

# Russell Kennedy's Government CPD Series

## Session 3: *Tips and Traps with the Provision of Social and Affordable Housing & Retail Leases Update*

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2021/03

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# 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. Presentation slides will also be sent to all attendees.
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback.

## Disclaimer

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The information contained in this presentation is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on the topics or areas discussed please contact the presenter directly.

# Introduction



# Tips and Traps with the Provision of Social and Affordable Housing

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# Overview

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- Our experience dealing with Social and Affordable Housing for State and Local Government
- Terminology:
  - Public vs Community Housing
  - Social vs Affordable Housing
- How Government supports Social and Affordable Housing growth, and issues faced with ensuring on-going Social and Affordable Housing outcomes
- What to take into account when considering whether something is suitable for Social or Affordable Housing
- Upcoming developments in Social and Affordable Housing sector



# Public vs Community Housing

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## Public Housing

- Public Sector housing
- Homes Victoria - Main State Provider

## Community Housing

- Provided by not-for-profit and private sector
- Housing owned or managed for community housing purposes predominantly held by not-for-profits regulated by the ***Housing Act 1983*** known as **Registered Agencies**, being either:
  - **Registered Housing Providers** (smaller, often manage and not own housing portfolios, may have a more targeted audience to support)
  - **Registered Housing Associations** (larger, both own and manage housing portfolios, better equipped to invest in and expand community housing stock)
- Some Community Housing, such as Affordable Housing sold to qualifying households, can be delivered through entities not regulated under the *Housing Act 1983*.

# Social vs Affordable Housing: Similar but Different

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## Social Housing

- Governed by *Housing Act 1983*
- Clearly defined
- Can be Public or Community Housing
- If Community Housing, must be owned, controlled, or managed by a **Participating Registered Agency** under the *Housing Act 1983*
- Only available to **Eligible Applicants** who meet eligibility criteria for Social Housing
- **Victorian Housing Register** established to place Eligible Applicants in suitable available Social Housing
- Eligibility criteria currently has very low income and asset limits set by Director of Housing
- Priority access also available to particularly vulnerable groups



# Social vs Affordable Housing: Similar but Different cont.

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## Affordable Housing

- More elusive definition – defined in the ***Planning and Environment Act 1987***, and used but not defined in *Housing Act 1983*
- Means housing, *including social housing*, that is appropriate for housing needs of very low, low, and moderate income households
- Income ranges specified by Order in Council
- Can be held by Registered Agencies, but not limited to this
- Can be rented to qualifying households, or sold to qualifying households under a range of schemes (low equity, shared equity, etc.)
- Often aimed at households or groups that do not qualify for Social Housing but still need support, e.g. “key workers” (teachers, emergency services staff), younger or older households

# Delivering Social and Affordable Community Housing

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## How Government supports Social and Affordable Housing Growth and Use

- Often a combination of approaches
- Funding provided by State Government to facilitate development, acquisition, and growth of Social and Affordable Housing: Big Housing Building, Social Housing Growth Fund
- Contractual and lending arrangements to secure how funds will be applied, with mortgages providing additional security: DTF financing agreements under Social Housing Growth Fund
- Director of Housing Interests possible where funds to purchase or develop the housing are provided by the Director, or land was transferred from the Director
- Section 173 Agreements under *Planning and Environment Act 1987* when a “Responsible Authority” (either Minister for Planning or a local Council) involved: Example section 173 agreement provided by DELWP

No matter the model, challenges are faced with both acquiring / developing new Social and Affordable Housing, and with ensuring that housing stock continues to deliver Social or Affordable Housing outcomes

# Delivering Social and Affordable Community Housing cont.

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## Identifying what housing to deliver

<b>Housing needs</b>	Working out who needs what in geographical areas and demographics
<b>Type</b>	Number of bedrooms, fit out required to suit specific housing needs
<b>Location</b>	Where dwellings will be located compared to non-community or public housing, and proximity to amenities and resources
<b>Integration</b>	Incorporating Social/Affordable Housing dwellings into surrounding development and environs, “tenure blinds” concept
<b>Tenure</b>	Will housing primarily be rented or owned by the target households
<b>Affordability</b>	Particularly for Affordable Housing, setting rent or purchase price at appropriate levels
<b>Longevity</b>	How long will housing benefit community, can it be repurposed or recycled
<b>Allocation</b>	How are people chosen to receive the housing

