



BRIMBANK OVERRULED

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On 22 July 2008 the Minister for Small Business Joe Helper made a determination under section 5(1)(e) of the *Retail Leases Act 2003* exempting certain retail premises leases granted by municipal councils from the application of the Victorian *Retail Leases Act 2003*.

Those leases exempted are leases entered into on or after 1 August 2008 under which the leased premises may be used wholly or predominantly for any one or more of the following purposes:

- i. public or municipal purposes;
- ii. charitable purposes;
- iii. as a residence of a practising minister of religion;
- iv. for the education and training of persons to be ministers of religion;
- v. as a club for or a memorial to persons who served in the First or Second World War or in any other war, hostilities or special assignment referred to in the *Patriotic Funds Act 1958*;
- vi. for the purposes of the Returned Services League of Australia;
- vii. for the purposes of the Air Force Association (Victoria Division);
- viii. for the purposes of the Australian Legion of Ex-Servicemen and Women (Victorian Branch).

An exemption is also provided in respect of any lease of premises by a council (including in its capacity as a committee of management within the meaning of the *Crown Land (Reserves) Act 1978*) under which the premises are used wholly or predominantly by a body, corporate or unincorporate, that exists for the purposes of providing or promoting community, cultural, sporting, recreational or similar facilities or activities or objectives and that applies its profits in promoting its objects and prohibits the payment of any dividend or amount to its members whether or not the premises are occupied by the tenant, held by

the tenant in trust for the occupant or sub-leased by the tenant to another person.

The determination applies to exempt sub-leases as well as leases and a certificate signed by the Small Business Commissioner shall be sufficient evidence that a lease is of a kind to which the determination applies.

This determination effectively overrides the decision of the Supreme Court of Victoria in *Brimbank City Council v Westvale Community Centre Inc* [2006] VSC 100 insofar as it applies to those leases by councils which are exempted by the determination.

In that case it was decided that a lease by Brimbank City Council to the Westvale Community Centre was subject to the application of the *Retail Leases Act 2003* because, although the community centre was not carrying out retailing in the usual sense for a profit, it was, nevertheless, providing retail services within the meaning of the legislation because it was providing services for fee or reward.

The determination is expressed to come into effect on 1 August 2008 and that will mean that it will apply to leases entered into on or after that date and leases entered into by councils before that date will not enjoy the benefit of the exemption provided by the determination.

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VICTORIAN ESSENTIAL SAFETY MEASURES REGULATIONS

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The essential safety measures regulations in part 12 of the *Victorian Building Regulations 2006* are now fully in force and are important for both landlords and tenants of commercial premises.

The regulations apply to all commercial buildings and include the following classes as defined in the *Building Code of Australia*.

Class 1b: Some boarding houses, guest houses or hostels

Class 2: Buildings containing sole-occupancy units (eg. Apartments, blocks of flats)

Class 3: Backpacker accommodation, residential parts of hotels or motels, residential parts of schools, accommodation for the aged, disabled or children

Class 5: Offices for professional or commercial purposes

Class 6: Shops or other buildings for sale of goods by retail cafes, restaurants, milk bars, dining rooms and bars

Class 7: Buildings used for car parks, storage or display of goods

Class 8: Laboratories or buildings for production or assembly of goods

Class 9: Public buildings such as health care buildings or assembly buildings, nightclubs, bars etc

The regulations require essential safety measures in these buildings to be maintained and an annual report to be prepared by the owner of the building and made available when requested.

An essential safety measure is defined under the regulations as an item listed in tables 1.1 – 1.11 of volume 1 of the *Building Code of Australia* except the items in table 1.4 relating to artificial lighting and includes safety systems such as the following.

Air conditioning systems	Fire detectors and alarm systems
Exit doors	Fire hydrants
Early warning systems	Fire isolated stairs
Emergency lifts and lighting	Fire rated materials
Emergency lighting	Fire windows
Emergency power supply	Mechanical ventilation
Emergency warning systems	Passage ramps
Exit signs	Path of travel to exits
Fire control centres	Smoke alarms
Fire curtains and doors	Smoke control systems
Fire extinguishers	Sprinkler systems

The owner of such a building is required to maintain the essential safety measures in a state which enables each of the essential safety measures to fulfil its purpose and ensure that it is not removed from its approved location except for the purpose of maintenance or in accordance with or as permitted by the regulations.

In respect of buildings constructed before 1 July 1994 an annual building report must be prepared before 13 June 2009.

An annual report should be prepared after an inspection by and with the assistance of a building practitioner and must be as follows.

- in a form approved by the Building Commission.
- signed by the owner or an agent of the owner.
- specify the address of the building.
- include the details of any inspection report made under the regulations.
- include a statement that the owner or an agent of the owner has taken all reasonable steps to ensure that -
 - each essential safety measure is operating at the required level of performance and has been maintained in accordance with the relevant occupancy permit or maintenance determination and fulfils its purpose;
 - since the last annual essential safety measures report there have been no penetrations to required fire-resisting construction, smoke curtains and the like in the building other than those for which a building permit has been issued;
 - since the last annual essential safety measures report there has been no change to materials or assemblies that must comply with particular fire hazard properties other than those for which a building permit has been issued; and
 - the information contained in the report is correct.

