



16 November 2011

RB; rp  
C110, 75-9 75-10  
73.25

The Honourable J Rau MP  
Attorney-General  
DX 336  
ADELAIDE

Dear Mr Attorney,

### **Retail and Commercial Leases Regulations 2010**

I refer to the above Regulations and to the two explanatory letters sent by the Commissioner of Consumer Affairs to various property industry representatives in August and October 2010, together with my letter dated 17 December 2010 and Deputy Commissioner's letters dated 21 January 2011 and 22 March 2011 (copies **enclosed**).

The purpose of this letter is to reiterate some concerns the Society's membership have in respect of the new Regulations as specified in my letter dated 17 December 2010 which have not been adequately addressed by the Commissioner.

While the attempted clarification of the Commissioner's interpretation of the Regulations is appreciated, as a matter of public policy for the promotion of consistent interpretation and application of the Regulations, I respectfully suggest that amending the Regulations as mentioned in my letter dated 17 December 2010 are required.

In particular, we enclose suggested amendments to Regulation 4(1), which in the Society's view would rectify the "grey area" and confirm the stated intention of the Commissioner (and presumably Parliament) that the new \$400,000 threshold is to apply to new leases entered into on or after 4 April 2011 and is not to apply to a lease which is renewed under a right of renewal conferred in a lease entered into prior to 4 April 2011.

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.

Further, the suggested additional wording also makes reference to GST for completeness. We note that it is a policy decision whether the \$400,000 threshold is intended to include GST or not. In that regard, we note that the original \$250,000 threshold was introduced before GST came into effect. Whichever way Parliament goes with this, we believe that it is critical that it be clearly stated whether the new threshold includes GST or not. As you are aware, uncertainty in business transaction leads to increased costs and inefficiencies and should be avoided if at all possible.

Parliament goes with this, we believe that it is critical that it be clearly stated whether the new threshold includes GST or not. As you are aware, uncertainty in business transaction leads to increased costs and inefficiencies and should be avoided if at all possible.

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



Ralph Böning  
**PRESIDENT**

## **Retail and Commercial Leases Variation Regulations**

### **4—Exclusions from application of Act**

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



**THE LAW SOCIETY  
OF SOUTH AUSTRALIA**

THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

124 Waymouth Street, Adelaide, South Australia, 5000

GPO Box 2066, Adelaide, South Australia, 5001, DX 333

Phone 08 8229 0200 • Fax 08 8231 1929

Email [email@lawsocietysa.asn.au](mailto:email@lawsocietysa.asn.au) • [www.lawsocietysa.asn.au](http://www.lawsocietysa.asn.au)

ED Group  
Su B's  
K Zuveta

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@lawsocietysa.asn.au](mailto:email@lawsocietysa.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



ED → CHS C115  
Government of South Australia

Office of Consumer and  
Business Affairs

73.25  
Prop Ctee

610/09 00056 2

Ms Jan Martin  
Executive Director  
Law Society of South Australia  
GPO Box 2066  
ADELAIDE SA 5001

Level 2  
Chesser House  
91-97 Grenfell Street  
Adelaide SA 5000

GPO Box 1719  
Adelaide SA 5001  
DX 225

Tel 08 8204 9588  
Fax 08 8204 9590

[www.ocba.sa.gov.au](http://www.ocba.sa.gov.au)

Dear Ms Martin

### **Retail and Commercial Leases Regulations 2010**

Thank you for your recent letter relating to the *Retail and Commercial Leases Regulations 2010*.

I note your concern about the Society not having reviewed and commented on the draft regulations. Please find attached copy of the consultation email that was sent to the Society on 26 July 2010. It is unfortunate that the email appears not to have been received by you. I confirm that all future correspondence to the Society will be sent by letter as well as by email.

I note your comments in relation to the proposed increase in the rent threshold for the application of the *Retail and Commercial Leases Act 1995* (the Act) as well as issues surrounding GST. Further consideration is required on the points raised and we will respond in due course.

