LPLC SEMINAR PAPER

APPLICATION OF THE *RETAIL LEASES ACT 2003 (VIC)*: A STEP-BY-STEP GUIDE

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1. It is not unusual for parties to execute a commercial lease, only to discover some years later that the lease is in fact a lease of retail premises. In the face of rising land tax, more tenants than ever are seeking to apply the *Retail Leases Act 2003* (Vic) (**RLA 2003**) to their lease in a bid to avoid those increasing liabilities, or to press any one of innumerable other arguments once a dispute erupts.

2. If there is a finding during the term that the RLA 2003 applies to a lease, there is an inevitable risk that the light will be shined on the solicitors who prepared the lease in the first place, with an associated risk of a compensation claim.

3. This paper provides a step-by-step guide for assessing at the transaction stage whether the RLA 2003 applies to a lease and helps reduce the risk of a claim being made against a solicitor who prepared a lease that later turns out to be retail.

4. The paper addresses the following topics:

   (a) the express exclusions in the RLA 2003;

   (b) the Ministerial determinations excluding the RLA 2003;

   (c) the substantive tests for the application of the RLA 2003;

   (d) further considerations in applying the RLA 2003; and

   (e) our conclusions and recommendations to practitioners.

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[1] Liability limited by a scheme approved under Professional Standards Legislation.
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Do the express exclusions in the statute apply?

5. There are a number of express exclusions to the RLA 2003 contained in both the statute itself and in associated Ministerial determinations. These are usually the best starting point when considering the application of the RLA 2003 because if they apply it is clear that the Act does not, and you need not look any further.

6. Accordingly, if the answer to any of the following questions is '*yes'*, then the RLA 2003 does not apply:

   (a) **Is the lease for a term of less than one year?** Under s 12(1), the RLA 2003 will not apply to a lease of less than one year. However, if the Tenant is continually in possession under the lease for more than one year, either by it being renewed or continued, then by operation of s 12(2) of the RLA 2003, the Act will apply on and from the date on which the Tenant has continually been in possession for one year;

   (b) **Do the occupancy costs exceed $1,000,000 per annum (exclusive of GST)?** Under s 4(2) of the RLA 2003, the Act does not apply to leases where the total occupancy costs exceed the threshold prescribed by regulations made under that Act. The current threshold is $1M (ex-GST).[3] Total occupancy costs include outgoings as defined in s 3 of the RLA 2003 and certain other expenses that are prescribed in reg 6(2) of the 2023 Regulations. Make sure you check those regulations when calculating the total occupancy costs. The application of the occupancy costs exclusion can be quite tricky, as the statute appears to presume that an estimate of outgoings has been provided.[4] If there is any doubt about the application of this exclusion, we recommend seeking specialist advice;

   (c) **Is the business carried on wholly or predominantly by the tenant as the landlord's employee or agent?** This exclusion is found in s 4(2)(b)

[3] See reg 6(1) of the *Retail Leases Regulations 2023 (Vic)* (**2023 Regulations**).
[4] See the note to s 4(3)(a) of the RLA 2003 and see the discussion about that note in *Verraty Pty Ltd v Richmond Football Club Ltd* [2020] VSCA 267.

of the RLA 2003 and rarely arises in practice. However, practitioners should be aware of its presence;

(d) **Is the tenant a listed corporation or a subsidiary of a listed corporation as those terms are defined in the Corporations Act?** This exclusion is found in s 4(2)(c) of the RLA 2003. If there is any doubt about the application of this exclusion, practitioners should check the definitions in the Corporations Act;

(e) **Is the tenant a company listed on a stock exchange outside Australia that is a member of the World Federation of Exchanges or a subsidiary of such a company?** This is an exclusion that is still in the statute. However, it has been problematic for a number of reasons[5] and has now been overtaken by the overseas listed company determination discussed further below. However, that determination applies only from 12 August 2016.[6] If you have a lease to a tenant of an overseas listed company that was entered into before 12 August 2016, we recommend seeking specialist advice.

7. You may also need to consider whether the lease commenced before 1 May 2003.[7] However, there are not many leases left in this category and most will have been renewed since then, or will be excluded by the 15-year determination discussed below. However, if you have a lease that commenced before 1 May 2003 that might be retail, then either the *Retail Tenancies Act 1986 (Vic)* or the *Retail Tenancies (Reform) Act 1998 (Vic)* might apply to it. Those Acts apply quite different criteria when assessing their application. Again, we suggested seeking specialist advice if this issue arises.

