

N E W S L E T T E R

RETAIL LEASES

YET MORE LEGISLATIVE CHANGES – THE 15 YEAR EXCLUSION

APPLICATION

A new Ministerial Determination, made under section 5(1)(c) of the *Retail Leases Act 2003* and published in the Victoria Government Gazette No. S 184, came into effect on 24 August 2004.

Certain long-term construction leases were recently excluded as “retail premises”, effective from 24 August 2004 and apply to all renewals.

The amendment ‘frees up’ the ability of parties where the exclusion applies to arrive at terms suitable to themselves, rather than being compelled to adopt the mandatory requirements of the Retail Leases Act 2003.

NEW EXCLUSIONS

The amendment excludes the operation of the Retail Leases Act 2003 on the following leases:

- Leases with a term of 15 years or more (excluding options)
- Renewals of such a lease, if they are for less than 15 years. [The renewal needs to fall within the meaning described in S9 of the Act.]
- Variations of such a lease, provided the terms are substantially the same as the original lease

WHEN DO EXCLUSIONS APPLY?

The exclusion only applies to such leases if they contain any provision that:

- Imposes on the tenant an obligation to carry out substantial work involving building, installation, repair or maintenance of the structure, fixtures, plant or equipment or gas, electricity, water drainage or other service appliances, fittings or fixtures; or
- Requires the tenant to pay any substantial amount for the above; or
- In any significant respect disentitles the tenant or any other person to remove such works.

The exclusion does not apply to any sub-lease which otherwise falls within the definition of ‘retail premises’ in the Act.

SEEK LEGAL ADVICE

Parties to a lease are recommended to read the Determination thoroughly and seek professional legal advice to determine whether the Determination applies to the lease.



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CERTIFICATES FROM THE SMALL BUSINESS COMMISSIONER

The Small Business Commissioner may certify that the lease is a lease which satisfies the provisions of the Determination.

Like other exclusions from the Act, a Certificate signed by the Small Business Commissioner is prima facie evidence that the lease falls within the exclusion. The tenant requests such a certificate and serves notice of same upon the landlord.

It is possible to request a certificate by downloading an application from the Small Business Commissioner's website at www.sbc.vic.gov.au.

HOW CAN KELLEHERS AUSTRALIA ASSIST YOU WITH RETAIL LEASE MATTERS?

- Determine which legislation applies to your retail lease and the obligations imposed under that legislation
- Determine whether your business falls within an exclusion category
- Provide advice in relation to rights and obligations under a current lease or a proposed lease

- Enter into negotiations on your behalf to ensure that your best interests are served in creating a lease agreement.
- Act on your behalf if a dispute arises regarding a retail lease and advise you of your alternatives to resolve the dispute.

For further information:

Business in Victoria

Department of Industry, Innovation and Regional Development

www.business.vic.gov.au

Phone: 13 22 15

Office of the Victorian**Small Business Commissioner**

www.sbc.vic.gov.au

Phone: 13 22 15

Toll free: 1800 136 034.

For Legislation:

Victorian Legislation and Parliamentary Documents

Retail Tenancies Act 1986

Retail Tenancies Reform Act 1998

Retail Leases Act 2003

<http://www.dms.dpc.vic.gov.au>

PLEASE NOTE: We suggest that our clients do not act only on the basis of material in our NEWSLETTER because the items are of the nature of general comment only and may be liable to misrepresentation in a particular circumstance. Also, changes in legislation and case law occur quickly, we therefore recommend that our advice should be sought before acting in any matters of this kind.



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