COMMERCIAL AND RETAIL LEASES

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The original version of this paper was presented at the Western District Law Association afternoon of Continuing Professional Development on Friday, 27 March 2015.

This paper endeavours to address some disparate but current and important issues relating to commercial leases and retail leases in Victoria.

1. COMMERCIAL LEASES

Commercial leases may be distinguished from residential leases and, for present purposes, from Crown leases, pastoral leases and mining leases. Retail leases are an important and highly regulated subset of commercial leases.

1.1 The Landlord's Title

The landlord's title is fundamental to the security and efficacy of a lease. The tenant will be bound by any registered interest which precedes the grant of the lease and, in the case of an unregistered lease exceeding three years, by any prior equitable interest in the land unless the holder of that prior interest has failed to take appropriate steps to protect the interest. Prior registered interests include, most commonly, prior mortgages.[1]

It follows that the tenant's solicitor should always search the title and, depending on the nature of the term, the premises and the proposed use, obtain certificates and make such other inquiries as would normally be made by a solicitor acting for a purchaser of land. The tenant's solicitor should also consider whether the proposed tenant should be advised to make inquiries as to the title boundaries. A surprisingly

[1] See section 1.3 below.

common and particularly embarrassing mistake is for the tenant to sign a lease where the wrong party is expressed to be the landlord, that is, the stated landlord is some entity other than the registered proprietor of the land.

1.2 The Leasehold Estate

If a lease in Victoria is for more than three years, it must be registered if the tenant is to have a legal estate in the land.[2] An unregistered lease for more than three years takes effect in equity only. Leases are almost never registered in Victoria because the interest of a tenant in possession of land is an exception to the paramountcy of the register.[3] The tenant's possession gives constructive notice to a purchaser of his, her or its rights.[4] It is submitted, however, that a cautious tenant of a very long lease at a rent much below market should register the lease.

A tenant's option to purchase the freehold contained in an unregistered lease is not protected by the paramountcy provisions of the Torrens legislation and should, therefore, be protected by a caveat. Tenant's options to renew are dealt with in section 1.5 below.

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[2] See sections 66(1) and 40(1) of the Transfer of Land Act 1958.

[3] See *Barba v Gas and Fuel Corporation* (1976) 12 A.L.R. 649 per Gibbs A.C.J. at 665 and 666 in relation to the rights of tenants in possession which are protected under section 42(2)(e) of the Transfer of Land Act 1958. As between a tenant in possession and the holder of a subsequent registered interest, the effect of section 42(2)(e) is that the competition between them is to be determined according to the general law as if the later interest had not been registered.

[4] See *Hunt v Luck* [1902] 1 Ch. 428 at 432 (C.A.).

Other interests dependent on the leasehold estate, such as a mortgage of lease, should also be protected by caveat. Where there is sub-lease, the head tenant (sub-lessor) should protect the head lease by lodging a caveat. It is not at all clear that a head tenant can be said to be a tenant in possession by virtue of the sub-tenant's possession. The sub-lessee's possession does not, of itself, give constructive notice to a purchaser of the head tenant's rights.[5] Where the tenant of leased premises allows a related company to conduct business at the premises, to pay the rent, to erect its own signs and to transfer to itself the electricity, water and telephone services, the related company and not the tenant may be in possession.[6]

1.3 Prior Mortgages

A prior registered mortgage is binding on the tenant. If the landlord defaults and the mortgagee wishes to eject the tenant or sell the premises free of the tenancy, the mortgagee will be able to do so.[7] The position is otherwise if the mortgagee has consented to the grant of the lease.[8] It follows that to protect the leasehold estate, an intending tenant should obtain the consent of all prior mortgagees before executing the lease.

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[5] A tenant's occupation is notice of the tenant's rights but not of his lessor's rights but actual knowledge of the payment of rent to the lessor is notice of the lessor's rights: *Hunt v Luck* at 432. In *Cullen v Thompson* (1879) 5 V.L.R. (E.) 147, Molesworth J. held, in reliance on the equivalent of section 43 of the Transfer of Land Act 1958, that a tenant's possession of land did not give a later registered mortgagee notice of the rights of the tenant's landlord. In that case, however, the landlord could not claim that he was a tenant in possession through his sub-tenant; the landlord did not claim as a tenant but as a defrauded owner.

