

## Guidelines to the *Retail Leases Act 2003*

What are “retail premises”?

Prepared and published by:

The Victorian Small Business Commissioner

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

### **Contents:**

- 1.0 About these Guidelines**
- 2.0 Purpose of these Guidelines**
- 3.0 Important disclaimer**
- 4.0 Application of the Act**
- 5.0 Meaning of retail premises**
  - 5.1 Residential area**
  - 5.2 When “retail premises” determined**
- 6.0 Guiding principles to determine ‘retail premises’**
  - 6.1 Interpretation of ‘retail’ by the Courts**
- 7.0 What are not retail premises**
  - 7.1 Ministerial Determinations**
    - 7.1.1 Retail Premises located in a multi-story building**
    - 7.1.2 Barristers’ Chambers Limited Premises**
    - 7.1.3 Fifteen (15) year Leases**
    - 7.1.4 Melbourne Market Authority Leases**
    - 7.1.5 Municipal Council Leases**
    - 7.1.6 New Zealand Stock Exchange listed corporations**
    - 7.1.7 Charitable and Community Purposes Leases**
  - 7.2 Lease or licence**
  - 7.3 Application if lease term is less than a year**
  - 7.4 Extended application - dispute resolution under the Act**
- 8.0 Section 4 – the legislation**

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

### **1.0 About these Guidelines**

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 The accompanying *Retail Leases Regulations 2013* commenced in 2013 and superceded the *Retail Leases Regulations 2003*.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

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

### **2.0 Purpose of these Guidelines**

The purpose of these Guidelines is to assist understanding of what constitutes “retail premises” under section 4 and the related provisions of the Act. Section 4 of the Act is reproduced at 8.0. If particular premises are retail premises, the legislation will govern the lease relating to the premises. If they are not, the legislation will have no application to the lease, although the dispute resolution provisions of Part 10 of the Act may still apply, as discussed at 7.4.

Note that the date upon which the lease is entered into (as defined in the legislation) will determine which retail leases legislation, whether it be the *Retail Tenancies Act 1986*, the *Retail Tenancies Reform Act 1998* or the *Retail Leases Act 2003* is applicable to the lease.

### **3.0 Important Disclaimer**

The opinions formed in these Guidelines are those of the VSBC and are not legally conclusive or binding on any person, corporation or authority or on any Court or Tribunal. 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 VSBC 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 law is complex and it is vital that professional advice from a competent person in this field is sought at the earliest opportunity.

## Guidelines to the *Retail Leases Act 2003*

### 4.0 Application of the Act

Section 11 of the Act provides in part that the *Retail Leases Act 2003* (the Act) applies to a retail premises lease that is entered into or renewed after the commencement of that section (i.e. 1 May 2003).

A 'lease' is defined in section 3 of the Act as meaning a lease, sub lease, agreement for lease or sub lease whether or not in writing.

Section 11(2) of the Act provides that except as provided by Part 10 (Dispute Resolution), the 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. Refer to 7.4 for details of the extended operation of Part 10 of the Act.

### 5.0 Meaning of retail premises

Section 4 of the Act (reproduced at 8.0 of these guidelines) provides that 'retail premises' means 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; or
- (b) the carrying on of a specified business or a specified kind of business determined by the Minister under section 5 of the Act (no such determination is currently in place).

#### 5.1 Residential area

The exclusion of residential area in section 4 of the Act should be read together with section 95 of the Act which makes provision for the landlord's responsibility for repair of the residential area. If the right to occupy the residential area arises under a retail premises lease, the *Residential Tenancies Act 1997* does not apply.

#### 5.2 When "retail premises" determined

Section 11(2) of the Act, in effect, provides that the time for determining whether the premises are "retail" is at the time the lease is entered into or renewed (see sections 7 and 9 of the Act for definition of "entered into" and "renewed" respectively).

Because of the effect of section 11(2), if the Act applies to the lease when entered into or renewed, and subsequently there is a change in circumstances during the term of the lease that affects the applicability of the Act, advice obtained by the VSBC indicates the lease will remain subject to the Act.

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

Similarly, where the Act does not apply when the lease is entered into, the lease will not become subject to the Act if there is a change in circumstances affecting its applicability (other than the dispute resolution provisions of Part 10, if the premises are retail premises at any time during the lease term). Therefore the status of the applicability of the Act is determined at the outset and does not change during the term of the lease. An example of the circumstances that may change include the tenant becoming (or ceasing to be) a listed company, due to the exclusions that apply under the Act. Refer to 7.0 for the details of exclusions from the Act.