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[5] See: https://samhopperbarrister.com/2016/09/07/ministerial-determination-overseas-listed-companies-and-their-subsidiaries/; and see: https://samhopperbarrister.com/2017/02/24/ministerial-determination-overseas-listed-companies-and-their-subsidiaries-part-2/; and see: https://samhopperbarrister.com/2012/01/06/new-ministerial-determination-excludes-new-zealand-companies-from-the-retail-leases-act-2003-vic-part-ii/

[6] The determination on 12 August 2016 replaced a determination dated 20 December 2011. That earlier determination provided that premises were not 'retail premises' if the tenant was a body corporate whose securities were listed on the New Zealand Stock Exchange Limited or a subsidiary of such a body corporate.

[7] RLA 2003, s 11(1).

Do any Ministerial determinations apply?

8. The Minister has power under s 5 of the RLA 2003 to make determinations that exclude certain classes of leases from the Act. Those determinations are included in the definition of *'retail premises'* in s 4(2)(e) to (h) of the RLA 2003.

9. There are currently eight determinations that operate under those sections. The Victorian Small Business Commission's website provides the following summary of those determinations with links to the text of each determination:

- ***Storeys:*** *Premises in a building that are wholly or predominantly used for the provision of retail services (other than those located entirely on any one of the first three storeys of the building) are excluded from the operation of the Act* – ***Determination 1***

- ***Barristers' Chambers:*** *Barristers' Chambers Limited is excluded from the operation of the Act* – ***Determination 2***

- ***15-year leases:*** *Leases for 15-years or longer are exempt where they impose substantial works or financial obligations on the tenant* – ***Determination 3***

- ***Melbourne Market Authority:*** *'Market land' as defined by the Melbourne Market Authority Act 1977* – ***Determination 4***

- ***Local council premises used for community or charitable purposes:*** *Local council premises that are leased for certain community and charitable purposes* – ***Determination 5*** *N.B: this determination was revoked by the determination covering premises used for community or charitable purposes.*

- ***Bodies corporate (and their subsidiaries):*** *Bodies corporate or companies or corporations whose securities are listed on a stock exchange outside Australia (or the subsidiaries of these bodies corporate, companies or corporations) are exempt from the operations of the Act* – ***Determination 6***

- ***Premises used for community or charitable purposes:*** *Premises that are leased for certain community or charitable purposes. This determination applies to leases entered into after 1 January 2015* – ***Determination 7***

- ***Premises used for farming or agricultural purposes:*** *Premises that are leased for certain farming operations. This determination has effect from 29 October 2019 –* ***Determination 8***

10. We recommend that practitioners retain the above list to use as a checklist when considering the application of the RLA 2003 to a lease, and check for any updates to that list at the VSBC's website here: https://www.vsbc.vic.gov.au/your-rights-and-responsibilities/entering-into-a-retail-lease/premises-not-covered-by-the-act/

11. We also make the following comments about some of those determinations:

    (a) the *'storeys'* exclusion applies to the first three storeys of a building, excluding any basement levels. The first storey is the ground level, meaning the first three storeys are levels ground-one-two; and

    (b) there have been a number of cases that have considered and applied the 15-year lease determination.[8] However, its application has proved quite challenging and the policy that underlies the determination is not entirely clear. We are aware of at least one case considering that determination which is scheduled to be heard later this year. Follow the lead author's blog for updates on cases as they emerge.[9]

If none of the exclusions apply, is the lease a lease of retail premises?

12. If none of the express statutory exclusions apply, then practitioners will need to consider the substantive test of whether the premises is retail. These tests are not as absolute as the exclusions set out above and inevitably involve a degree of judgment by practitioners.

13. Section 4(1) of the RLA 2003 states that:

[8] See: *Bella Barista Pty Ltd v Glenview Place Pty Ltd* (Retail Tenancies) [2013] VCAT 649 (6 May 2013); *Luchio Nominees Pty Ltd v Epping Fresh Food Market Pty Ltd* (Building and Property) [2016] VCAT 937 (14 June 2016); *Cunningham Pier Pty Ltd v Seabrook Events Pty Ltd* (Building and Property) [2021] VCAT 1004 (31 August 2021).
[9] See: www.samhopperbarrister.com

*(1) In this Act, **retail premises** means premises, not including any area intended for use as a residence, that under the terms of the lease relating to the premises are used, or are to be used, wholly or predominantly for—*

(a) the sale or hire of goods by retail or the retail provision of services; or

(b) the carrying on of a specified business or a specified kind of business that the Minister determines under section 5 is a business to which this paragraph applies.

14. The authorities in this area were recently reviewed by her Honour Judge Kirton in *W.G.Z Pty Ltd atf the W.G.Z Family Trust v Arva Investments Pty Ltd* [2024] VCC 1777, who held that:

[62] … it is well established that each case must be determined based on its own facts.

