VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST **VCAT REFERENCE R115/2014**

CATCHWORDS

Retail premises lease – Essential safety measures – Commercial tenancies – Required building work – Provision of essential safety measures – Statutory requirements – Freedom of contract – Inconsistency – Test for inconsistency – Contracting out – Statutory purpose or policy – Circuitous device to avoid compliance – Circumvention of compliance – Building regulations – Smoke alarms – Smoke detection systems – Owner's responsibilities under a retail premises lease – Tenant's responsibilities under a retail premises lease - Maintenance – Repairs – Condition of the premises when the retail premises lease was entered into – Misuse by tenant - Tenant's fixtures – Urgent repairs – Capital costs – Outgoings – Legal expenses – Other expenses – *Building Act 1993* (Vic) s 1, 3, 4, 250, 251 - *Building Regulations 2006* (Vic) - *Building (Interim) Regulations 2005* (Vic) – *Building Regulations 1994* (Vic) – *Retail Leases Act 2003* (Vic) s 1, 3, 29, 30, 39, 41, 46, 47, 48, 51, 52, 94 - *Retail Leases Regulations 2013* (Vic) – *Building Control Act 1981* (Vic) s 173 – *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516.

Small Business Commissioner – Advisory opinion – Reference of matters for advisory opinion – Principles as to whether advisory opinion should be given by Tribunal – Decision to give advisory opinion – *Small Business Commissioner Act 2003* (Vic) s 11A; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 125, 148(1).

IN THE MATTER of s 11A of the *Small Business Commissioner Act 2003* (Vic)

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

APPLICANT:	Small Business Commissioner
WHERE HELD:	55 King Street, Melbourne
BEFORE:	Justice Greg Garde AO RFD, President
HEARING TYPE:	Hearing
DATES OF HEARING:	5 February 2015
DATE OF ORDER:	1 May 2015
CITATION:	Small Business Commissioner: reference for advisory opinion (Building and Property) [2015] VCAT 478.

ORDER

1. Pursuant to s 125 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the Tribunal gives an advisory opinion as to the questions

referred to it under s 11A of the *Small Business Commissioner Act 2003* (Vic) as follows.

Questions 1, 2 and 4

1 The key steps that need to be undertaken to resolve the issue of whether a landlord may enforce a term of a retail premises lease stipulating that the tenant is obliged to provide or maintain the leased property's essential safety measures ('ESM') are in summary:

(1) identify the nature of the obligation, and the party on whom the obligation is imposed by the relevant Building Regulation relating to the ESM;

(2) determine, as a matter of statutory construction, whether the obligation must be complied with through the actions of the owner or landlord;

(3) if the obligation must be complied with through the actions of the owner or landlord, any term of the lease or of a contract which purports to require the tenant to perform the obligation is void, and any term which purports to require the tenant to pay the cost of performing the obligation is void;

(4) if the obligation relating to the ESM is that the owner or landlord must ensure that a result is achieved or a standard is met the landlord may agree with the tenant for the tenant to achieve the result, or meet the standard, and the tenant will be obliged to perform the retail premises lease in accordance with the term at the landlord's expense;

(5) in the circumstances set out in (4), the tenant is able to deduct the costs necessarily incurred in the performance of the term of the retail premises lease or agreement from rental, or recover the cost from the landlord; and

(6) in circumstances where the landlord is obliged to provide or maintain an ESM under a Building Regulation but fails to do so, the tenant under a retail premises lease may carry out the required work, and recover the expenses of the work from the landlord, or deduct those expenses from rent due to the landlord under s 251(1) and (2) of the *Building Act 1993* (Vic) ('*Building Act*').

2 In addition, the landlord is not able to require the tenant under a retail premises lease to provide or maintain an ESM in circumstances where:

(1) Section 52(2) of the *Retail Leases Act 2003* (Vic) ('*RLA*') applies and the landlord is responsible for providing or maintaining the ESM in order to maintain the retail premises in

a condition consistent with the condition of the premises when the retail premises lease was entered into, and the ESM:

(a) forms part of the structure of, or is a fixture in the retail premises;

(b) constitutes plant or equipment at the retail premises; or

(c) is an appliance, fitting or fixture provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services;

unless the need for the repair of the ESM arises out of misuse by the tenant, or the tenant is entitled or required under the retail premises lease to remove the ESM at the end of the lease; or

(2) provision or replacement of the ESM is a capital cost within s 41 of the *RLA* relating to the building, or plant in a building in which the retail premises are located or any building or plant in a retail shopping centre in which the retail premises are located, or are used in association with a building in which the retail premises are located or any building in a retail shopping centre in which the retail premises are located; or

(3) the requirements of s 39 of the *RLA* for the recovery of outgoings from a tenant are not satisfied with the result that the tenant is not liable to pay the amount claimed by the landlord in respect of outgoings; or

(4) the requirements of the *Retail Leases Regulations 2013* (Vic) are not met with the result that the amount of outgoings cannot be recovered, or that the amount of outgoings that can be recovered is limited.

Question 3

Section 251 of the *Building Act* takes effect as set out in the answer to Questions 1, 2 and 4. Section 251 operates despite s 39 of the *RLA* imposing the costs of maintaining ESMs on the landlord, in the circumstances described above.

Question 5

A landlord is entitled to recover from the tenant the cost of maintenance and repairs to the retail premises or to the landlord's installations in the retail premises as outgoings in circumstances where:

(1) section 251 of the *Building Act* does not apply and the relevant Building Regulation requires the cost to be paid by the landlord;

(2) section 52(2) of the *RLA* does not apply;

(3) the cost incurred is not a capital cost within the meaning of s 41 of the *RLA*;

(4) the landlord satisfies the requirements of s 39 of the *RLA* for the recovery of outgoings; and

(5) the landlord satisfies the requirements of the *Retail Leases Regulations 2013* (Vic) concerning outgoings.

The expression 'other expenses' set out in s 51(1) of the *RLA* should be construed as applying to expenses arising in the course of the provision of the legal services described in s 51(1), such as disbursements by a legal practitioner, or other expenses incidental or ancillary to the performance of the legal services described in s 51(1).

2. Liberty to the Small Business Commissioner to apply.

Justice Greg Garde AO RFD
President

APPEARANCES:

For the applicant:	Mr G Golvan QC Mr B Mason and Mr L Vatousios of Counsel Mr M Schramm, Solicitor, Office of the Victorian Small Business Commissioner.
For the Shopping Centre Council of Australia:	Mr R Hay SC Mr M Woolley and Ms R Argyle, Gadens Lawyers
For The Real Estate Institute of Victoria Limited:	Mr S Hopper of Counsel. Mr R Lowenstern, Solicitor, The Real Estate Institute of Victoria Limited.

REASONS

Introduction

1 On 15 May 2014, the Small Business Commissioner ('the Commissioner') applied to the Victorian Civil and Administrative Tribunal ('the Tribunal') for an advisory opinion by way of answering five questions set out in the application ('the application').

2 The application is made under s 11A of the *Small Business Commissioner Act 2003* (Vic) ('*SBC Act*') and s 125 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*').[1] The application is made by the Commissioner on the basis that he is satisfied that the matter is in the public interest.

3 Following the application, the Tribunal directed that extensive notice be given of the application, including written notice to peak bodies and government entities. Public notices were placed in 'The Age' and the 'Australian Financial Review' newspapers. The Commissioner and the Tribunal also gave notice of the application on respective websites.

4 Six bodies or firms of legal practitioners responded to the notices given of the application and made submissions to the Tribunal. They were:

(1) The Law Institute of Victoria ('LIV');

(2) The Shopping Centre Council of Australia ('Shopping Centre Council');

(3) The Real Estate Institute of Victoria Ltd ('REIV');

(4) The Property Council of Australia (Victoria) ('Property Council');

(5) Marshalls & Dent Lawyers; and

(6) Andrew Pandeli & Co, Solicitors.

5 The Commissioner, Shopping Centre Council and the REIV appeared by counsel at the hearing of the application.

The reference to the Tribunal

6 The Commissioner's reference to the Tribunal asked that the Tribunal give an advisory opinion. Five matters were referred to the Tribunal, and were in substance:

> (1) whether a landlord may enforce against a tenant a contractual obligation in a commercial lease stipulating that the tenant is obliged to provide or maintain the leased property's 'essential safety measures' ('ESM'), in satisfaction of the landlord's obligations under the *Building Act* or the *Building Regulations 2006* (Vic) ('*Building Regulations*') to ensure that any ESM

[1] Section 11A came into effect on 1 May 2014 pursuant to s 9 of the *Small Business Commissioner Amendment Act 2014* (Vic).

required to be provided are maintained in a state which ensures that the ESM is able to fulfil its purpose (the appropriate state);

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

(a) prohibits a landlord from recovering from a tenant the ESM compliance costs incurred when a tenant breaches a contractual obligation to maintain a leased property's 'essential safety measures' in the appropriate state;

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

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

(3) where non-capital ESM compliance costs incurred by a landlord to ensure that any ESM works required to be provided are maintained in the appropriate state, are also specified as recoverable outgoings under a retail premises lease, but there is no obligation on the tenant to undertake the ESM works, whether s 251 of the *Building Act 1993* (Vic) ('*Building Act*') takes precedence over s. 39 of the *Retail Leases Act 2003* (Vic) ('*RLA*'), such that:

(a) a landlord cannot recover the ESM compliance costs as recoverable outgoings against a tenant;

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

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

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

7 The reference to the Tribunal is supported by the affidavits and exhibits of Mark Robert Schramm sworn 15 May 2014 and 10 September 2014. Mr Schramm is a senior manager employed in the Victorian Office of the Small Business Commissioner ('VSBC'). VSBC was established under the

SBC Act and commenced operation on 1 May 2003. Its purpose is to enhance a competitive and fair operating environment for small business in Victoria.[2] VSBC has a range of functions and powers under the *SBC Act*, the *RLA*, and other legislation. VSBC has the function of making arrangements to facilitate the resolution of retail tenancy disputes by mediation, or other form of alternative dispute resolution.[3] VSBC provides information and guidance to parties to retail tenancy disputes concerning the issues that arise in relation to the dispute. VSBC also provides a preliminary assistance function in relation to retail tenancy issues. It has website, telephone and in-person capabilities. It assists interested parties and the public generally to understand the provisions and application of the *RLA*.[4]

8 VSBC receives a large number of inquiries from landlords, tenants, legal practitioners and real estate agents concerning retail tenancy issues and related legislation. In the financial year 2012-13, VSBC received 1,103 applications for mediation of retail tenancy disputes and 7,545 telephone inquiries for preliminary assistance concerning retail or commercial lease issues. From November 2012 to April 2014, there were approximately 500 telephone inquiries concerning commercial lease repairs and maintenance issues.