As such, the only opportunity for the status of the applicability of the Act to change is upon renewal of the lease.

**Example:** A lease is entered into with a public company tenant for five years with a five year option for renewal. The permitted use of the premises is retail. At the time the lease was entered into, the Act did not apply. In year 3, the lease is assigned to a non-public company. There is no variation to the terms of the lease and therefore the assignment does not amount to a new lease (section 8 of the Act). For the remaining two years of the initial term, the Act will not apply. However, upon the lease renewal (because the renewal of a lease is regarded as the granting of a new lease), the applicability of the Act changes and the Act may then apply to the lease for the five year option term. The same would apply if the lease term were extended by agreement. This results in a surrender and termination of the existing lease and the grant of a new lease for the remainder of the then extended term.

However, if there was a dispute between the original tenant and the landlord, or the assignee and the landlord, during the initial term, the dispute resolution provisions of Part 10 of the Act would apply.

This information is based on advice received by the VSBC, but has not been subject to decision by the Victorian Civil and Administrative Tribunal (VCAT) or the courts.

### **6.0 Guiding principles to determine ‘retail premises’**

Since the Act does not define “retail”, an interpretation of the term must rely on its ordinary meaning. In order to determine whether the premises are “retail” each lease and its circumstances must be assessed individually, having regard to the nature and provisions of the lease, including the actual or intended use of the premises under the terms of the lease. The wording used in a lease does not necessarily determine whether premises are retail premises as defined by section 4 of the Act.

#### **6.1 Interpretation of ‘retail’ by the Courts**

The term ‘retail premises’ in the Act has been considered by the courts in a variety of circumstances. The decision of the Supreme Court of Victoria in the case of *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor [2013] VSC 344* suggests that if the premises are used for the selling of a good or service to an ‘ultimate consumer’ they

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

may be characterised as being retail premises. This is a very broad interpretation of retail premises.

As regards the provision of services, the VCAT case, *Global Tiger Logistic Pty Ltd v Chapel Street Trust [2012]* (R172/2012) also affirmed such a test, in which Member Rowland stated:

*‘Given the ultimate consumer test I find it difficult to conceive of any sale of a service which would be other than retail.’*

The following statements are from the *Fitzroy Dental* case:

- The essential feature of retailing is the provision of an item or service to the ultimate consumer for fee or reward. The end user may be a member of the public but not necessarily so.
- The fact that a good or service is provided to a person who uses the good or service as an ‘input’ in that person’s business for the purpose of producing or providing a different good or service to another person does not detract from the possible characterisation of the first person (and perhaps also the second person depending on all the circumstances) as the ‘ultimate consumer’ of the original good or service, and the subsequent good, respectively.

### **7.0 What are not retail premises**

Some premises which would otherwise constitute ‘retail premises’ are excluded from the Act. Section 4(2) of the Act provides that ‘retail premises’ does not include the following premises-

- (a) Premises in respect of which the occupancy costs under the lease concerned is more than the amount prescribed by the regulations (currently \$1,000,000 per annum exclusive of GST). ‘Occupancy costs’ are defined in sub-section (3) to include:
  - (i) the rent payable under the lease, not being rent (or any part of rent) that is to be determined by reference to the turnover of a business; and
  - (ii) the outgoings, as estimated by the landlord, to which the tenant is liable to contribute under the lease; and
  - (iii) any other costs of a prescribed kind that the tenant is liable to pay under the lease. Currently advertising and promotional services, including marketing fund contributions, is prescribed as an other kind of cost.

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

- (b) premises that are used wholly or predominantly for the carrying on of a business by a tenant on behalf of the landlord as the landlord's employee or agent;
- (c) premises the tenant of which is--
  - (i) a listed corporation (as defined in section 9 of the Corporations Act); or
  - (ii) a subsidiary (as defined in section 9 of the Corporations Act) of such a corporation;
- (d) premises the tenant of which is--
  - (i) a body corporate whose securities are listed on a stock exchange, outside Australia and the external territories, that is a member of the World Federation of Exchanges; or
  - (ii) a subsidiary (as defined in section 9 of the Corporations Act) of such a body corporate;
- (e) kinds of premises, businesses (or a specified business), tenants or leases that are exempted by determination of the Minister [sections 4(2)(e), (f), (g) and (h)].

