2 September 2019

The Hon Vickie Chapman MP
Attorney-General
PO Box 464
ADELAIDE SA 5001

By email: agd@agd.gov.sa.au

Dear Ms Attorney

Retail and Commercial Leasing Act (Miscellaneous) Amendment Bill 2019

1. I refer to the Retail and Commercial Leasing Act Amendment Bill 2019 introduced into Parliament on 3 July 2019 (“the Bill”).

2. The Society has worked closely with the Small Business Commissioner, over a number of years now, particularly in relation to the review of the Retail and Commercial Leases Act 1995 (SA) (“the Act”) undertaken by retired Judge Alan Moss and subsequently in respect of the (now lapsed) Retail and Commercial Leases (Miscellaneous) Amendment Bill 2017 introduced into Parliament by the previous Government.

3. Enclosed for your information is a letter from the Society to the Small Business Commissioner dated 1 March 2019 in relation to an earlier version of the Bill. A number of the concerns raised in this letter remain with respect to the current version of the Bill.

Application of the Act

4. The Society notes clause 5 of the Bill, which proposes a new section 4 of the Act with respect to the application of the Act.

5. The Society has consistently advocated the need for the Act to provide certainty, particularly in respect of the crucial issue of when the Act does or does not apply to a lease. The lack of certainty as to whether or not the Act could apply and cease to apply at different stages during the life of the lease, in the Society’s view, has been a long-term weakness of the Act and requires rectification. This was exacerbated by the increase of the prescribed rent threshold from $250,000 to $400,000 in 2011.

6. The application of the Act, and whether it can or cannot cease/commence application during the life of a Lease should be simple and clear. Landlords and Tenants and those that work within the industry (solicitors, conveyancers, real estate agents, valuers and property managers) need to know what the rules are so they can make informed decisions.

7. The Society considers the Act should prescribe that either one of the two following overriding principles should apply with respect to the application of the Act:
7.1 If the Act applies to a Lease at the commencement of the Lease term or the commencement of any renewal, then that position remains the case for the life of the Lease term or renewal term and vice versa, and regardless of subsequent changes in circumstance; or

7.2 Whether or not the Act applies to the Lease at any particular time during the life of the Lease is determined by whether the criteria for the application of the Act or any of the exclusions are met at the particular time. That is, the Act can commence or cease application at any time due to changes in circumstance during the life of the Lease.

8. The Society notes the Bill introduces both additional exceptions (and exceptions to exceptions) and an amalgamation of both of the overriding principles set out above, with some Leases having the application of the Act locked in for the life of the Lease and other Leases having the application of the Act determined by the changes in circumstances from time to time.

9. The Society is concerned that the Bill will create further uncertainty with respect to the application of the Act to the continuing detriment of the property industry.

Registration

10. The Society notes the proposed sections 4(3) and 4(4) contemplate certain leases and renewals of certain leases, being exempted from the application of the Act for the life of the Lease (or life of the renewal) if such leases (or renewals) are registered by the Lessor within 3 months of being executed.

11. The Society considers the new exemption will to add a further layer of complexity and impracticality to the Act and its application. It is likely if the exemption is passed in its current form, that different "classes" of leases are going to exist, being those that meet all of the criteria required for the exemption to apply, those that did not meet the criteria and those where no-one actually knows whether or not the criteria was met.

12. In practice in the years ahead, every Lease that people are parties to, deal with or advise upon will need to be specifically considered (including the history of the execution and registration of the lease) to work out which class the particular lease falls into, in order to determine if it is subject to the Act or not (i.e. – is the lease registered and, if it is registered, were all of the other criteria met or not met at the time it was registered?).

13. The Society suggests, if the intention is that Leases above the rent threshold at lease commencement are to be forever not subject to the Act, then the Act should simply reflect this intention. Alternatively, if it is intended that the Act should apply or not apply to Leases as determined by the rent payable and the rent threshold at any particular time, then similarly it should be legislated accordingly.

14. The Society does not support the proposed provisions and notes the following concerns:

Protections under the Real Property Act 1886

15. The registration of a lease under the Real Property Act 1886 ("the Real Property Act") is for the benefit of Lessees, as Lessees who so register obtain a registered interest in the land and obtain the benefit of the property rights created by such registration. In particular, Lessees obtain the benefit of indefeasibility such that their interest as lessee will be binding and secure, notwithstanding future dealings in the land by the owner.
16. Title by registration is a cornerstone principle of South Australian property law, and it is lamentable that so few Lessees currently register their leases. As it is, Lessees already face significant disincentives to register their Leases. Lease registration usually requires the preparation and lodgement of a filed plan (cost between $1,000 and $2,000), the payment of half of a Mortgagee consent fee (i.e. half of $350.00 or such other amount as mortgagee may charge), the payment of the Land Services SA registration fee (currently $170) as well as the additional legal costs of registration and complying with the Registrar-General’s Verification of Identity policy.

17. The new subsections 4(3)-(4) of the Bill effectively provide an additional disincentive to a Lessee seeking registration of its lease. Certainly, many Lessees and their advisers will deliberately not register the Lessee's lease, where doing so would result in the non-application of the Act being locked in for the life of the Lease.