[6] See *Lamb Kee Ying Sdn. Bhd. v Lamb Shes Tong* [1975] A.C. 247 (P.C.).

[7] *Commonwealth Bank of Australia v Baranyay* [1993] 1 V.R. 589 at 598 per Hayne J.

[8] Ibid.

If, however, a prior mortgagee decides not to obtain vacant possession upon a default by the landlord but, instead, enters into possession by receiving the rents and profits, that is, receives rent from the tenant, the lease becomes binding on the mortgagee.[9] This rule depends upon the mortgagee or the mortgagee's agent receiving the rent directly; the receipt of rent by a receiver appointed by the mortgagee as the agent of the mortgagor does not make the lease binding on the mortgagee.[10]

A prior mortgagee may be estopped from denying that it has consented to a lease but mere knowledge that a tenant has taken possession, or even knowledge of the terms of the lease, does not give rise to any estoppel against the mortgagee.[11] It is very arguable, however, that in premises such as a shopping centre or office development where:

(a) there are multiple leases;

(b) the mortgagor-landlord habitually grants leases without the consent of the mortgagee;

(c) the mortgage prohibits the grant of leases without the consent of the mortgagee;

(d) the mortgagee knows that the landlord habitually grants leases without consent;

(e) the landlord knows that the mortgagee knows of this practice of the landlord:

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[9] *Commonwealth Bank of Australia v Baranyay* at 600, *Lever Finance Ltd v Needleham's Trustees* [1956] Ch. 375 at 382, *Stroud Building Society v Delamont* [1960] 1 W.L.R. 431, *Barclays Bank v Kiley* [1961] 1 W.L.R. 1050 and *Chatsworth Properties v Effiom* [1971] 1 W.L.R. 144.

[10] Ibid.

[11] *Commonwealth Bank of Australia v Baranyay* at 600.

the mortgagee would be held to have represented to the landlord or encouraged the landlord to believe that the landlord might continue to grant leases without obtaining the consent of the mortgagee. In such circumstances, the landlord would believe, on reasonable grounds, as result of the mortgagee's conduct, that he, she or it was permitted to grant further leases. On that basis, the mortgagee would be estopped, according to the ordinary principles of promissory estoppel[12], from denying that he, she or it had consented to such further leases. It is submitted that this risk is a real one for a mortgagee that does not take seriously a clause in the mortgage prohibiting the grant of leases without the mortgagee's consent.

1.4 Subsequent Mortgages

Registered and unregistered mortgages granted by the landlord subsequent to an unregistered lease rank behind the lease, at least if the tenant was in possession at the time of the mortgage. A fortiori, they would rank behind a registered lease.

1.5 Options to Renew

Some writers recommend that a tenant with an option to renew should lodge a caveat to protect that right. The better view is that this is not necessary if the option is contained in the lease document and the tenant is in possession.[13]

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[12] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 C.L.R. 387 and *Commonwealth Bank of Australia v Baranyay* at 600.

[13] See *Burke v Dawes* (1938) 59 CLR 1 at 17 to 18, approved in *Barba v Gas and Fuel Corporation* (1976) 12 A.L.R. 649 per Gibbs A.C.J. at 665 and see footnote 3 above.

In drawing or advising on a renewed lease (normally under an option to renew) it is important to recognize that the new document is likely to be interpreted as a stand alone document in respect of the new term. So, for example, a clause requiring the reinstatement of the premises to the condition prevailing at the commencement of the term will probably be construed as requiring reinstatement to the condition of the premises at the start of the renewed lease, not the condition prevailing at the start of the original term. Similarly, provisions (repeated from an original lease document) relating to an initial rent free period are likely to be treated as operable in respect of the relevant period of the renewed lease.