#### **7.1 Ministerial Determinations**

As at 1 December 2014 there are six (6) Ministerial Determinations (“the Determinations”), the effect of which is to exclude a retail premises lease from the operation of the *Retail Leases Act 2003* (“the Act”). A seventh Determination comes into effect on 1 January 2015. The Determinations have been made pursuant to Section 5 (1) of the Act.

The Determinations and the dates on which they came into effect are as follows:

- |  |   |
|--|---|
| 1. <i>Retail Premises located in a multi-story building.</i> | <i>1 May 2003.</i>  |
| 2. <i>Barristers’ Chambers Limited Premises.</i>             | <i>1 May 2004.</i>  |
| 3. <i>Fifteen (15) Year Leases.</i>                          | <i>24 August 2004.</i>                                      |
| 4. <i>Melbourne Market Authority Leases.</i>                 | <i>19 September 2005.</i>                                   |
| 5. <i>Municipal Council Leases.</i>                          | <i>1 August 2008.</i><br><i>(revoked on 1 January 2015)</i> |
| 6. <i>New Zealand Stock Exchange listed corporations.</i>    | <i>20 December 2011.</i>                                    |
| 7. <i>Charitable and Community Purposes Leases</i>           | <i>1 January 2015.</i>                                      |

The Determinations are published in full in the legislation section of the VSBC website at [www.vsbv.vic.gov.au](http://www.vsbv.vic.gov.au)

The following is a brief explanation of the Determinations.

## Guidelines to the *Retail Leases Act 2003*

### **7.1.1 Retail Premises located in a multi-story building**

This Determination applies to “*Premises that are located entirely within a building which, under the terms of the lease relating to the premises, or part of the premises, are used, or are to be used, wholly or predominantly for the retail provision of services, other than premises located entirely on any one or more of the first three stories in a building, excluding any basement levels*”.

The effect of the Determination is to exclude from the operation of the Act premises or part of the premises in a building that are used wholly or predominantly for the retail provision of services, **other than those located on any one of the first three storeys of the building**. In calculating the first three storeys of the building, the basement levels are not included. Accordingly, the first three stories in a building are ground floor, first floor, and second floor.

The Determination does not affect the application of the Act to any premises in the building which are used wholly or predominantly for the retail sale of goods. The Determination also does not affect any retail premises in a shopping centre.

In summary, retail premises in a multi-story building, which are used wholly or predominantly for the provision of services, must be located entirely on either the ground floor, or the first floor or the second floor of the building for the lease to be governed by the Act.

### **7.1.2 Barristers’ Chambers Limited Premises**

This Determination applies to premises which are leased or subleased by Barristers’ Chambers Limited to a legal practitioner who has been issued with a practising certificate by the Victorian Bar. A lease or sublease from Barristers’ Chambers Limited to a Barrister is not governed by the Act.

### **7.1.3 Fifteen (15) year Leases**

This is a more complex Determination and should be considered carefully taking into account the following:

#### The Policy Background

The intention of the Act was to draw what Parliament regards as a proper balance between the rights and liabilities of landlords and tenants, and in so doing promote more certainty and fairness in the relationship between landlords and tenants, in the area of retail leases.

The Act made significant changes especially to the scheme of responsibility for repairs and maintenance. These changes resulted in undesirable outcomes for certain leases in particular Crown land leases.

## Guidelines to the *Retail Leases Act 2003*

Such leases typically stipulated that the tenant was responsible for the construction, installation, repair and maintenance of buildings and structures. These leases also commonly required the tenant to leave any structures built or improvements made by the tenant to the premises on the land at the end of the lease.

By way of compensation and in recognition of these obligations imposed on tenants, the terms of such leases were long and the rent required to be paid was very low or even *peppercorn rent*. Leases of this type included Alpine Resorts, Amusement Parks, Sports and Recreational Grounds, Raceways, Theatres, Caravan Parks, Marinas, and Youth Camps.

The operation of the Act changed the role of the landlord of these leases from a lease administrator to a property investor/manager. Such a change in role was perceived as being of little or no benefit to either the landlord or the tenant. The substantial increase in costs to the landlord, arising particularly from the repair and maintenance obligations of the landlord under the Act, would have resulted in a substantial increase in the rent and may have resulted in many of these leases not being commercially viable for tenants.

Many of these facilities considered to be community facilities and of considerable benefit to the community would not have been undertaken or would have failed if undertaken, if the Act applied. The Act was therefore viewed as impractical with regard to these leases.

