

# Annual Government CPD Day

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Friday 24 March 2023

Presenters: Samantha Taylor and Stella Wild



# Webinar housekeeping

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- All attendees will be on mute and their cameras turned off for the entire webinar
- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
- Use the Q&A function for specific questions related to the webinar content – Questions will be addressed at the end of the webinar
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback

# Leasing Tips & Traps

Considerations for effective and compliant leases

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# Preliminary considerations

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- Consider, is it a lease or a licence?
- If it is a lease, does *Retail Leases Act 2003 (RLA)* apply?
- Consider definition of retail premises lease
  - A lease of premises used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services
  - The “ultimate consumer” test has been confirmed in: *IMCC Group (Australia) Pty Ltd v CB Cold Storage Ltd [2017] VSCA 178*
  - Recent decision confirm the “ultimate consumer” test is one of a number of factors. Other decisions considering the meaning of “retail premises” include:
    - *Bulk Powders Pty Ltd v Seicon Pty Ltd [2018] VCAT 2000*
    - *Eastcombe Pty Ltd v Fagersta Steels Pty Ltd (Building and Property) [2022] VCAT 780*

Do these decisions indicate the increasing importance of being ‘open to the public’ in the required sense?
- Section 94 of the RLA provides that parties cannot contract out of the RLA

# Preliminary considerations

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- **Key RLA exceptions (s. 4(2)) - the RLA will not apply if:**
  - Occupancy costs (rent plus outgoings) > \$1 million.
  - Tenant is a listed public company or a subsidiary of a listed public company.
  - Term < 12 months (unless possession > 12 months).
  - Premises used for carrying on a business by a tenant on behalf of the landlord as employee or agent
  - Excluded through Ministerial Determinations made under section 5 (see *below*)

# Preliminary considerations

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- **Ministerial Determinations under RLA**

- Premises above 3rd storey of building (exception only applies to Tenant who sells services, not goods)
- Term is 15 years or longer (excluding options) and substantial works are required by Tenant
- Corporations or subsidiaries of corporations listed on a stock exchange outside Australia
- A lease of premises used wholly or predominantly for public, municipal or charitable purposes (etc.), **OR**

A lease of a premises used wholly or predominantly by a NFP entity that exists for the purposes of providing or promoting community, cultural, sporting, recreational or similar facilities or activities or objectives

**AND the rent (including any GST) is no more than \$10,000.00 per annum**

# Preliminary considerations

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- **Check the land title**
  - Confirm the registered proprietor of the Premises and whether its freehold or Crown land
  - Check whether any encumbrances on title eg. mortgage, caveats
- **Planning certificates and permits**
- **ASIC searches of entities**
- **Victorian Government Land Transactions Policy**

# Key Lease Terms

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- **Parties**

- Must be legal entities – check searches, consider trading names
- Must have the power to grant / enter into the lease

- **Premises**

- Include a plan of premises if possible.
- Carefully consider definitions of “Tenant’s Property” and “Landlord’s Property”.
- Are there common areas or shared areas?

- **Car parking**

- Is there to be a separate car parking licence or are they part of premises?
- Is an additional fee payable?



# Key Lease Terms

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- **Permitted use**

- Be accurate
- Consider prohibition on retail use.
- Consider broad vs narrow permitted use

- **Term/Options**

- If RLA applies, must be for minimum term of 5 years (including any further terms), unless Tenant obtains waiver certificate from SBC.
- Consider other statutory restrictions e.g. *Crown Land (Reserves) Act 1978*.
- Consider RLA requirements for options.

# Key Lease Terms

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- **Commencing Rental**

- Is GST included?
- Net, gross or semi-gross rental?

- **Rent reviews**

- CPI, Fixed and Market Review
- Consider RLA requirements.
- Face rent vs effective rent

- **Incentives**

- Rent free period, rent abatement
- Fitout contribution – consider ownership and claw back.

# Key Lease Terms

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- **Outgoings**

- Categories of outgoings and manner of apportionment.
- Obtain an estimate and breakdown of outgoings.
- Consider RLA requirements and restrictions (including maintenance obligations).

- **Insurance**

- Which tenant policies are required?
- Does the landlord need to be named?
- Other policy requirements?

- **Security**

- Security Deposit or Bank Guarantee and/or Director's guarantees?
- Consider RLA requirements
- Fixed for term or increased in line with rent increases.
- Other bank guarantee requirements eg. expiry dates.

# Key Lease Terms

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- **Landlord/Tenant works**

- Beware undefined terms e.g. bare shell, clean shell, warm shell
- Clarify timing and any contribution to costs.
- Consider refurbishment requirements during the term.

- **Make good**

- Who owns and who must remove the improvements?
- Beware undefined terms e.g. base building condition.
- Consider obtaining a condition report.

- **Early Termination**

- Relocation / Demolition
- Tenant break clauses
- Consider RLA implications

# Key Lease Terms

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- **Assignment and Subletting**

- Is Landlord consent required?
- Can Landlord consent be withheld at Landlord's discretion?
- Consider RLA requirements

- **Legal Costs**

- Consider RLA restriction
- Consider the use of a lease deposit

- **Conditions**

- Is the offer non-binding?
- Is the offer otherwise conditional e.g. Board approval?
- Will the lease be conditional e.g. subject to planning approval?

# Questions

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## Disclaimer

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# Contacts

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