

Legislative Council—No 115A

As reported with an amendment, report adopted, Standing Orders suspended and passed remaining stages, 10 December 2019

South Australia

**Retail and Commercial Leases (Miscellaneous)
Amendment Bill 2019**

A BILL FOR

An Act to amend the *Retail and Commercial Leases Act 1995* and to make related amendments to the *Landlord and Tenant Act 1936*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Retail and Commercial Leases (Miscellaneous) Amendment Act 2019*.

5 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

10 Part 2—Amendment of *Retail and Commercial Leases Act 1995*

4—Amendment of section 3—Interpretation

(1) Section 3(1)—after the definition of *Fund* insert:

GST means the tax payable under the GST law;

GST law means—

- 15 (a) *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth; and
- (b) the related legislation of the Commonwealth dealing with the imposition of a tax on the supply of goods and services;

(2) Section 3(1)—after the definition of *premium* insert:

20 *public company* has the same meaning as in section 9 of the *Corporations Act 2001* of the Commonwealth;

(3) Section 3(1)—after the definition of *statutory rights of security of tenure* insert:

subsidiary includes a subsidiary within the meaning of section 9 of the *Corporations Act 2001* of the Commonwealth.

25 (4) Section 3—after subsection (1) insert:

(1a) For the purposes of this Act—

prescribed threshold, in relation to rent payable under a retail shop lease, means—

- 30 (a) the amount of \$400 000 per annum exclusive of GST; or
- (b) if a greater amount is prescribed by the regulations for the purposes of this definition and the Act—the amount so prescribed.

5—Substitution of section 4

Section 4—delete the section and substitute:

4—Application of Act

- 5 (1) This Act applies to a retail shop lease if the premises to which the
lease applies consist of a retail shop or a retail shop together with an
adjacent dwelling.
- (2) However, this Act does not apply to a retail shop lease—
- 10 (a) on or after the relevant day (whether the lease was entered
into before or after that day), subject to subsection (3),
during any period in respect of which the amount of rent
payable under the lease exceeds the prescribed threshold
(regardless of whether the Act applies or does not apply to
the lease at the time the lease is entered into or renewed
because of the amount of rent payable under the lease); or
- 15 (b) if the lease is for a term of 1 month or less; or
- (c) if the right of occupation arises under—
- (i) an agreement for the sale and purchase of premises;
or
- 20 (ii) a mortgage; or
- (iii) a scheme under which a group of adjacent premises
is owned by a company and the premises
comprising the group are let by the company to
persons who jointly have a controlling interest in
the company; or
- 25 (d) if the lessee is—
- (i) an ADI; or
- (ii) a body corporate authorised by law to carry on the
business of insurance; or
- 30 (iii) the Crown or an agency or instrumentality of the
Crown in right of the State, another State or
Territory, or the Commonwealth; or
- (iv) a municipal or district council or other authority
with powers and functions of local government; or
- 35 (e) if the lessee is—
- (i) in the case of a lease entered into on or after the
relevant day—a public company, or a subsidiary of
a public company, other than a public charitable
company or a subsidiary of a public charitable
company; or

- 5
- (ii) in the case of a lease entered into before the relevant day or a lease renewed after the relevant day (whether on the same or different terms) pursuant to a right or option conferred by a lease entered into before the relevant day—a public company, or a subsidiary of a public company (including a public charitable company or a subsidiary of a public charitable company); or
- 10
- (f) if, in the case of a lease entered into on or after the relevant day—the lessee is a body corporate whose securities are listed on a stock exchange outside Australia and the external territories or a subsidiary of such a body corporate; or
- (g) if, in the case of a lease entered into on or after the relevant day—
- 15
- (i) the lessor is—
- (A) the Crown or an agency or instrumentality of the Crown in right of the State; or
- (B) a municipal or district council or other authority with powers and function of local government; and
- 20
- (ii) the lessee is of a class specified by the regulations for the purposes of this paragraph.
- (3) Despite subsection (2)(a), this Act does not apply to—
- (a) a retail shop lease—
- 25
- (i) that is lodged for registration by the lessor within 3 months after both parties have executed the lease, and in relation to which the lessor has provided written notice of lodgement to the lessee within 1 month of lodgement; and
- 30
- (ii) that remains registered for the term of the lease; and
- (iii) under which, at the time the lease is lodged for registration, the rent payable exceeds the prescribed threshold; or
- (b) any renewal of a retail shop lease referred to in paragraph (a)—
- 35
- (i) that is, following execution by both parties, lodged for registration by the lessor not later than 2 months after the day on which the lease would, but for the renewal, expire, and in relation to which the lessor has provided written notice of lodgement to the lessee within 1 month of lodgement; and
- 40
- (ii) that remains registered for the term of the renewed lease,
- despite the fact that—

