

**THE LAW SOCIETY  
OF SOUTH AUSTRALIA**

THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

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22 March 2011

C110  
RB;rp

The Honourable Iain Evans MP  
Parliament House  
North Terrace  
ADELAIDE SA

Dear Iain

**Retail and Commercial Leases (Miscellaneous) Amendment Bill 2011**

I refer to your faxed letter of 18 March 2011 and thank you for inviting the Society to consider the *Retail and Commercial Leases (Miscellaneous) Amendment Bill 2011*. The Bill was referred to the Society's Property Committee. We provide the following comments (noting that we have only had a short time to consider the Bill).

**Generally**

1. The debate should focus on fixing the transitional issues relating to the new Regulations to the *Retail and Commercial Leases Act 1995* (the Act), as identified in the last paragraph of Mr Darley's speech in the Legislative Council on 10 November 2010, before this issue gets muddied by the content of the draft Bill which is effectively a major (and no doubt controversial) shift in policy on the recoverability of land tax. With 4 April 2011 being the transitional date for when the increased rent threshold of \$400,000 per annum applies, there are now less than 2 weeks to rectify the grey area in the Regulations.

A copy of the Society's 17 December 2010 submission to OCBA and the amended wording to the *Retail and Commercial Leases Variation Regulations 2010*, which would in the Society's view rectify the "grey area" and confirm the stated intention of OCBA (and presumably Parliament) that the new \$400,000 threshold is to apply to new leases entered into on or after 4 April 2011 is attached. The additional wording endeavours to be consistent with the wording used in section 81(2) of the Act, which is a transitional provision relating to the introduction of the Act in 1995. It is envisaged that section 6 of the Act ("When the lease is entered into") would apply to the suggested amended wording.

The suggested amended wording also makes reference to GST for completeness (and consistency with the Society's submission).

### **New Section 4(4) – Application to Act**

2. The indexing of the \$400,000 threshold will have the same transitional issues with respect to current versus new leases and this issue will need to be carefully thought through when drafting the relevant indexing scheme in the Regulations. Business' should not have to deal with more uncertainty.
3. The threshold punishes a "gross lease" where outgoings for the premises are built into the rent the lessee pays.
4. With reference to current section 4(2)(a), the following matters require consideration:
  - How does section 4(2)(a) apply to an extension of lease, as opposed to a renewal of a lease?
  - Is it intended that the rent payable under the lease remains constant for the period of the lease? For instance, In Year 1 the rent might be below the threshold and the Act applies, in Year 2 the rent might exceed the threshold and the Act does not apply, in Year 3 the rent might drop below the threshold (on a market review, or perhaps by operation of s. 40 damaged premises) and the Act applies. The lease contract would be a moveable feast, with the Act implied terms dropping in, and dropping out.
  - In calculating the threshold, does it include money paid by the lessee to the lessor to compensate the lessor for liability for GST?

### **New Section 30 – Recovery of Land Tax**

5. Rights of renewal under current leases are not addressed in new sections 30(4) & (5) to the Act, nor in Schedule 1 to the Bill. If it is intended that the new rules do not apply to such renewed leases then this fact should be clearly stated.
6. The new sections 30(2) & (3) to the Act represent a shift in policy. It is not appropriate for the Society to express a view on such matters.

I trust these comments are of assistance. Please do not hesitate to contact me, should you require any further information.

Yours sincerely



Ralph Bönig  
**PRESIDENT**

South Australia

## Retail and Commercial Leases Variation Regulations 2010

under the *Retail and Commercial Leases Act 1995*

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### Part 1—Preliminary

#### 1—Short title

These regulations may be cited as the *Retail and Commercial Leases Variation Regulations 2010*.

#### 2—Commencement

These regulations will come into operation on 4 April 2011.

#### 3—Variation provisions

In these regulations, a provision under a heading referring to the variation of specified regulations varies the regulations so specified.

### Part 2—Variation of *Retail and Commercial Leases Regulations 2010*

#### 4—Variation of regulation 4—Exclusions from application of Act

Regulation 4—before its present contents (now to be designated as subregulation (2)) insert:

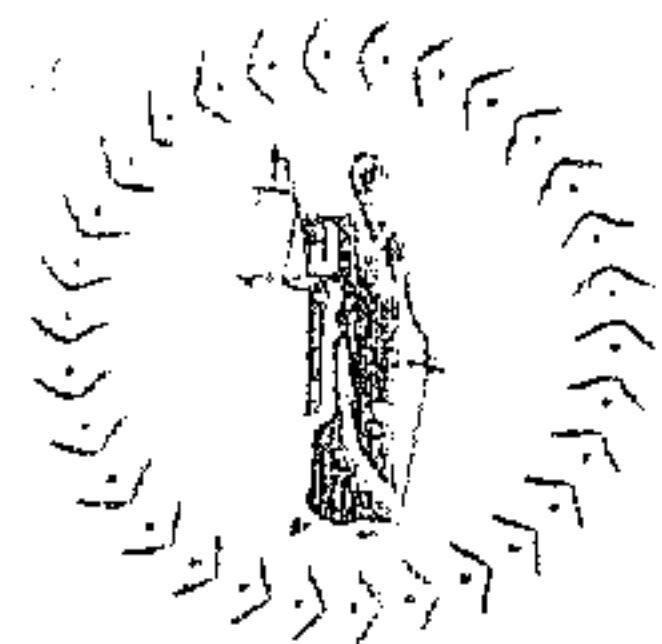
- (new) (exclusive of any goods and services tax)*
- (1) For the purposes of section 4(2)(a) of the Act, the amount of \$400 000 per annum is prescribed (and, consequently, the Act does not apply to a retail shop lease if the rent payable under the lease exceeds \$400 000 per annum). For the purposes of this Regulation, "new retail shop lease" means a retail shop lease entered into on or after 4 April 2011 (including such a lease that is renewed after 4 April 2011 under a right or option of renewal conferred before 4 April 2011).