### The purpose of the Determination

The purpose of the Determination is to exempt long term leases which impose substantial financial obligations on the tenant from the operation of the Act, **where such exemption would be beneficial to both the landlord and the tenant.**

The Determination is not restricted to Crown land leases, but may apply to any retail lease as long as that lease satisfies all of the criteria of the Determination. However, it is not the purpose or intent of the Determination to exclude genuine small and medium retail tenants from the protections provided by the Act, where doing so would not be in the best interests of the tenant.

### The nature of the Act

The Act is remedial legislation. It gives powers and rights to a retail premises tenant that do not otherwise exist at common law. The Determination takes away those rights by excluding the application of the Act and accordingly, the Determination should be read narrowly, so as not to take away those rights except to the extent expressly and clearly provided.

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

The criteria for the Determination to apply

*(this section updated 14 June 2016)*

The Determination in summary requires:

- (a) The Lease must be for an initial term of 15 years or more, and
- (b) The Lease must impose an obligation on the Tenant (or other person) to carry out substantial work on the Premises, or incur substantial expenditure on works or improvements at the Premises, **or**
- (c) The Lease must significantly disentitle the tenant (or other person) from removing such works or improvements at the Premises at the end of the Lease.

Prior to this *update* these Guidelines put the view that, in applying the criteria in the Determination the word “**or**” appearing between sub-paragraphs (e) and (f) of Paragraph A of the Determination (as highlighted above) is construed and read as a conjunctive, namely, as an “and”, on the grounds that there would have to be substantial works or improvements by the Tenant in the first place for there to be a significant disentitlement to remove such works or improvements.

However this interpretation was not supported in *Luchio Nominees Pty Ltd v Epping Fresh Food Market Pty Ltd (Building and Property)* [2016] VCAT 937, 7 June 2016 where the Member determined that the ‘or’ should be read as an ‘or’.

Tenants and landlords should seek their own legal advice in ascertaining whether a lease is a lease exempted from the Act by this Ministerial Determination.

### The VSBC Certificate

The VSBC will no longer be providing Certificates in respect of this Determination or any other Determination.

A VSBC Certificate of itself did not determine conclusively whether a lease comes within the Determination and therefore is not governed by the Act.

Whether the premises are in fact exempt from the Act by virtue of the Determination is subject always to the decision of the Tribunal or Court (as the case may be).

### **7.1.4 Melbourne Market Authority Leases**

This Determination applies to retail premises being “market land” as defined by the *Melbourne Market Authority Act 1977*. Accordingly, such Premises are excluded from the operation of the Act.

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

### **7.1.5 Municipal Council Leases**

This Determination applies to retail premises leases granted by Municipal Councils under which the premises are to be used for purposes expressly provided in Paragraph A of the Determination. This is also a more complex Determination and should be considered carefully taking the following into account:

#### The purpose of the Determination

The purpose of the Determination is to exempt certain types of leases granted by Municipal Councils from the operation of the Act. These leases are granted at a low or *peppercorn* rent and the premises are to be used by the tenant as specified in Paragraph A (a) or (b) of the Determination. The specified use of the premises in the lease must have an apparent community benefit or service and, coupled with the other provisions of the lease, it can be said that such exemption from the Act would be beneficial to both the landlord and the tenant.

#### The VSBC Certificate

The VSBC will no longer be providing Certificates in respect of this Determination or any other Determination.

A VSBC Certificate of itself did not determine conclusively whether a lease comes within the Determination and therefore is not governed by the Act.

Whether the premises are in fact exempt from the Act by virtue of the Determination is subject always to the decision of the Tribunal or Court (as the case may be).

This Determination will be revoked and replaced with a new Determination (Charitable and Community Purposes Leases) as from 1 January 2015

### **7.1.6 New Zealand Stock Exchange listed corporations**

This Determination applies to premises the tenant of which is a corporation listed on the New Zealand Stock Exchange or a subsidiary of such listed corporation. A lease to which this Determination applies is not governed by the Act.

This Determination was as a result of the New Zealand Stock Exchange ceasing to be a member of the World Federation of Exchanges referred to in Section 4 (2) (d) of the Act.

### **7.1.7 Charitable & Community Purposes Leases**

This new Determination revokes and replaces the Municipal Council Leases Determination with some variations. It is not limited to only leases granted by a Municipal Council and it applies to retail premises leases under which the premises are to be used for purposes expressly provided in Paragraph 1(a) and (b) of the Determination.