5 (c) the prescribed threshold is subsequently increased such that the rent payable under the lease or renewed lease (as the case requires) no longer exceeds the prescribed threshold (and the Act would otherwise apply in relation to the lease or renewed lease by virtue of the operation of subsection (2)(a)); or

10 (d) the amount of rent payable under the lease or renewed lease (as the case requires) is decreased (for example, as a result of a review of rent under the lease), such that the rent payable under the lease or renewed lease no longer exceeds the prescribed threshold (and the Act would otherwise apply in relation to the lease by virtue of the operation of subsection (2)(a)).

15 (4) Subsection (3)—

(a) does not apply to, or in respect of—

20 (i) a retail shop lease entered into before the relevant day (regardless of any registration of the lease on or after the relevant day); or

(ii) despite any other Act or law, the renewal of a retail shop lease on or after the relevant day, pursuant to a right or option conferred by a retail shop lease entered into before the relevant day (regardless of any registration of the renewal of the lease on or after the relevant day); but

25 (b) may apply to, or in respect of, a new retail shop lease (whether on the same or different terms) entered into by an existing lessee and lessor after the relevant day.

30 (5) The regulations may exclude from the application of this Act (either conditionally or unconditionally) a specified class of retail shop leases.

35 (6) To avoid doubt, this Act may, on or after the relevant day, apply, or cease to apply to a retail shop lease of a kind referred to in subsection (2)(d), (e), (f) or (g) depending on whether the lessee or lessor becomes, or ceases to be, a lessee or lessor of a kind referred to in the relevant paragraph during the term of the lease.

(7) In this section—

public charitable company means a public company limited by guarantee and registered under the *Australian Charities and Not-for-profits Commission Act 2012* of the Commonwealth;

40 ***relevant day*** means the day on which this section comes into operation.

6—Insertion of section 6A

After section 6—insert:

6A—Valuer-General to review prescribed threshold

- 5 (1) The Valuer-General must, within the last year of each prescribed period and in accordance with the regulations, conduct a review of the prescribed threshold for the purposes of this Act.
- 10 (2) On completing a review, the Valuer-General must forward to the Minister a report on the review and the conclusions reached by the Valuer-General as to whether or not, as a result of the review, the prescribed threshold in relation to rent payable under a retail shop lease should be increased.
- 15 (3) The regulations may make provision with respect to the conduct of a review by the Valuer-General including (without limitation), by specifying requirements (if any) in relation to—
- (a) matters to be taken into account by the Valuer-General; and
 - (b) consultation to be undertaken by the Valuer-General.
- (4) In this section—
- prescribed period* means—
- 20 (a) the period ending on 30 October next following the second anniversary of the commencement of this section; and
- (b) each successive period of 5 years thereafter.

7—Amendment of section 9—Commissioner's functions

Section 9—after paragraph (f) insert:

- 25 and
- (g) any other functions assigned to the Commissioner by or under this Act.