[63] Based on the authorities summarised by Senior Member Forde in Eastcombe Pty Ltd v Fagersta Steels Pty Ltd,[10] matters I should take into account when considering whether the Premises are a retail premises include:

(a) *the nature of the goods or service offered;*

(b) *whether a fee is paid;*

(c) *whether the goods or service is generally available to anyone willing to pay the fee;*

(d) *whether the ultimate consumer test is satisfied;*

(e) *whether the premises are open to the public in the required sense; and*

(f) *whether the test is satisfied at the time the lease was entered into.*

[10] [2022] VCAT 780, 7 [24].

15. While that list has not been considered by either the Supreme Court or the Court of Appeal, it stands as the latest word from a Court summarising the test for retailing and provides a useful framework for practitioners considering the application of the RLA 2003.

16. We make the following observations about each of the element in that list.

17. **The nature of the goods or service offered.** To determine whether the premises satisfies that test, it is usually necessary for practitioners to make inquiries as to the nature of the tenant's business at the Premises.

18. In *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178, the Court of Appeal stated:

> *23. …the concept of the 'retail provision of services' in the Retail Leases Act and its predecessor legislation … involves close consideration of the service that is offered, whether a fee is paid, whether it is a service that is generally available to anyone who is willing to pay the fee and whether the persons who use the service are the 'ultimate consumer'.*

19. The Court concluded that:

> *50. In summary, the services were used by the Tenant's customers who paid a fee. Any person could purchase the services if the fee was paid. The Tenant's business was open during normal business hours. The Tenant's customers have not passed on the services to anyone else. They were the ultimate consumers of the Tenant's services. In isolation, none of these features would suffice to constitute the premises as retail premises. Conversely, the absence of one or more of them, would not necessarily result in a finding that the premises were not retail premises. However, in the circumstances of this case, when all of those features are taken together, the conclusion must be that the premises are retail premises.*

20. This has resulted in a number of premises being held to be retail that do not necessarily align with expectations in the marketplace, such as:

(a) a patent attorney, who was often engaged by solicitors to provide services to the solicitors' clients (see *Wellington v Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333);

(b) a logistics business consisting of shipping/transport and storage/warehousing (see *Global Tiger Logistics Pty Ltd v Chapel Street Trust* (unreported, VCAT, Member L Rowland, 8 November 2012));

(c) a convention facility where the space was on-supplied by the tenant to conference organisers (see *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd* [2013] VSC 344);

(d) a quarry where the tenant processed and sold sand extracted from the site to members of the public (*Phillips v Abel* [2019] VCAT 1031);

(e) a premises where the tenant was in the business of manufacturing and installing custom gates and most of the tenant's work (by dollar value) involved the supply of gates to builders, not to the owner of the land on which the gate was installed (*Access Solutions International Pty Ltd v Gamet Pty Ltd* [2017] VCC 1563).

21. **Whether a fee is paid.** Retailing involves the provision of services or the sale of goods '*for fee or reward'* (see *Wellington v Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333 and *Sorbara v DJ and AJ McCallum Pty Ltd* [1992] 2 VR 1).

22. It is not necessary for the sale or supply to be for profit or as part of a business (see *Brimbank City Council v Westvale Community Centre Inc* [2006] VSC 100), but there must be some form of fee or reward paid for the goods or services.

23. **Whether the goods or service are generally available to anyone willing to pay the fee.** While this is a separate requirement in her Honour's list of elements, any questions of restrictions to access or supply have generally been dealt with by the Tribunal in recent years when considering the question of whether a particular premises is open to the public in the sense required by the RLA 2003, and was dealt with in some earlier cases considered by the court in

conjunction with the ultimate consumer test, both of which are discussed further below.

24. **Whether the ultimate consumer test is satisfied.** This is probably the most conceptually difficult part of the test for retailing. The ultimate consumer test was expressed by Nathan J in *Wellington v Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333 as follows (at 336):

> *The essential feature of retailing, is to my mind, the provision of an item or service to the ultimate consumer for fee or reward. The end user may be a member of the public, but not necessarily so. In support of this conclusion, I call in aid not only commonsense but the Macquarie Australian Dictionary which defines retail as being a sale to an ultimate consumer, usually in small quantities. When the verb is used in the transitive form, it is to sell directly to the consumer.*

25. This test is known as the *'ultimate consumer test'* and has been described as *'the touchstone'* of retailing (see *Stringer v Gilandos Pty Ltd* [2012] VSC 361 and *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor* [2013] VSC 344) and was approved as a central part of the test for retailing under the RLA 2003 by the Court of Appeal in *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178.