Where the landlord has taken a guarantee of the tenant's obligations, it will be a matter of construction whether the words of the guarantee are wide enough to cover the tenant's obligations under the renewed lease. The words of a guarantee are construed strictly against the creditor, however.[14]

1.6 Personal Guarantees

A lessor will frequently take a guarantee of the obligations of a corporate tenant from the directors or shareholders of the tenant. It is submitted that the ordinary rules relating to guarantees and to the protection of particular kinds of guarantors apply in this context. If a particular guarantor is not directly involved in the operation of the corporate tenant and gains no significant benefit from the transaction personally,

[14] See *Ankar Pty. Ltd. v National Westminster Finance (Australia) Ltd.* (1987) 162 C.L.R. 549 at 561.

there is a risk that the rule in *Garcia v National Australia Bank Limited*[15] will apply. According to that rule, where a guarantee by a person not involved in the business of the debtor company is given gratuitously because of the trust and confidence reposed by the guarantor in the controller of the company, the guarantee will be unenforceable unless the guarantor:

(a) actually understood "the purport and effect of the transaction of surety ship";

(b) the creditor itself took steps to explain the "purport and effect" of the transaction to the guarantor; or

(c) the creditor reasonably believed that the purport and effect of the transaction had been explained to the guarantor by "a competent, independent and disinterested stranger".

Where, to the knowledge of the creditor, the relationship between the guarantor and the controller of the company is marital (de jure or de facto), it will be presumed that a relationship of trust and confidence provides the explanation for the guarantee. The rule applies to other personal relationships, such as between siblings or personal friends, but in those cases there is not necessarily any presumption and much will depend on the extent of the creditor's knowledge of the relationship and motivation of the guarantor. The essential question will be whether, as a matter of fact, the creditor knew or should have known that the relationship provided the explanation for the guarantee.[16]

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[15] (1998) 194 C.L.R. 395 especially at 408 to 409, [31] to [33].

[16] See *Kranz v National Australia Bank Limited* (2003) 8 V.R. 310 at 322.

The construction of guarantees relating to renewed leases is dealt with in section 1.5 above.

1.7 Essential Safety Measures

There is a current and very interesting controversy as to whether responsibility for "essential safety measures", that is, measures required under the Building Act 1993 and the Building Regulations 2006 concerning matters such as fire safety, clean air and safe egress from premises, can be allocated contractually between landlord and tenant whether as to performance or as to cost. Sub-sections (1) and (2) of section 251 of the Building Act 1993 provide (with my underlining) that:

> "(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."

The Victorian Civil and Administrative Tribunal has held[17] that this section precludes any attempt by a landlord to pass on to the tenant the cost of such works. There has been learned argument, however, that the better view is that while the Act and Regulations may impose on a landlord an obligation to comply with such safety requirements, the Act should not be read as preventing the imposition of a contractual obligation on the tenant either to perform such works or to bear the cost of them. In a case where the relevant part of the Regulations required the landlord "to ensure" that certain safety measures were effected, the Tribunal held[18] that the

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[17] *Chen v Panmure Hotel Pty. Ltd.* [2007] VCAT 2464 at [38].

[18] *McIntyre v Kucminska Holding Pty. Ltd.* [2012] VCAT 1766 at [69].

lease could impose on the tenant an obligation to attend to the relevant matters (the landlord thereby complying with its obligation under the relevant regulation "to ensure" that the measures were taken). The Tribunal went on to hold, however, that the landlord was required by section 251 of the Act to bear the ultimate cost, whatever the lease might say about responsibility for such costs. This decision has also been criticized by some commentators. Similar controversy exists in relation to section 52 of the Retail Leases Act 2003.[19]

Because of the importance of the issue, the Victorian Small Business Commissioner has exercised his power under section 11A of the Small Business Commissioner Act 2003 to seek an advisory opinion from the Victorian Civil and Administrative Tribunal. The written submissions to the Tribunal of interested parties, with analyses of competing propositions of law, can be read on the Commissioner's website.[20] The Tribunal constituted by the President, Garde J., followed the previous Tribunal decisions holding that landlords cannot pass on to tenants the costs of complying with essential safety measures in commercial premises.[21]

2. RETAIL LEASES

As mentioned on page 3 above, retail leases are a highly regulated subset of commercial leases.

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[19] See section 2.3 below.

[20] http://www.vsbc.vic.gov.au/news-publication/advisory-opinion-essential-safety-measures/

[21] *Small Business Commissioner: Reference for Advisory Opinion (Building and Property)* [2015] VCAT 478

2.1 Application of the Retail Leases Act 2003

In broad terms, a retail lease will be regulated by the Retail Leases Act 2003 if:

(a) the premises are wholly or predominantly used under the terms of the lease for the retail hire or sale of goods, or the retail provision of services;[22]

(b) the term of the lease is one year or more (including periodic tenancies where the continuous possession of the tenant reaches one year);[23]

(c) the tenant is not a listed public company[24] or listed foreign company[25];

(d) the annual cost of the premises to the tenant, including rent and all outgoings payable by the tenant, does not exceed $1 million;[26] and

(e) the premises or lease are not exempt under a determination by the Minister[27].

