SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCI 2025 0014

NORTHCOTE SHOPPING CENTRE PTY LTD (ACN 624 599 748) Applicant

v

ALDI FOODS PTY LTD (ACN 086 210 139) Respondent

JUDGES:	NIALL CJ, RICHARDS and DONAGHUE JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	28 May 2026
DATE OF JUDGMENT:	16 June 2026
MEDIUM NEUTRAL CITATION:	[2026] VSCA 140
JUDGMENT APPEALED FROM:	[2024] VSC 799 (Croft J)

LEASES AND TENANCIES – Retail leases – Rent review – Where rent review clauses impose mid-term annual rent reviews in accordance with Consumer Price Index, and between term rent reviews based on current market rent – Whether clause imposing maximum cap on rent increases in rent review clauses contravenes s 35(2) of the *Retail Leases Act 2003* – Whether cap contravenes requirement for single basis or formula – Leave to appeal refused.

Retail Leases Act 2003, ss 1, 35.

Counsel

Applicant:	Mr S Hopper SC with Mr C Dawlings
Respondent:	Mr R Hay KC with Mr B Harding

Solicitors

Applicant:	Aintree Group Legal
Respondent:	Birdsong Legal

NIALL CJ
RICHARDS JA
DONAGHUE JA:

1 This application for leave to appeal from a judgment given in the Trial Division raises a short but important point concerning rent review under the *Retail Leases Act 2003* (the 'Act').

2 For the reasons that follow leave to appeal should be refused.

The lease

3 Since 9 July 2018, the applicant has been the sole registered proprietor of the land at Northcote Central Shopping Centre, 5 Separation Street, Northcote (the 'premises').

4 The respondent is the tenant of a shop situated on part of the premises under a lease granted by the former registered proprietor of the premises on 2 June 2008 for a term of 15 years commencing on 3 May 2007, with options for two further terms of five years each. On 18 November 2021, the respondent exercised its option to renew for a further five year term commencing 3 May 2022. It is not in dispute that the lease is a 'lease of retail premises' under the Act.

5 As noted, the respondent entered into the lease in June 2008. The applicant became entitled to the reversion under the lease when it became owner of the premises in July 2018.

6 The terms of the lease were varied by deed dated 10 November 2021.

7 The lease as varied provides for two regimes by which rent may be reviewed:

(a) mid-term annual rent reviews in accordance with the Consumer Price Index ('CPI rent review'); and

(b) 'between term' rent reviews at the commencement of each new term based on current market rent ('market rent review').

8 Clause 11 of the lease provides for market rent review:

> **RENT REVIEWS TO MARKET**
>
> **11.1** In this clause **'review period'** means the period following each Market Review Date until the next review date or until the end of this lease. The review procedure on each Market Review Date is —
>
> (a) Each review of Rent may be initiated by either party but, if the Act applies, the review is compulsory.
>
> (b) A party may initiate a review by giving the other party, not more than 9 months nor less than 6 months before the relevant Market Review Date a written notice stating the current market Rent which it proposes as the Rent for the review period. Unless the Act applies, if the party receiving the notice does not object in

writing to the proposed Rent within 15 Business Days, it becomes the Rent for the review period.

(c) If:

(i) The Act does not apply and the party receiving the notice serves an objection to the proposed Rent within 15 Business Days and the parties do not agree on the Rent within 15 Business Days after the objection is served; or

(ii) the Act applies and the parties do not agree on what the Rent is to be for the review period

the parties must appoint a Valuer (if the Act applies, a specialist retail Valuer) to determine the current market Rent.

If the Act does not apply and the parties do not agree within 15 Business Days after the objection is served, on the name of the Valuer, the Valuer must be nominated by the senior office-bearer of the Australian Property Institute — Victoria Division, at the request of either party. If the Act applies, the specialist retail Valuer is to be appointed by agreement of the parties, or failing agreement, by the Small Business Commissioner.

(d) In determining the current market Rent for the Premises the Valuer must:

(i) consider any written submissions made by the parties within 15 Business Days of their being informed of the Valuer's appointment

(ii) determine the current market Rent as an expert …

…

11.6 The parties acknowledge that the Rent may increase or decrease following review to market in accordance with this clause 11 depending on the movement in the market rent.