9 VSBC also provides education and guidance to the commercial tenancy sector in the form of educational seminars, presentations at business functions and through its website. Part of the information provided responds to queries relating to ESM compliance under the *Building Act* and the *Building Regulations*, as well as repair and maintenance obligations under commercial leases subject to the *RLA*.

10 The Commissioner is aware that the question of who should bear the responsibility and expense of ESM compliance, repair and maintenance is one that many landlords, tenants and real estate agents have difficulty with. This issue is often the subject of questions from stakeholders at presentations and seminars conducted by VSBC. It is the subject of inconsistent views in legal journals. The Commissioner considers that the many inquiries received as to these matters indicate a widespread lack of certainty and understanding. The Commissioner also considers that the clarification of these issues is desirable and of benefit to the commercial tenancy sector, and arguably the community of Victoria, generally.

11 The REIV relies on the affidavit of Matthew Gerard Walsh sworn 28 October 2014. Mr Walsh is a very experienced real estate agent and past Chairman of the Commercial and Industrial Chapter of the REIV. He refers to widespread confusion in the commercial, retail and industrial market in Victoria following publication of an article in the Law Institute Journal in

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2 SBC Act s 1.
3 RLA s 84.
4 RLA s 85.

April 2012 and the perceived view in the industry that the Tribunal's decisions in two past cases are inconsistent.

12 Subsequent to the hearing, Mr Schramm provided the Tribunal with a list of ESMs. This list is reproduced in substance as a schedule to these reasons.

Should the Tribunal address the matters referred for advisory opinion?

13 There have been very few matters in Australia referred to tribunals for advisory opinions under statutory powers such as s 11A of the *SBC Act* and s 125 of the *VCAT Act*. In a case involving a reference by the Director General of Social Services, *Re Reference under s 11 of the Ombudsman Act 1976*,[5] Justice Brennan P of the Administrative Appeals Tribunal (as he then was) held that a tribunal with an advisory opinion jurisdiction had a discretion as to whether it should be exercised.

14 Before accepting a reference to give an advisory opinion, Brennan P held that a tribunal should be satisfied regarding a number of issues. They were in summary:

(1) the questions on which the tribunal should undertake to express an advisory opinion should be questions which it is fitted to answer definitively;

(2) the tribunal should be satisfied, before it decides to give an advisory opinion, that it is furnished with the facts, equipped with the principles (legal, administrative, scientific or otherwise pertaining to a special branch of knowledge) and given access to the expertise needed to form a definitive opinion on the question referred;

(3) the tribunal should be satisfied that the exercise of its advisory jurisdiction is likely to produce a useful practical result;

(4) the advisory jurisdiction should not be exercised on questions which are purely hypothetical if there is no likelihood of the hypothesis becoming a reality;

(5) an advisory opinion is not a mere make-weight to be evaluated by a decision-maker in reaching a decision;

(6) whilst an advisory opinion does not legally bind, as a judicial declaration would bind, the persons interested in the question referred to the tribunal, the giving of an advisory opinion is an exercise of authority by the tribunal, and should be reserved to cases where it will be definitive of the norms affecting 'the taking of action in pursuance of a discretionary power' or 'the exercise of the power';

(7) an advisory opinion would not be definitive if there were not some area of controversy to be settled, or some area of uncertainty to be eliminated;

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5 (1979) 2 ALD 86, 90.

(8) the arguments before the tribunal must sufficiently spell out the possible solutions and the respective implications of their adoption;

(9) the discretion whether to give or to decline to give an advisory opinion may depend on the nature of the assistance given to the tribunal in forming its opinion;

(10) if the question referred is solely or principally a question of law, and the question is about to be an issue in a curial proceeding, considerations of prudence would advise against giving an advisory opinion before the court delivers its judgment;

(11) in such a case, the expression of opinion by the tribunal may be unnecessary if the court's judgment is in accord with the tribunal's opinion; and

(12) if the court's judgment is contrary to the tribunal's opinion, there would be divergent definitions to guide the administrator in taking administrative action and in exercising discretionary powers. If possible, divergences should be settled by an appeal.[6]

15 I accept these principles and hold that they are applicable to the reference of matters for advisory opinion to the Tribunal under s 125 of the *VCAT Act*.

16 I am satisfied that the present reference of five questions by the Commissioner is a reference that should be accepted by the Tribunal. The questions referred to the Tribunal are questions of law. There is little, if any, factual background, and there are no disputed matters of fact. The Tribunal is fitted to answer the questions definitively. The Tribunal has jurisdiction to resolve landlord and tenant disputes under s 89 of the *RLA*. I have had the benefit of considered written and oral submissions of two senior counsel and three junior counsel. There has been extensive research as to the decided cases, and the history of statutory provisions. I am as well-equipped as any court or tribunal could be to answer the questions of law referred to it.

17 I accept the evidence contained in the affidavits of Mr Schramm and Mr Walsh. The exercise of advisory jurisdiction by the Tribunal is likely to produce a practical result. The matters referred to the Tribunal are not hypothetical or academic in nature. Resolution of the legal issues raised in the referral is likely to be of benefit to the landlord and tenant community in the area of retail tenancies, and to legal practitioners and advisers.

18 A reference for an advisory opinion should not interfere in a dispute pending in the Tribunal. However, no dispute pending in the Tribunal has been identified which would be affected by the giving of an advisory opinion in this matter. No appeal from the Tribunal in its retail tenancy jurisdiction has been identified which would be affected.

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[6] Under s 148(1) of the *VCAT Act*, a party to a proceeding may by leave appeal on a question of law from an order of the Tribunal in the proceeding.

19 The Commissioner is satisfied under s 11A(3) of the *SBC Act* that the referral of the questions to the Tribunal for advisory opinion is in the public interest. The clarification of the matters referred to the Tribunal in this application may assist in preventing disputes in relation to matters that have broad relevance and application to small businesses, reduce the number of disputes referred to VSBC and potentially reduce the number of applications progressing to the Tribunal. This will provide benefit to commercial and retail tenants and commercial and retail landlords across Victoria. In my view, the referral is in the public interest given the frequency and significance of disputes under retail premises leases about ESMs and the need for clarification of the rights and obligations of landlords and tenants under these leases.

Relevant statutory law

20 Sections 250 and 251 of the *Building Act* provide:

> **250. Right of owner to carry out required work on occupied building or land**
>
> (1) If the owner of a building or land is required to carry out any work or do any other thing under this Act or the regulations the owner may give a written notice to the occupier of the building or land—
>
> (a) stating particulars of the work to be carried out or thing to be done; and
>
> (b) requiring the occupier to permit the owner and any other person to enter the building or land and carry out the work or do the thing.
>
> (2) If the occupier of the building or land does not comply with a notice within 7 days after the notice is given, the owner of the building or land may apply to the Magistrates' Court for an order.
>
> (3) The Magistrates' Court may make an order requiring the occupier of the building or land to permit the owner and any other person to enter the building or land and carry out the work or do the thing.
>
> (4) The occupier of the building or land must comply with the order.
>
> …
>
> (5) While the occupier of the building or land fails to comply with the order the owner of the building or land is not liable for an offence for failing to carry out the work or do the thing.
>
> **251. Occupier or registered mortgagee may carry out work**
>
> (1) If the owner of a building or land is required under this Act or the regulations to carry out any work or do any other thing and

the owner does not carry out the work or do the thing, the occupier of that building or land or any registered mortgagee of the land or the land on which the building is situated, may carry out the work or do the thing.

(2) An occupier may—

(a) recover any expenses necessarily incurred under subsection (1) from the owner as a debt due to the occupier; or

(b) deduct those expenses from or set them off against any rent due or to become due to the owner.

(3) A registered mortgagee may—

(a) recover any expenses necessarily incurred under subsection (1) from the owner as a debt due to the mortgagee; or

(b) give notice in writing of those expenses to the mortgagor.

(4) On the giving of notice under subsection (3)(b), the expenses are deemed to be added to the principal sum owing under the mortgage.