26. While it is beyond the scope of this paper to provide a complete analysis of the ultimate consumer test, we make the following observations about its operation:

    (a) the ultimate consumer may be a business or commercial consumer and does not need to be an ordinary domestic or household consumer (see *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178);

    (b) the sale of goods to a consumer can be contrasted to the wholesale sale of goods. However, it is difficult to conceive of a service that could be provided wholesale and somehow on-supplied. Consequently, almost all services will be supplies to the ultimate consumer(see *Wellington v*

Norwich Union Life Insurance Society Ltd [1991] 1 VR 333 and *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178);

(c) where goods are sold to a business that changes them before any on-supply, the business will be the ultimate consumer of those goods (see, in particular *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd & Anor* [2013] VSC 344, esp at [17]). Consequently, where dashboards were supplied to Holden who then fitted them to cars that it was manufacturing, Holden was the ultimate consumer of those dashboards (see *Access Solutions International Pty Ltd v Gamet Pty Ltd* [2017] VCC 1563); and

(d) goods or services acquired by an intermediary will satisfy the ultimate consumer test. For example, in *Wellington v Norwich Union Life Insurance Society Ltd* [1991] 1 VR 333, a patent attorney engaged by a solicitor to provide services to the solicitor's client was found to be providing retail services directly to the solicitor's client, and the solicitor's client was the ultimate consumer of those services. Also, in *Access Solutions International Pty Ltd v Gamet Pty Ltd* [2017] VCC 1563 the owner of land was held to be the ultimate consumer of bespoke gates acquired on its behalf by a builder or architect.

27. The ratification of the ultimate consumer test in *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178 resulted in a wider range of supplies satisfying the test than was previously expected (see, for example, the discussion in *Access Solutions International Pty Ltd v Gamet Pty Ltd* [2017] VCC 1563, esp at [142]) and the application of the ultimate consumer test can lead to counter-intuitive results. If you are in doubt about the application of this element to a particular lease, we recommend seeking specialist advice.

28. **Whether the premises is open to the public in the required sense.** This element has been the subject of significant litigation since the decision in *C B Cold Storage*. The outer reaches of this element are still being tested by the Tribunal and it is yet to be the subject of an appeal to a superior Court.

29. In the early decision of *536 Swanston Street Pty Ltd v Harbrut Pty Ltd* (1988) V ConvR 54-323, Kaye J said (emphasis added):

I have been referred to several definitions by authorities of what is described as retail shop and retail trade. Perhaps the most succinct statement from which assistance is to be derived is from that made by Viscount Dunedin in his speech in Turpin v Middlesbrough Assessment Committee and Kaye & Eyre Brothers, Limited, [1931] AC p.451 at p.474. His Lordship then said, referring to buildings, ***that they were buildings to which the public can resort for the purpose of having particular wants supplied and services rendered to them.***

It is, in my view, clear that the demised premises fall within that description of ***being available to members of the public*** *for the purposes of having their food and drink requirements supplied and services of discotheque entertainment provided to them. Accordingly, in my view, the demised premises are retail premises within the meaning of the Act.*

30. In *FP Shine (Vic) Pty Ltd v Gothic Lodge Pty Ltd* [1994] 1 VR 194, Ashley J considered whether a caravan park was a retail premises under the *Retail Tenancies Act 1986* (Vic) and held that (at 198, emphasis added):

In 536 Swanston Street, Kaye J had to consider a lease of premises used as a restaurant, cabaret and discotheque. ***Members of the public could enter the premises upon payment of an admission fee****. Having paid that fee,* ***any such person*** *could enjoy music and entertainment provided and could use the facilities for dancing and so on. In addition, food and drink could be purchased.*

His Honour held that: (1) the premises were used wholly or predominantly for carrying on a business - that is, the business of provision of entertainment; (2) the business included both sale of goods (that is, sale of food and drink) and provision of services (that is, the services of the discotheque); and (3) that the provision of goods and services were properly characterised as "retail".

In my respectful opinion his Honour's conclusions were correct and may be applied to the facts now under consideration. In the present situation

the business involving the retail provision of services is the provision of serviced caravan sites with necessary ancillaries of kiosk, amenities block and recreation room. ***It has a retail characteristic, being provision of services to members of the public*** *wishing to avail themselves of the services in return for payment of money. It is no less retail provision of services because they are provided by way of site hire. No doubt, by analogy, the admission to the discotheque in 536 Swanston Street was only for some limited period.*

31. In *Stringer v Gilandos Pty Ltd* [2012] VSC 361, Croft J considered whether serviced apartments were retail premises under the RLA 2003 and held that (emphasis added):

