

# 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.

## 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."

### 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.

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 should 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 is substantially reduced.

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)



### Important notice

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

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