(5) If the mortgagor is not the owner the mortgagor may recover the amount deemed under subsection (4) to be added to the principal sum from the owner as a debt due to the mortgagor.

(6) This section applies despite any covenant or agreement to the contrary.

21 The purposes and objectives of the *Building Act*, and a number of definitions set out in s 3 of the *Building Act* are relevant to ss 250 and 251:

1 Purposes

The main purposes of this Act are—

(a) to regulate building work and building standards; and

(b) to provide for the accreditation of building products, construction methods, building components and building systems; and

(c) to provide an efficient and effective system for issuing building and occupancy permits and administering and enforcing related building and safety matters and resolving building disputes; and

(d) to regulate building practitioners and plumbers; and

(e) to regulate plumbing work and plumbing standards; and

(f) to provide for the accreditation, certification and authorisation of plumbing work, products and materials; and

(g) to regulate cooling tower systems; and

(h) to limit the periods within which building actions and plumbing actions may be brought.

3. Definitions

(1) In this Act—

…

building includes structure, temporary building, temporary structure and any part of a building or structure;

…

building regulations means regulations made under Part 2;

…

owner—

(a) in relation to land which has been alienated in fee by the Crown and is under the operation of the *Transfer of Land Act 1958*, (other than land in an identified folio under that Act) means the person who is registered or entitled to be registered as proprietor, or the persons who are registered or entitled to be registered as proprietors, of an estate in fee simple in the land; and

(b) in relation to land which has been alienated in fee by the Crown and is land in an identified folio under the *Transfer of Land Act 1958* or land not under the operation of the *Transfer of Land Act 1958*, means the person who is the owner, or the persons who are the owners, of the fee or equity of redemption; and

(c) in relation to Crown land reserved under the *Crown Land (Reserves) Act 1978* and managed or controlled by a committee of management, means the Minister administering that Act; and

(d) in relation to any other Crown land, means the Minister or public authority that manages or controls the land;

owner in relation to a building, means the owner of the land on which a building is situated;

…

4. Objectives of Act

(1) The objectives of this Act are—

(a) to protect the safety and health of people who use buildings and places of public entertainment;

(b) to enhance the amenity of buildings;

(c) to promote plumbing practices which protect the safety and health of people and the integrity of water supply and waste water systems;

(d) to facilitate the adoption and efficient application of—

(i) national building standards; and

(ii) national plumbing standards;

(e) to facilitate the cost effective construction and maintenance of buildings and plumbing systems;

(f) to facilitate the construction of environmentally and energy efficient buildings;

(g) to aid the achievement of an efficient and competitive building and plumbing industry.

(2) It is the intention of Parliament that in the administration of this Act regard should be had to the objectives set out in subsection (1).

22 Regulation 1202 of the *Building Regulations* defines 'essential safety measure':

> ***essential safety measure*** means—
>
> (a) an item specified in Column 2 of Part 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 or 12 of Schedule 9 that is required by or under the Act or these Regulations to be provided in relation to a building or a place of public entertainment; or
>
> (b) any other item that is required by or under the Act or these Regulations to be provided in relation to a building or place of public entertainment for the safety of persons in the event of fire and that is designated by the relevant building surveyor as an essential safety measure; or
>
> (c) any other item that is an essential safety measure within the meaning of Division 1 of Part 12 of the *Building (Interim) Regulations 2005* as in force before their revocation;

23 The provisions of the *RLA* which are most material to the matters referred to the Tribunal are:

> **1. Main purpose**
>
> The main purpose of this Act is to replace the scheme in the *Retail Tenancies Reform Act 1998* with a new scheme to enhance—
>
> (a) the certainty and fairness of retail leasing arrangements between landlords and tenants; and
>
> (b) the mechanisms available to resolve disputes concerning leases of retail premises.
>
> …
>
> **3. Definitions**
>
> In this Act—
>
> …
>
> ***outgoings*** means a landlord's outgoings on account of any of the following—
>
> (a) the expenses directly attributable to the operation, maintenance or repair of—
>
> (i) the building in which the retail premises are located or any other building or area owned by the landlord and used in association with the building in which the retail premises are located; or

(ii) in the case of retail premises in a retail shopping centre, any building in the centre or any areas used in association with a building in the centre;

(b) rates, taxes, levies, premiums or charges payable by the landlord because the landlord is—

(i) the owner or occupier of a building referred to in paragraph (a) or of the land on which such a building is erected; or

(ii) the supplier of a taxable supply, within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth, in respect of any such building or land;

…

29. Meaning of *outgoings* to which a tenant contributes

In this Part, ***outgoings*** to which a tenant under a retail premises lease contributes or is liable to contribute means any outgoings (as defined in section 3) in respect of which the tenant is liable under the lease to make any payment to the landlord.

30. Alterations to premises to enable fit out

(1) A retail premises lease where the retail premises are located in a retail shopping centre is taken to provide as set out in this section if the tenant is liable under the lease to pay an amount for the costs of, or associated with, carrying out works to alter any of the following to enable the proposed fit out of the premises—

(a) the electrical reticulation at the premises;

(b) the automatic sprinkler system at the premises;

(c) the power or gas supply to the premises;

(d) the layout of air-conditioning ducts or registers;

(e) the location of exhausts;

(f) telephone or electrical cabling;

(g) such other things as are prescribed by the regulations.

(2) The works must be carried out by a person or persons with suitable skills and experience engaged, or approved, by the landlord.

(3) The maximum cost of the works, or a basis or formula with respect to those costs, is to be agreed in writing by the landlord and tenant before the works begin.

(4) If the landlord and tenant cannot agree on the maximum cost of the works or a basis or formula with respect to those costs, the maximum cost is to be determined by an independent quantity surveyor appointed by—

(a) agreement between the landlord and tenant; or

(b) if there is no agreement, the Small Business Commissioner—

and the landlord and tenant are to pay the costs of the independent quantity surveyor in equal shares.

(5) The tenant is not liable to pay an amount in respect of the works that is more than the maximum cost agreed by the landlord and tenant, or determined by the independent quantity surveyor, as the case may be.

…

39. Recovery of outgoings from the tenant

(1) The tenant under a retail premises lease is not liable to pay an amount to the landlord in respect of outgoings except in accordance with provisions of the lease that specify—

(a) the outgoings that are to be regarded as recoverable; and

(b) in a manner consistent with the regulations, how the amount of those outgoings will be determined and how they will be apportioned to the tenant; and

(c) how those outgoings or any part of them may be recovered by the landlord from the tenant.

(2) The regulations may prescribe the manner in which the amount of outgoings may be determined and apportioned to a tenant.

…

41. Capital costs not recoverable

(1) Subject to subsection (2), a provision in a retail premises lease is void to the extent that it requires the tenant to pay an amount in respect of the capital costs of—

(a) the building in which the retail premises are located; or

(b) any building in a retail shopping centre in which the retail premises are located; or

(c) any areas used in association with a building referred to in paragraph (a) or (b); or

(d) plant in a building referred to in paragraph (a) or (b).

(2) Subsection (1) does not operate to render void a provision in a retail premises lease requiring the tenant to undertake capital works at the tenant's own cost.

…

46. Estimate of outgoings

(1) A retail premises lease is taken to provide as set out in this section.

(2) 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.

(3) The tenant must be given the estimate of outgoings—

(a) before the lease is entered into; and

(b) 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.

(4) 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 this section until the tenant is given that estimate.

47. Statement of outgoings

(1) A retail premises lease is taken to provide as set out in this section.

(2) The landlord must prepare a written statement that details all expenditure by the landlord, in each of the landlord's accounting periods during the term of the lease, on account of outgoings to which the tenant is liable to contribute.

…

48. Adjustment of contributions to outgoings

(1) A retail premises lease is taken to provide as set out in this section.

(2) There is to be an adjustment between the landlord and tenant for each of the landlord's accounting periods during the term of the lease to take account of any underpayment or overpayment by the tenant in respect of outgoings during that period.

…

51. Liability for costs associated with lease

(1) A landlord under a retail premises lease is not able to claim from any person (including the tenant) the landlord's legal or other expenses relating to—

(a) the negotiation, preparation or execution of the lease; or

(b) obtaining the consent of a mortgagee to the lease; or

(c) the landlord's compliance with this Act.

(2) However, subsection (1) 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 a sub-lease, including investigating a proposed assignee or sub-tenant and obtaining any necessary consents to the assignment or sub-lease.

52. Landlord's liability for repairs

(1) A retail premises lease is taken to provide as set out in this section.

(2) The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into—

(a) the structure of, and fixtures in, the retail premises; and

(b) plant and equipment at the retail premises; and

(c) the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.

(3) However, the landlord is not responsible for maintaining those things if—

(a) the need for the repair arises out of misuse by the tenant; or

(b) the tenant is entitled or required to remove the thing at the end of the lease.

(4) The tenant may arrange for urgent repairs (for which the landlord is responsible under this section or under the terms and conditions of the lease) to be carried out to those things if—

(a) the repairs are necessary to fix or remedy a fault or damage that has or causes a substantial effect on or to the tenant's business at the premises; and

(b) the tenant is unable to get the landlord or the landlord's agent to carry out the repairs despite having taken reasonable steps to arrange for the landlord or agent to do so.

(5) If the tenant carries out those repairs—

(a) the tenant must give the landlord written notice of the repairs and the cost within 14 days after the repairs are carried out; and

(b) the landlord is liable to reimburse the tenant for the reasonable cost of the repairs and may not recover that cost or any part of it as an outgoing.