# Looking ahead

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- **Big Housing Build**
- **Review of Social Housing Regulation – Consultation March to September, with final report March 2022**
- **Victorian Regulation vs National Regulation**
- **Streamlining planning processes**



# Retail Leases Update

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Principal

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# Overview

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- An overview of recent amendments to the *Retail Leases Act 2003* (Vic) (**RLA**) and case law developments in this area.
- *Retail Leases Amendment Act 2020* (Vic) (**Amending Act**) amended the RLA
  - The amendments came into effect on 23 September 2020 (ESMs) & 1 October 2020
  - Key amendments: Essential Safety Measures; Disclosure Statements; Option notification and commencement; Security deposits
- Case update
  - *Verraty Pty Ltd v Richmond Football Club Ltd* [2020] VSCA
  - *Nowrozi v Plains Properties Pty Ltd* [2020] VCAT
  - *Sneakerboy Retail Pty Ltd trading as Sneakerboy v Georges Properties Pty Ltd* [2020] NSWSC (31 July 2020 and 26 August 2020)
  - *CB Buffet (Burwood) Pty Ltd v Delloyd Pty Ltd* [2020] VCAT
  - *PS Market Pty Ltd v Brijcam Nominees Pty Ltd* [2020] VCAT
  - *Filomeno Nominees Pty Ltd v Crown Group Pty Ltd* [2021] VCAT

# Retail Leases Act 2003 (Vic) – Key Amendments

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## Essential Safety Measures

- *Building Regulations 2018/Building Act 1993* require a land owner to repair/maintain Essential Safety Measures (**ESMs**).
- Before Amending Act: the generally accepted position was that under a retail or non-retail lease, a landlord cannot require a tenant to **carry out** ESM repair/maintenance, and cannot pass on ESM repair/maintenance **costs** to a tenant, even if the lease expressly allows it to do so (see s.251 *Building Act 1993* and *VCAT Advisory Opinion*).
- Amending Act:
  - RLA (ss. 3, 29, 41, 52, 122) and *Building Act 1993* have been amended to enable a Landlord to pass on costs of repairs/maintenance or installation of ESMs to a Tenant, if the lease allows it to do so. Applies to retail leases only.
  - ESM amendments are retrospective and apply to retail leases entered into before Amending Act, but ESM costs can only be sought as from 23 September 2020.
  - Tenant may agree with the Landlord to repair/maintain ESMs on behalf of Landlord, but this does not affect a Landlord's statutory obligations under the *Building Regulations 2018/Building Act 1993*.

# Retail Leases Act 2003 (Vic) – Key Amendments

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## Disclosure Statements

- Landlord must give Tenant a Disclosure Statement, and copy of proposed lease (including particulars of tenant, rent and term), **at least 14 days** before lease is entered into (**formerly 7 days**) (s.17(1)(a))
- If Disclosure Statement and proposed lease are given less than 14 days before lease is entered into, the term of the lease **is taken to commence** 14 days after the Disclosure Statement and proposed lease are given (s. 17(1C))
- When Landlord gives Tenant copy of proposed lease, it must notify Tenant of any changes to the previous copy of the lease (s. 17(1B))
- The Disclosure Statement provided on **renewal** of a lease must set out any changes to the previous Disclosure Statement given to the Tenant (s. 26(2))



# Retail Leases Act 2003 (Vic) – Key Amendments

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## Option to Renew – Notice

- Under s.28(1A), Landlord must give notice to Tenant at least 3 months before date by which option must be exercised (was previously 6 months).
- The notice must set out:
  - Date by which option may be exercised;
  - Rent for first 12 months;
  - Availability of an early rent review (s.28A);
  - Availability of a cooling-off period (s.28B); and
  - Any changes to the most recent Disclosure Statement provided to the Tenant (eg. attach a marked-up Disclosure Statement to the notice).
- This applies to new leases *and* to leases that are already in place unless the last date to exercise the option is earlier than 1 January 2021.
- If Landlord fails to provide the notice on time, the date by which the option must be exercised is extended to the date that is 3 months after the tenant receives the notice (was previously 6 months).