9 'Market Review Date' is defined as:

> the first day of each further Term of this lease and the first day of any year of the Term identified in Item 7 as a market review pursuant to clause 11.

10 Clause 15 provides for CPI rent review. It defines 'Consumer Price Index' to mean 'the index published by the Australian Government Statistician under the heading "All Groups" for Melbourne' and provides a formula for adjusting the rent by reference to the Consumer Price Index. Clause 15.6 records the parties' acknowledgement that the rent may increase or decrease following that adjustment, depending on the movement in the Consumer Price Index.

11 Item 7 of the schedule to the lease provides for the rent during the initial term. Item 12 of the schedule is the rent review clause for further terms of the lease and provides:

Further term

2 further Terms each of 5 years.

Rent in each further Term is to be determined as follows:

Year 1: Market review pursuant to clause 11.

Year 2: The Rent in year 1 varied by CPI.

Year 3: The Rent in year 2 varied by CPI.

Year 4: The Rent in year 3 varied by CPI.

Year 5: The Rent in year 4 varied by CPI.

"varied by CPI" means an adjustment of Rent by reference to the Consumer Price Index pursuant to clause 15.

In no case is Rent varied by CPI to be more than the previous year's Rent increased by 6%.

In no case is Rent varied by market review to be more than the previous year's Rent increased by 10%.

12 The argument in this application for leave to appeal concerns the validity of the 6 per cent and 10 per cent limits on the CPI rent review and the market rent review respectively (the 'caps').

The statutory provisions

13 Section 35 of the Act provides:

35 Rent reviews generally

(1) If a retail premises lease provides for a review of the rent payable under the lease or under a renewal of the lease, the lease must state—

(a) when the reviews are to take place; and

(b) the basis or formula on which the reviews are to be made.

(2) The basis or formula on which a rent review is to be made must be one of the following—

(a) a fixed percentage;

(b) an independently published index of prices or wages;

(c) a fixed annual amount;

(d) the current market rent of the retail premises;

(e) a basis or formula prescribed by the regulations.

Note

For reviews based on the current market rent of the retail premises, see section 37.

(3) A provision in a retail premises lease is void to the extent that it purports to preclude, or prevents or enables a person to prevent, the reduction of the rent or to limit the extent to which the rent may be reduced.

(4) However, subsection (3) does not apply to a provision that uses—

(a) a basis or formula referred to in subsection (2)(a), (b) or (c); or

(b) a prescribed basis or formula to which subsection (3) does not apply.

…

(6) A rent review provision in a retail premises lease is void if the lease does not specify how the review is to be made.

(7) If a provision in a retail premises lease that provides for a review of the rent payable under the lease does not comply with subsection (2) or is void under subsection (6), the rent is to be—

(a) as agreed between the landlord and tenant; or

(b) if there is no agreement within 30 days after the landlord gives the tenant, or the tenant gives the landlord, a written notice specifying an amount of rent for the purposes of the review, the amount determined by a specialist retail valuer appointed by the Small Business Commission as the current market rent of the retail premises.

…

The proceedings below

14 The parties were in dispute about the operation of the rent review clauses and brought that dispute to the Victorian Civil and Administrative Tribunal (the 'Tribunal') under pt 10 of the Act. The applicant contended that the rent review clause did not comply with s 35(2) of the Act, with the consequence that rent had to be agreed or assessed to market under s 35(7) without the cap provided for in the lease. The Tribunal concluded that both the CPI rent review and the market rent review in item 12 to the schedule to the lease mixed or merged methods or modes of rent review and therefore offended s 35(2) and its requirement that a single basis or formula be adopted (ie 'one of the following').[1]

15 On appeal on a question of law under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998*, a judge of the Trial Division concluded that there was no

[1] *Northcote Shopping Centre Pty Ltd v Aldi Foods Pty Ltd* [2024] VCAT 641 (Acting Senior Member Nash).

impermissible merger of modes of review and upheld the appeal.[2] The applicant seeks leave to appeal from that decision.