Made by the Governor

with the advice and consent of the Executive Council  
on 26 August 2010

No 200 of 2010

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17 December 2010

C110  
JM,rp

Mr David Green  
Commissioner for Consumer Affairs  
Office of Consumer and Business Affairs  
GPO Box 1719  
ADELAIDE SA 5001

Dear Commissioner

### Retail and Commercial Leases Regulations 2010

I refer to the above Regulations and to the two explanatory letters sent from your Office to various property industry representatives in August and October 2010 (copies enclosed).

The purpose of this letter is to raise some concerns the Society's membership have in respect of the new Regulations.

#### *General*

Unfortunately, the Society does not appear to have been given an opportunity to review and comment on the draft Regulations (unlike other draft legislation). Upon further investigation, I am told that this may have been due to the use of an incorrect email address. To that end, please note the Society's correct email address is [email@lawsociety.sa.asn.au](mailto:email@lawsociety.sa.asn.au). We also request that you consider sending future communications by letter as well as by email.

#### *Increased rent threshold for application of the Retail and Commercial Leases Act ("the Act")*

The Regulations state that the increased rent threshold (i.e. from \$250,000 to \$400,000 per annum) comes into operation on 4 April 2011. From your August and October 2010 letters to various property industry representatives, we understand that it is the intent of the new Regulations that the increased threshold will:

1. apply to **new leases** entered into on or after 4 April 2011 (i.e. will not apply to leases entered into prior to 4 April 2011); and
2. not apply to a lease which is renewed under a right of renewal conferred in a lease entered into prior to 4 April 2011.

Unfortunately, the Regulations do not express any such intent. Given that your above-stated intentions in respect of the 4 April 2011 date are not contained in the Regulations and given it is the view of many property lawyers, and also the view of your Office, that the Act can commence or cease to apply during the term of a lease, I advise that our members in the course of acting conservatively will need to advise their

clients that existing leases with an annual rent of between \$250,000 and \$400,000 may become subject to the Act on 4 April 2011 unless some further varied Regulations are passed. One consequence of this for Landlords is that from 4 April 2011 they will no longer be able to recover land tax from their Tenant, which is unfair not only when the rent payable was originally negotiated and agreed on the basis that the Tenant would reimburse the Landlord for land tax but particularly in cases where there is no opportunity for a market rent review for a number of years.

We submit that some fairly simple Regulations should be passed to address the above concern and more importantly express the intention of the new Regulations as expressed by your Office. Some of our members have communicated to me that in the interim they will be recommending that their Landlord clients require those of their Tenants who are paying annual rents in between \$250,000 and \$400,000 to apply to either the relevant Minister or the Magistrates Court for an order exempting their lease from the operation of the Act. This approach obviously contradicts one of your Office's stated intentions of reducing red tape for Landlords and Tenants.

### *Repeal of the exemption for leases of licensed premises*

In your August 2010 letter to various property industry representatives, you stated that new leases for licensed premises that fall within the scope of the Act and are entered into on or after 4 April 2011 will no longer be exempt from the provisions of section 18 and Part 7 of the Act. There are no Regulations which express this transition date of 4 April 2011. Accordingly, our members will need to advise their clients that from 1 September 2010 all provisions of the Act will now apply to all leases of licensed premises. Is there a new Regulation that will be passed to give effect to your stated transition date of 4 April 2011? If not, immediate consideration should be given to this.

### **GST**

I refer to your Office's October 2010 letter to various property industry representatives where it is stated that "it is considered that 'rent payable' under a lease for the purposes of section 4(2)(a) of the Act includes GST wherever GST is payable". I assume that this statement is a response to a number of queries directed to your office. The Society's Property Committee tells me that the vast majority of property lawyers who practice in commercial leasing are of the contrary view due to:

1. GST not being 'rent';
2. the \$200,000 per annum rent threshold for application of the Act being introduced in 1995, prior to the introduction of GST in 2000 (i.e. the effect of your Office's statement is to reduce such rent threshold in July 2000 from \$200,000 to \$181,818 plus GST, which I submit is contrary to Parliament's original intention and is inconsistent with the fact that net rents did not decrease upon the introduction of GST and the fact that valuers continue to value premises on a GST exclusive basis); and
3. industry practice for commercial leases to be negotiated and drafted as \$X rent per annum plus GST (note: I also point out section 3(2) of the Act which states: "In the interpretation of this Act, accepted practices and interpretations in the industry concerning the leasing of retail shops are to be taken into account.").

Given the above and the likely confusion caused by the statement made by your Office in its October 2010 letter, I respectfully suggest that you reconsider your statement and possibly issuing a clarifying statement.

even if it simply acknowledges that your view is not necessarily accepted by all members of the property industry, that your view should not be relied on and that independent legal advice should be obtained. If you do decide to recommend Variation Regulations to address the abovementioned transition issues, you may like to also clarify this GST issue by using wording such as: "...\$400,000 per annum (exclusive of any GST) is prescribed..."

In summary, there is a considerable amount of confusion existing in the property industry regarding the new Regulations, which in our view could be easily removed by the introduction of some simple Variation Regulations (like number 200 of 2010 - *Retail and Commercial Leases Variation Regulations 2010*) which express the intention of the Regulations stated by your office.

The Chair of the Society's Property Committee would be happy to meet with you to discuss this letter and any proposed new Regulations you intend to introduce.

Thank you for your time in considering this letter and I look forward to hearing from you.

Yours sincerely



Jan Martin  
EXECUTIVE DIRECTOR