioner: Reference for advisory opinion (Building and Property)*[26] reached the same view in *Café Dansk v Shiel*[27] to the effect that the cost of s.52 compliance cannot be passed on to the tenant.

Issues concerning repairs and maintenance often also require consideration of s.54 (tenant to be compensated for interference) and s.57 (damaged premises). These sections may entitle the tenant to compensation and rent abatement respectively where a defect in the premises is not rectified (s.54) or premises are damaged thereby reducing the tenant's ability to use the premises (s.57). Section 54(2)(d) was considered in

[24] [2014] VCAT 454
[25] [2009] VCAT 829
[26] [2015] VCAT 478
[27] [2009] VCAT 36

*National Hospitality Group Pty Ltd v Regal Hotels Pty Ltd*[28] where the tenant was awarded $35,000 damages for breach of the covenant for quiet enjoyment due to the failure of the landlord to address the tenant's complaints about water entering the tenant's premises from a neighbouring building.

### 5.17 Essential Safety Measures

Until recently, uncertainty in legal circles has existed concerning a landlord's ability to pass on to a tenant the costs of essential safety measures (ESMs) compliance under s.251 of the *Building Act 1993* (BA) and *Building Regulations 2006* (Regulations). ESMs are various safety related obligations imposed by the Regulations (in the main) on the owner of a building and include periodic safety/maintenance inspection and reporting requirements.

One view was that the cost of ESM compliance could not be passed on to a tenant in part due to the application of s.251 BA which enables an occupier to recover ESM costs from the owner or sent them off against rent where the owner does not do the ESM work they are obliged to do.[29]

A contrary view was that an owner could recover ESM costs via an appropriately drawn lease[30] and that s.251 only becomes operative when the landlord does not do what he/she is obliged to do under the BA and Regulations, and since (for example) Reg. 1217 requires only that the owner '*must ensure*' the ESM is completed, the owner can contract with the tenant to do the work. The contrary view was that since the owner has not been required to 'carry out the work' or 'do the thing' but only to ensure it has been carried out, s.251 does not operate to enable the tenant to recover the cost or set it off against rent.

On 1 May 2015, VCAT provided an Advisory Opinion in *Small Business Commissioner: Reference for advisory opinion (Building and Property)*[31] in response to an application by the VSBC seeking clarification as to who should pay for ESM compliance costs in commercial leases. The application was made under 2014

[28] [2013] VCAT 413
[29] N. Mermelstein and M. Redfern *Tenants beware: Don't get hit by safety maintenance costs,* April 2012 86 (04) LIJ, p.28
[30] R. Cocks *Property – The Cost of Safety,* Law Institute Journal, March 2013, 87 (3) LIJ, p.74. See also S. Hopper *A need to resection* (2013) 87(10) LIJ, p.36.
[31] [2015] VCAT 478

amendments to the SBC Act enabling the VSBC to seek an advisory opinion where in the public interest to do so.

The Advisory Opinion by Justice Garde states that if an owner is obliged to provide an ESM the owner must provide and pay for that item. Where the ESM obligation provides that the owner 'must ensure' compliance, the owner can pass the obligation on to the tenant and the owner must pay for the ESM item.

**AT THE END OF THE LEASE**

### 5.18 Security Deposit and Make Good on Expiry

A common cause of retail tenancy disputes occurs at the end of a lease usually involving the condition of the premises and whether the premises have been left in a condition as required by the lease. Such disputes usually also involve the entitlement of the landlord to retain the security deposit.

Section 24 provides that the landlord must hold the security deposit in an interest bearing account on behalf of the tenant and return the deposit to the tenant together with the interest as soon as practicable after the lease ends. This is subject to the landlord's legal entitlement to appropriate the security deposit.

Some of these disputes involve tenants' lack of understanding of the extent of their 'make good' obligations, for example, if they have agreed to repaint. In the main, however, 'make good' disputes centre on a disagreement about the condition of the premises at the commencement of the tenancy compared to the condition at the end. This experience serves to highlight the importance of completing a comprehensive inspection report at the start of the tenancy.

### 5.19 Holding over

Section 10 provides that where a tenant continues to be in possession of the retail premises after the lease expires, the lease is taken to continue for the purposes of the Act while the tenant is in possession.

However, where the Act did not apply to the lease (for example a lease for less than 12 months[32]) it appears that once an occupancy period reaches 12 months, the RLA will apply to the lease due to the effect of s.12(2). The result of this is that s.21 will then apply to the lease, extending it to become a five-year lease dating back to the

[32] Section 12 provides that the RLA does not apply to a lease for a term of less than one year.

commencement of the occupancy period (unless the tenant has obtained and served on the landlord a certificate of waiver under s.21).

### 5.20 Premature Termination

Many leases provide for a notice to be given to the tenant allowing 14 days to rectify a breach prior to the landlord being able to re-enter. This compares with the requirement to give a 14 day notice pursuant to s.146 of the *Property Law Act 1958*, except in the case of non-payment of rent. These requirements are not always observed.

Allied with premature termination/re-entry issues are complaints by tenants that their landlords have failed to take appropriate action to re-let the premises and mitigate their loss. Many tenants are under the impression that it is the landlord that must demonstrate that adequate steps have been taken to mitigate loss when in fact the onus of proof is on the tenant to prove on the balance of probabilities that the landlord has failed to discharge this obligation.[33] The case of *Glentham Pty Ltd v Luxer Holdings Pty Ltd & Anor*[34] is of interest as it examined various alleged failures by a landlord to mitigate loss, and shows the difficulty of discharging the onus of proof to establish them. The allegations included a failure to place an advertising (i.e. 'for lease') sign on the premises, inadequate advertising, asking high rent, refusal of further offers by the tenant, failure by the landlord to remove a spa and sauna to make the premises more attractive to let and offering a 6 month rent free period to a new tenant. It was held none of these elements were proven by the tenant to constitute failure to mitigate.

Premature termination of a lease often raises the issue of the ownership of plant and equipment and goods left on the premises. Where the tenant abandoned the premises, the now repealed Part IVA of the *Landlord & Tenant Act 1958* used to deal with the removal and disposal of goods left on retail premises. From 1 December 2012 Part 4.2 of the *Australian Consumer Law and Fair Trading Act 2012* deals with uncollected goods. The 2012 provisions introduced different requirements for the disposal of goods depending on their value.

The case of *GADM Enterprises Pty Ltd & Anor v Indigo Cove Pty Ltd*[35] dealt with the situation where a landlord re-entered the premises by changing the locks, wrongfully asserted ownership over the tenant's goods and sought to incorporate the goods into a

[33] See *Market Ring Write Services Pty Ltd v Dudson* [2013] VCAT 546
[34] [2006] WASC 132
[35] [2013] VCAT 699

new lease with another tenant. The VCAT held that the tenant had not abandoned the goods and that the landlord had converted them. The VCAT also held that the landlord had engaged in unconscionable conduct in contravention of s.77.

### 5.21 Landlord's notice of intentions concerning renewal

Section 64 applies to a retail premises lease where there is no option for a further term and provides that the landlord must, at least six months but no more than 12 months before the lease term ends, give written notice to the tenant offering a renewal or informing the tenant that no renewal will be given.

The problem for many landlords is that they are not aware that s.64 also provides that if the landlord fails to give such notice, the lease continues on the same terms and conditions until six months after the day on which the landlord ultimately gives the notice.

### Contact the VSBC

The VSBC may be contacted on 13 VSBC (13 8722) or via the website vsbc.vic.gov.au.

Mark Schramm is a Senior Manager with the Office of the Victorian Small Business Commissioner.