

## INFORMATION STATEMENT -

### IMPACT OF INCLUDING LAND TAX IN GROSS RENTS

As of 1 July 2003, the *Retail Leases Act 2003* (the Act) prohibits landlords from recovering from the tenant the landlords' land tax as part of outgoings. This may prohibit the market practice of landlords offering tenants gross rents, which include an amount of land tax, as this is inconsistent with the intention of the Act. As such, this Information Statement serves as a cautionary note to small business landlords on the inadvertent risk associated with this practice.

#### Background to the *Retail Leases Act 2003*

On 1 May 2003, the Act came into effect. Retail leases that are entered into or renewed from 1 May 2003 will be subject to the provisions of the Act. The Act introduces a range of new provisions. One of the new provisions prohibits landlords from recovering from tenants the landlords' land tax as part of outgoings.

#### Prohibition on recovery of land tax

*Section 50* of the Act (which takes effect from 1 July 2003) provides:

#### ***“Recovery of*** land tax

*A provision of a retail premises lease is void to the extent that it makes the tenant liable to pay an amount for tax for which the landlord is liable under the Land Tax Act 1958.”*

#### Role of the Office of the Small Business Commissioner in educating small businesses

The Office of the Small Business Commissioner (OSBC) has a general information and education role under the Act, and its own establishing Act, the *Small Business Commissioner Act 2003*. This role includes the following functions:

- to facilitate and encourage the fair treatment of small businesses in their commercial dealings with other businesses in the marketplace;
- to promote informed decision-making by small business in order to minimise disputes with other businesses;
- to monitor emerging trends in market practices that have an adverse effect on small businesses; and

- to give preliminary assistance in dispute resolution designed to ensure that -
  - the parties are fully aware of their rights and obligations; and
  - there is full and open communication between the parties concerning the matter.

As a result of these functions, it is necessary for the OSBC to bring to the attention of small business landlords, the risk associated with offering gross rents that include an amount of the landlord's land tax.

### Market practice

A gross rent is an all-inclusive amount that the tenant has to pay the landlord in consideration for the landlord providing the tenant possession of the premises. In some instances, landlords find gross rents easier, and less costly, to administer than net rents (which means an amount of rent plus outgoings).

As the *Act* prohibits landlords from recovering land tax from tenants as part of *outgoings*, some landlords are instead using the practice of gross rents to be able to recover land tax as part of *rent*.

On the face of it, this practice does not breach *section 50* as the landlord is not requiring payment of land tax via a lease *provision*, such as the outgoings provision. Rather, the land tax is "hidden" in the rent. However, there may be an inadvertent consequence of this practice because of the operation of *section 94* of the *Act*.

### Effect of *section 94*

*Section 94* of the *Act* will deem a provision in a lease void if it is contrary to, or inconsistent with, anything in the *Act*. It appears clear from the *Act* that Parliament generally believes that land tax is not an outgoing of which the tenant enjoys the benefit, and as such, the landlord should be liable for the expense.

It is not beyond possibility that a scenario may arise where a tenant, believing that the rent being paid under the lease contains an amount of land tax, challenges the validity of the rent provision by relying on *section 94*. In such a scenario, under *Part 10* of the *Act*, the tenant can challenge the rent provision by recourse to mediation through the OSBC, and ultimately, for determination by the Victorian Civil and Administrative Tribunal (the Tribunal). In its argument, the tenant will rely on the fact that Parliament's intention behind *section 50* was to prohibit *any form* of recovering the landlord's land tax from the tenant, whether via outgoings or otherwise. Further, the argument will propose that as land tax was included as a component of the rent, *section 94* will operate to make void the entire rent clause in the lease. In the scenario, the consequence of this argument being accepted is that the landlord will be disentitled to receive any rent under the lease. That is, not only will the land tax component of the rent be prohibited, but the whole rent clause is made void and there

is no entitlement to any rent.

Having regard to the risk illustrated in this scenario, small business landlords should act with extreme caution when offering tenants gross rents that include an amount of land tax.

Things landlords can do to protect their investment

When offering tenants gross rents, landlords should not include an amount for the landlords' land tax.

Further, it may be prudent for landlords to provide the tenant with an adequate breakdown of what amounts the gross rent comprises. Preferably, this could be provided in writing. The disclosure statement would be an appropriate method for providing the breakdown in writing.

By taking this precaution, the risk that the rent provision may be successfully challenged by the tenant is substantially reduced.

Contact details for the OSBC

For further assistance, small business landlords should contact the OSBC:

Telephone: 13 22 15 Toll Free 1800 136 034

Facsimile: (03) 9651 9943

Website: [www.sbc.vic.gov.au](http://www.sbc.vic.gov.au)

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Important notice

This Information Statement contains information intended to assist compliance with retail leases laws. It should not be regarded as legal advice.