



Department of
Innovation, Industry and Regional Development

17 December 2007

Ms Alison Lyon
Director, Legal and Corporate
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Dear Ms Lyon *Alison*

RETAIL LEASES ACT – APPLICATION TO LOCAL COUNCIL PREMISES LEASED TO COMMUNITY ORGANISATIONS

I am writing to formally seek your organisation's views regarding the attached draft ministerial determination, currently under consideration by the Minister for Small Business, that would have the effect of removing from the coverage of the *Retail Leases Act 2003* certain premises that are leased by local councils to community organisations.

As you are aware, the principal purpose of the Act is to enhance the certainty and fairness of retail leasing arrangements between landlords and small tenants, with the legislative framework broadly implying a commercial relationship between the parties.

However, in the *Brimbank* case last year (*Brimbank City Council v Westvale Community Centre Inc* [2006] VSC 100), the Supreme Court confirmed that the Act can also apply where a local council has leased a premises at nominal rent to a community organisation that operates a neighbourhood house offering services that are retail in nature.

The *Brimbank* case has caused concern among certain local councils that, given the non-commercial nature of its leases with community organisations, the Act is ill-suited to apply to such leases and may jeopardise a mutually beneficial arrangement, to the detriment of the community at large.

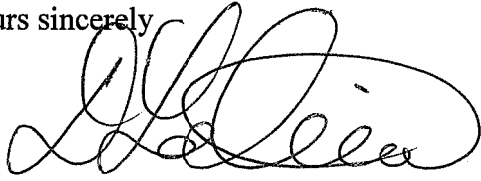
Following careful consideration by the Department, it is currently proposed that a ministerial determination be made under section 5 of the Act, along the lines of the attached draft document.

Rather than seeking to define broad concepts such as 'community activity' or 'community organisation', the Department has taken the approach of basing the draft determination on existing provisions in the *Local Government Act 1989*, that provide that local council land used for charitable or religious purposes are not rateable, and the definition of 'recreational lands' under the *Cultural and Recreational Lands Act 1963*. It is envisaged that this approach would provide greater legal certainty in the operation of the proposed determination.

I request that any comments be provided to me by **Monday 4 February 2008**. Should you wish to discuss this matter with me, I can be contacted by phone on Ph. 9651 9768 or by email at david.latina@iird.vic.gov.au.

I look forward to hearing your views on this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read "D. Latina", written in a cursive style.

David Latina
Executive Director
Office of Small Business

ATTACHMENT A: DRAFT MINISTERIAL DETERMINATION

Retail Leases Act 2003

PREMISES NOT CONSTITUTING RETAIL PREMISES

This Determination is made under Section 5(1)(c),(d) and (e) of the **Retail Leases Act 2003**.

- A. Acting under section 5(1)(c),(d) and (e) of the **Retail Leases Act 2003**, I determine that the following kind of premises, kind of tenant and kind of lease is premises, a tenant and a lease to which section 4(2)(f),(g) and (h) applies:

Premises which are leased under a lease from any Council under section 4 of the **Local Government Act 1989** to a tenant where under the terms of that lease:

- (a) the premises which are leased are to be occupied and used exclusively for purposes to which the provisions of paragraphs 154(2)(a),(b),(c),(d) or (f) of the **Local Government Act 1989** would apply as though the provisions of sub-sections 154(3), (3A) and (4) were not applicable in the event that they would otherwise be applicable to such premises; or
- (b) the premises which are leased are "recreational lands" within the meaning of paragraph (a) of the definition of "recreational lands" in section 2 of the **Cultural and Recreational Lands Act 1963**

and whether the premises are occupied by the tenant, held by the tenant under the lease in trust for the occupant or whether the premises are sub-leased by the tenant to another person.

- B. A certificate signed by the Minister for Small Business shall, pursuant to section 5(1A) of the **Retail Leases Act 2003**, be evidence of the application of this Determination.
- C. This Determination applies to a kind of premises, kind of tenant and kind of lease to which paragraph (a) or (b) of paragraph A of this Determination applies at the time the lease is entered into under the provisions of section 7 of the **Retail Leases Act 2003** whether or not the provisions of either of these paragraphs cease to apply after the lease is entered into.
- D. Where this Determination applies to a kind of premises, kind of tenant and kind of lease it continues to apply to such a lease whether that lease is surrendered and regranted by operation of law, or otherwise, or renewed where the new lease arising or entered into as a result of such surrender and regrant or renewal is in substantially the same terms as such surrendered or renewed lease.
- E. This Determination is an addition to and does not replace any other Determination and, particularly but without limitation, is to be read subject to the Ministerial Determination dated 20 August 2004 made by the Minister for Small Business and notified in the Victoria Government Gazette No S184 Monday 23 August 2004 to the extent that any premises, tenant or lease is subject to that Determination.
- F. Nothing in this Determination is to be taken to prevent its application to any sub-lease of any lease in respect of which this Determination applies in any way, whether as a kind of premises, kind of tenant and kind of lease, in addition to its application to any such lease.
