

Article Information

Author: Adam Rinaldi

Service: Property & Development

Sector: Infrastructure

Proposed amendments to South Australia's retail lease legislation

Following an extensive review process, the Retail and Commercial Leases (Miscellaneous) Amendment Bill 2017 (SA) has passed

Following an extensive review process, the *Retail and Commercial Leases (Miscellaneous) Amendment Bill 2017* (SA) has passed through the House of Assembly and is presently awaiting consideration in the Legislative Council of the South Australian Parliament.

The Bill proposes to amend the *Retail and Commercial Leases Act 1995* (SA) (**Act**) and the amendments are set to affect landlords and their agents. The Minister for Small Business, the Honorable Martin Hamilton-Smith, has claimed that the Bill is designed to support the small business sector, and that under the proposed amendments to the Act, retail and business tenants receive improved protections and greater clarity around the responsibilities for both landlord and tenants.

The Small Business Commissioner (**SBC**) has indicated that whilst the Bill has now lapsed it remains the Small Business Commissioner's position that the amendments proposed under the Bill will be recommended to the elected Government following the March 2018 election.

The Bill follows an independent review and extensive public consultation which consisted of two tranches of extensive industry and stakeholder consultation. Specifically, in December 2013, the State Government committed to undertake a review of the Act. In December 2014, a formal review process was initiated by the SBC on behalf of the former Minister for Small Business, the Honourable Tom Koutsantonis, with the publication of an Issues Paper seeking public comment on various issues relating to the Act. On 13 February 2015, submissions to the Issues Paper closed with 37 submissions received from a broad range of organisations, industry groups and individuals. The submissions made to the Issues Paper went on to inform retired District Court Judge Mr Alan Moss as he formulated the Moss Review on 14 April 2016. The Moss Review makes 20 recommendations on a broad range of issues relating to the Act. The Moss Review was released by the SBC for the second tranche of public consultation on 24 May 2016.

Many of the recommendations in the Moss Review were incorporated in the Bill. To the relief of many landlords, some of the more controversial amendments recommended to the Act specified in the Moss Review were not included in the Bill including:

1. the mandatory registration of leases;
2. a requirement that all bank guarantees for security of a lease under the Act be held by the SBC; and
3. the inclusion of a legislative pathway for an orderly exit from a lease by a failing business.

The amendments to the Act as set out in the Bill have been summarised below.

Application of the Act

The rent payable pursuant to the lease is one of the relevant factors in determining whether or not the Act applies to the lease. Section 4(2)(a) of the Act previously provided that the Act does not apply to a retail or commercial lease if the rent payable under that lease exceeds \$250,000 per annum. This amount was increased to \$400,000 pursuant to the *Retail and Commercial Leases Variation Regulations 2010* (SA) which came into force on 4 April 2011. There were no transitional provisions which meant that the new rent threshold (the increase from \$250,000 to \$400,000) was likely to apply to leases entered into before 4 April 2011. The absence of transitional provisions has given rise to ambiguity as to the application of the increase to the threshold to leases which commenced before 4 April 2011.

The issue of whether the Act applies to the lease is a significant commercial issue for landlords. If the Act applies to the lease, the landlord would be precluded from:

- recovering land tax from the tenant (refer to Section 30 of the Act)
- adjusting rent in accordance with whichever two methods of calculating the change would result in the higher rent (refer to Section 22(3)(c) of the Act); and
- disallowing a decrease in rent (refer to Section 22(4) of the Act).

The Bill clarifies an important aspect of the Act making it express that retail shop leases can “move into” and “out of” the jurisdiction of the Act. The Bill confirms that the:

- the Act may, after a decrease in the rent payable under the lease, apply to a lease to which the Act did not apply immediately before the decrease in rent because the rent payable under the lease no longer exceeds the prescribed threshold;
- the Act may, after an increase in the prescribed threshold, apply to a lease to which the Act did not apply at the time the lease was entered into, or renewed, because the rent payable under the lease no longer exceeds the prescribed threshold; and
- the Act may, after an increase in the rent payable under the lease, cease to apply to a lease to which the Act applied immediately before the increase in rent because the rent payable under the lease now exceeds the prescribed threshold.

The decisions of the Supreme Court of South Australia in *WST Pty Ltd v GRE Pty Ltd & Ors* [2012] SASCFC 146 and *Diakou Nominees Pty Ltd v Gouger Street Pty Ltd & Ors* [2017] SASC 72 presently provide authority commentary as to how to apply the Act as the rent payable increases above the threshold prescribed in the Act during the term of the lease (including any renewal) and on how to apply the Act where the rent was originally above the previous threshold (with the consequence that the Act did not apply at the start of the lease) but, as a result of the increase in the threshold to \$400,000 on 4 April 2011, the rent was now below the threshold. The Court has held in these decisions that:

- leases which were not subject to the Act on 3 April 2011 on the basis of annual rent being above \$250,000 become captured by the Act on 4 April 2011 (being the date when the threshold had changed) where the annual rent was less than \$400,000; and
- a lease will remain subject to the Act until such time as the rent exceeds the applicable threshold amount whatever it may be from time to time.