# Retail Leases Act 2003 (Vic) – Key Amendments

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## Right to an Early Rent Review (before exercising option to renew)

- If lease provides for market review of rent on commencement of further term, tenant can request an early rent review within 28 days after the option notice is issued under s.28(1A).
- Tenant must still exercise the option by the option exercise date.
- If specialist retail valuer is appointed to determine rent, the last date by which the option can be exercised is extended to the date that is 14 days after the tenant is notified of the determination.

## Right to a Cooling-Off Period (after exercising option to renew)

- If Tenant exercises option and has not requested an early rent review, Tenant will have a 14 day cooling-off period during which they may give written notice to the Landlord that they no longer wish to exercise the option.
- If cooling-off notice is given:
  - Term of lease is extended by 14 days
  - The lease is taken not to have been renewed
  - Tenant is not able to exercise an option to renew the lease

# Retail Leases Act 2003 (Vic) – Key Amendments

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## Security deposits

- Landlord must return security deposits within **30 days** of the lease ending, provided the Tenant has fulfilled lease obligations (s.24(1)(d))
- Previously, the RLA merely required a Landlord to return a security deposit “as soon as practicable”
- Likely to also apply to bank guarantees



# Case update

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## Verraty Pty Ltd v Richmond Football Club Ltd [2020] VSCA 267

- FACTS:
  - Richmond Football Club Ltd (**Tenant**) entered into a lease of premises in 2004 with Verraty Pty Ltd (**Landlord**).
  - The premises was used as a gaming venue and bistro. At the time the lease was entered the premises were 'retail premises' as defined section 4 of the RLA.
  - The lease contained a clause permitting the landlord to recover land tax from the Tenant, however this clause was unenforceable while the RLA applied to the lease because of section 50 of the RLA, which renders a provision of a retail premises lease void to the extent it seeks to make a tenant liable to pay land tax.
  - During the term of the lease the Tenant's occupancy costs exceeded \$1,000,000.
  - The Landlord initiated proceedings in VCAT arguing that the lease ceased to be a lease of retail premises when occupancy costs exceeded \$1,000,000 because of section 4(2)(a) of the RLA. The Landlord was successful in VCAT.
  - The Tenant appealed the decision of VCAT and was successful in the Supreme Court (see *Richmond Football Club Ltd v Verraty Pty Ltd* [2019] VCAT 1073. The Landlord appealed to the Court of Appeal.

# Case update

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## Verraty Pty Ltd v Richmond Football Club Ltd [2020] VSCA 267 (continued)

- HELD:

- The VSCA dismissed the appeal.

*“... if a lease is a ‘retail premises’ lease at the commencement of the lease, it remains subject to the Act even if the premises cease to be retail premises. In short, the text, context and purpose of the Act strongly support the view that it is not possible [for a lease] to jump in and out of the Act from time to time depending on whether the premises continue to fall within the definition of ‘retail premises’ . [para 8]*

- Confirms that whether a lease is retail premises is established upon commencement or renewal.
- Does not address *obliter dicta* comments of Croft J in the Supreme Court decision, suggesting that whether a lease could cease to be a retail lease on renewal would depend on the provisions of the lease regarding renewal.

# Case update

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## Nowrozi v Plains Properties Pty Ltd (Building and Property) [2020] VCAT 322

- FACTS:
  - Shukrullah Nowrozi and Nasim Nowrozi (**Tenant**) leased premises from Plains Properties Pty Ltd (**Landlord**) from 1 October 2013. The lease was for a term of 5 years with one option to renew.
  - The lease was a lease of retail premises, therefore subject to the RLA.
  - Under section 28(1) (now s 28(1A)) of the RLA landlords have an obligation to notify tenants of the date after which an option is no longer exercisable. Note, the change from 'obligation to 'notify' to 'give written notice' as a result recent changes to the RLA.
  - The Tenant argued the lease was invalidly terminated as the notice required by section 28 (1) had not been provided by the Landlord.