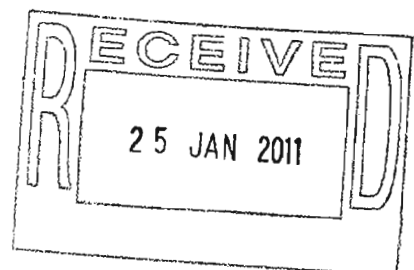
Additionally, in relation to the repeal of the exemption from the provisions of s18 and Part 7 of the Act for leases of licensed premises, the grace period to 4 April 2011 was provided for by an instrument of exemption executed by the Minister for Consumer Affairs on 31 August 2010 under s77(1)(b) of the Act. The effect of the instrument of exemption was announced by letter to retail tenancy stakeholders on 27 August 2010 and public notice in *The Advertiser* on 28 August 2010. A copy of the instrument of exemption was also published in the *Government Gazette* on 28 October 2010.

If you require further information about the new regulations or the variation regulations please contact the Tenancies Branch on 8204 9544.

Yours sincerely

**Anne Gale**  
Deputy Commissioner for Consumer Affairs

21 January 2011



**Haltis, Deahna (AGD)**

**From:** Haltis, Deahna (AGD)  
**Sent:** Monday, 26 July 2010 6:27 PM  
**To:** 'email@lawsociety.sa.asn.au'  
**Subject:** Retail & Commercial Leases Regulations remake

**Importance:** High  
**Sensitivity:** Confidential

**Attachments:** Draft Regulations for Consultation.pdf

The Law Society of South Australia  
For the attention of: Ms Jan Martin, Executive Director

Jan

As you are aware the *Retail and Commercial Leases Regulations 1995* (the Regulations) expire on 1 September 2010.

Based on the feedback received on the current operation of the Regulations, a set of recommendations was developed for their amendment and improvement from which revised Regulations were drafted. As a result of the proposed amendments, it has been decided to release them to particular stakeholders for the purposes of consultation. Attached is a draft copy of the proposed revised Regulations.



Draft Regulations  
for Consulta...

There are approximately 10 proposed amendments to the Regulations. Three are particularly significant. These are:

- increasing the rent cap that excludes the application of the Act from leases where rent is over \$250,000 pa to \$400,000 pa;
- removing the exemption for leases of licensed premises from the application of Part 7 of the Act which contains protections for lessees seeking to assign their lease; and
- extending the exemption for leases of certain types of related bodies corporate from the requirement of a minimum 5 year term to an exemption from the entire Act.

I invite you to review the proposed revised Regulations. We seek your feedback on the proposed amendments and in particular, any impacts relating to implementation if the proposed amendments were to commence on 1 September 2010.

As you are aware, the revised Regulations must be made on 1 September 2010. Therefore, unfortunately, the timeframe within which you will be able to comment is limited as I seek your comments by Friday 6 August 2010.

Please feel free to contact me on 8204 9770 with any queries.

Kind regards

**Deahna Haltis** | Principal Policy Officer  
Office of Consumer and Business Affairs  
Chesser House, 91-97 Grenfell Street, Adelaide  
p: (08) 8204 9770 | e: haltis.deahna@agd.sa.gov.au

**Attorney-General's Department Disclaimer:**

The information in this e-mail may be confidential and/or legally privileged. It is intended solely for the addressee. Access to this e-mail by anyone else is unauthorised. If you are not the intended recipient, any disclosure, copying, distribution or any action taken or omitted to be taken in reliance on it, is prohibited and may be unlawful.

EU-VICTORIA



Government of South Australia

Office of Consumer and Business Affairs

C110  
73-25  
Prop CAT

610/09 00056 2

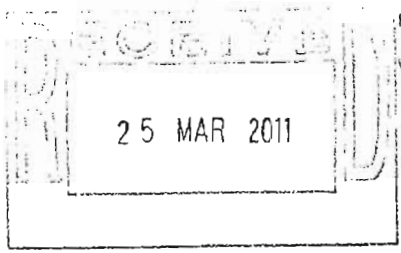
Level 2  
Chesser House  
91-97 Grenfell Street  
Adelaide SA 5000

GPO Box 1719  
Adelaide SA 5001  
DX 225

Tel 08 8204 9588  
Fax 08 8204 9590

www.ocba.sa.gov.au

Ms Jan Martin  
Executive Director  
Law Society of South Australia  
GPO Box 2066  
ADELAIDE SA 5001



Dear Ms Martin

**Retail and Commercial Leases Regulations 2010**

I refer to your letter concerning the *Retail and Commercial Leases Regulations 2010* and my response dated 21 January 2011. I have had the opportunity to consider further the matters raised in your letter.

