

Article Information

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Proposed changes to South Australia's retail lease legislation

The Marshall Government has recently proposed a number of significant changes to the legislation which regulates the retail and commercial property sector in South Australia.

On 3 July 2019, the Honourable Vicki Chapman (Deputy Premier and Attorney General) introduced into Parliament and moved the second reading of the Retail and Commercial Leases (*Miscellaneous Amendment Bill*) 2019 (SA) (**Bill**). The Bill proposes a number of substantive amendments to the *Retail and Commercial Leases Act 1995* (SA) (**Retail Act**).

The Bill incorporates and builds on the previous iteration of the legislation introduced into Parliament by the former Wetherill Government, which subsequently lapsed when Parliament was prorogued prior to the State election in 2018.

Application of the Retail Act

Under the Retail Act as it currently stands, if the annual rent of a retail shop lease exceeds the '*prescribed threshold*', the Retail Act will not apply to such lease.

Since the '*prescribed threshold*' under the Retail Act was increased in 2011 to \$400,000 per annum, there has been much debate and judicial consideration as to whether a retail shop lease may move into, or out of the jurisdiction of the Retail Act.

Importantly, the Bill seeks to address this issue by amending section 4 of the Retail Act to make it explicitly clear that the Retail Act may apply, or cease to apply during the term of a retail shop lease. So in other words, a retail shop lease may move into, or out of the jurisdiction of the Retail Act.

Such movement may be 'triggered' by way of an adjustment to the '*prescribed threshold*' (which may then bring a retail shop lease within the application of the Retail Act), or alternatively, by way of a rent review where the annual rent payable under a retail shop lease subsequently exceeds the '*prescribed threshold*' (and such lease may then fall outside of the application of the Retail Act).

In addition, a retail shop lease may also move into, or out of the jurisdiction of the Retail Act as a result of a landlord or tenant either becoming, or ceasing to be the kind of landlord or tenant referred to within the Retail Act.

Specifically, the Retail Act may not apply to a retail shop lease entered into after the Bill becomes law, if:

- the landlord is the Crown (or instrumentality of the Crown) in South Australia, or a municipal or district council (or other local government authority); or
- the tenant is a body corporate whose securities are listed on a stock exchange outside of Australia and the external territories; or
- the tenant is a '*public company*' or a '*subsidiary*' of a public company (as defined in section 9 of the *Corporations Act 2001* (Cth)).

Exemption to the application of the Retail Act

However, the Bill also introduces an exemption to the proposed movement of a retail shop lease into, or out of the jurisdiction of the Retail Act. If at the time a retail shop lease is entered into, the annual rent exceeds the '*prescribed threshold*' (and the Retail Act therefore does not apply), the parties may ensure the Retail Act will not apply to such lease in the future (irrespective of whether the Retail Act would otherwise apply due to a change in the rent payable under such

lease or an increase in the '*prescribed threshold*') by lodging such lease (and any renewal) for registration with the Lands Titles Office within three (3) months' of execution.

In the past, registration of a retail shop lease has often been considered to be of benefit to a tenant (rather than a landlord). Clearly, the proposed exemption to the Retail Act means that landlords may also enjoy a significant benefit associated with the registration of a retail shop lease.

Prescribed Rent Threshold

The Bill confirms the '*prescribed threshold*' in relation to the rent payable under a retail shop lease is \$400,000 per annum *exclusive of GST*.

In addition, the Bill provides a mechanism for the Valuer-General to review the '*prescribed threshold*', initially two (2) years after the Bill becomes law and every five (5) years thereafter.

Securities

The other significant amendments proposed by the Bill pertain to the relevant securities which may be provided by a tenant pursuant to a retail shop lease.

Bank Guarantees

Under the Bill, a landlord must now return a bank guarantee (except if the bank guarantee has expired or been cancelled) within two (2) months of the tenant completing the performance of its obligations under the retail shop lease (which is secured by such bank guarantee). If a landlord fails to return the bank guarantee to the tenant within this period of time, the landlord will be liable to pay compensation for any loss or damage suffered by the tenant as a result.

Importantly, this proposed provision of the Retail Act will apply to all bank guarantees provided as security for a retail shop lease entered into ***either before, or after the Bill becomes law***.

Security Bonds

The maximum permitted amount of a security bond to be provided by a tenant under a retail shop lease will be increased from four (4) weeks' rent to three (3) months' rent exclusive of GST.

In the past, landlords have typically viewed security bonds as an unattractive form of security due to such restrictions with respect to quantum (in addition to having to deal with the Small Business Commissioner). However, the proposed changes to the Retail Act may alter this view in the future.

Disclosure

The Bill prescribes that a landlord (or its agent) must provide:

- a prospective tenant with a copy of the proposed retail shop lease, together with a copy the "*Retail and Commercial Lease Guide*" dated June 2018 published by the Small Business Commissioner (link [attached](#)) as soon as a landlord (or its agent) enters into negotiations with a prospective tenant; and
- a signed disclosure statement (in duplicate) to a tenant before a retail shop lease is entered into. Upon service of a disclosure statement, a tenant (or its agents) must execute both copies of the disclosure statement and return one copy to the landlord within fourteen (14) days.

Importantly, landlords (or their agents) will no longer be required to serve a disclosure statement with respect to the renewal of a retail shop lease.

Other changes

The Bill also proposes the following notable changes to the Retail Act:

- If a retail shop lease is held over for any period of time (including in excess of a period of six (6) months'), a tenant will not be entitled to receive a new five (5) year term of such lease.
- Many of the penalty provisions under the Retail Act will be markedly increased (up to 60%).
- The Small Business Commissioner will be able to:
 - sign a certified exclusionary clause of a retail shop lease (in addition to a solicitor); and
 - grant exemptions to the application of the Retail Act (in addition to a magistrate).
- There will be time limits imposed on landlords to return a fully executed retail shop lease to a tenant and if a retail

shop lease is to be registered, for the lodgement of such lease for registration.

- A tenant of a retail shop lease which is a '*public charitable company*' (or a '*subsidiary*' of a public charitable company) may benefit from the application of the Retail Act.

Going forward

Piper Alderman will closely follow the parliamentary debate regarding the Bill and will be able to assist the South Australian property sector by providing further advice as to the impact of the proposed changes to the Retail Act.

Although the Bill may still be subject to change, in the meantime, prudent landlords may wish to consider aligning their lease management practices with the proposed changes to the Retail Act in advance of the Bill becoming law.