…

94. The Act prevails over retail premises leases, agreements etc.

(1) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it is contrary to or inconsistent with anything in this Act (including anything that the lease is taken to include or provide because of a provision of this Act).

…

Inconsistency

24 The crucial issue in the application of s 251 of the *Building Act* and the provisions of the *RLA* is to determine the correct approach to be taken to inconsistency. This is because Parliament has enacted inexcludable laws governing the relationship of landlord and tenant under a retail premises lease, while at the same time leaving the parties freedom of contract in other respects. When is a term of a retail premises lease rendered void in whole or part for inconsistency with a statutory provision? The answer stems from the test to be adopted for inconsistency as this determines the extent (if any) to which the parties can contract out of a statutory provision or circumvent its effective operation.

25 Determination of the test to be adopted for inconsistency is a pivotal issue in this application, as the test adopted stands to be applied in the interpretation of retail premises leases generally. Section 251(6) of the *Building Act* and s 94 of the *RLA* address the effect of inconsistency rather than what is necessary for there to be inconsistency. Parliament has not provided any statutory test of inconsistency applicable to retail premises leases leaving it to the courts and the Tribunal to determine the correct test.

26 There are four possible tests that might be adopted to determine whether a contractual term is inconsistent with a statutory provision:

(1) There is an established body of authority in the High Court of Australia dealing with inconsistency arising from s 109 of the Constitution.[7] Section 109 provides that where the law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid. There are three main tests that have been enunciated by the High Court in constitutional cases. The first is whether it is impossible to obey both laws simultaneously.[8] The second is whether one law confers a right which the other law purports to take away.[9] This test is directed at the situation where one law confers a legal right, entitlement, privilege or benefit which the other law seeks to take away or diminish. The third test is known as the 'covering the field' test. It arises when a Commonwealth law shows a legislative intention that the law passed by the Commonwealth shall be the only law that regulates the subject matter. Any State law that interferes with, or intrudes onto the field covered by the Commonwealth law will be

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7 *Commonwealth of Australia Constitution Act 1900* (Imp).

8 See for example, *R v Licensing Court of Brisbane, ex parte Daniell* (1920) 28 CLR 23.

9 *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J); *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 478 (Knox CJ and Gavan Duffy J); *Ansett Transport Industries (Operations) Pty Ltd v Waverley* (1980) 142 CLR 237, 259-60 (Mason J); *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388 396-7 [9], 398-9 [15] (Toohey and Gaudron JJ, Dean, Dawson and McHugh JJ concurring).

invalid.[10] The three tests are not exclusive, with laws assessed as valid or invalid by reference to all three tests.[11]

(2) A second test that might be adopted is a test of the nature of that found in section 150 of the Australian Consumer Law.[12] Section 150 is used to determine whether a term of a contract is inconsistent with a provision of Part 3-5 of that law. Section 150 states:

> **Application of all or any provisions of this Part etc. not to be excluded or modified**
>
> (1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term) that purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying, any of the following is void:
>
> (a) the application of all or any of the provisions of this Part;
>
> (b) the exercise of a right conferred by any of those provisions;
>
> (c) any liability under any of those provisions.
>
> (2) A term of a contract is not taken to exclude, restrict or modify the application of a provision of this Part unless the term does so expressly or is inconsistent with that provision.

This test makes it clear that the exclusion, restriction or modification by contract of a right conferred or a liability imposed by statute will result in an inconsistency.

(3) A third test that might be applied in determining whether a term of a retail premises lease or agreement is rendered void or inoperative for inconsistency with a statutory provision is that adopted by the High Court of Australia in *Caltex Oil (Aust) Pty Ltd v Best*.[13]

> An express statutory prohibition against contracting out renders void or inoperative contractual provisions which are inconsistent with the statute. Inconsistency between contract and statute is not confined to literal conflicts or collisions between the contractual provisions and the statutory provisions. Inconsistency in this context arises whenever there is a conflict between a contractual provision or the operation of such a provision and the purpose or policy of the statute. So, if the operation of a contractual provision defeats or circumvents the

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10 See *ex parte McLean* (1930) 43 CLR 472; *Re Credit Tribunal; ex parte General Motors Acceptance Corp, Australia* (1977) 137 CLR 545, 563 (Mason J); *Miller v Miller* (1978) 141 CLR 269, 275 (Barwick CJ).

11 See *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.

12 *Competition and Consumer Act 2010* (Cth), Schedule 2.

13 (1990) 170 CLR 516 ('*Caltex Oil*').

> statutory purpose or policy, then the provision is inconsistent in the relevant sense and falls within the injunction against contracting out.
>
> The principle that it is not permissible to do indirectly what is prohibited directly, which is expressed in the maxim quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud, is a more traditional general statement of the same proposition. It has been acknowledged that, in conformity with this principle, the adoption of a circuitous devise with a view to avoiding the need to comply with a constitutional requirement will be of no avail.[14]

(4) A fourth test that might be adopted is a test that is confined solely to direct inconsistency in the form of literal conflicts or collisions between contractual terms and statutory provisions. In all other respects, the parties to retail premises leases would enjoy freedom of contract. The test offers a narrow approach to inconsistency and seeks to maximise freedom of contract as against the operation of statutory provisions. This approach to inconsistency is essentially the approach adopted in the submissions made on behalf of the Shopping Centre Council and REIV.

27 I am of the opinion that the test propounded in *Caltex Oil* is the preferred test, and should be applied when considering inconsistency in the context of s 221 of the *Building Act*, and the provisions of the *RLA*. I prefer the *Caltex Oil* test to the other tests of inconsistency for these reasons:

(1) the *Caltex Oil* test is directed at inconsistency between a statute and a term of a contract– not between statute and statute where different considerations including constitutional considerations of the relationship between the Commonwealth and the States arise;

(2) the *Caltex Oil* test is a decision of the High Court, and is of the highest authority;

(3) adoption of the *Caltex Oil* would provide greater certainty, and a fair balance between the interests of landlords and tenants to retail premises leases being the first main purpose of the *RLA*;[15]

(4) adoption of the *Caltex Oil* test would ensure that the statutory purpose or policy underlying s 251 of the *Building Act* and the *RLA* is given weight in decision making;

(5) the *Caltex Oil* test gives recognition to the principle that a contractual provision that defeats, or circumvents a statutory purpose or policy should be treated as inconsistent with the statutory purpose underlying the legislation in question;

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14 Ibid 522-3 (Mason CJ, Gaudron and McHugh JJ; Dawson J agreeing) (citations omitted).

15 *RLA* s 1(a).

(6) the *Caltex Oil* test gives recognition to the long-standing maxim that it is not possible to do indirectly what is prohibited directly;[16] and

(7) adoption of this principle recognises that courts should not readily permit the purpose and policy underlying statutes to be defeated by artificial schemes or contrivances intended to avoid or circumvent compliance.

28 The *Caltex Oil* test has three limbs. Each is considered when determining whether a contractual provision is inconsistent with a statute:

(1) inconsistency includes, but is not confined to literal conflicts or collisions between the contractual provisions and the statutory provisions;

(2) inconsistency also arises whenever there is a conflict between a contractual provision or the operation of such a provision and the purpose or policy of the statute; and

(3) if the operation of a contractual provision defeats or circumvents the statutory purpose or policy, then the provision is inconsistent in the relevant sense and falls within the injunction against contracting out.

29 In determining the purpose or policy of a statutory provision, it is appropriate to have regard to the principles set out in *Certain Lloyd's Underwriters subscribing the Contract No IH00AAQS v Cross*[17] where French CJ and Hayne J said:

> 23. It is as well to begin consideration of this issue by re-stating some basic principles. It is convenient to do that by reference to the reasons of the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:
>
> > "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."
>
> 24. The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose

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16 The maxim '*quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*' acknowledges the principle that adoption of a circuitous device with a view to avoiding the need to comply with a legislative or constitutional requirement will be of no avail – see *Caltex Oil* (1990) 170 CLR 516, 522-3 and the cases cited at that reference; and *ICM Agriculture Pty Ltd. The Commonwealth* (2009) 240 CLR 140, 197 [134] (Hayne, Kiefel and Bell JJ).

17 (2012) 248 CLR 378.

of *all* the provisions of the statute" (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision "by reference to the language of the instrument viewed as a whole", and "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed".

25. Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative "intention" is to use a metaphor. Use of that metaphor must not mislead. "[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have" (emphasis added). And as the plurality went on to say in *Project Blue Sky*:

> "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

To similar effect, the majority in *Lacey v Attorney-General (Qld)* said:

> "Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts."

The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention.

26. A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose. The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions. As Spigelman CJ, writing extra-curially, correctly said:

> "Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. *It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case.*"

(Emphasis added.) And as the plurality said in *Australian Education Union v Department of Education and Children's Services*:

> "In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose."[18]

Observations concerning s 250 and 251 of the *Building Act*

30 Sections 250 and 251 are in Part 13 of the *Building Act*, which is entitled 'General Enforcement Provisions'. They form part of Division 4 which is titled 'Offences and penalties'. Section 250 gives a statutory power to the owner of a building or land who is required to carry out any work or do any other thing under the *Building Act* or *Building Regulations*, after giving a written notice, to require the occupier to permit the owner and any other person to enter the building or land and carry out the work or do the thing.