Comment

For tenants who are about to enter into a lease of a building for which an annual essential safety measures report is required a copy of that report should be obtained from the landlord before entering into the lease and any matters raised in the report dealt with before the lease is signed by the parties.

From the point of view of the owner it will be important that the building is regularly inspected and annual reports prepared.

For both landlords and tenants of these buildings, the provisions of section 251 of the *Victorian Building Act 1993* should always be kept in mind. Section 251 provides that, in spite of any provision of the lease between the parties, a tenant of the premises may carry out works required to be carried out by the owner of the premises under the Building Act or the regulations under the Act and deduct the costs of doing so from, or set them off against, the rent due to be paid to the owner.

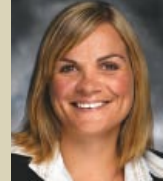
In respect of this section the decision of Deputy President Macnamara of VCAT in *Chen v Panmure Hotel Pty Ltd* [2007] VCAT 2464 should be noted as far as Deputy President Macnamara decided that where a requirement is made upon an owner to carry out works under the *Building Act 1993*, the owner is unable to require the tenant to carry out those works that are required to be carried out

by the tenant under the lease because the effect of the section is to impose that obligation upon the owner. Refer to the note on this decision on page 5 below.

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REGISTRATION OF ALPINE LEASES

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Background

All of Victoria's six alpine resorts are Crown land deemed to be permanently reserved under section 4(1) of the *Crown Land (Reserves) Act 1978* ("CLRA"), with the exception of three small parcels of freehold land within Mt Hotham Alpine Resort. Other than these freehold parcels, land tenure for developments in alpine resorts is by way of a Crown lease.

The *Alpine Resorts (Management) Act 1997* established six separate Alpine Resort Management Boards ("the Boards") who are responsible for the management of the Crown land within their respective resorts. Each Board is deemed to be a committee of management under the CLRA and has direct operational responsibilities for their respective resorts including the power to grant leases of Crown land within the resorts.

Until recently, leases have been granted in accordance with the government's Alpine Resorts Leasing Policy approved by the Government in 2002. This policy has provided a consistent framework for the leasing of Crown land in the alpine resorts.

Legislative change

In 2004 a report prepared in response to the Government's Alpine Resorts 2020 Strategy ("the Report") identified the need for a contemporary leasing policy that assisted in attracting long term investment in the resorts. The Report recommended that a system of lease registration would be one cost effective way of increasing investor confidence and benefiting alpine resort stakeholders. At present, of the estimated 400 Crown leases and 1500 subleases in the alpine resorts, very few are registered.

To support the establishment of the alpine lease registration system, the *Transfer of Land (Alpine Resorts) Act 2006* was assented to on 20 June 2006 ("TLARA"). In particular, the TLARA amended section 8 of the *Transfer of Land Act 1958* to require the registration of leases granted by Boards in the alpine resorts. From 21 June 2006, the registration of all new leases entered into on or after this date became compulsory. The registration of leases and subleases entered into before 21 June 2006 is still voluntary. In addition to the amendments, the Department of Sustainability and Environment ("DSE") prepared guidelines that outlined the supporting framework, technical requirements and procedures to satisfy lease and sublease registration in Victoria's alpine resorts ("Guidelines").



Registration requirements for leases and subleases

For an alpine lease to be registered, the Guidelines provide that it must satisfy the following requirements that are strictly applied by Land Victoria:

- The land must be in the State cadastre and correctly described by a lease plan certified by the Surveyor General.
- The form of the lease must be either in the form of the standard Alpine Resorts Lease document (available from the Boards of the DSE) or a DSE approved alternative lease.
- The lease must be fully executed and consented to by the Board.

Registration of an alpine sublease is not compulsory but is encouraged to ensure a reliable record of the agreement between the subtenant and the head tenant. For a sublease to be registered it must comply with the following:

- The Board must have consented to the sublease.
- The subleased area must be correctly identified on a plan.

- The sublease must be in the prescribed format, being Form 29 of the *Transfer of Land (General) Regulations* 2004.
- The head lease, under which the sublease has been granted, must be registered.

Registration of existing leases and subleases

The registration of leases and subleases that existed before the amendments to the *Transfer of Land Act* 1958 is voluntary and not always possible if the documents do not comply with the technical requirements of registration. If this is the case, and parties do want to register the documents, they will have to surrender the existing lease or sublease and enter into a new lease or sublease that complies with the technical requirements.

The Guidelines provide that any one of the following will prevent existing leases from being registered:

- The lease was granted by the former State Electricity Commission of Victoria.
- The lease is not current.
- The lease has been transferred so the original parties have changed.
- The term is unclear.
- The area of the land being leased has changed or is inadequately described.
- The lease has been varied.
- The original lease is not available.

Any one of the following will prevent existing subleases from being registered:

- The sublease is not in the Form 29 format.
- The head lease is not registered.
- The sublease is not current.
- The head lease has been transferred so the tenant in the head lease is not the same as the head tenant in the sublease.
- The sublease has been transferred so the subtenant in the sublease has changed.
- The term is unclear.
- The area being subleased has changed or is inadequately described.
- The sublease has been varied.
- The original sublease is not available.