The applicant's submissions

16 The applicant, as landlord, seeks to be relieved of the 10 per cent cap in the market rent review. To that end, the applicant makes two primary submissions:

(a) the clause impermissibly contains or combines two of the permitted mechanisms provided for in s 35(2) when the section only permits a single basis or formula to be adopted; and

(b) the clause represents an impermissible qualification or alteration to the basis or formula prescribed.

17 As to the first argument, the applicant submits that on its plain text s 35 permits only one of the stipulated bases or formulae to be adopted in a lease. In addition to the text, the applicant submits that this also accords with the vice to which the section is directed as revealed by the extrinsic materials and legislative history.

18 The applicant submits that both the market rent review and CPI rent review provisions contravene this prescription. It contends that, in each case, the cap is a 'fixed percentage' within s 35(2)(a). On that basis, it asserts that the market rent review combines the bases or formula in s 35(2)(a) and (d), and the CPI rent review combines those in s 35(2)(a) and (b). The applicant submits that that the extrinsic materials and legislative history pertaining to s 35(2) reflect a policy intention to allow rent to fluctuate both up and down in accordance with the market. It says that construing s 35(2) so as to permit a clause that caps the amount by which rent can be increased would ignore this legislative intention.

19 The respondent's case is that neither the market rent review nor the CPI rent review involve the application of two formulae or bases.

Decision

20 The first step in the applicant's argument — that s 35(2) does not permit a lease to contain more than one of the stipulated basis or formula — can be accepted. The respondent did not contend to the contrary. That construction both accords with the text and addresses one of the problems that the section was designed to overcome. That problem was found in leases that provided for two alternative rent review mechanisms and gave one party, usually the landlord, the ability to choose between them at the relevant time. This offended certainty of outcome and method, and it gave unreasonable power to the party to whom the choice was given.[3]

21 However, the second step in the applicant's primary argument cannot be accepted. That is because the rent review clause is properly characterised as providing for a single

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2 *Aldi Foods Pty Ltd v Northcote Shopping Centre Pty Ltd* [2024] VSC 799 (Croft J) ('Reasons').

3 One of the Act's primary purposes is to enhance 'the certainty and fairness of retail leasing arrangements between landlords and tenants': s 1(a).

method or basis to undertake each of the CPI rent review and the market rent review. In order to explain this conclusion, and to address the applicant's second argument about whether the clause represents an impermissible modification of the statutory provision, it is convenient to address the meaning and operation of the rent review clause.

22 Dealing first with the market rent review, item 12 provides that the rent is to be reviewed on each Market Review Date pursuant to cl 11. Clause 11 provides for the means by which the review may be initiated and the appointment of the valuer. In determining the current market rent for the premises the valuer must adopt the methodology in cl 11.1(d)(i)–(viii) and the outcome is binding. Clause 11.6 expressly contemplates that the rent may increase or decrease according to the outcome of the review.

23 The structure of item 12 to the schedule provides that rent at the commencement of a new term will be determined pursuant to cl 11. Item 12 goes on to say '[i]n no case is Rent varied by market review to be more than the previous year's Rent increased by 10%'. Reading cl 11 and item 12 together, it is plain that the valuer is to undertake the valuation in accordance with cl 11 and at the completion of that process the rent will be varied up or down in accordance with the result of that valuation, subject to the proviso in item 12 that the rent may not increase by more than the cap. The cap represents a ceiling but not a floor on the review. As a result, the cap is consistent with the express acknowledgement in cl 11.6 that the rent may increase or decrease following the review depending on movement in the market rent.

24 The imposition of a proviso in the form found in item 12 does not alter the methodology to be adopted by the valuer in conducting the market rent review. Nor does it represent the combination of two or more methods. It is true that, in the event that a market increase determined by the valuer in accordance with cl 11 is greater than 10 per cent, the rent will not increase by more than that figure. However, that is not the same as providing that the rent review is to be made by a fixed percentage, so as to adopt the basis or formula in s 35(2)(a). To the contrary, the percentage cap will be irrelevant to the market rent review whenever market rents have either gone down, or increased by amounts lower than the cap. Even when the cap is engaged, it applies only because current market rents have increased by more than the cap. In that contingency, the cap prevents the rent increase from reflecting the full amount of the increase in current market rents. Nevertheless, the 10 per cent increase in the rent that will occur in such a case occurs *only* because there has been an increase in current market rent of more than that amount, thereby illustrating that current market rent remains the 'basis or formula on which [the] rent review is to be made'.