> *65. It is clear from the Statement of Agreed Facts that the Plaintiffs' Units were available for occupation* ***by members of the public****, ultimate consumers for fee or reward (being fees paid for accommodation).*[11] *The Plaintiffs' Units were, in my view, used wholly or predominantly for the carrying on of a business involving the sale or hire of goods by retail or the retail provision of services. There was no evidence as to the precise nature of the goods and services provided by the Defendant apart from accommodation. I only note that the parties agree that the Defendant operates the TBC business which provides for the Facilities. Motels, hotels or resort complexes, generally speaking, provide retail services for fee or reward, including the hiring out of the rooms. They may also sell food, liquor and other beverages, by retail, at any restaurant faculty provided.*[12] *In any event, the hiring out of rooms or units for fee or reward* ***to members of the public*** *clearly constitutes the provision of retail services.*[13] *…*

32. In *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd* [2013] VSC 344, Croft J spent a substantial portion of his judgment considering the nature of the

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[11] *See Defendant's Outline of Submissions, paragraph 18; Transcript, page 45; and see above, paragraph 41.*
[12] *Noting that retail services can include the sale of goods such as liquor: see, Sharp v O'Driscoll (SCWA, Malcolm CJ, Pidgeon and Franklyn JJ, 21 March 1997, unreported, BC9700941).*
[13] *For a discussion of goods and services, see Croft and Hay, Retail Leases Victoria (LexisNexis, Looseleaf), at [30,055] and [180,055].*

premises and the extent to which it is '*open to the public'* (see paragraphs [29] to [42]). His Honour was considering whether a conference centre that could be leased or licenced by members of the public was open to the public in the sense required by the RLA 2003 and qualified the requirement in the following way, equating in some ways to being *available* to the public:

> *[33] For the reasons I have indicated I am not satisfied that there is any basis in the provisions of the Act or the authorities for constraining the concept of "open to the public" with respect to Premises to the extent that the Plaintiffs would have it constrained. True it is that it would be very difficult to imagine a situation where commercial premises which were accessible on a "walk in off the street" basis could, in the absence of specified and unusual circumstances, be said not to be "open to the public". It does not, in my view, follow that the converse position indicates that premises are not "open to the public".*
>
> *[34] In the present circumstances I am satisfied that the Premises is "open to the public". There is no evidence to suggest that any person or class of persons is prohibited or otherwise prevented from being able to utilise the conference and function services provided by the Defendants at the Premises. The use of the conference and function services, and those provided by the café/restaurant (which is licenced), are available and open to any member of the public subject to booking the conference or function facilities and the payment of a fee. The fact that the Premises may not be "open" for the provision of services during usual ordinary business, such as apply to ordinary retail shops or restaurants and bars, does not detract in any way from the Premises being "open to the public" in the relevant sense. It appears from the evidence that booking requests for the Premises and booking arrangements are made to and at the Adjoining Premises. This does not, however, detract from the use of the Premises itself in accordance with the Lease and so the position with respect to the application of the Act is not affected.*

33. The Court of Appeal referred variously to this element in *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178, holding that:

46 We reject the Landlord's submission that the judge approached the task on the basis that an ultimate consumer test alone suffices to determine whether there has been a retail provision of services. The judge looked at other matters, including whether the services are generally available to any person for a fee. ***Ashley J referred to the provision of services to 'members of the public' in FP Shine. In Fitzroy Dental, Croft J looked at whether the services were 'open to the public.' On analysis, it seems to us that their Honours were concerned with whether there were restrictions on access to the service and who could use it.*** *They were not concerned with the characteristics of the user (for example, whether the user was an individual or a business). Both judges relied on Wellington. In that case, Nathan J made it clear that the user may, but need not, be a member of the public.*

*47 Here, even if one assumes that there may be a limited number of people who use the service (because they need to use large trucks to transport the goods to be stored) that would not matter. In any event, the Tenant does provide transport facilities if required on payment of an extra fee****. In short, the Tenant does not impose any relevant restrictions on access. Anyone can use the service and the Tenant's office is open during business hours to customers and prospective customers alike.***

…

50 In summary, the services were used by the Tenant's customers who paid a fee. Any person could purchase the services if the fee was paid. ***The Tenant's business was open during normal business hours.*** *The Tenant's customers have not passed on the services to anyone else. They were the ultimate consumers of the Tenant's services. In isolation, none of these features would suffice to constitute the premises as retail premises. Conversely, the absence of one or more of them, would not necessarily result in a finding that the premises were not retail premises. However, in the circumstances of this case, when all of those*

features are taken together, the conclusion must be that the premises are retail premises.

34. Since those decisions, the Tribunal has held that at least two leases are excluded from the operation of the RLA 2003 because of this element.

35. In *Bulk Powders Pty Ltd v Seicon Pty Ltd* (Building and Property) [2018] VCAT 2000, Senior Member Forde found that a business selling protein supplement powders was not open to the public in the sense required by the RLA 2003, stating in her reasons:

[29] In this case, the evidence is that the premises are not open to the public. In particular:

i. There is no signage at the premises identifying it to the public as being the premises of the tenant;

ii. Mr Supple gave evidence that the tenant did not want its location to be publicly known in part due to suspicious fires occurring at a nearby competitor's premises, for the safety of its female staff and for commercial reasons;

iii. Mr Supple gave evidence that only customers with a long-term trading history are permitted to enter the premises by appointment.

