

The Meaning of "Retail" Continues to Grow



Following the decision of Justice Croft of the Supreme Court (confirmed by the Court of Appeal) in *CB Cold Storage Pty Ltd -v- IMCC Group (Australia) Pty Ltd*, agents and landlords alike need to very carefully consider whether the intended permitted use of premises falls within the operation of the *Retail Leases Act 2003 (the Act)*.

Most agents and their landlord clients assume that the words "retail" and "retail premises" when used in the Act apply to what could generally be described as a retail shop selling goods or services to ordinary domestic or household consumers. The recent *CB Cold Storage Case* and a growing body of case law confirms that the test for determining whether a particular supply is a retail supply is the "ultimate consumer test". That is, whether the goods or services are supplied to the ultimate consumer of those goods or services.

1. The goods or services can still be supplied on a retail basis if they are supplied business to business; and
2. Most (possibly all) services are retail.

The *CB Cold Storage Case* involved a gigantic warehouse with freezer storage capacity where the tenant held goods for various retailers in cold storage and arranged for delivery of batches of frozen products to those retailers the Court held that the logistical services offered by the Tenant were retail services on the basis that the ultimate consumer of those logistical services were the large retailers who had their own frozen products stored at the premises, therefore the Retail Lease Act applies to this Lease.

Accordingly, the Act can apply to premises from which goods or services are supplied business to business,

provided that those goods or service are supplied to the ultimate consumer of those goods or services. This may apply to services supplied business to business, provided that the services are not on-supplied, or to goods that are supplied business to business and that are used as an input in the second person's business. **As a result of the *CB Cold Storage Case*, unless a new statutory exclusion applies, warehousing and logistical business are likely to be treated as retail premises.**

There is likely to be a significant number of leases in the community that are regulated by the Act without the parties knowing. This may lead to a number of actions by tenants against landlords where leases have been entered into with unintended consequences.

The most obvious consequences of the Act applying to leases that were thought to be outside the operation of the Act are:

1. Land Tax is not recoverable
2. Landlords have more onerous maintenance and repair obligations
3. Landlords must provide Disclosure Statements and annual Outgoings Estimates and Reconciliations.

Contact Us

If you wish to discuss any of the material above, please contact **Stephen Roache** on (03) 8621 2804.

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