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

This is also a more complex Determination and should be considered carefully taking the following into account:

### **The purpose of the Determination**

The purpose of the Determination is to exempt certain types of leases from the operation of the Act. Such leases will provide that the rent payable is no greater than \$10,000 per annum **AND** provide that the permitted use of the premises by the tenant is for the purpose or purposes specified in Paragraph 1(a) and (b) of the Determination.

The specified use of the premises in the lease must have an apparent community benefit or service and, coupled with the other provisions of the lease, it can be said that such exemption from the Act would be beneficial to both landlord and tenant.

### **7.2 Lease or licence**

Where retail premises are occupied under a licence, the Act will not apply to such premises in the absence of a retail premises lease. It is important to note, however, that the Act will apply to premises occupied via a contract called a 'licence' if the 'licence' is in fact a lease. In this regard, whether a 'licence' is in fact a lease may depend on factors such as whether exclusive possession has been granted under the purported licence and what the parties intended under the agreement.

### **7.3 Application if lease term is less than a year**

Section 12(1) of the Act provides the Act does not apply to a retail premises lease which is for a term of less than one year. However, the Act will apply to a lease which has been renewed, continued or extended which results in the tenant being in continuous possession of the retail premises under that lease for one year or more. The application of the Act will be from the commencement date of that lease.

### **7.4 Extended application - dispute resolution under the Act**

Where the Act does not apply to a retail premises lease, Part 10 of the Act (Dispute Resolution) may still apply to a retail tenancy dispute arising under a lease that provides for the occupation of retail premises in Victoria, to which the Act (or previous legislation governing retail leases listed below) does not apply. Section 81(1)(c) of the Act extends the coverage of dispute resolution provisions in the Act to leases that otherwise are not covered by the Act, the *Retail Tenancies Act 1986* or the *Retail Tenancies Reform Act 1998*.

Section 82 of the Act also provides that Part 10 applies to a lease of premises that are retail premises at any time (prior to a referral of a retail tenancy dispute to the VSBC) during the lease.

## Guidelines to the *Retail Leases Act 2003*

### 8.0 Section 4 – the Legislation

Section 4:

*Meaning of "retail premises"*

- (1) *In this Act, "retail premises" means 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; or*
  - (b) *the carrying on of a specified business or a specified kind of business that the Minister determines under section 5 is a business to which this paragraph applies.*
- (2) *However, "retail premises" does not include the following premises--*
- (a) *premises in respect of which the occupancy costs (as defined in sub-section(3)) under the lease concerned is more than the amount prescribed by the regulations for the purposes of this paragraph;*
  - (b) *premises that are used wholly or predominantly for the carrying on of a business by a tenant on behalf of the landlord as the landlord's employee or agent;*
  - (c) *premises the tenant of which is--*
    - (i) *a listed corporation (as defined in section 9 of the Corporations Act); or*
    - (ii) *a subsidiary (as defined in section 9 of the Corporations Act) of such a corporation;*
  - (d) *premises the tenant of which is--*
    - (i) *a body corporate whose securities are listed on a stock exchange, outside Australia and the external territories, that is a member of the World Federation of Exchanges; or*
    - (ii) *a subsidiary (as defined in section 9 of the Corporations Act) of such a body corporate;*
  - (e) *premises used wholly or predominantly for the carrying on of a specified business or a specified kind of business that the Minister determines under section 5 is a business to which this paragraph applies;*
  - (f) *premises of a kind that the Minister determines under section 5 are premises to which this paragraph applies;*

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

- (g) *premises the tenant of which is a kind of tenant that the Minister determines under section 5 is a tenant to which this paragraph applies;*
  - (h) *premises the lease relating to which is a kind of lease that the Minister determines under section 5 is a lease to which this paragraph applies.*
- (3) *In sub-section (2)(a), "occupancy costs" means--*
- (a) *the rent payable under the lease, not being rent (or any part of rent) that is to be determined by reference to the turnover of a business; and*
  - (b) *the outgoings, as estimated by the landlord, to which the tenant is liable to contribute under the lease; and*
- Note: Section 46 requires the landlord to give the tenant a written estimate of the outgoings to which the tenant is liable to contribute.*
- (c) *any other costs of a prescribed kind that the tenant is liable to pay under the lease.*
- (4) *Regulations made for the purposes of sub-section (2)(a) may--*
- (a) *prescribe an amount; or*
  - (b) *prescribe a method by which an amount may be calculated.*

*Note: This Act may not apply to certain premises because of Part 3 (Application of the Act).*

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