Victorian RLA fails another road test

I have been often heard to complain about the thoughtless and pointless regulation at the heart of the retail lease legislation in Australia.

It is sometimes a good idea to road test the legislation under match conditions to see how well the regulation works.

So, let's have a look at how useful the legislation is when a tenant exercises an option to renew in Victoria.

To make the maths a bit easier, we will assume a lease under which the tenant has a Term of 5 years commencing on 1/07/2019 expiring on 30/06/2024, and that the tenant is required to exercise the option between 6 months and 3 months before the end of the Term. That is, the last date on which the tenant can exercise the option is 3 months before the end of the Term.

Under s28(1A), the landlord is required to serve a notice on the tenant at least 3 months before the last date on which the option can be exercised. Therefore, in our hypothetical lease above, the notice must be served by 30/12/2023.

The notice must specify a number of things, including:

(a) the date by which the option must be exercised; and

(b) the rent payable for the first 12 months of the renewed lease.

Pausing here, section 35 relevantly provides that the only basis or formula for a rent review must be one of:

(a) a fixed percentage [eg the rent increases by 4%];

(b) an independently published index [eg CPI];

(c) a fixed amount; or

(d) the current market rent.

Now let's combine the requirements of s28(1A) and s35 and see what pops out.

If the lease says that the rent for the first year of the further term will be the passing rent at the end of the current term, increased by 4% or increased by a fixed amount [ie in accordance with the requirements of s35(a) or (c)], s28(1A) requires the landlord to serve a reminder on the tenant of the date on which its option times out, and to advise the tenant of the rent that will be payable if the option is exercised, being an amount the tenant is perfectly capable of working out for itself.

If a tenant is incapable of working out for itself that $100 increased by 4% is $104, then no amount of helpful regulation will keep the tenant afloat.

In other words the requirement is no more than regulation for the sake of regulation. It serves no useful purpose.

Things get more interesting when we combine the CPI and market rent review provisions in s35 (ie s35(b) and (d)) with s28(1A).

Looking first at CPI, the rent review machinery in the lease will usually provide that the rent payable from the review date will be the passing rent, varied by the change in the CPI from the quarter preceding the previous review date, to the CPI for the quarter preceding the current review date.

If we apply this to our hypothetical lease above, the quarter preceding the current review date of 1/07/2024, will be the quarter from 1/04/2024 to 30/06/2024. This period falls after the date by which the landlord must serve its notice.

We have seen that under s28(1A) the landlord must serve the notice by 30/12/2023 advising "the rent payable for the first 12 months under any renewed term". And we have just seen that in a case where the rent is to be determined by reference to the CPI, the landlord cannot possibly know the amount of the change until after that date. That is, we are putting the cart before the horse. It is literally impossible to comply.

The best the landlord can do is to serve the statutory notice, and merely advise the tenant that the rent for the further term will be the passing rent, varied by the CPI.

But this is doing nothing more than telling the tenant something it already knows. In other words, it is pointless.

If I have got this wrong, then things get truly alarming, because s28(2) provides that if the landlord fails to give the required notice, the date for exercise the option is extended until the date that is 3 months after the landlord notifies the tenant as required. The ABS is expected to publish the CPI for the quarter ending 30/6/2024 on around 11/07/2024. If the effect of s28(1A) is that the landlord cannot serve a valid notice until 11/07/2024, this would give the tenant until 11/10/2024 to exercise its option, some 9 months after the date agreed to by the parties.

The same complaint applies in a case where the lease provides for a market rent review.

It is impossible for the landlord to specify "the rent payable for the first 12 months under any renewed term", because under s 37, the market rent is to be an amount agreed upon between the parties, or failing agreement, an amount determined by a valuer.

Unless by some miracle the landlord and tenant agree the market rent at least 6 months before the review date, the landlord cannot specify in its notice the rent for the first 12 months of the further term, because that rent has not yet been agreed or determined.

It follows that the best the landlord can do when it serves its notice, is to simply advise the tenant that a market rent review will apply from the review date. But again, isn't this pointless, because the tenant already knows this by simply reading its own lease? The notice does not take the matter any further.

It might be said that the landlord should specify in its notice the landlord's opinion of the market rent, but this is not what the section requires. The landlord's opinion is not "the rent".

It follows that s28(1A) requires the landlord to notify the tenant of the last date on which the tenant can exercise its option [this is something the tenant already knows], and either set out a simple mathematical calculation which the tenant's 8 year old child can work out, or tell the tenant that the rent will be determined by the process set out in the lease, which the tenant already knows by simply reading its own lease.

It therefore looks to me that the only point of the regulation is to make the landlord jump through hoops, which I suppose can be fun, until you add the cost of the exercise to the management fee line of the outgoings budget. I don't know about you, but when tenants complain about the high cost of management fees, I think they should vent their frustration on the organ grinder, not the monkey. Landlords have to pay staff to manage this mumbo jumbo. The cost/benefit analysis tells us that we would be better off without it.

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