2.2 Consequences of Regulation

It is not practical to do more in this paper than summarize some of the main areas of the regulation of retail leases. The requirements and restrictions include the following:

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[22] See section 4(1)(a) of the Retail Leases Act 2003.

[23] See section 12 of the Retail Leases Act 2003.

[24] See section 4(2)(c) of the Retail Leases Act 2003.

[25] That is, "a body corporate whose securities are listed on a stock exchange, outside Australia and the external territories, that is a member of the World Federation of Exchanges": see section 4(2)(d) of the Retail Leases Act 2003. Some well known foreign stock exchanges are not part of the World Federation of Exchanges.

[26] See section 4(2)(a) of the Retail Leases Act 2003 and regulation 6 of the Retail Leases Regulations 2013.

[27] See paragraphs (e) to (h) of section 4(2) of the Retail Leases Act 2003.

(a) The minimum term of a retail lease, including any option to renew, must be five years.[28]

(b) The proposed landlord must provide a disclosure statement in accordance with the regulations at least seven days before entering into a retail lease.[29]

(c) The landlord must give the tenant not less than six months and not more than twelve months notice that the date for the exercise of an option to renew is approaching.[30]

(d) The tenant cannot be required to pay the landlord's costs of the lease although the landlord's costs of an assignment can be recovered from the tenant if the lease so provides.[31]

(e) Provisions requiring the payment to or for a landlord of key-money or payments for goodwill are void and illegal (under criminal penalty).[32]

(f) Liability to pay for outgoings is regulated: see section 2.3 below.

(g) If the lease does not include an option to renew, the landlord must either offer an option to renew or state that no such option is offered not less than six months and not more than twelve months before the end of the lease term.[33] Effectively, therefore, a retail lease cannot be terminated (in the absence of a breach) without six months notice, even if the term has come to its end.

(h) Retail tenancy disputes are within the exclusive jurisdiction of the Victorian Civil and Administrative Tribunal: see section 2.4 below.

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[28] See section 21(1) of the Retail Leases Act 2003.

[29] See section 17(1) of the Retail Leases Act 2003 and regulation 8 of the Retail Leases Regulations 2013.

[30] See section 28(1) of the Retail Leases Act 2003.

[31] See section 51 of the Retail Leases Act 2003.

[32] See section 23 of the Retail Leases Act 2003.

[33] See section 64 of the Retail Leases Act 2003.

2.3 Outgoings

Under section 46 of the Retail Leases Act 2003, the landlord is required to give the tenant an itemized estimate of outgoings to which the tenant is liable to contribute before the lease is entered into and again at least one month before the start of each financial year. Under section 47, an account of actual outgoings must be given to the tenant not later than three months after the end of each financial year.

Section 41 of the Act requires the landlord to bear any capital costs relating to any building in which the lease premises are located. It reads as follows:

> "(1) Subject to subsection (2), a provision in a retail premises lease is void to the extent that it requires the tenant to pay an amount in respect of the capital costs of —
> (a) the building in which the retail premises are located; or
> (b) any building in a retail shopping centre in which the retail premises are located; or
> (c) any areas used in association with a building referred to in paragraph (a) or (b); or
> (d) plant in a building referred to in paragraph (a) or (b).
> (2) Subsection (1) does not operate to render void a provision in a retail premises lease requiring the tenant to undertake capital works at the tenant's own cost."

Section 52 deals with structural repairs and the maintenance of certain kinds of fixtures and plant and equipment. It reads as follows:

> "(1) A retail premises lease is taken to provide as set out in this section.
> (2) The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into —
> (a) the structure of, and fixtures in, the retail premises; and
> (b) plant and equipment at the retail premises; and
> (c) the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.
> (3) However, the landlord is not responsible for maintaining those things if —
> (a) the need for the repair arises out of misuse by the tenant; or
> (b) the tenant is entitled or required to remove the thing at the end of the lease.
> (4) The tenant may arrange for urgent repairs (for which the landlord is responsible under this section or under the terms and conditions of the lease) to be carried out to those things if —
> (a) the repairs are necessary to fix or remedy a fault or damage that has or causes a substantial effect on or to the tenant's business at the premises; and

(b) the tenant is unable to get the landlord or the landlord's agent to carry out the repairs despite having taken reasonable steps to arrange for the landlord or agent to do so.