# Case update

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## Nowrozi v Plains Properties Pty Ltd (Building and Property) [2020] VCAT 322 (continued)

- HELD:
  - The VCAT applied *Xiao v Perpetual Trustee Company Ltd* [2008] VSC 412 and held the obligation to ‘notify’ a tenant means the Landlord must provide the Tenant was actually notified of the latest date to exercise its option as required by section 28. The Landlord cannot rely on deemed notice provisions set out in the lease.
  - The Landlord could not prove the Tenant was notified, therefore the termination of the lease was invalid.
  - Note, change in language as a result of the 1 October 2020 amendments. Now requires a landlord to ‘give’ information before the option to renew the lease expires rather than ‘notify’. Query the effect of this on the findings in *Xiao v Perpetual Trustee Company Ltd* and *Nowrozi v Plains Properties Pty Ltd* (Building and Property) [2020].

# Case update

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## Phillips v Abel (Building and Property) [2019] VCAT 1031 (10 July 2019)

- FACTS:
  - Abel (Landlord) is the registered proprietor of land comprising 497 hectares of rural property near Warragul. Part of the property comprising approximately 249 hectares was leased to Phillips (Tenant) for a term of 5 years with options. The premises was used by the Tenant as a quarry and the Tenant extracted sand and sold it to customers. The Tenant sought to exercise an option, the Landlord denied the Tenant had validly exercised its option, in part because the Tenant had not paid land tax and therefore had failed to pay outgoings. The Tenant argued it was not liable for outgoings which accrued prior to the Landlord providing the Tenant with an estimate of outgoings, as required by s 46 of the RLA.
- HELD:
  - The premises are retail premises as defined in the RLA.
  - The Tenant is not liable to contribute to outgoings that accrued before provision of an estimate of outgoings under section 46 of the RLA.



# Case update

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**Sneakerboy Retail Pty Ltd trading as Sneakerboy v Georges Properties Pty Ltd [2020] NSWSC 996 (31 July 2020); Sneakerboy Retail Pty Ltd trading as Sneakerboy v Georges Properties Pty Ltd (No 2) [2020] NSWSC 1141 (26 August 2020)**

- **FACTS:**

- Sneakerboy Retail Pty Ltd (Tenant) was in rent arrears and Georges Properties Pty Ltd (Landlord) called on the bank guarantee and terminated its lease at the beginning of the COVID-19 pandemic but before the National Cabinet Mandatory Code of Conduct (**Code**) was enacted as law in NSW.
- The Tenant sought relief against forfeiture.

- **HELD:**

- The Tenant was entitled to an order for relief against forfeiture.
- This had the effect of reinstating the lease, as a result, the lease became subject to the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW).

# Case update

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## CB Buffet (Burwood) Pty Ltd v Delloyd Pty Ltd (Building and Property) [2020] VCAT 1234

- FACTS:

- CB Buffet (Burwood) Pty Ltd (**Tenant**) ran a buffet restaurant and its trade was adversely affected by COVID-19 as early as January 2020. It fell into rent arrears and the landlord terminated the lease for non-payment of rent on 27 March 2020.
- The *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) (**Act**) and the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (Vic) (**Regulations**) (together referred to as the **CTRS**) were not enacted when the lease was terminated.
- The Tenant argued the lease was an eligible lease under the CTRS and that it was entitled to the benefit of the protection of regulation 9 of the Regulations. Alternatively, the Tenant sought relief against forfeiture and argued the relief against forfeiture should take into account the tenant's entitlement to rent relief under the CTRS.

# Case update

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## CB Buffet (Burwood) Pty Ltd v Delloyd Pty Ltd (Building and Property) [2020] VCAT 1234

- HELD:
  - The Tenant is not entitled to take advantage of the rent relief provisions contained in the CTRS. The lease is not an eligible lease within the meaning of section 13 of the Act because the lease was not in effect as at 29 March 2020.
  - Therefore, the tenant is not entitled to rent relief under the CTRS. The tenant would be required to pay all rent payable under the lease as a condition of the grant of relief against forfeiture.



