ESSENTIAL SAFETY MEASURES AND ACCOUNTING FOR OWNERS CORPORATION FEES IN RETAIL PREMISES

Are you an Owners Corporation Manager who has been asked by an Agent or Landlord to charge a tenant for Essential Services as part of the Owners Corporation fees where the property is a Retail premises?

Yes? Well before you do it is advisable that you consider whether doing so would mean breaching the *Retail Leases Act 2003* and *Retail Leases Regulations 2013*.

Section 52(2) of the RLA clearly states that a Landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into:

(a) the structure of, and fixtures in, the retail premises;
(b) plant and equipment at the retail premises; and
(c) the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.

In 2015, Justice Garde, President of VCAT provided an advisory opinion as to whether the costs associated with Essential Safety Measures can be charged to the tenant. In answer to this, Garde J confirmed that where section 52(2) of the RLA applied, a Landlord is generally not able to require the tenant under a retail premises lease to provide or maintain an Essential Safety Measure

How to account for Owners Corporation fees where the premises is a Retail premises?

Various provisions of the RLA and RLR make it clear that a landlord must at the very least understand how the Owners Corporations fees and charges are calculated having regard to the following factors:

1. The tenant is excused from liability unless the outgoing benefits the specific retail premises;
2. Essential Safety Measures as explained above;
3. Capital costs are not recoverable from the Tenant;
4. The tenant is also not liable to pay towards the sinking fund.

Disguising any of the fees above as Owners Corporation fees will likely result in those fees being challenged by the Tenant. If challenged, it is likely that these fees will be void as requiring the Tenant to pay for these charges is a breach of the RLA and RLR. This could result in devastating outcomes for Landlords who would be required to payback these invalid charges to their Tenant and accounting nightmares for Managers required to account for same.

For assistance on any Owners Corporation matters, please contact Emilia Panayiotou, Mark Lipshutz or Jonathan Cohen at CLP Lawyers on 9042 2070 or at clp@clplawyers.com.au.

Ground Floor, 23 Milton Parade Malvern VIC 3144
www.clplawyers.com.au