(5) If the tenant carries out those repairs —

(a) the tenant must give the landlord written notice of the repairs and the cost within 14 days after the repairs are carried out; and

(b) the landlord is liable to reimburse the tenant for the reasonable cost of the repairs and may not recover that cost or any part of it as an outgoing."

This section provides, essentially, that landlords are responsible for structural repairs as well as the repair of capital equipment and of appliances provided under the lease by the landlord. The Victorian Civil and Administrative Tribunal has held that sections 41 and 52 preclude any contractual attempt to reallocate responsibility to perform such works or to reallocate liability for the cost of such works.[34] In reaching this conclusion, the Tribunal placed considerable weight on the views of Dr. Croft[35], now Croft J. of the Supreme Court of Victoria. The consequence of the Tribunal's approach to sections 41 and 52 of the Act is that the contractual freedom of the parties to a retail lease to make the tenant pay for repairs is limited to repairs and works not covered by those sections. As with essential safety measures for leases generally, however, there has been learned dissent from the Tribunal's view: see section 1.7 above. The effect of sections 41 and 52 was included in the Small Business Commissioner's advisory opinion application to the Tribunal. The resulting advisory opinion of the President was consistent with the previous decisions of the Tribunal and with the views of Dr. Croft: see section 1.7 above.

[34] *Café Dansk Pty Ltd v Shiel* [2009] VCAT 36 (14 January 2009) at [44].

[35] C.E. Croft, *Retail Leases Victoria*, Lexis Nexis (Looseleaf).

2.4 Retail Tenancy Disputes

Part 10 of the Retail Leases Act 2003 deals with dispute resolution. The essential scheme of the Act is that the Victorian Civil and Administrative Tribunal has exclusive jurisdiction to determine retail tenancy disputes.[36] "Retail tenancy dispute" is widely defined in section 81 of the Act as follows (with my underlining):

> "(1) In this Part, retail tenancy dispute means a dispute between a landlord and tenant —
> (a) arising under or in relation to a retail premises lease to which —
> (i) this Act applies or applied because of Part 3; or
> (ii) the Retail Tenancies Reform Act 1998 or the Retail Tenancies Act 1986 applies or applied; or
> (b) arising under a provision of the Retail Tenancies Reform Act 1998 or the Retail Tenancies Act 1986 in relation to a lease to which that Act applies or applied; or
> (c) arising under a lease that provides for the occupation of retail premises in Victoria to which none of those Acts apply or applied —
> despite anything to the contrary in this Act (apart from subsection (2) and section 119(2)).
> (1A) In addition, a retail tenancy dispute includes —
> (a) a dispute between a landlord and a guarantor of a tenant's obligations under a lease arising in circumstances referred to in subsection (1)(a), (b) or (c); and
> (b) a dispute between a landlord and a person who has given an indemnity to the landlord for loss or damage arising as a result of a breach by a tenant of a lease in circumstances referred to in subsection (1)(a), (b) or (c).
> (2) However, retail tenancy dispute does not include a dispute solely relating to the payment of rent or a dispute that is capable of being determined by a specialist retail valuer under section 34, 35 or 37 of this Act or under section 12A or 13A of the Retail Tenancies Reform Act 1998 or section 10 or 11A of the Retail Tenancies Act 1986."

It can be seen that a retail tenancy dispute is not confined to claims for relief under the Retail Leases Act 2003 but extends to general law and contract claims between landlord and tenant if the lease is one to which the Act applies.

The main exceptions to the scheme, so far as the Act is concerned, are:

(a) claims relating solely to the payment of rent[37] — the policy appears to be that simple debt collection claims by landlords for unpaid rent will be made in the Courts; and

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[36] See section 89 of the Retail Leases Act 2003.

[37] See section 81(2) of the Retail Leases Act 2003, which excludes pure rent payment disputes from the definition of "retail tenancy dispute".