# Case update

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## PS Market Pty Ltd v Brijcam Nominees Pty Ltd (Building and Property) [2020] VCAT 1468

- FACTS:

- The Tenant was not an employer of staff in the relevant business and therefore could not satisfy the requirements to obtain Jobkeeper. The Tenant was a member of a group of companies, and staff were employed by the Tenant's parent company. The Tenant argued that the lease was an eligible lease on the basis that it was an eligible business participant in Jobkeeper.
- The Tenant argued that the Code is an applicable industry code within the meaning of section 77(2)(g) of the RLA, providing a set of principles to which regard should be had when evaluating whether there has been unconscionable conduct on the part of the Landlord.

- HELD:

- The Tenant was not entitled to protection from re-entry under regulation 9 of the CTRS Regulations because the Tenant was not entitled to Jobkeeper. The Tenant's argument that it was an eligible business participant in Jobkeeper was not accepted because the evidence failed to present sufficient evidence to prove this.

# Case update

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## PS Market Pty Ltd v Brijcam Nominees Pty Ltd (Building and Property) [2020] VCAT 1468 (continued)

- HELD:
  - The Landlord's conduct in serving a notice of default was not unconscionable conduct within the meaning of the RLA. The Tenant was in substantial rental arrears and was not entitled to any rent relief under the COVID-19 legislation. Therefore, the proposition that the Landlord acted unconscionably by serving the Notice of Default cannot, without more, be sustained.



# Case update

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## Filomeno Nominees Pty Ltd v Crown Group Pty Ltd (Building and Property) [2021] VCAT 81

- FACTS:
  - The Tenant had not paid rent or outgoings since 1 April 2020. The Landlord served a notice of default alleging non-payment of rent on 10 September 2020 and re-entered the leased premises on 9 October 2020.
  - The Tenant argued the re-entry was invalid on the basis of the CTRS Regulations. The Landlord argued the Tenant had not made a valid application for rent relief in accordance with the Regulations.
- HELD:
  - At no time before the service of the Notice of Default had the Tenant made a request for rent relief that complied with regulation 10 of the Regulations.
  - The protection provided by regulation 9 is dependent on compliance with regulation 10, on that basis the Notice of Default and re-entry were valid.

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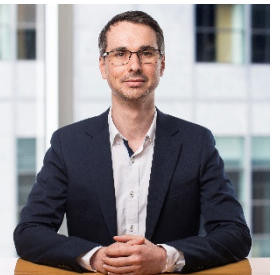
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## Feedback

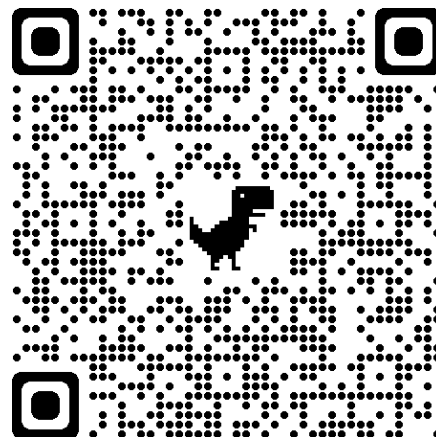
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Melbourne

# Upcoming Victorian Government CPD Sessions

Session	Date	Presenter/s	CPD
<b>Session 4:</b> The Coroners' Court – The 'Golden Rules' of The Jurisdiction	<i>Friday 12 March</i>	Ben Lloyd – <b>Russel Kennedy</b>	1 Point <i>Substantive Law</i>
<b>Session 5:</b> Ethics and Professional Development	<i>Friday 19 March</i>	Anna Hinder – <b>Guest Speaker</b>	1 Point in <i>Ethics</i>
<b>Session 6:</b> Making Defensible Administrative Decisions	<i>Friday 26 March</i>	Emma Turner – <b>Russell Kennedy</b>	1 Point <i>Substantive Law</i>

\*\* All session will run from 11:00 am – 12:00 pm.



## Register!

Scan this QR code to register and get more information on upcoming session.





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