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Essential changes to retail and commercial leasing legislation in South Australia

The retail and commercial leasing sector in South Australia is dominated by small businesses with the sector being a vital contributor to economic activity in the State as well as being a major employer.

The *Retail and Commercial Leases Act 1995* (SA) (**Act**) regulates the leasing of retail and commercial tenancies and imposes a number of fundamental protections in favour of tenants (which are implied into leases) who are privy to leases subject to the Act.

The *Retail and Commercial Leases (Miscellaneous) Amendment Act 2019* (SA) (**Amending Act**) received royal assent on 19 December 2019 and amends the Act. The Amending Act comes into operation on 1 July 2020 and represents a further iteration of the legislation introduced into Parliament by the former Weatherill Government.

The amendments to the Act are not extensive and have been heralded by property industry constituents and pundits as essential to rectify various anomalies within the Act and to improve the transparency of, and clarify obligations and processes under the Act. Some of the notable amendments to the Act include:

1. removing the requirement for landlords to provide tenants with a disclosure statement on the renewal of a lease – the provision of a disclosure statement in the context of a renewal is viewed by many landlords as a superfluous requirement where you have a willing and able tenant that is committed to renewing a lease on identical terms in circumstances where they are fully apprised as to the tenant's financial commitments and obligations for the renewal period;
2. significantly increasing the maximum security bond permitted under a lease from four weeks' to three months' rent – security bonds are not used frequently as a form of security in commercial leases but these changes may influence change to industry practice;
3. allowing leases to move in and out of the operation of the Act where the tenant becomes, or ceases to be, a tenant of the type excluded by the Act – practically, this may not be of much utility to landlords privy to leases initially subject to the Act as such leases will often be drafted to accord with the requirements of the Act;
4. the Act will not apply where the lessor is the Crown, or an agency or instrumentality of the Crown, or a municipal or district council – this is the first time that the identity of the landlord may result in the lease being excluded from the application of the Act;
5. leases entered into prior to 1 July 2020 may move in and out of the operation of the Act where the annual rent exceeds the prescribed threshold (now $400,000 GST exclusive) regardless of whether the Act initially applied to the lease because of the rent then payable (enshrining recent case law principles);
6. leases entered into on or after 1 July 2020 will not be subject to the Act if rent exceeds the prescribed threshold at the time the lease is lodged for registration, the lease is lodged for registration within three months after it is signed, the landlord has notified the tenant of lodgement within one month of lodgement and the lease remains registered for the term – this will be the case regardless of any increase to the prescribed threshold or decrease in rent which would otherwise bring the lease within the operation of the Act. A landlord will be entitled to preserve (and lock in) the status of an excluded lease of the aforesaid nature upon a renewal of such lease by complying with certain procedural requirements. It is imperative that landlords review their processes around timing for registration of leases to lock in the status of an excluded lease entered into on or after 1 July 2020 which has rent exceeding the prescribed threshold;
7. the provision of a formal process for the Valuer-General to review the prescribed threshold periodically – this

process will assist with mitigating against substantial one off increases in the rent threshold (as was the case where the threshold increased from $250,000 to $400,000 as a consequence of the introduction of the *Retail and Commercial Leases Regulations 2010* (SA) which represented a material shift to the property industry);

8. a five year term will not be implied where a tenant holds over for longer than six months after the expiry of an earlier lease –this resolves the problem arising from the Supreme Court decision of *Pastina Pty Ltd v Hosana Excelsis One Universal Church Inc* [2019] SASC and the confusion that previously arose as to whether the Act implied a five year term if a tenant held over after the expiry of an earlier lease;
9. clarifying that GST will not be taken into account in determining whether the annual rent exceeds the "prescribed threshold" or in determining the quantum of the security bond – these amendments are long overdue to address clear anomalies in the Act and to reflect industry practice (with the existing provisions unclear and open to debate);
10. excluding leases from the Act where the tenant is a company listed on a foreign stock exchange – 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 and standing than most South Australian landlords;
11. the inclusion of public charitable companies being within the coverage of the Act recognising that operators within the not for profit sector are valued in our community and should be afforded the benefit of the tenant protections contained in the Act.

As a key take-home message, landlords in SA (particularly landlords of shopping centres) will need to update their administrative procedures and lease covenants to accord with the Amending Act in order to avoid penalties for non-compliance (noting that penalties for non-compliance under the Act have increased in some instances by up to 50% although general increases are broadly in line with CPI movement since 1995).

The Amending Act imposes various time sensitive requirements which will impact on the administrative processes of landlords associated with the registration of leases (with timing in some cases essential to preserve the status of an excluded lease), return of signed leases to tenants, return of bank guarantees to tenants (with landlords liable to pay tenants compensation if bank guarantees are not returned to tenants in accordance with the new rules) and the nature of disclosure material to be distributed to tenants with the Act amended to now require landlords to provide an information brochure to tenants (in a form to published by the Small Business Commissioner) as soon as negotiations are entered into with the tenant.

The implementation of the amendments to the Act coincides with the implementation of COVID-19 legislation affecting commercial tenancies together with the amendments to the *Land Tax Act 1936* (SA) which come into force on 30 June 2020. As a result of the COVID-19 pandemic, landlords have had to contend with significant financial challenges and the timing for the implementation of these legislative changes (which many property pundits support) is unfortunate in the current circumstances as landlords have the onerous and difficult task of having to respond to significant legal changes at a time where their effort and energy is (or ought to be) directed at managing a global crisis, mitigating their loss of rent exposure and ensuring the financial viability of their tenants