(b) claims for the return of illegal key-money or goodwill payments and claims for relief from forfeiture or for unconscionability — these claims are not exclusive to the Victorian Civil and Administrative Tribunal[38].

The process of dispute resolution under the Retail Leases Act 2003 is that except in cases where an injunction is sought, the dispute must first be referred to a mediation arranged by the Small Business Commissioner.[39] An application (except an injunction application) cannot be made to the Victorian Civil and Administrative Tribunal unless and until the Commissioner provides a certificate that mediation has failed or is unlikely to resolve the dispute. The Commissioner's costs of the mediation are shared by the parties.[40]

No costs order can be made by the Victorian Civil and Administrative Tribunal in a retail tenancy dispute unless a party has conducted the Tribunal proceeding vexatiously or has refused to take part in or withdrawn from mediation.[41] It follows that each party must bear his, her or its own costs of the Tribunal proceedings no matter how egregious the transactional misbehaviour of a party has been or how complicated or difficult the forensic process, provided that the party does not conduct the dispute resolution process improperly. Significantly, the Tribunal's ordinary offer

[38] See section 89(4) of the Retail Leases Act 2003, which provides for the forum in which "retail tenancy disputes" are justiciable. See also section 23(4) in relation to key-money and payments for goodwill.

[39] See section 87 of the Retail Leases Act 2003.

[40] See section 86(5) of the Retail Leases Act 2003.

[41] See section 92 of the Retail Leases Act 2003.

of compromise rules are inapplicable nor can the Tribunal make a costs order based on a *Calderbank* offer.[42]

A further characteristic of the exclusive jurisdiction of the Victorian Civil and Administrative Tribunal under the Retail Leases Act 2003 is that there is no appeal from decisions of the Tribunal except on questions of law, and then only with leave.[43]

There may be cases, therefore, where the disadvantages to an aggrieved party of the Tribunal's no cost and limited appeal regime are such that an attempt might be made to avoid the Part 10 process altogether by commencing proceedings, if possible, for misleading and deceptive conduct or unconscionable conduct under federal law. Section 18(1) of the Australian Consumer Law provides that:

> "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

Section 20(1) of the Australian Consumer Law provides that:

> "A person must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law from time to time."

Section 22(1) of the Australian Consumer Law prohibits unconscionable conduct in trade or commerce in the acquisition or supply of goods or services except acquisition by or supply to listed public companies. The Australian Consumer Law applies as federal law in cases to which the constitutional power of the Commonwealth

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[42] Section 92(1) of the Retail Leases Act 2003 expressly excludes the operation of the normal costs provisions contained in the Victorian Civil and Administrative Tribunal Act 1998, including section 112 of that Act, which deals with formal offers of settlement. Section 159 of the Victorian Civil and Administrative Tribunal Act 1998 provides that an "enabling enactment" (such as the Retail Leases Act 2003) prevails, to the extent of any inconsistency, over the Tribunal Act.

[43] See section 148 of the Victorian Civil and Administrative Tribunal Act 1998.

extends.[44] For present purposes, the most significant of these situations is where one or other party to a retail tenancy dispute is a trading or financial corporation. There will be many cases where contractual disputes can be framed as, or will at least involve, disputes about misleading or deceptive conduct or unconscionable conduct. Once a remedy is sought under federal law in the Federal Court of Australia or the Federal Circuit Court of Australia, that court has "accrued jurisdiction" to determine all matters in controversy between the parties, whether arising under federal, state or common law, and whether involving multiple causes of action, provided that there is the "same substratum of facts" or "common transactions and facts".[45] Accrued jurisdiction is exercisable even if the federal claim fails.

A successful claim in a federal court, even if made under state law is likely to carry with it the costs of the proceeding.

[44] The Australian Consumer Law applies to all persons in Victoria as state law by virtue of section 8 of the Australian Consumer Law and Fair Trading Act 2012. Sections 131, 4 and 6 of the Competition and Consumer Act 2010 of the Commonwealth apply the Australian Consumer Law, which is contained in Schedule 2 of that Act, as federal law in cases including where the conduct is that of trading or financial corporations, where a trading or financial corporation (other than a listed public company) is affected by the conduct, conduct occurs in interstate or foreign trade or commerce or conduct makes use of postal, telegraphic or telephonic services.

[45] See *The Laws of Australia*, Thomson Reuters, at [19.5.3590].