18. The Society considers it would be a poor outcome if a Lessee will be placed in a situation where they have to weigh up and decide whether they would prefer to not have the Lessee protections provided by the Real Property Act or to never have the Lessee protections provided by the Act. Lessees should not have the benefit of one legislative regime compromised by it having the benefit of the other regime.

Lodgement of the Lessor or by the Lessee

19. The Society considers the application of the Act being determined by whether the Lease is lodged for registration by Lessor or by the Lessee is likely to cause uncertainty and consequential disputes.

20. With the abolition of paper titles, either the Lessor or the Lessee can lodge a Lease for registration. Lessee lodgements are now more common. The Society questions why the new exemption from the Act is contemplated by the Bill to only apply if the Lease is lodged for registration by the Lessor, and will not apply if it is lodge by the Lessee or a mortgagee (which also sometimes happens).

21. Furthermore, once the Lease has been lodged for registration and is registered, there is no way in future for third parties to know which party originally lodged the Lease for registration. If a third party is considering purchasing a leased property or a financier is considering lending money secured by a leased property, how will they know which party originally lodged the Lease for registration? And hence how will they know whether or not the Lease is subject to the Act?

22. If the new subsections 4(3) and (4) are to proceed the Society suggests the words "by the lessor" be deleted from 4(3)(a)(i) and 4(3)(b).

Time frame for lodgement

23. The Society considers the 3-month time frame for lodgement of the Lease contemplated by the new subsections 4(3) and (4) may be highly problematic from a practical perspective.

24. Many Leases are not dated, or are dated with a date that does not accurately reflect when the Lease was actually executed. From the outset parties will have to deal with there not being certainty as to when the Lease was actually executed and hence when the proposed 3-month timeframe begins.

25. Furthermore, Leases can take many months following execution before they are lodged for registration. Following execution some or all of the following will usually need to be done:

(a) the premises may need to be built and or surveyed;
(b) a filed plan may need to be prepared and registered;
(c) mortgagee consent usually needs to be obtained (a process that can take many months in itself), particularly as mortgagee consent usually requires that the document travel interstate or overseas;
(d) the process of certification (including verification of identity) needs to be gone through.

26. The Society is informed by its Property Committee that Leases actually being ready for registration within 3 months of being executed are very much the exception. As such, the exception contemplated by 4(3) and (4) would in effect be impractical and meaningless in the majority of cases.

27. Given that registering the Lease will be disadvantageous to the Lessee due to this new exemption, the well advised or informed Lessee would see a benefit in deliberately delaying all of the above processes to the extent possible in order to ensure the 3-month time frame is missed.

New exceptions – Charitable companies

28. The Society notes the proposed new section 4(2)(e) that will make leases to public companies that are charitable bodies subject to the Act. The Society queries the appropriateness of this provision, given the intent of the Act is to provide protection for “mum and dad” type Lessees.

29. Furthermore, introducing an exception (public companies that are charities) to the current exception (public companies generally) adds another complexity which the entire industry needs to be aware of and consider in relation to the application of the Act.

Overseas companies

30. The Society notes the proposed sub-section 4(2)(f) which will exclude the application of the Act to leases granted to companies with shares listed on overseas stock exchanges (or subsidiaries of same).

31. The Society considers the Act should not apply to any company that is registered or incorporated in a jurisdiction outside of Australia or is a subsidiary of such an overseas company.

32. The proposed new section presents a practical difficulty in that it requires any Landlord, leasing agent, property manager, lawyer, conveyancer or any other person whose job it is to grant a lease, negotiate a leasing transaction or prepare leasing documents to establish whether or not the tenant or its parent company is listed on any stock exchange anywhere in the world.

33. Undertaking the necessary searches across the countless stock exchanges that exist around the world will be an onerous and time-consuming process. Extensive searches of overseas company registers would be required to establish the parents of overseas companies and could present any number of practical challenges.

34. If, however, the exception applied to any company registered or incorporated overseas, then no more than an ASIC search of the Tenant and its Australian parents would be required to be undertaken. ASIC searches will reveal whether the parent of the Tenant is registered or incorporated overseas.
35. However, under the amendment currently proposed, if an ASIC search reveals a tenant company (or its parent) is incorporated overseas, a person would firstly have to work out how to search that company (or parent) in the overseas equivalent of ASIC in order to work out the ultimate parent of the company. They would then have to go through the arduous process of either searching that company’s website to see if there is a reference to that company being listed on a stock exchange, or, alternatively, locating the relevant websites of the stock exchanges in that particular jurisdiction (of which there may be more than one, for example, in America) and then attempt to search each of such stock exchanges to see if the company is listed.

36. The time involved could be substantial with considerable potential for a mistake to be made due to a person’s unfamiliarity with the relevant overseas jurisdiction, how companies are registered in that jurisdiction and the particular stock exchanges that operate in that jurisdiction. Furthermore, the Landlord and its consultants will continually have to monitor that company in its overseas jurisdiction, noting that companies list and de-list from stock exchanges all of the time.