The decisions of *WST Pty Ltd v GRE Pty Ltd & Ors* [2012] SASCFC 146 and *Diakou Nominees Pty Ltd v Gouger Street Pty Ltd & Ors* [2017] SASC 72 will continue to have application to leases which “move into” and “out of” the jurisdiction of the Act prior to the enactment of the Bill. The *Diakou Nominees* case is presently being appealed to the Full Bench of the Supreme Court. This potentially leaves many landlords and tenants in dispute as to their entitlements and obligations under the Act where leases entered into prior to 4 April 2011 “move into” and “out of” the jurisdiction of the Act prior to the enactment of the Bill. Unless the Bill is amended to rectify this ambiguity, the situation will left to be determined by the Court which would depend on the outcome of the *Diakou Nominees* case and its appeal to the Full Bench of the Supreme Court.

Rent Threshold

The Bill clarifies that the prescribed rental threshold of \$400,000 is exclusive of GST. This proposed amendment has been described by the Law Society of South Australia as “long overdue”. The Bill also clarifies that other amounts specified in the Act (such as the maximum amount which the Act permits to be paid by way of security under a security bond) are GST exclusive.

The Bill also includes provisions requiring the rental threshold specified in the Act to be reviewed by the Valuer-General within two years of the amendments to the Act coming into effect and each successive period of five years thereafter. The Bill makes it clear to parties entering into a lease that it is highly probable that the rental threshold will be adjusted and that this may result in a lease moving into and out of the jurisdiction of the Act.

Public Companies

The Bill provides that the terms “public company” and “subsidiary” in the Act will have the same meanings as defined in the *Corporations Act 2001* (Cth). The term “public company” as defined in the *Corporations Act 2001* (Cth) essentially provides that a public company is a company other than a proprietary company. These new definitions will ensure that the Act will not apply to companies or subsidiaries of companies listed on a stock exchange outside of Australia. Without the amendment, it is arguable that the Act will apply to an Australian private company which is a subsidiary of a large multi-national company with far greater financial power than most Australian landlords.

Documents to be provided to tenants

The Bill provides that the landlord (or its agent) must, as soon as it enters into negotiations with a prospective tenant, provide the prospective tenant with a written copy of the proposed lease (but not necessarily including the particulars of the tenant, the rent or the term of the lease). The maximum penalty for non-compliance of this requirement has increased from \$500 to \$8,000. The Bill overlooks that many commercial terms will be open for negotiation at the time the landlord commences its negotiations with the tenant (including in relation to security, turnover rent, recovery of outgoings, payment of promotions levy, rent reviews etc) and that the lease will consequently be subject to extensive amendments prior to its execution.

A landlord must also provide prospective tenants with an the information brochure published by the SBC at the time the lease is provided to the prospective tenant. There are penalties for non-compliance.

Disclosure Statements

Section 12 of the Act has been amended to provide that a disclosure statement is not required to be given in respect of a renewal of the lease.

The methods and requirements for service of the disclosure statement are clarified in the Bill. The Bill amends the Act to permit service by email.

The tenant or the tenant's agent must return the disclosure statement signed by or on behalf of the Tenant within 14 days of service.

Provision of Lease

Section 16 of the Act is amended to provide that the landlord must:

- provide the tenant with an executed copy of the lease; and
- if the lease is to be registered, lodge the lease for registration,

within one month after the lease is returned to the landlord or the landlord's lawyer or agent following its execution by the tenant.

Landlords will need to be efficient in signing and registering leases which may give rise to administrative issues for landlords managing large property portfolios.

Bank Guarantees

A landlord must return a bank guarantee to the tenant within two months after the tenant completes performance of the obligations under the lease for which the bank guarantee is provided as security. There is a maximum penalty of \$8,000 for non-compliance.

The Bill also provides that the landlord will be liable to pay to the tenant compensation for any loss or damage suffered by the tenant if the landlord fails to return the bank guarantee within the maximum return period (i.e. the two month period set out above).

These amendments are not in our view controversial from a landlord's perspective as the Act will not preclude the landlord from retaining a bank guarantee in circumstances where the tenant has delayed completion of its make good and reinstatement obligations.

Five year term and exclusionary clauses

The Bill clarifies that holding over for a period longer than six months after the relevant term of the lease has expired does not imply a new lease with a minimum five year term. The amendments to the Act ensure that holding over does not imply a new term and will allow either party to terminate the hold over.

The SBC is granted the power to certify exclusionary clauses in addition to lawyers. Exclusionary clauses allow tenants to waive their statutory rights of security of tenure and permit tenants to enter into leases for a period less than five years.

Penalties

In the Moss Review it was noted that "[t]he penalties for offences or misbehaviour under the current Act are clearly out dated, and in serious need of being increased". There has been an increase in the amounts payable on a number of

penalties for offences under the Act including in relation to the requirement to:

- provide a copy of the lease as soon as the landlord or its agent enters into negotiations with a prospective tenant;
- provide prospective tenants with an information brochure published by the SBC;
- provide a disclosure statement; and
- return the bank guarantee within two months after the tenant completes performance of the obligations under the lease.

Concluding Remarks

The amendments to the Act contemplated by the Bill are not extensive and will not result in a wholesale reform or adjustment to the Act. Many of the amendments to the Act refine and improve the Act to rectify opaqueness and ambiguity. Examples include clarifying that the prescribed rental threshold of \$400,000 is exclusive of GST and that a holding over pursuant to a lease will not imply a new term. These are much needed reforms.

However, the Bill is not without its faults and the uncertainties associated with the Bill have been highlighted in this article. These issues should be given consideration by the legislature before the Bill is enacted.