25 In our view, where s 35(2)(a) refers to 'a fixed percentage' as the basis or formula on which a rent review to be is to be conducted, it refers to a predetermined percentage to be applied in every review. Plainly that is not the effect of the cap.

26 For the above reasons, notwithstanding the cap, the basis or formula for the calculation of the rent review which is set in cl 11 and item 12 is properly characterised as falling only within s 35(2)(d) of the Act.

27 The same applies in respect of CPI rent review. The rent is to be adjusted in accordance with cl 15, and may increase or decrease depending on the movement in the Consumer

Price Index. Item 12 provides that '[i]n no case is rent varied by CPI to be more than the previous year's Rent increased by 6%'. This sets a cap or ceiling on a CPI rent review, without adopting a fixed percentage as an alternative method or formula on which the rent review is to be conducted.

28 It follows that the first argument must fail because the rent review clause does not involve an amalgam of two or more of the modes set out in s 35(2).

29 The second argument, which was advanced by the applicant in oral submissions, is that it is not permissible to alter or qualify the basis or formula set out in s 35(2) and that item 12 offends this rule and is void on that basis. It may be accepted that s 35(2) sets out an exhaustive catalogue of bases or formulae that may be adopted in a rent review under a lease to which the Act applies. That much is plain from the text of s 35(2). Accordingly, a rent review clause will not comply with s 35(2) when the lease provides a basis or formula for rent review that is not included in the available list set out in the provision.

30 The question in an individual case is whether the relevant rent review clause in a lease specifies a basis or formula that complies with s 35(2). Here, that question reduces to whether the caps in item 12 mean that this lease adopts a basis or formula different to that set out in s 35(2)(d) in the case of market rent review and that set out in s 35(2)(b) in the case of annual CPI rent review.

31 As a matter of text, the combination of cl 11 and item 12 provides that the rent review will be on the basis or formula of the current market rent. The same applies in respect of the combination of cl 15 and item 12: the basis or formula used to conduct the review is the Consumer Price Index. In each case, the lease contemplates that rent reviews may occur precisely in accordance with a basis or formula specified in s 35(2) (eg exactly in accordance with the Consumer Price Index or current market rents). In other words, it contemplates that the caps will not have any application to some (perhaps many) rent reviews. Further, even in rent reviews where the caps are reached, they do not alter the specified basis or formula, but instead impose a cut-off or ceiling on giving effect to the specified basis or formula. The caps are, in that respect, to be distinguished from provisions that might attempt to modify a basis or formula specified in s 35(2) in a generally applicable way (for example, by providing for reviews of rent to be 'half of the Consumer Price Index' or 'twice the current market rent'). We consider there to be a conceptual difference between altering a specified basis or formula (by, for example, multiplying the Consumer Price Index by two) compared to the imposition of a cap on increases *after* a formula that complies with s 35(2) has already been applied. Nothing in these reasons should be taken to imply that a rent review clause of the former kind would be consistent with s 35(2) of the Act.

32 Although not a precise analogy, the above reasoning is similar to the imposition of a statutory cap on damages in an action in tort. In that context, the general approach is to assess damages in accordance with ordinary principles and then apply the cap at the

conclusion of that process.[4] The imposition of a maximum cap does not change or alter the basis or formula on which damages are to be assessed. That applies equally in the present situation.

33 Section 35(2) does not expressly prohibit a cap on an outcome of a rent review. The applicant contends that it is implicit in s 35(2) that a cap impermissibly qualifies the stipulated basis or formula. If that argument is correct, it would logically apply with equal force to a collar on an outcome of a rent review. That is, s 35(2) would impliedly prohibit both a cap and a collar on the outcome. Such an implication does not sit with the express, but limited, restriction in s 35(3), which renders a rent review clause void to the extent that it purports to preclude, or prevents or enables a person to prevent, the reduction of the rent or to limit the extent to which the rent may be reduced. On the applicant's submission, this restriction would be otiose, providing an additional textual reason for rejecting the submission.

34 Given the reference to legislative history in argument it is necessary to say something about it. Ultimately, however, the legislative history provides little assistance in resolving the issue presently in dispute.