37. The Society notes the basis of the Act is to address the inequality of bargaining power perceived to exist between "big" Landlords and "small" Tenants. Overseas companies that expand into South Australia are unlikely to be the "small" mum and dad type Tenants that the Act is designed to protect. In many cases overseas companies will be significantly better resourced than many Landlords.

38. The Society has previously identified and presented to the Small Business Commissioner at least three categories of such multinationals whose leases would not be caught by the proposed new section 4(2)(f). These are set out below:

- **Government owned overseas companies**

39. Overseas companies that are owned by Governments would not be exempted by the new section 4(2)(f). For example, Kordia Solutions Pty Ltd is an Australian subsidiary of Kordia Group Ltd, a company incorporated in New Zealand and which is wholly owned by the New Zealand Government.

- **Privately owned multinationals**

40. Privately owned multinational companies would not be exempted by the new section 4(2)(f). For example, Aldi Foods Pty Ltd is the entity which leases premises for Aldi Supermarkets in Australia. Aldi Foods Pty Ltd is a wholly owned subsidiary of Hofer KG which (after extensive searching) appears to be a subsidiary of "Aldi Sud".

- **Private Equity**

41. Diversey Australia Pty Ltd is an Australian private company whose sole shareholder is Diversey Incorporated, a company based in America. It appears that Diversey Incorporated is owned by private equity interests. It is not listed on any overseas stock exchange.

42. The Society considers that the above 3 examples demonstrate that the proposed new section 4(2)(f) is not broad enough. By limiting the exclusion to only overseas listed companies and their parents, multinationals with different ownership arrangements have the benefit of the Act. This appears to be inconsistent with the main objective of the Act.
43. The Society notes that considerable time and resources were required to work out the ownership of the tenants in the above 3 examples. It is unsatisfactory that such a process is required in order to work out something as fundamental as whether or not an exemption from the Act will apply or not.

**Security Bonds**

44. The Society notes the Bill seeks to increase the maximum security bond to 3 month's rent. The Society suggests that such amount should be inclusive of GST rather than exclusive. Any amount the Lessor receives from the security bond will be subject to GST such that 1/11th has to be remitted to the Australian Taxation Office. This means that effectively the value of the security to the Landlord is less than 3 months' rent (which is not the intention) unless the security bond is a GST inclusive figure.

**Abandoned Goods**

45. The Society has previously proposed to the Small Business Commissioner amendments relating to section 76 of the Act, with respect to abandoned goods. The amendments are noted below for your consideration.

46. The Society suggests the reference to "terminates" in section 76(1) be amended to read "expires" such that s76(1) commences with:

"If a retail shop lease expires or is terminated, and goods are left on the premises..."

47. This is a simple amendment intended to simply make it clear that section 76 applies both when a lease expires (due to the agreed term coming to an end) or is terminated (e.g. following a Tenant default). We have come across examples of parties believing that section 76 only applies if the lease is terminated (e.g. following a Tenant default).

48. Furthermore, as previously submitted the Society suggests a new sub-section 76(9) be included as follows:

"For the avoidance of doubt, for the purposes of this section the expression "goods" does not include the fit-out, fixtures or fittings of the Lessee"

49. The Society proposes the inclusion of this provision on the basis that it is not uncommon for Tenants to vacate premises leaving fit-out, fixtures and fittings in place. The removal of such fit-out, fixtures and fittings is often an onerous and expensive obligation for the Landlord and the value of such items, once no longer in situ, is rarely significant.

50. Currently section 76 creates an obligatory expense for the Landlord which is of no benefit for anyone (because second hand, removed fitout is rarely of any value to the Tenant either). It is not uncommon for commercial leases to state that Tenant-owned fit-out left in the premises following expiry (and in breach of the Lease) shall become the property of the Landlord.

51. The Society considers that in circumstances where the Tenant has vacated and has breached the Lease by leaving Tenant fit-out, fixtures and fittings in place, there is no reason why such a provision in the lease should not be enforceable. There is even less reason why a Landlord in such circumstances should be compelled to undertake an expensive de-fit process which is of no benefit to either party.
Preference rights at end of shopping centre leases

52. The Society has previously proposed to the Small Business Commissioner amendments relating to section 20C of the Act, with respect to preference rights in shopping centres. These amendments are noted below for your consideration.

53. The Society suggests that a new section 20C(2)(e) be added to the Act as drafted below:

"(e) The lease contains a right or option to renew or extend the lease".

54. This amendment is suggested on the basis that presently there is some confusion as to whether Tenants in retail shopping centres are entitled to preference rights where the lease has a right of renewal.

55. The Courts determined in the matter of Paralawie Investments Pty Ltd v Maurice Srour Pty Ltd and others (2006) SADC16 that preference rights do not apply where the lessee had a right of renewal. The Society considers that this judicial interpretation should be reflected in the Act.

The Society would be pleased to discuss any of the matters raised above with you further.

Yours sincerely

Stephen Hodder
CHIEF EXECUTIVE
T: (08) 8229 0200
E: stephen.hodder@lawsocietysa.asn.au

Encl: Letter to the Small Business Commissioner 1 March 2019