31 Section 251(1) of the *Building Act* recognises that the owner of a building or land may be required by the *Building Act* or *Building Regulations* to 'carry out any work' or to 'do any other thing'. It has application if the owner does not meet these obligations, providing statutory authorisation for the occupier or registered mortgagee of the building or land to 'carry out the work' or 'do the thing'. Section 251(2) then permits the occupier to recover expenses from the owner as a debt due to the occupier, or set off the expenses against rent.

32 Subsection 251(2) does not specify any particular time period for the owner to do the work required by the *Building Act* or the *Building Regulations* As a result, the law requires the work to be carried out, or the thing to be done within a reasonable time in the circumstances.[19]

33 The intention of Parliament underpinning s 251 is to ensure that work required to be carried out or things required to be done by an owner of a building or land under the *Building Act* or *Building Regulations* are completed by the owner, and if the owner defaults, to authorise their completion by the occupier at the owner's expense.

34 In enacting s 251, Parliament intended to affect the rights and obligations of owners and occupiers generally. Section 251 extends to buildings of all types, and is not confined to retail premises leases. Section 251(6) provides for s 251 to apply 'despite any covenant or agreement to the contrary'. As a

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18 Ibid 388-90 [23] – [26] (citations omitted).

19 See *York Air Conditioning & Refrigeration (Australasia) Pty Ltd v Commonwealth* (1949) 80 CLR 11, 62 (Dixon J) and the other authorities cited in Lewison and Hughes, *The Interpretation of Contracts in Australia* (Lawbook Co) (2012) [6.15].

result, s 251 applies to all buildings and land the subject of requirements under the *Building Act* or *Building Regulations*, where the requirements are placed on the owner of the building or land. It operates to displace any covenant in a retail premises lease or agreement to the contrary.[20]

Key steps that assist in resolving disputes concerning the operation of s 251 of the *Building Act* and the *Building Regulations*

35 The first step in the resolution of disputes under s 251 of the *Building Act* is to identify the relevant regulation engaged by s 251 of the *Building Act*, the nature of the obligation imposed under the regulation, and the party on whom the obligation is imposed. Section 251(1) is engaged only if the obligation is placed on the owner of a building or land. If the obligation is placed on the owner, the regulation may specify that compliance is to be by the owner or that the owner is to ensure that a result or standard is reached.[21]

36 The second step is to identify the terms of the retail premises lease that relate or may relate to the obligation that arises under the relevant regulation and s 251 of the *Building Act*. There may be a covenant to maintain or repair, or a covenant relating to reimbursement or indemnity for expenses or other terms that are relevant.

37 The third step is to identify whether there is any inconsistency between the covenants or agreements of the parties and the relevant regulation or s 251 itself. Subsection 251(6) of the *Building Act* directs an inquiry as to whether there is any covenant or term of the retail premises lease or any other agreement that is inconsistent with the regulation engaged by s 251(1), or with s 251 itself. The statement in s 251(6) that the section applies 'despite any covenant or agreement to the contrary' should be taken as incorporating the regulations found in the *Building Regulations* when those regulations are engaged by s 251(1) of the *Building Act* – or in other words the regulations that have the effect of requiring an owner of a building or land 'to carry out any work or do any other thing' in the terms of s 251(1).

38 In order to determine whether a covenant or agreement is 'to the contrary' of a regulation engaged by s 251(1) or s 251 itself, it is necessary to apply the *Caltex Oil* test. In addition, to any literal inconsistency, there will be an inconsistency if there is a conflict between a term of a retail premises lease or the operation of such a provision and the purpose or policy of the

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20 The predecessors of s 251 extend back to clause 174 of the *Building Control Bill 1980* (Vic). Accompanying Notes on Clauses described cl 174 as proving "that an occupier may with the consent of the municipal council execute certain works required by this Act if the owner of the building fails to do the work". Following the withdrawal of this bill for further consultation, cl 173 was amended to a substantially similar form to the current s 251 and enacted in the *Building Control Act 1981* (Vic). Accompanying Notes on Clauses to the 1981 Act describe s 173 as providing "that in certain circumstances an occupier or registered mortgagee may act in default of an owner".

21 There may also be other classes of regulation to be considered in the future, but these are the two classes that were the subject of submissions and which have been discussed in the decided cases.

relevant regulation or s 251 itself. Such a conflict includes an attempt to defeat or circumvent the statutory purpose or policy.

39 The fourth step is to determine the extent of any inconsistency between the relevant regulation and s 251 and the covenants and agreements of the parties. Inconsistent covenants and agreements are disregarded to the extent of the inconsistency.

Building regulations that are to be complied with by the owner

40 The *Building Regulations* contain regulations which impose obligations on owners and occupiers. There are two main classes of regulations which impose duties on owners. The first main class includes regulations that specify that they are to be complied with by the owner. An example is r 709 which requires the installation of smoke alarms and smoke detection systems to comply with specified Australian standards. Another is r 1205 provides that owners must comply with a maintenance determination in relation to that building or place.

41 While an owner may use employees or retain contractors to perform the work needed to meet their obligations under these regulations, these obligations are imposed upon, and must be met by the owner. Application of the *Caltex Oil* case leads to the conclusion that any term of a retail premises lease which seeks to transfer either the obligation to do the work or the cost of doing the work onto an occupier or tenant would be void as conflicting with the purpose and policy of the regulation.

42 There are two additional observations:

(1) In circumstances where the owner fails to meet the obligations imposed by a regulation which must then be met by the occupier, the occupier has the right to carry out the work under s 251(1). In this event, the occupier may recover the costs necessarily incurred as a debt due to the occupier or deduct the expenses from or set them off from any rental due or that may become due to the owner. As these rights arise under s 251(1) and (2) of the *Building Act*, they cannot be excluded by a term of a retail premises lease.

(2) The second observation relates to the *RLA*. The landlord cannot recover expenses other than in compliance with the *RLA*. This is discussed later in these reasons.

43 An example of this class of case is provided by *Chen v Panmure Hotel Pty Ltd (Retail Tenancies)*.[22] The building surveyor of the local shire sent a letter to Ms Chen, the owner, drawing her attention to r 709 of the *Building Regulations* which required the installation of 'hard wired smoke detectors in certain existing residential buildings'. The letter referred to a requirement effective from 14 June 2009 requiring a building constructed prior to 1 July 2003 to be fitted with 'a fire sprinkler system'. Ms Chen

[22] [2007] VCAT 2464 ('*Chen v Panmure*').

contended that the tenant was obliged to carry out and meet the cost of the installation of the smoke alarms.

44 Deputy President Macnamara (as he then was) held that s 251 applied, and said that the obligation to carry out the works and to bear the costs of the works could not be imposed on the tenant:

> It would in my view be inconsistent with the law's abhorrence of circuity for me to make an order which purports to impose the obligation of carrying out these works upon the lessee when the *Building Act* itself has clearly imposed the obligation on the lessor and given the lessee the right to recover the cost of carrying out the works as against the lessee despite any provision in the lease to the contrary.

45 *Chen v Panmure* stands for the proposition that if the regulation requires the landlord to perform the work the landlord may not require the tenant to perform the work through a stipulation in the retail premises lease or in a separate agreement. The obligation to perform the work, and the resulting cost of the work has been placed on the landlord. If the landlord defaults, and the tenant carries out the work, the tenant can recover from the landlord the cost of compliance with the requirement.

46 By contrast, it was the tenant as occupier on whom the obligation to maintain emergency exits under r 1218 was imposed. Section 251 was not available to trump the provisions of the lease. However, as the works were capital works, the tenant was protected by s 41(1) of the *RLA*.

47 Although the decision of the High Court in *Caltex Oil* was not cited to Deputy President Macnamara in *Chen v Panmure*, the result and reasons are entirely consistent with the outcome that would have been obtained had the *Caltex Oil* test been applied. A covenant in a lease seeking to transfer to the tenant performance of a statutory obligation imposed on the landlord personally is inconsistent with the purpose and policy of the statutory provision that the landlord is to perform the obligation. It is impermissible for a landlord to circumvent such a regulation by transferring the obligation to the tenant.

Building regulations requiring that the owner ensure that a result is achieved or standard attained

48 The second main class of regulation discussed in the submissions made to the Tribunal consists of regulations which provide that an owner 'must ensure' that a specific result is achieved or standard is attained in relation to a building or land. This class requires an owner to ensure that the result is achieved or the standard is attained, but not necessarily by the owner's own endeavours.

49 Regulations of this nature when taken with s 251 of the Building Act will have the following consequences in the context of a retail premises lease:

(1) while the landlord has to ensure that the result is achieved, or the standard required by the regulation is met, the landlord does not have to do so by personal performance;

(2) the landlord may agree with the tenant in the retail premises lease for the tenant to perform some or all of the work necessary to achieve the result or attain the standard;

(3) a regulation of the 'must ensure' class does not preclude a landlord from agreeing with a tenant under a retail premises lease for the tenant to assist the landlord to achieve the specified result or attain the standard required by the regulation;

(4) nonetheless it would be contrary to the purpose of the regulation that the landlord is to be responsible for the achievement of the result, or attainment of the standard, if the landlord were to seek to divest the obligation imposed by the regulation, or to seek to transfer the financial burden of compliance with the regulation to the tenant; and

(5) a term of a retail premises lease or contractual term which seeks to transfer the cost of compliance from the landlord to the tenant is void.

