

IT'S SETTLED: "BUSINESS TO BUSINESS" SERVICES MAY ATTRACT THE OPERATION OF THE RLA

Date: 30 January 2018

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On 15 December 2017, the High Court of Australia refused special leave to appeal the decision of the Victoria Court of Appeal in *IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd* [2017] VSCA 178 (**CB Cold Storage**).

The decision to refuse special leave to appeal means that the ultimate consumer test remains a primary factor in determining the application of the *Retail Leases Act 2003* (Vic) (the Act) to retail, commercial and industrial leases. Further, an "ultimate consumer" may be an individual or a business, meaning that premises from which "business to business" services are provided may be a "retail premises" for the purpose of the Act.

The decision in *CB Cold Storage* has potentially significant implications for industrial and commercial leasing practice in Victoria. Our alert on 31 August 2017 set out a detailed discussion of the background and the Court of Appeal's decision in *CB Cold Storage*. A copy of our alert can be accessed [here](#).

APPLICATION OF THE ACT AND THE CONCEPT OF THE "ULTIMATE CONSUMER"

The Act applies to leases of premises which are used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services. The "ultimate consumer" test is used as a means of determining whether the premises is used for a retail purpose. In simple terms, a premises will be used for the retail provision of goods or services where the relevant good or service is supplied to the "ultimate consumer". In *CB Cold Storage*, the Court of Appeal confirmed that a consumer of a service (in that case, cold storage services) can be a business provided that they are the "ultimate consumer" of the relevant service. The ultimate consumer may therefore be an individual or a business, provided that the consumer does not pass on the goods or services to someone else.

SIGNIFICANCE OF THE DECISION

The effect of the Court of Appeal's decision is that the Act has a much broader application and now includes premises which would previously have been understood to be excluded from the operation of the Act.

The application of the Act has significant implications for both landlords and tenants. Key implications include a prohibition on the recovery of certain outgoings (including land tax and certain capital expenditure) from tenants, "rise and fall" market rent reviews and mandatory minimum five year lease terms.

In respect of existing leases, tenants should consider whether their lease may in fact be a retail lease by virtue of the "ultimate consumer" test and seek appropriate advice. It may be possible to assert rights under the Act, including relief from the recovery of land tax and or certain capital expenditure.

In respect of new leases, the parties should consider the potential application of the Act and seek appropriate advice prior to entering into a lease. Parties should be aware that the Act cannot be excluded by agreement, so the inclusion of a clause purporting to confirm that the Act does not apply cannot be relied on. If there is uncertainty in respect of the application of the Act, the parties should seek advice as to the steps they should take to ensure compliance with the Act or, alternatively, things that can be done to address the potential application of the Act (such as the use of a "gross" lease structure where the rent is "grossed up" to include an allowance for outgoings which would otherwise not be recoverable).

If you have any concerns as to how you may be affected by the CB Cold Storage case, please do not hesitate to get in touch.

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