

31 March 2016

**Mr David McIver**

Policy Adviser  
Small Business Victoria  
Department of Economic Development, Jobs, Transport and Resources  
Level 35, 121 Exhibition Street  
Melbourne VIC 3000

By email only: david.mciver@ecodev.vic.gov.au

Dear Mr McIver

**Proposed Ministerial Determination under s5(1)(d) of the *Retail Leases Act 2003* (Vic)  
Foreign listed companies**

The Law Institute of Victoria (LIV) appreciates the opportunity to provide feedback regarding a proposed Ministerial Determination under s5(1)(d) of the *Retail Leases Act 2003* (Vic) (the Act).

**Proposed Ministerial Determination**

Under s4(2)(g) of the Act, 'retail premises' to which the Act applies do not include 'premises the tenant of which is a kind of tenant that the Minister determines under section 5 is a tenant to which this paragraph applies'. Section 5(1)(d) of the Act provides that the Minister may 'determine that a kind of tenant is a tenant to which section 4(2)(g) applies'. The draft Ministerial Determination under s5(1)(d) you have provided for comment proposes that the following kind of tenants are tenants to which s4(2)(g) of the Act applies:

- bodies corporate whose securities are listed on an overseas stock exchange; or
- subsidiaries (as defined in section 9 of the *Corporations Act 2001*) of such bodies corporate.

You have advised that the draft determination seeks to correct the anomaly whereby publicly listed corporations on overseas exchanges may be classified as retail tenants solely on the basis that these exchanges are not members of the World Federation of Exchanges. This is because s4(2)(d) of the Act only provides that 'retail premises' do not include premises the tenant of which is:

- i. 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; or
- ii. a subsidiary (as defined in section 9 of the *Corporations Act 2001*) of such a body corporate.

**Law Institute of Victoria comments**

Members of the LIV's Leases Committee have expressed concern about the scope for foreign corporations which are not listed on a stock exchange that is a member of the World Federation of Exchanges to be entitled to the protections conferred on retail tenants under the Act. As you have

observed, this outcome is inconsistent with the original intention of the Act to exclude listed companies and their subsidiaries as retail tenants.

The LIV therefore supports the proposed Ministerial Determination in principle and suggests some minor drafting corrections to reflect the terminology in the Act. Please see attached amended determination with proposed changes tracked. The changes which the LIV proposes are:

- in the dot point, refer to 'companies and corporations' as well as 'bodies corporate'. A company defined in the *Corporations Act 2001* is a body corporate. However, the words 'body corporate' might not be appropriate for reference to an entity listed on a stock exchange outside Australia. We also note that the draft determination refers to 'corporations' in original paragraph 3 (although we are proposing the deletion of this paragraph);
- in the dot point, amend the words in the brackets to read 'including subsidiaries as defined in section 9 of the *Corporations Act 2001*' This would make it clear that subsidiaries of bodies corporate as they might be defined in overseas legislation would be included as well as subsidiaries defined in section 9 of the *Corporations Act 2001*;
- in the dot point, amend the reference to 'an overseas stock exchange' to 'a stock exchange outside Australia'. This follows more closely the terminology in section 4(2)(d)(i) of the Act;
- deletion of paragraph 3 which provides that 'Such corporations are not retail tenants under the Act'. This paragraph appears superfluous.

While supporting the determination in principle, the LIV also makes the following comments:

1. **Scope of the Ministerial Determination**  
The LIV queries whether the Ministerial Determination should have broader application and exclude all foreign corporations from the protections afforded by the Act on the basis that such corporations would not need the protection of the Act if they have the resources to establish a presence in Australia. The LIV suggests that this should be explored.
2. **Determining status of foreign corporations**  
The LIV is concerned that the difficulties in determining the status of foreign corporations and their local subsidiaries remain. LIV members have indicated that is often almost impossible to determine this status (or expensive if overseas firms are to be engaged to carry out company searches which cannot be done within Australia), which means that it will not be possible to ascertain whether or not the Act applies. To partially address this, the LIV suggests that the Ministerial Determination could extend to foreign state-owned corporations and their local subsidiaries.

Also, if the term 'overseas stock exchange' is to be retained, the LIV queries whether the term should be defined.

3. **Retrospective application**  
The LIV notes that the Ministerial Determination will not have retrospective effect, so will not address the problems that currently exist in relation to the application of the Act to certain foreign corporations.
4. **Blockchain**  
While it may be premature to consider the implications of blockchain on stock exchanges and the subsequent impact upon retail lease transactions in Victoria, the LIV notes that the

ASX has heavily invested in a Wall Street blockchain company. The LIV would welcome the opportunity to discuss this with you in due course.

If you would like to discuss any of the above comments in further detail, please contact Karen Cheng, Rebekah Farrell or Barton Wu, LIV Property & Environmental Section, at [kcheng@liv.asn.au](mailto:kcheng@liv.asn.au), [rfarrell@liv.asn.au](mailto:rfarrell@liv.asn.au) or [bwu@liv.asn.au](mailto:bwu@liv.asn.au).

Yours sincerely



Steven Sapountsis  
President  
Law Institute of Victoria