50 An example of this class of case is *McIntyre v Kucminska Holdings Pty Ltd.*[23] In this case, the Tribunal considered r 1217(a) of the *Building Regulations* which provided that the owner of a building or place of public entertainment 'must ensure that any essential safety measure required to be provided in relation to that building or place …' is 'maintained in a state which enables the essential safety measure to fulfil its purpose'.

51 The Tribunal considered that the words of the provision made it clear that the obligation to bear the cost of the ESM ultimately rested with the landlord. It was not open to a landlord to contract out of that obligation.

52 However, the terms of the lease required the tenant to arrange for an essential safety measures report and to purchase whatever fire fighting equipment was required in order to comply with such a report. Section 251 of the *Building Act* does not prohibit a landlord from placing such an obligation on the tenant, save and except that the landlord must reimburse the tenant for the costs associated with the compliance, failing which the tenant was entitled to set off these costs against rent due and payable under the lease. It was significant that r 1217 stated that the owner must ensure that the ESMs are carried out. The regulation does not prohibit a landlord from placing a contractual obligation on the tenant to undertake the work, albeit that the landlord remained legislatively responsible to ensure that the work is carried out.

53 The Tribunal said:

> 70. Indeed, it may be beneficial, from a practical viewpoint, for the tenant to implement whatever remedial work is required in

[23] [2012] VCAT 1766 (SM Riegler).

order to comply with an *essential safety measures* report, having regard to the fact that the tenant is in occupation at the relevant time and is therefore better placed to minimise disruption to its business operations.

71. Moreover, it seems that the *Building Act 1993* contemplates such a scenario, given that the Act expressly provides for the tenant to undertake that work and recoup its expenditure by setting off the costs of compliance against rent. Therefore, I do not consider that a contractual obligation, placed on the tenant to undertake whatever work is required in order to comply with an *essential safety measures* report, offends s 251of the *Building Act 1993*. The contractual and the statutory obligations are able to sit side-by-side.

54 Application of the test stated by the High Court in *Caltex Oil* leads to a similar result. It would be inconsistent with the purpose and policy of r 1217 when taken with s 251 of the *Building Act*, for the landlord to seek to transfer to the tenant its overall responsibility to comply with that regulation. Equally, it would be inconsistent with the purpose and policy of r 1217 when taken with s 251 to seek to pass financial responsibility for compliance onto the tenant. It is not inconsistent with r 1217 for the tenant to contract with the landlord to perform acts which will assist the landlord to comply with r 1217 provided that the tenant is able to set-off the costs of compliance against the rent, or to be reimbursed by the landlord for compliance costs.

Observations concerning provisions of the *RLA*

55 Section 52(2) of the *RLA* provides that the landlord is responsible for maintaining the premises in a condition consistent with the condition of the premises when the retail premises lease was entered into. [24] This responsibility extends to:

(a) the structure of, and fixtures in, the retail premises;

(b) plant and equipment at the retail premises; and

(c) the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.

56 Section 52(1) provides that a retail premises lease is taken to provide as set out in that section. Terms of the retail premises lease inconsistent with the provisions of the *RLA* are void.

57 Section 94(1) provides that a provision of a retail premises lease or of an agreement is void to the extent that it is contrary to or inconsistent with anything in the *RLA* (including anything that the lease is taken to include or provide because of a provision of the *RLA*).

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[24] See [19] above.

58 Outgoings may be recovered by a landlord from a tenant in accordance with the provisions of the *RLA*. As defined in s 3, 'outgoings' include the expenses directly attributed to the operation, maintenance or repair of the building in which the retail premises are located, or any other building or area owned by the landlord and used in association with the building in which the retail premises are located. Outgoings may only be recovered in accordance with provisions of the lease that specify –

(a) the outgoings that are regarded as recoverable;

(b) in a manner consistent with the regulations, how the amount of those outgoings will be determined and how they will be apportioned to the tenant; and

(c) how those outgoings or any part of them may be recovered by the landlord from the tenant.[25]

59 The *RLA* imposes a number of requirements on landlords before outgoings can be recovered. A written estimate of the outgoings to which the tenant is liable to contribute under the lease must be provided to the tenant itemising the outgoings 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 the period.[26] The landlord must also prepare a written statement that details all expenditure by the landlord, in each of the landlord's accounting periods during the term of the lease, on account of outgoings to which the tenant is liable to contribute. The statement must be made available to the tenant at least once in relation to expenditure during each of the landlord's accounting periods during the term of the lease, and be given to the tenant within 3 months after the end of the accounting period to which it relates.[27] Outgoings statements must be prepared in accordance with applicable accounting standards and meet other requirements.[28]

60 Section 41(1) voids a provision in a retail premises lease to the extent that it requires the tenant to pay an amount in respect of the capital costs of:

(a) the building in which the retail premises are located;

(b) any building in a retail shopping centre in which the retail premises are located;

(c) any areas used in association with a building referred to in paragraph (a) or (b); or

(d) plant in a building referred to in paragraph (a) or (b).

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25 *RLA* s 39.
26 Ibid ss 46(2)-(3).
27 Ibid ss 47(2)-(3).
28 Ibid ss 47(5)-(7).

61 Section 41(1) does not apply if the retail premises lease contains a provision requiring the tenant to undertake capital works at the tenant's own cost.[29]

Key steps that assist in resolving disputes concerning the effect of the *RLA* on the interpretation of retail premises leases

62 The first step in the resolution of disputes as to the effect of the *RLA* on retail premises leases is to identify the relevant terms of the retail premises lease. These are the terms agreed by the parties set out in writing in the lease, and those incorporated by the *RLA* into the lease. Many of the sections of the *RLA* provide that a retail premises lease is taken to include the substance of the respective sections as if they were terms of the lease.

63 The second step is to determine whether any term agreed by the parties and found in the retail premises lease is inconsistent with any term of the retail premises lease imported into the lease by the *RLA*, or any provision of the *RLA* whether or not imported into the retail premises lease as a term.

64 The terms included in the retail premises lease by operation of the *RLA* override inconsistent contractual terms. Any provision of a retail premises lease or agreement or arrangement between the parties to a retail premises lease is void to the extent that it is contrary to or inconsistent with any term imported into a retail premises lease by the *RLA* or if it is contrary to or inconsistent with any provision of the *RLA*, whether or not the retail premises lease takes effect as if the provision was a term of the lease.[30]

65 As I have said, the appropriate test of inconsistency is that set out by the High Court in the *Caltex Oil* case. In addition to any literal inconsistency or collision between contractual and statutory provisions, a contractual provision will be inconsistent with a statutory provision if there is a conflict between the contractual provision or the operation of a contractual provision, and the purpose or policy of the statutory provision. If the operation of the contractual provision defeats or circumvents the statutory purpose or policy of the statutory provision then the provision is inconsistent with the statutory provision.

66 The third step is to interpret the lease. Interpretation of the lease proceeds on the basis that any inconsistent term is void to the extent it is contrary to or inconsistent with the provisions of the *RLA*. In some cases, it may be necessary to disregard the inconsistent term entirely.

The landlord's liability for repairs

67 The *RLA*, as part of its main purpose, is intended to enhance certainty and fairness of retail leasing arrangements between landlords and tenants.[31] Section 52(2) imposes an obligation requiring the landlord to maintain the

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29 Ibid s 41(2).
30 Ibid s 94.
31 Ibid s 1(a).

premises in a condition consistent with the condition of the premises when the retail premises lease was entered into, unless the need for repair arises out of misuse by the tenant, or the tenant is entitled or required to remove the thing at the end of the lease.[32]

68 Section 52(2) was amended into its current form in 2005.[33]. Prior to its amendment in 2005, s 52 of the *RLA* provided that the landlord was responsible for maintaining the items listed in s 52(2)(a)-(c) in 'good repair'. The *2005 Act* reduced the landlord's responsibility to a responsibility for maintaining the listed items in a condition consistent with the condition of the premises when the retail premises lease was entered into. This may be a standard less than good repair if that was the condition of the premises at the commencement of the retail premises lease.

69 The *2005 Act* added a footnote under s 52(5). The footnote refers to s 39 and 41 of the *RLA* dealing with outgoings and capital costs respectively.[34]

70 The Explanatory Memorandum for the *Retail Leases Bill 2003* referred to clause 52 in the following terms:

> Clause 52 provides for the circumstances where urgent repairs to the premises have to be made. The landlord is responsible for maintaining the premises in good repair, (except for tenants' fixtures, etc or where the repairs result from the tenants' misuse of the premises) but tenants are allowed to arrange urgent repairs, at the landlord's expense, where the fault affects their business substantially and they made reasonable efforts to get the landlord to fix the problem. Tenants must give the landlord a written notice of the repairs and costs within 14 days of the repairs being made.

71 By contrast, the Explanatory Memorandum for the *2005 Act* states:

> Clause 25
>
> …
>
> Sub-clause (5) amends section 52(5)(b) of the Principal Act to clarify that a landlord cannot recover from the tenant the cost of urgent repairs as an outgoing.
>
> Sub-clause (6) inserts a note at the foot of section 52(5) of the Principal Act regarding sections 39 and 41. The effect of the note is to highlight other provisions in the Act which, together with the application of section 52 of the Act, clarify that while the landlord is responsible to arrange and carry out the repairs under sub-section (2), the cost of those repairs, other than capital costs and the cost of urgent repairs, may be passed on to the tenant if they have been specified in the lease as recoverable outgoings under the lease.