[30] The respondent carries on a business of selling certain products, with sales predominantly on line. Whilst that activity might be considered to be "retail", in my view that does not make the premises retail premises. It is clear on the evidence that the premises are used predominantly for production and storage of product. The fact that product sold on line is shipped from the storage facility does not, in my view, make the storage facility retail premises.

36. In *Eastcombe Pty Ltd v Fagersta Steels Pty Ltd* (Building and Property) [2022] VCAT 780, Senior Member Forde considered whether a lease to a business selling steel was open to the public and held this element was not satisfied for the following reasons:

[58] The evidence in support of the Premises not being open to the public in the retail sense includes:

a. members of the public gain access through the warehouse roller door;

b. attendance by customers is restricted. Customers must be accompanied by a staff member when in the warehouse. Signs state people entering must wear special clothing and be accompanied by a member of staff to enter the Premises;

c. the absence of signage at the entrance to the business park to identify that the Tenant is an occupant of the business park;

d. a small discreet sign beside one of the warehouse roller doors with the Tenant's name;

e. the external office/reception area door of the Premises is kept locked;

f. there is no contact number displayed at the front office/reception area door;

g. the nature of the business being a wholesaler although the customer base is unclear;

h. the lay out of the warehouse depicted in photographs showing huge racks of product sometimes stacked to the ceiling and stacks of large steel sheets and overhead cranes; and

i. no obvious sales area or showroom other than the portable office.

[59] Unlike in Fitzroy Dental and FP Sunshine where customers are required to pay a hire fee or an entrance fee to gain entry, a member of the public cannot enter the Premises and walk around unaccompanied. Their access remains restricted.

[60] While I accept the Tenant's evidence that it is possible for a member of the public to attend the Premises during business hours and make a purchase, I am not persuaded that the Premises operate or have ever operated since the commencement of the Lease as a retail premises in the sense required by the RLA.

37. Accordingly, you should be aware of this element when considering whether a particular lease falls under the RLA 2003 and follow the lead author's blog for cases in this area as they emerge.

38. **Whether the test is satisfied at the time the lease was entered into.** It has been clear for a long time that a lease cannot enter into the RLA 2003 part-way through its term (see *LONTAV Pty Ltd v Pineross Custodial Services Pty Ltd* [2011] VSC 485, [100]-[105] (John Dixon J)).

39. However, a series of VCAT cases held that a lease could *'hop out'* of the RLA 2003 if it ceased meeting the statutory criteria for its application, such as the $1M occupancy costs rule (see, for example, *William Buck (Vic) Pty Ltd v Motta Holdings Pty Ltd* [2018] VCAT 15 and *Verraty Pty Ltd v Richmond Football Club Ltd* (Building and Property) [2019] VCAT 1073) or the public company exclusions.

40. However, it has now been conclusively determined by Croft J in the Supreme Court in *Richmond Football Club Ltd v Verraty Pty Ltd* [2019] VSC 597 and by the Court of Appeal in *Verraty Pty Ltd v Richmond Football Club Ltd* [2020] VSCA 267 that the time for determining whether a lease is regulated by the RLA 2003 is when the lease is *'entered into'* of the purposes of that Act and no other time. Practically, that means that you determine whether the RLA 2003 applies at the start of the lease, when the tenant exercises an option or when the tenant enters a new lease of the premises.

41. There is, however, one rare exception. If the lease is varied to a sufficient degree as to constitute a surrender and re-grant, such as purporting to vary the lease by extending its term, the original lease is surrendered by operation of law and the purported variation constitutes a newly granted lease. This is referred to as a surrender and regrant. This occurred in the case of *Richmond*

Football Club Limited v Verraty Pty Ltd (Retail Tenancies) [2011] VCAT 2104[14] in which a lease was granted before the operation of the RLA 2003 and then varied in 2004 to add some extra years to the term. The purported variation caused a surrender and regrant of the lease, and the new lease was held to be under the RLA 2003. As a result, the landlord was required to reimburse old payments of land tax to the tenant and the tenant was relieved from paying land tax for the balance of the term.

Further considerations

42. Practitioners should be aware of two further issues that may arise from the text of s 4 of the RLA 2003, namely whether:

    (a) any retail use of the leased premises is the *'predominant'* use to which the tenant puts the premises; and

    (b) the use is '*under the terms of the lease relating to the premises'*.