**Rent threshold**

I note your comments about the proposed increase in the rent threshold for the application of the *Retail and Commercial Leases Act 1995* (the Act). I remain of the view that that the increased rent threshold applies only to new leases entered after 4 April 2011. I accept that the regulations are silent concerning this matter, however, it is a well established principle of statutory interpretation that without clear words to the contrary legislation will be presumed not to operate retrospectively so as to affect existing rights and liabilities: *Maxwell v Murphy* (1957) 96 CLR 261, 267. Where legislation is procedural in effect and does not alter existing rights and liabilities, the presumption does not apply: *Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 183 CLR 595, 615.

In my view, the presumption applies wherever the increased rent threshold affects existing rights and liabilities. This is the case in your example concerning a landlord's existing right to recover land tax. In my view, the presumption prevents the change in threshold affecting this right.

**Applications for exemption**

I am concerned by the suggestion that your members might advise their landlord clients to "require" their tenants to apply for exemption from the operation of the Act. Clearly, an interested person may apply either to the Minister or to the Magistrates Court of South Australia for an exemption under s77 of the Act. However, that provision in no sense *requires* such an application and, in many cases, such an application will be contrary to a tenant's interests. In my view, it is quite improper for a landlord by harassment or coercion to place pressure upon a tenant to apply for an exemption: see, for example, s50 of the *Australian Consumer Law* (the ACL).

## Inclusion of GST

I note your comments in relation to whether GST is applicable to the rent threshold. Again, I remain of the view that "rent payable" under a lease for the purposes of s4(2)(a) of the Act includes GST whenever GST is payable. I accept that the provision is silent, but view that this is the most natural reading of the provision.

Virtually all retail shop leases where the threshold becomes relevant will require the payment of GST. As a result, landlords will forward to the Australian Tax Office a portion of the rent paid, less any entitlement to input tax credits arising from the landlord's business. Similarly, most tenants will claim input tax credits for GST paid on their rent, offsetting GST paid by customers in their retail shops. In my view, these matters are quite incidental to the operation of the Act which regulates retail shop leases, principally by protecting the interests of tenants. The more natural reading is that rent payable includes GST wherever GST is payable. There is no reason to believe that Parliament intended that the threshold should exclude from the calculation of rent payable that portion which may ultimately be payable as a tax to the Commonwealth Government.

In regard to your reference to current "industry practice", after considering the matter in detail I believe that Parliament would have intended that the concept of "rent" would be an amount that reflected the single price for the legal right to be granted the lease. Parliament adopted that view in relation to all consumer contracts when it applied the Australian Consumer law as a law of South Australia. The rule against component pricing is simply a specific reflection of the general law against misleading representations, set out in detail in regard to pricing to protect domestic consumers. If s48 of the ACL did apply directly to retail and commercial leases, a pecuniary penalty would apply if the rent was not prominently displayed in a single figure, including GST, as the single price. GST falls on the lease transaction itself and is borne by the lessee as part of the total amount of the rent, thus the use of "rent" in the Act should be as a single amount inclusive of GST for the legal right to the grant of the lease. I believe that Parliament would have considered that achieving transparency and avoiding the risk of lessees being misled relevant considerations in its use of the concept of "rent" in the Act.

Finally, I note that s4(2)(a) permits only an "amount" to be prescribed. For this reason, an amended regulation in the terms that you recommend would not, in my view, be within power.

If you require further information about the new regulations or the variation regulations, please contact the Tenancies Branch on 8204 9544.

Yours sincerely



**Anne Gale**

Deputy Commissioner for Consumer Affairs

22 March 2011