35 The precursors to the current restrictions on rent review in s 35 can be found in s 10 of the *Retail Tenancies Act 1986* and s 12 of the *Retail Tenancies Reform Act 1998* ('*1998 Act*'). Each of those iterations rendered void a ratcheted market rent review clause that prevented the rent from falling. In the *1998 Act*, s 12(2) provided that the basis or formula for a rent review 'must be one only of' a list (a) to (e), being a list that is identical to the present list in s 35(2). The only difference between s 12(2) of the *1998 Act* and s 35(2) is that the former said it must be 'one only of' and the latter omitted the word 'only'.

36 The applicant also relied on the second reading speech accompanying the introduction of the Retail Tenancies Reform Bill 1998.[5] The Minister addressed the topic of market rent reviews by observing that the existing legislation caused 'a technical problem whereby, under some leases, rents cannot decrease at market review'.[6] The change was intended to make clear that a review to market allows rents to be adjusted up or down according to the market circumstances prevailing and to expressly prohibit ratchet clauses.

37 Two things emerge from that history. First, the legislation has consistently prohibited ratchet clauses in market review. Second, since 1998 the legislation has required a single mechanism, drawn from a specified list, to be applied to a review. On this aspect, we

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4 See, eg, *Cripps v Vakras* [2014] VSC 279, in which Kyrou J observed, with respect to those provisions under the *Wrongs Act 1958* imposing statutory caps for general damages, that such provisions 'have never been held to impose a scaling requirement. Judges or juries decide the appropriate amount of damages and if that amount exceeds the statutory cap, the amount of damages is reduced to the amount of the cap': at [604]. See also *Tuohey v Freemasons Hospital* (2012) 37 VR 180; [2012] VSCA 80, in which Redlich JA found that the application of s 28F of the *Wrongs Act 1958* — which imposes a statutory maximum on damages for past or future economic loss due to a loss of earning capacity — involves 'no departure from the common law methodology of calculating economic loss': at 184 [14], 185 [17] (Mandie JA agreeing at 193 [37], Kyrou AJA agreeing at 193 [38]).

5 Victoria, *Parliamentary Debates,* Legislative Assembly, 17 February 1998, 148 (Thomas Reynolds).

6 Ibid 149.

agree with the applicant that no significance can be attached to the deletion of the word 'only' when s 12 of the *1998 Act* was re-enacted in substantially the same form in s 35 of the Act. Beyond those matters, we do not consider that the legislative history assists in deciding whether the rent review clause complies with s 35(2).[7]

38 It is clear that a particular vice the legislation sought to address was the use of a ratchet clause that allowed a landlord to benefit from market increases but immunised the landlord from any market reduction. Contrary to the applicant's submissions, the legislative history does not reveal a broader intention to target rent review clauses *other* than ratchet clauses that prevent rent decreases in a falling market.[8] In addition to this aspect it seems clear that, with some restrictions, parties to a lease should be free to negotiate terms of the lease while also achieving the legislative purpose of specifying a single method of reviewing rent (thereby giving certainty to the parties to the lease and preventing one party from being able to choose a more favourable method at the time of review).

39 The caps in item 12 limit the extent to which rent can increase. They do not offend the prohibition on ratchet clauses in s 35(3) and do not produce an uncertain or obviously capricious or unintended consequence. They are not void by reason of s 35 of the Act.

40 In our view the rent review clause provides a single basis or formula of fixing the market rent review according to the current market rent of the retail premises, and a single method for CPI rent review. The caps do not offend s 35(2) of the Act.

41 For these reasons the decision of the judge was correct and leave to appeal should be refused.

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7 It follows that we do not see the Act (including, in particular, the separation of s 12(3) in the *1998 Act* into s 35(3) and (4) in the Act) as having introduced a 'structural change in the rent review provision' that 'indicates a substantive change in the legislative approach to the regulation of rent review arrangements': cf Reasons, [23].

8 So much is apparent from s 35(4) of the Act, which specifies that the prohibition in s 35(3) on provisions that prevent rent reductions does not apply to any of the bases or formulae listed in s 35(2) *except* that in s 35(2)(d) concerning current market rent.