Caps off to the Victorian RLA

In 2023 I wrote an article commenting on the decision in *Q St Kilda Tenancy Pty Ltd v Kane* [2023] VCAT 75.

That case concerned the effect of s35(2) of the Victorian RLA, which in effect provides that only 1 method of review can be used on any rent review, the method of review being confined in essence to a fixed percentage; CPI; a specified amount or a market review.

In the *Q St Kilda* case, the lease provided for an annual CPI review, capped at 4%. The tenant argued, successfully, that this provision contained 2 methods of review: CPI and a fixed percentage, in breach of s35(2). Member Nash agreed with this argument with the result that the rent defaulted to a market rent review in accordance with s35(7) of the RLA.

In my article I argued that the Tribunal had got its analysis wrong, and I speculated as to how long it would take for landlords to weaponise the decision. I said:

> "…*there is now a risk that provisions of this type could be used by landlords as a sword…. If the rent review provision had imposed a market rent review, with any increase capped at 4%, the landlord could obtain an order from VCAT removing the cap, and expose the tenant to the uncapped risk of the market review*".

It did not take long. In *Northcote Shopping Centre Pty Ltd v Aldi Foods Pty Ltd* [2024] VCAT 641 the Aldi lease provided for annual CPI rent reviews, capped at 4% with a market rent review on exercise of the option (after 15 years), capped at 10%.

Aldi exercised the option and the landlord brought the proceedings to have the cap removed, relying on the *Q St Kilda* precedent.

Member Nash heard the application, and did not hesitate to apply his previous reasoning and decision in *Q St Kilda* with the effect that an uncapped market rent review would apply on exercise of the option, and that the annual, capped, CPI reviews would be replaced by annual market rent reviews.

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As stated in my previous article, the decision is sustainable, based on the language used in s35(2), but in my view remains just as wrong.

In the Tribunal's view, 2 methods of review are applied on each review. In my world, only 1 method of review is used, subject to a limiter (which can only benefit the tenant). When deciding which of these competing views should be preferred, I think the evident objects of the RLA are better achieved by the interpretation I propound, particularly when applied to the terms of a lease negotiated between 2 robust and sentient industry participants. I think a freely negotiated cap on a market rent review is not to be lightly ignored in those circumstances.

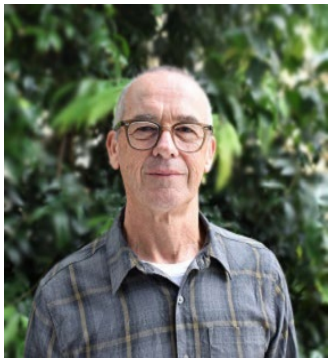
However, my opinion does not carry much water. The real complaint is with the people on the sidelines who draft this inadequate legislation, and who then fail to respond to issues that arise from their work.

There is not a tenant on the planet who would complain about the imposition of a limiter on rent uplifts.

And as I pointed out a year ago in my earlier article on *Q St Kilda*, the RLA in NSW and QLD is drafted in such a way that a limiter is not a problem.

But in VIC, the rent review mechanism now looks to have been designed for the benefit of landlords not tenants. I am just shaking my head in disbelief that the architects of the 14 day disclosure period are incapable of responding to the *Q St Kilda* debacle. They seem to be focused on the hole, rather than the doughnut.

The decision is just good news for landlords.



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Disclaimer: This article is a general summary with focus on issues of interest to the authors. It is not intended to be used as legal advice.

Speirs Ryan is a Sydney based boutique property law firm with national coverage. The firm is uniquely placed with specialist teams in both property transactions and strata law.

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