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32 Ibid s 52(3)(a) and (b).

33 *Retail (Leases) Amendment Act 2005* (Vic) (the '*2005 Act*') s 25(1) and (2)(a).

34 The footnote is not part of the *RLA* – see *Interpretation of Legislation Act 1984* (Vic) s 36(3) – but may be given consideration as part of the interpretive exercise: s 35(b)(i).

According to the Explanatory Memorandum, the adoption of the footnote to s 52 was intended to clarify that while the landlord was responsible for arranging and carrying out repairs under s 52(2), the costs of those repairs other than capital costs and the cost of urgent repairs may be passed onto to the tenant if they have been specified as recoverable outgoings under the lease.[35]

72 A statutory provision placing the responsibility for maintaining the condition of the structure, fixtures, plant and equipment, appliances, fittings and fixtures relating to utilities and other services on the landlord has a clear purpose and policy – namely that Parliament expects and requires the landlord to meet this responsibility. Applying the *Caltex Oil* test of inconsistency, any contractual provision that is inconsistent with the purpose or policy underlying the statutory provision is inconsistent, and therefore void to the extent of the inconsistency.

73 This conclusion as to the legislative purpose and policy underlying s 52(2) is strengthened by s 52(3). As far as s 52(3) is concerned, it would not be necessary to exempt a landlord from responsibility for maintaining the things mentioned in s 52(2) in circumstances where the need for repair arose out of tenant's misuse or related to the tenants' fixtures, unless the landlord would have responsibility for those matters in the absence of the exemption.

74 Section 52(4) makes specific provision for urgent repairs for which the landlord is responsible (whether under s 52(2) or under the terms and conditions of the lease). Section 52(5) permits a tenant who carries out these repairs to obtain reimbursement of costs from the landlord. It would not be necessary to make specific provision in favour of the tenant as is found in s 52(4) and (5) unless the landlord were responsible for maintaining the items listed in s 52(2) at the landlord's expense.

75 The note inserted below s 52(5) by the *2005 Act* does not alter these conclusions. While referring to ss 39 and 41, there is nothing in the note that is contrary to what is otherwise the clear meaning of s 52(2)-(5). The references in the note are appropriate in any event. As the note highlights, outgoings including repairs, and capital costs are addressed in s 39 and 41. These sections apply to costs and expenditure falling outside s 52.

76 The statements made under clause 25 of the Explanatory Memorandum are misconceived. The note does not have the effect suggested. It does not affect the interpretation of the provisions of the *RLA*. The consequence suggested in the note is not achieved by the substantive provisions of s 52(2)-(5). It could hardly be otherwise when s 52(2) places on the landlord the responsibility for maintaining a standard consistent with the condition of the premises when the retail premises lease was entered into,

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35 The explanatory memorandum is not part of the *RLA* but may be considered in its interpretation – See *Interpretation of Legislation Act 1984* (Vic) ss 36(3D), 35(a)(iii).

while ss 52(1) and 94 render this responsibility an inexcludable term of every retail premises lease in Victoria.

77 In *Café Dansk Pty Ltd v Shiel*,[36] Deputy President Macnamara stated:

> Mr Shiel in his evidence said that he attended a seminar conducted by the Real Estate Institute of Victoria which advocated this same view. It was apparently in reliance upon this view that Mr Shiel in the early version of the disclosure statement included an estimated outgoing of $2000 per annum for repairs and maintenance to the property. In his work *Retail Leases Victoria*, Dr Croft does not appear to refer to the note added to s 52 in 2005. On the suggestion that the landlord's cost of complying with s 52 may be recovered by the landlord as an outgoing Dr Croft said :
>
> > Prior to the amendments effected by the 2005 amending Act, it had been suggested that a landlord may be able to recover the costs for his repair obligations under subs 52(2) from the tenant, but this suggestion would appear to face at least two reasonably substantial difficulties. The first is that under para 51(1)(c) a landlord is not able to claim from any person (including the tenant) the landlord's legal or other expenses relating to the landlord's compliance with the 2003 Act. The other difficulty is that even if the landlord's expenses in complying with subs 52(2) are regarded as falling within the definition of "outgoings" under s 3 of the Act, recovery of outgoings as defined depends upon the operation of ss 29 and 39 which, in turn, depends upon the lease provisions which comply with 39. As the provisions of subs 52(2) are 'implied terms', implied by force of statute and also expressly protected by the provisions of s 94 (which, in subs 94(1) expressly prevents contracting out with respect to 'anything that the lease has taken to include or provide because of the provisions of this Act' ...), the difficulty appears to be substantial.
>
> I find Dr Croft's sceptical views on this point compelling. It would, in my view, make a mockery of s 52 if Parliament having allocated the responsibility for certain repairs to the landlord, the landlord could then send the bill to the tenant for the cost of carrying out those repairs. To attempt to reach this unlikely result by reliance on the note at the end of the section is, to quote Lord Salmon, "like trying to suspend a 3 tonne truck from a cobweb" (*Broome v Cassell & Co* [1971] 2 QB 354, 390). Even if I were wrong on this point, the strategy for a landlord to recover the cost of compliance with his s 52 obligations from the tenant would depend upon there being a covenant in the lease making these amounts recoverable as outgoings. There is no such clause in this lease. The covenants requiring the tenant to carry out the repairs itself do not deal with any outgoings issue.[37]

78 The conclusion that I have reached is the same as the view expressed by Deputy President Macnamara and the sceptical view expressed by Dr Croft

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36 *Café Dansk Pty Ltd v Shiel (Retail Tenancies)* [2009] VCAT 36 ('*Café Dansk v Shiel*').
37 Ibid [43]-[44].

in his work *Retail Leases Victoria*.[38] While it does not appear that the erroneous content under clause 25 of the Explanatory Memorandum was referred to Deputy President Macnamara when he decided *Café Dansk v Shiel*, it is most unlikely that it would have made any difference to his decision having regard to his strong conclusions and reasons for decision.

79 Assistance as to the meaning and effect of s 52(2)(a)-(c) can also be found in the decisions of the Tribunal.[39]

Capital costs and outgoings

80 Section 41(1) renders void any provision in a retail premises lease including to the extent that it requires the tenant to pay an amount in respect of capital costs of a building, plant in a building, or areas used in association with a building in which the retail premises are located. An exception applies under s 41(2) in relation to a provision in a retail premises lease requiring the tenant to undertake capital works at the tenant's own cost.

81 'Outgoings' are defined in s 3 of the *RLA* to include expenses directly attributable to the operation, maintenance or repair of the building in which the retail premises are located or any other building or area owned by the landlord and used in association with the building in which the retail premises are located. The definition also extends to retail premises in a retail shopping centre, or areas used in association with a building in the centre.

82 Section 39 describes the basis on which a lease may specify that a tenant under a retail premises lease is liable to pay outgoings. The lease must specify:

(1) the outgoings that are to be regarded as recoverable;

(2) in a manner consistent with the regulations how the amount of those outgoings will be determined and how they will be apportioned to the tenant; and

(3) how these outgoings or any part of them may be recovered by the landlord from the tenant.

83 The *Retail Leases Regulations 2013* (Vic)[40] address the determination and apportionment of outgoings and the maximum outgoings that may be claimed.

Does s 251 of the *Building Act* take precedence over s 39 of the *RLA*?

84 The ordinary rule of construction is that the words of statutory provisions should be read harmoniously with all words given effect and reconciled as

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38 LexisNexis, *Retail Leases Victoria* (at Service 27) [70,005].

39 See for example, *My Club Pty Ltd v Somalex Nominees Pty Ltd (Retail Tenancies)* [2008] VCAT 171 (DP Macnamara); *Yan v Wang (Retail Tenancies)* [2008] VCAT 2405 (SM Davis) and *Bretair v Cave (No 2) (Retail Tenancies)* [2013] VCAT 1808 (SM Riegler).

40 *Retail Leases Regulations 2013* (Vic).

a matter or ordinary interpretation.[41] Section 251 operates despite s 39 of the *RLA*, imposing the costs of maintaining ESMs on the landlord in the circumstances described above.

85 Even if s 251 of the *Building Act* were to be regarded as inconsistent with s 39 of the *RLA*, the principle of statutory construction '*generalia specialibus non derogant*', meaning 'where there is a conflict between general and specific provisions, the specific provisions prevail', would lead to the same conclusion. [42]

The meaning and effect of s 51(1)(c) of the *RLA*

86 Section 51(1)(c) provides that a landlord under a retail premises lease is not able to claim from any other person (including the tenant) the landlord's legal or other expenses relating to the landlord's compliance with this Act.

87 The principal purpose of s 51 is to prevent a landlord under a retail premises lease from claiming from any person including the tenant, the landlord's legal expenses relating to:

(1) the negotiation, preparation of execution of the lease;

(2) obtaining the consent of a mortgagee to the lease; and

(3) the landlord's compliance with the *RLA*.

There is one exception afforded by s 51(2). A landlord may claim reasonable legal or other expenses incurred by the landlord in connection with an assignment of a lease or a sublease, including investigating a proposed assignee or sub-tenant and obtaining any necessary consents to the assignment or sub-lease.

88 The protection afforded by s 51(1) extends not only to tenants under a retail premises lease. It extends to 'any person', and will include persons associated with the tenant and guarantors of obligations entered into by the tenant.