43. **Whether the retail is the *predominant* use.** Under s 4(1) of the RLA 2003, the tenant's retail use must be the *predominant* use to which the premises is put.

44. Until recently, there has been a difference of views about whether the predominant use should be determined by reference to the dollar value of sales associated with a particular use or by a broader set of considerations. While this has not been addressed at the Supreme Court or the Court of Appeal, the issue has now been addressed at the County Court level in favour of a broader approach.

45. In *Cambridge Co-ordinates Pty Ltd v Vikings Press Pty Ltd* (Retail Tenancies) [2000] VCAT 2646, Deputy President Macnamara (as his Honour was then) considered that:

    [32] … the predominant nature of business is to be determined by reference to the activities involved in the business and where a business entails as one

[14] Yes, it was a dispute between the same parties about a lease of the same property eight years earlier.

invariably does the sale of goods or services that activity is best judged by reference to the volume of sales in dollar terms.

46. In *Elmer v Minute Wit Enterprises Pty Ltd* [2002] VCAT 1101, Senior Member R Davis considered a property that was used for both residential and retail uses, and held that:

> *In my view, it is wrong to apply only a strictly mathematical test when determining the predominant use of premises. However, it is appropriate to take into account the amount of the premises that are used for retail purposes along with any other factors that may be relevant.*
>
> *…*
>
> *In my view, no single factor by itself is determinative, that is, one cannot just look at a spatial feature used for retail purposes, the trading hours, the proportion of rent paid, or precisely what is written in the lease. One must take all those matters as a whole and come to a factual conclusion of whether the premises described in the lease "are used, or are to be used, wholly or predominantly for the carrying on of a business involving the sale or hire of goods by retail or the provision of retail services.*

47. In *Access Solutions International Pty Ltd v Gamet Pty Ltd* [2017] VCC 1563, both parties and Macnamara J approached the question by reference to the dollar value of each category of sales in question.

48. Her Honour Judge Kirton in *W.G.Z Pty Ltd atf the W.G.Z Family Trust v Arva Investments Pty Ltd* [2024] VCC 1777 considered a property that was used for a combination of logistics services and storage, where the dollar value of associated sales was not informative. Her Honour harmonised the apparent divergence in the caselaw and held that:

> *[56] [Judge Macnamara's] comments about assessing use spatially or by volume of sales … is not authority for a broader proposition that the income from a service, rather than the floor space occupied for delivering*

that service, is the appropriate measure for assessing the use of a premises.

[59] In my view, the above authorities lead to the conclusion that the appropriate way to measure usage of a premises will depend on the circumstances of each case. In some cases it may be spatially (by floor space), in others it may be by volume of sales or income, in some it may be a combination of measures, and in others there may be some other measure not yet considered.

49. Accordingly, the better view at this stage is that the broader approach is the correct way to determining whether a retail use is the predominant use at a property.

50. **Whether the retail use is '*under the terms of the lease relating to the premises'.*** Under s 4 of the RLA 2003, the retail use by the tenant must be a use that is permitted '*under the terms of the lease*'.

51. In *Sofos v Coburn* (1992) V ConvR ¶54-439, the tenant leased premises with the permitted use expressly states to be *'wholesale and export fish supply'*. The tenant argued that, notwithstanding the restrictions in the permitted use, it sold fish from the leased premises directly to consumers and the lease should, as a result, be regulated by the RLA 2003. Justice Nathan held that the tenant's own breach of the permitted use meant that the retail activities were not *'under'* the lease and the tenant's own contravention of the lease could not bring it under the *Retail Tenancies Act 1986 (Vic)* (the predecessor to the RLA 2003).

52. In *Cambridge Co-ordinates Pty Ltd v Vikings Press Pty Ltd* (Retail Tenancies) [2000] VCAT 2646, Deputy President Macnamara (as his Honour was then) considered a lease with a permitted use of '*storage, warehouse and ancillary wholesale clothing outlet with retail to public'* and held that the sales under that permitted use were ancillary to the main use to which the premises was permitted to be put. Consequently, as the lease only permitted sales as an ancillary use, the RLA 2003 could not apply to it.

53. The issue of restrictions in the permitted use to prevent the RLA 2003 from applying to a lease has become a particular focus for leasing lawyers in the last few years they seek to draft leases that minimise the impact of *CB Cold Storage*.

54. Also, the decision of the President in *Small Business Commissioner reference for advisory opinion* (Building and Property) [2015] VCAT 478 confirmed that the anti-avoidance provisions in s 94 of the RLA 2003 should be construed broadly, making attempts to prevent the application of the RLA 2003 difficult.

