

Australian Property Institute Limited

# MEMBER ALERT

## RETAIL LEASES ACT 2003 (VICTORIA) - DEFINITION OF 'RETAIL PREMISES'

**Reference** Member Alert - Retail Leases Act 2003 (Vic) - Definition of 'Retail Premises'

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## **Retail Leases Act 2003 (Victoria) - definition of 'retail premises'**

The Victoria Civil and Administrative Tribunal (VCAT) recently handed down the decision of *Phillips v Abel* [2019], further clarifying 'retail premises' under the *Retail Leases Act 2003* (the Act). This follows on from the decision of the Victorian Supreme Court of Appeal in *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017].

Significantly, the 'purpose of occupation' and the 'ultimate consumer' test apply when determining whether property is 'retail premises' under the Act. This governs whether a landlord is entitled to recover land tax from a tenant.

*"Retail Lease Act 2003 – SECT 50 Recovery of land tax*

*(1) A provision of a retail premises lease is void to the extent that it makes the tenant liable to pay an amount for tax for which the landlord or head landlord is liable under the Land Tax Act 2005."*

The API would like to thank **Hall & Wilcox** for preparing the publication below and for granting the API permission to provide this to our Members.

### **Landlord caught between a rock and a hard 'lease': VCAT finds sand quarry to be a 'retail premises' lease**

30 Jul 2019

The Victorian Civil and Administrative Tribunal has recently handed down the decision of *Phillips v Abel* [2019] VCAT 1031 which continues the trend of pushing the boundary of what had traditionally been considered 'retail premises' for the purposes of the *Retail Leases Act 2003* (Act).

Following the comments made by the Victorian Supreme Court of Appeal in *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178, the Tribunal held that, when determining whether the Act applies to a particular lease, the purpose of occupation of the tenant rather than the character of the land is the primary consideration.

In finding that a lease of largely vacant land (comprising a 250 ha sand quarry) constitutes 'retail premises' for the purposes of the Act, the decision is a further example of the effect of the legal test which is applied in assessing if the premises are 'retail premises'. Significantly, the decision clarifies that even effectively empty land can constitute a 'retail premises' provided that a tenant fundamentally conducts a retail business from the premises.

#### **Facts**

Mr Peter Abel (**Landlord**) owns a large rural property in Victoria. In 2007, the previous registered owners leased part of the property, comprising 249.65 hectares (**Land**) to Mr Grant Phillips (**Tenant**) for a five year term with options for five further terms of five years each.

The Land was predominantly open pasture and was used by the Tenant to extract stone for the primary purpose of selling or using the stone commercially or for construction, building, road or manufacturing

works. Over the course of its occupation, the Tenant erected some buildings and other infrastructure on the Land.

In 2012, the Tenant successfully renewed his lease for a further term of five years. In August 2016, the Tenant exercised his option for a further term, however this was rejected by the Landlord on the basis that the Tenant was in default for not paying land tax and outgoings under the Lease.

The Tenant contended that he was not liable to pay land tax or any outgoings incurred prior to being given a 'statement of outgoings' because the lease was governed by the Act, and in particular, section 46 which had not been complied with.

The Landlord argued that the Tenant originally leased bare land, therefore the Act should not apply because the word 'premises' required land with a building of some sort erected on it. On this basis, the Landlord rejected that a statement of outgoings was required to be provided and that the Tenant was liable to pay the outstanding amounts.

In order to resolve these issues, the Tribunal was asked to again consider what is a 'retail premises' for the purposes of the Act.

#### **Is a sand quarry considered 'retail premises'?**

Section 4 of the Act defines 'retail premises' as premises that are used, or are to be used, wholly or predominantly for the sale or hire of goods by retail or the retail provision of services.

As noted above, the Tenant extracted sand, clay, gravel from the Land, and then sold these directly to customers. The Tribunal applied the 'ultimate consumer test' from *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* to determine whether the business conducted under the lease in fact constituted the provision of retail services.

In summary, the primary question to ask under this test is '*are the services used by the person to whom they are sold or are the services passed on by the purchaser in an unaltered state to some third person?*' In answering this question, this requires a consideration of the service that is offered, whether a fee is paid and whether it is generally available to anyone who is willing to pay the fee.

The Tribunal found that the sand and other materials quarried by the Tenant were sold to its customers who predominantly used that sand for their own purposes. The majority of customers used the sand to create other products like concrete, roof tiles and building blocks. Other customers of the tenant (which were in the minority) also used the sand in an unaltered state for various other purposes such as in the creation of equestrian arenas, replenishing beaches or as a repacked product by garden supply companies.

The Tribunal therefore concluded that the ultimate consumer test was satisfied and that the Tenant's business constituted the retail provision of goods and services.

## Meaning of 'premises'

The term 'premises' is not defined in the Act; nor has it been judicially considered in the context of the Act. Given that the Act is silent on whether bare land falls within the definition of 'retail premises', the Tribunal found that the definition should not be narrowly construed to exclude bare or otherwise vacant land.

As we have seen in other recent decisions in this area, the Tribunal favoured a wider interpretation of 'retail premises' because it is theoretically possible for a retail business to be conducted on bare land, absent any building. For example, a car park without an attendant's kiosk or a paddock for horse agistment. As such, excluding a form of retail business on the basis that it was not conducted in a building, would be contrary to Parliament's intention and the main purposes of the Act.

The Tribunal established that the focus should be on the purpose of occupation and in this case, it was clear that the Tenant predominantly used the Land for the retail provision of goods and services. In short, this meant that the lease in question was to be governed by the Act.

## Obligation under the Act

Section 46(2) of the Act requires the landlord to give the tenant a written statement of the outgoings to which the tenant is liable to pay under the lease. The tenant, however, is not liable to pay any of the outgoings until that statement has been provided.

In failing to comply with section 46(2) and provide the Tenant with a statement of outgoings, the Tribunal held that the Tenant was not liable to pay the outstanding outgoings. The Tribunal further held that the late provision of a statement of outgoings will not retrospectively revive the Tenant's liability for outgoings previously incurred.

## Key takeaways

- The expanding examples from cases of what are considered 'retail premises' means that more leases are likely to be subject to the provisions of the Act. Because of this, there may be an increase in tenants seeking to exercise their rights under the Act.
- There is a risk for landlords that tenants may also seek reimbursement of past payments which were made pursuant to the lease but not permitted to be charged under the Act. There are various potential defences which may be open to landlords depending on the circumstances.
- In this case, the question of whether the provisions of the Act applied was used by the tenant to exercise an option which would otherwise not have been possible because of the Tenant's subsisting default for failure to pay land tax and outgoings. This demonstrates that whether a lease is governed by the Act can have wide ranging implications.

- The existence of buildings or other infrastructure is not a mandatory requirement for premises to be considered 'retail premises' under the Act. As this case demonstrates, leases of bare land can potentially fall within the scope of the Act.
- Landlords should carefully scrutinise all existing and future leases if they are unclear in order to determine whether they are subject to the provisions of the Act. A failure to comply with the Act can have serve consequences for Landlords, including an inability to recover outstanding arrears and outgoings.
- Landlords should start by considering the purpose of the occupation and then apply the 'ultimate consumer test'. If the land is used wholly or predominantly for the retail provision of goods and services, unless an exception applies, the lease will be governed by the Act and the Landlord will be subject to various obligations.

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