89 The uncertainty with s 51(1) arises in the use of the term 'other expenses'. This expression is also used in s 51(2). On one view, the expression 'other expenses' when used in relation to the landlord's compliance with the Act found in s 51(1)(c) might have very wide compass extending to almost any expense of any nature incurred by the landlord in achieving compliance with any provision of the *RLA*.

90 Such a wide meaning would collide with the general scheme of the *RLA* including much of Part 5 – Division 4 dealing with the recovery of outgoings. It is unlikely to be the correct construction. Section 51 must be interpreted in accordance with the Act as a whole. Section 51(1)(c) should

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41 See D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (8th edition) (2014) [4.40], [7.18]-[7.21] and the cases cited at those references.

42 Ibid.

be read together with the other provisions in the *RLA* and as a provision forming part of the scheme of provisions constituting Division 4 of Part 5.

91 In my view, the expression 'other expenses' means expenses arising in the course of the legal services described in s 51(1) such as disbursements by a legal practitioner, or expenses incidental or ancillary to the performance of the legal services referred to in s 51(1). Such a meaning for the expression 'other expenses' has sensible and appropriate application in s 51(2) as it relates to the assignment of lease or sub-lease, the investigation of proposed assignees or sub-tenants, and the obtaining of necessary consents. The meaning is consistent with the concept of an expense as being a debt or obligation incurred rather than a cost which might be incurred in the future.

92 As far as s 51(1)(c) is concerned, the result is that if the landlord seeks legal advice or assistance concerning the landlord's compliance with the *RLA*, the legal costs and expenses associated with the provision of legal services are not recoverable from the tenant or other persons. This interpretation does not conflict with, or negate the operation of the other provisions in Division 4 of Part 5 of the *RLA*.

Conclusion

93 Section 251 of the *Building Act* and the provisions of the *RLA* give rise to complex legal issues of interpretation and are difficult of application to some factual circumstances. The opinions and views set out in these reasons are intended to assist the Commissioner as well as the parties to retail premises leases as to the operative statutory provisions, and their legal effect.

94 The questions asked by the Commissioner for the opinion of the Tribunal are answered in the manner set out in the Tribunal's order.

95 Liberty to apply is reserved to the Commissioner in case there are further or consequential issues which arise in this referral.

Justice Greg Garde AO RFD
President

SCHEDULE

Essential Safety Measures taken from Schedule 9 of the *Building Regulations 2006*[43]

PART 1—BUILDING FIRE INTEGRITY

Column 1 *Item*	*Column 2* *Safety Measure*
1	Building elements required to satisfy prescribed fire-resistance levels
2	Materials and assemblies required to have fire hazard properties
3	Elements required to be non-combustible, provide fire protection, compartmentation or separation
4	Wall-wetting sprinklers (including doors and windows required in conjunction with wall-wetting sprinklers)
5	Fire doors (including sliding fire doors and their associated warning systems) and associated self-closing, automatic closing and latching mechanisms
6	Fire windows (including windows that are automatic or permanently fixed in the closed position)
7	Fire shutters
8	Solid core doors and associated self-closing, automatic closing and latching mechanisms
9	Fire-protection at service penetrations through elements required to be fire-resisting with respect to integrity or insulation, or to have a resistance to the incipient spread of fire
10	Fire protection associated with construction joints, spaces and the like in and between building elements required to be fire-resisting with respect to integrity and insulation
11	Smoke doors and associated self-closing, automatic closing and latching mechanisms
12	Proscenium walls (including proscenium curtains)

PART 2—MEANS OF EGRESS

Column 1 *Item*	*Column 2* *Safety Measure*
1	Paths of travel to exits
2	Discharge from exits (including paths of travel from open spaces to the public roads to which they are connected)

[43] This schedule of essential safety measures was provided by the parties.

Column 1	*Column 2*
Item	*Safety Measure*
3	Exits (including fire-isolated stairways and ramps, non fire-isolated stairways and ramps, stair treads, balustrades and handrails associated with exits, and fire-isolated passageways)
4	Smoke lobbies to fire-isolated exits
5	Open access ramps or balconies for fire-isolated exits
6	Doors (other than fire or smoke doors) in a required exit, forming part of a required exit or in a path of travel to a required exit, and associated self-closing, automatic closing and latching mechanisms

PART 3—SIGNS

Column 1	*Column 2*
Item	*Safety Measure*
1	Exit signs (including direction signs)
2	Signs warning against the use of lifts in the event of fire
3	Warning signs on sliding fire doors and doors to non-required stairways, ramps and escalators
4	Signs, intercommunication systems, or alarm systems on doors of fire-isolated exits stating that re-entry to a storey is available
5	Signs alerting persons that the operation of doors must not be impaired
6	Signs required on doors, in alpine areas, alerting people that they open inwards
7	Fire order notices required in alpine areas

PART 4—LIGHTING

Column 1	*Column 2*
Item	*Safety Measure*
1	Emergency Lighting

PART 5—FIRE FIGHTING SERVICES AND EQUIPMENT

Column 1	*Column 2*
Item	*Safety Measure*
1	Fire hydrant system (including on-site pump set and fire-service booster connection)
2	Fire hose reel system
3	Sprinkler system
4	Portable fire extinguishers

Column 1	*Column 2*
Item	*Safety Measure*
5	Fire control centres (or rooms)

PART 6—AIR HANDLING SYSTEMS

Column 1	*Column 2*
Item	*Safety Measure*
1	Smoke hazard management systems— (a) automatic air pressurisation systems for fire-isolated exits; (b) zone smoke control system; (c) automatic smoke exhaust system; (d) automatic smoke-and-heat vents (including automatic vents for atriums); (e) air-handling systems that do not form part of a smoke hazard management system and which may unduly contribute to the spread of smoke; (f) miscellaneous air handling systems covered by Sections 5 and 11 of AS/NZS 1668.1 serving more than one fire compartment; (g) other air-handling systems.
2	Carpark mechanical ventilation system
3	Atrium smoke control system (see item 1d for smoke and heat vents)

PART 7—AUTOMATIC FIRE DETECTION AND ALARM SYSTEMS

Column 1	*Column 2*
Item	*Safety Measure*
1	Smoke and heat alarm system
2	Smoke and heat detection system
3	Atrium fire detection and alarm system

PART 8—OCCUPANT WARNING SYSTEMS

Column 1	*Column 2*
Item	*Safety Measure*
1	Sound system and intercom system for emergency purposes
2	Building occupant warning system

PART 9—LIFTS

Column 1	*Column 2*
Item	*Safety Measure*
1	Stretcher facilities in lifts
2	Emergency lifts

Column 1	*Column 2*
Item	*Safety Measure*
3	Passenger lift fire service controls

PART 10—STANDBY POWER SUPPLY SYSTEM

Column 1	*Column 2*
Item	*Safety Measure*
1	Standby power supply system

PART 11—BUILDING CLEARANCE AND FIRE APPLIANCES

Column 1	*Column 2*
Item	*Safety Measure*
1	Open space around large isolated buildings
2	Vehicular access around large isolated buildings

PART 12—MECHANICAL VENTILATION AND HOT, WARM AND COOLING WATER SYSTEMS

Column 1	*Column 2*
Item	*Safety Measure*
1	Mechanical ventilation systems incorporating cooling tower systems (other than a system serving only a single sole-occupancy unit in a Class 2 or 3 building or a Class 4 part of a building)
2	Mechanical ventilation systems incorporating Hot and Warm water systems (other than a system serving only a single sole-occupancy unit in a Class 2 or 3 building or a Class 4 part of a building)

Essential Safety Measures taken from Division 1, Part 12 of the *Building (Interim) Regulations 2005* as in force prior to their revocation

Column 1	*Column 2*
Item	*Safety Measure*
1	Building Fire Integrity
2	Means of Egress
3	Signs
4	Fire Fighting Services and Equipment
5	Air Handling Systems
6	Automatic Fire Detection and Alarm Systems
7	Occupant Warning Systems
8	Lifts
9	Standby Power Supply Systems

Column 1	*Column 2*
Item	*Safety Measure*
10	Building Clearance and Fire Appliances

Essential Safety Measures taken from the *Building Regulations 1994* as in force prior to their revocation

Column 1	*Column 2*
Item	*Safety Measure*
1	Air conditioning systems
2	Emergency lifts
3	Emergency lighting
4	Emergency power supply
5	Emergency warning and intercommunication systems
6	Exit doors
7	Exit signs
8	Fire brigade connections
9	Fire control centres
10	Fire control panels
11	Fire curtains
12	Fire dampers
13	Fire detectors and alarm systems
14	Fire doors
15	Fire extinguishers (portable)
16	Fire hose reels
17	Fire hydrants
18	Fire indices for materials
19	Fire isolated lift shafts
20	Fire isolated passageways
21	Fire isolated ramps
22	Fire isolated stairs
23	Fire mains
24	Fire protective coverings
25	Fire rated access panels
26	Fire rated control joints
27	Fire rated materials applied to building elements
28	Fire resisting shafts
29	Fire resisting structures
30	Fire shutters
31	Fire windows

Column 1 *Item*	*Column 2* *Safety Measure*
32	Lightweight construction
33	Mechanical ventilation systems
34	Paths of travel to exits
35	Penetrations in fire-rated structures
36	Smoke alarms
37	Smoke control measures
38	Smoke doors
39	Smoke vents
40	Sprinkler systems
41	Stairwell pressurisation systems
42	Static water storage
43	Vehicular access for large isolated buildings
44	Warning systems associated with lifts