Conclusion

Given the technical requirements that must be complied with in order for leases and subleases to be registered, it is expected that many existing leases and subleases will remain unregistered. However, it is envisaged that in time, as the terms of existing leases expire and new leases are issued, this new system of compulsory registration will eventually result in all alpine leases being registered. It is also expected that this new system of registration will result in many stakeholders deciding to register their subleases as well as their leases.

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AN IMPORTANT RENTAL VALUATION DECISION

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The decision of Senior Member Cremean of VCAT in *Salem Enterprises Pty Ltd v CSJ Food Enterprises Pty Ltd* of 25 February 2008 is an important decision in respect of the rental valuation of premises which are subject to the *Retail Leases Act 2003*.

In respect of a rental determination of such premises, section 37(6) of the Act requires that the valuation must be in writing and contain detailed reasons for the valuer's determination and specify the matters to which the valuer has had regard in making the determination.

In this case it appears that the valuer adopted a usual valuation practice of setting out in detail the comparable premises which had been considered for the purposes of the valuation and then without much more, fixed the rent.

Senior Member Cremean decided that the parties were not bound by the valuation because it had not complied with the requirements of section 37(6) of the Act because the valuer had simply not provided in writing his detailed reasons for his determination.

Whilst the valuer had noted the comparable premises for which he had regard he did not provide reasons why he had come to the conclusion that the rental value of the premises should be as he had determined by reference to those comparable values and the other factors which he took into account in reaching his determination in accordance with the requirements set out in section 37 of the Act.

The valuation provisions of section 37 place onerous requirements on a valuer and this decision shows that, unless they are fully complied with, a valuation will be at risk of being set aside and not bind the parties to the lease.

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SECTION 251 OF THE VICTORIAN BUILDING ACT

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In his recent decision in *Chen v Panmure Hotel Pty Ltd* VCAT Deputy President Macnamara had to consider the important provisions of section 251 of the *Victorian Building Act 1993*.

Section 251 of the *Building Act 1993* provides as follows.

251. Occupier or registered mortgagee may carry out work

- (1) If the owner of a building or land is required under this Act or the regulations to carry out any work or do any other thing and the owner does not carry out the work or do the thing, the occupier of that building or land or any registered mortgagee of the land or the land on which the building is situated, may carry out the work or do the thing.
- (2) An occupier may-
 - (a) recover any expenses necessarily incurred under subsection (1) from the owner as a debt due to the occupier; or
 - (b) deduct those expenses from or set them off against any rent due or to become due to the owner.
- (3) A registered mortgagee may-
 - (a) recover any expenses necessarily incurred under subsection (1) from the owner as a debt due to the mortgagee; or
 - (b) give notice in writing of those expenses to the mortgagor.
- (4) On the giving of notice under subsection (3)(b), the expenses are deemed to be added to the principal sum owing under the mortgage.
- (5) If the mortgagor is not the owner the mortgagor may recover the amount deemed under subsection (4) to be added to the principal sum from the owner as a debt due to the mortgagor.
- (6) This section applies despite any covenant or agreement to the contrary.

In this case the landlord of the Panmure Hotel had received a requirement from her local council requiring certain works to be carried out. The landlord did not carry out the works and applied to VCAT for orders that they be carried out by her tenant as required by the terms of the tenant's lease.

The tenant defended the application and its grounds of defence included a reliance on section 251 of the *Building Act 1993*.

In deciding for the tenant on this point, Deputy President Macnamara found that the lease did require the tenant to carry out the works but that to make an order requiring the tenant to do them would, effectively, be inappropriate as section 251 of the *Building Act 1993* had the effect of placing the responsibility for them upon the landlord:



"38 Regulation 709(8) of the *Building Regulations* imposes the obligation of compliance relative to the smoke alarms upon the 'owner of the building'. Regulation 706 defines owner in a manner which identifies for present purposes Ms Chen to the exclusion of the respondent lessee. The effect of Section 251 of the Act is that the lessee can carry out the work and recover its outlays as a debt from Ms Chen. The section is said to apply '*despite any covenant or agreement to the contrary*' (Section 251(6)). The result would appear to be that if Panmure Hotel were obliged by a determination of this Tribunal to carry out the works relative to the hard wired smoke alarms it could recover its outlays from Ms Chen. There is nothing in Section 251 which would preclude its operation where an occupier carried out the works in question under the compulsion of a Tribunal determination. It would in my view be inconsistent with the law's abhorrence of circuitry for me to make an order which purports to impose the obligation of carrying out these works upon the lessee when the *Building Act* itself has clearly imposed the obligation upon the lessor and given the lessee the right to recover the cost of carrying out the works as against the lessor despite any provision in the lease to the contrary. Hence no determination should be made against the lessee with respect to the smoke detectors."

In respect of those works which were required by the council to be carried out by the tenant, the tenant had no recourse to section 251 of the *Building Act 1993* because the section only applied where the works were required to be carried out by the owner of the building.

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- Skilled Visas
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