55. This issue was referred to without being resolved by Judge Macnamara in the County Court, sitting also as a Vice President of VCAT in *Access Solutions International Pty Ltd v Gamet Pty Ltd* [2017] VCC 1563, and by Croft J, sitting as a Justice of the Supreme Court and as an acting Vice President of VCAT in *Koga Nominees Pty Ltd v Loscam Australia Pty Ltd & Ors* [2018] VSC 455, but the issue was not resolved in either case.

56. In the last few weeks, the issue has been addressed directly in the case of *Grand View Trading Pty Ltd v SJV Properties Pty Ltd* (Building and Property) [2025] VCAT 545. In that case, Deputy President Riegler considered a lease that contained the following permitted use:

> *Warehouse, manufacturing, importing, storage and sale of stonework machinery and tools and portable housing.*
>
> *The parties expressly agree that the Permitted Use expressly excludes any use which would result in the Premises being retail premises pursuant to the Retail Leases Act 2003.*

57. The lease also contained other relevant provisions including an acknowledgement that the RLA 2003 did not apply to the lease and covenants limiting public access to the majority of the premises.

58. After noting that s 94 of the RLA 2003 prevents parties from contracting out of the RLA 2003, the Deputy President held that:

[26] … on one hand, the first paragraph of Item 12 of the Schedule permits the sale of stone work machinery and tools and portable housing without qualification, while on the other hand, the following paragraph of Item 12 of the Schedule excludes any use which would result in the Premises being retail premises pursuant to the RLA.

[27] However, according to the Landlord, the second paragraph of Item 12 of the Schedule simply reflects the agreement between the parties that the Premises can be used to conduct some retail activity, provided that the retail activity is not predominant. In other words, that it remains ancillary to the main use of the Premises as a warehouse or premises in which goods can be manufactured or stored.

[28] As I have already indicated, a provision in a lease which purports to exclude or is inconsistent with the operation of the RLA will be deemed void, pursuant to s 94 of that Act. That said, I do not consider that the second paragraph of Item 12 of the Schedule purports to exclude the operation of the RLA or is inconsistent with that Act. It does not state that the Act does not apply. Rather, it restricts the Tenant from using the Premises for an activity that would result in the RLA governing the relationship between the parties.

59. Accordingly, the Deputy President found that the lease permitted some retailing, but that the second paragraph of Item 12 of the Schedule was effective to restrict the permitted use such that any retailing was ancillary and not the predominant use of the premises.

60. However, the Deputy President also recognised the following:

[29] Nevertheless, I accept that on one view, it might be said that the second paragraph of Item 12 of the Schedule is ambiguous or at the very least unclear. In other words, the clause may have been clearer if it had simply stated that any retail activity was to be ancillary to the predominant use of the Premises as a warehouse or storage facility. Expressing the clause as prohibiting a use which would result in the Premises being retail premises

pursuant to the Retail Leases Act 2003 requires the reader to make a further enquiry as to what constitutes retail premises under the RLA.

61. The Deputy President then reviewed other covenants in the lease and pre-contractual communications between the parties and concluded that they had in fact agreed that any retailing was to be ancillary to the predominant use of the premises as a warehouse and office.

62. The upshot for practitioners seems to be that:

    (a) a restriction on the permitted use such as that in Item 12 of the Schedule to the lease in Grand View Trading could be more concisely drafted but will, nevertheless, be effective;

    (b) *provided that* the restriction in the permitted use genuinely reflects the parties' bargain.

63. As we read the Deputy President's reasons, particularly in light of the President Garde J's findings in *Small Business Commissioner reference for advisory opinion* (Building and Property) [2015] VCAT 478, such a restriction will not be effective if it does not reflect the true bargain between the parties and is in substance of device to contract out of the operation of the RLA 2003.

Concluding remarks and commercial recommendations

64. As you can see from the above discussion, the application of the RLA 2003 is technical, difficult and, at times, counter-intuitive.

65. When drafting or reviewing leases to which the RLA 2003 may apply, we recommend that you work through each of the elements discussed in this paper and use it as a checklist.

66. If including a restriction on the permitted use practitioners should consider the case law but ensure that any restriction accurately reflects the parties' bargain and that it is not being used as a device to avoid the operation of the RLA 2003.

67. If that is not available and you are still uncertain about whether the RLA 2003 applies, we recommend advising your client to treat the lease as retail and make the commercial terms reflect assumption. Most importantly, that will mean removing land tax as a recoverable outgoing and making an adjustment to the rent on account of the landlord adopting that cost and the risk of future increases. It also means making the landlord responsible for repair and maintenance under s 52 of the RLA 2003, which may affect the rent in some cases.

68. If that is not possible or palatable, we suggest seeking specialist advice. There are a number of well-known counsel who specialise in retail leasing and can assist.

69. We also recommend following the leading author's blog at www.samhopperbarrister.com for developments in this area as they arise.