8—Substitution of section 11

Section 11—delete the section and substitute:

11—Copy of lease to be provided to prospective lessee

- 30 (1) A person who, as a lessor, or acting on behalf of a lessor—
- (a) offers to enter into a retail shop lease; or
 - (b) invites an offer to enter into a retail shop lease; or
 - (c) indicates by advertisement by any means that a retail shop is
- 35 for lease,

5 must, as soon as the person enters into negotiations with a prospective lessee (and before a retail shop lease is entered into), provide the prospective lessee with a written copy of the proposed retail shop lease (but not necessarily including the particulars of the lessee, the rent or the term of the lease).

Maximum penalty: \$8 000.

- 10 (2) At the time a copy of the proposed retail shop lease is provided to the prospective lessee under subsection (1), the lessor, or a person acting on behalf of a lessor, must also provide the prospective lessee with a copy of the information brochure (if any) about retail shop leases published by the Commissioner.

Maximum penalty: \$800.

Expiation fee: \$120.

- 15 (3) This section does not apply to or in respect of the renewal of a retail shop lease.

9—Amendment of section 12—Lessee to be given disclosure statement

- (1) Section 12(1)—delete subsection (1) and substitute:

- 20 (1) A lessor, or the lessor's agent, must, before a retail shop lease is entered into, give the lessee a disclosure statement for the lease signed by or on behalf of the lessor in accordance with the requirements set out in subsection (4).

Maximum penalty: \$8 000.

- (1a) A disclosure statement for a retail shop lease is not required to be given in respect of a renewal of a retail shop lease.

- 25 (2) Section 12(4)—delete subsection (4) and substitute:

- (4) A disclosure statement provided under subsection (1) must be served on the lessee—

(a) by personal service on the lessee or the lessee's agent; or

(b) by leaving it for the lessee at—

30 (i) the lessee's usual or last known place of residence or business; or

(ii) in the case of a lessee that is a company, the company's registered office,

with someone apparently over the age of 16 years; or

35 (c) by serving it by post on the lessee or the lessee's agent at the lessee's or agent's address provided by the lessee or agent for the purpose; or

40 (d) by transmitting it by fax or email to a fax number or email address provided by the lessee or lessee's agent for the purpose (in which case the disclosure statement will be taken to have been served at the time of transmission); or

(e) in any other manner prescribed by the regulations.

(4a) Service by post is effected by addressing, prepaying and posting the disclosure statement, and service will be taken to have occurred when the disclosure statement would be delivered in the ordinary course of post.

5 (4b) A lessee or lessee's agent must, within 14 days of being served with the disclosure statement, return a signed acknowledgement of receipt of the disclosure statement to the lessor or the lessor's agent.

10—Amendment of section 14—Lease preparation costs

(1) Section 14(1)—delete ", stamping"

10 (2) Section 14(2)(a)—delete "the stamp duty payable on the lease and"

11—Amendment of section 15—Premium prohibited

Section 15(2)(a)—delete "\$10 000" and substitute:

\$15 000

12—Substitution of section 16

15 Section 16—delete section 16 and substitute:

16—Lease documentation

A retail shop lease is taken to include provision to the following effect:

20 (a) if the lease is not to be registered—the lessor must provide the lessee with an executed copy of the lease within 1 month after the lease is returned to the lessor or the lessor's lawyer or agent following its execution by the lessee;

25 (b) if the lease is to be registered—the lessor must lodge the lease for registration within 1 month after the lease is returned to the lessor or the lessor's lawyer or agent following its execution by the lessee, and the lessor must provide the lessee with—

(i) an executed copy of the lease; and

30 (ii) confirmation that the lease has been registered, within 1 month of the date of its registration.

13—Amendment of section 19—Security bond

(1) Section 19(1)—delete subsection (1) and substitute:

(1) A person must not—

35 (a) require more than one security bond for the same retail shop lease; or

(b) require the payment of an amount by way of security under a security bond if the total amount paid by way of security exceeds 3 months' rent (exclusive of GST) under the lease.

Maximum penalty: \$1 500.

(1a) In connection with subsection (1)(b), the maximum amount of the security bond is to be calculated by reference to the rent payable during the first year of the lease (expressed as a monthly rent) but if a lease provides rent concessions, such as a rent-free period or a period of rent at concessional rates, the concession will be disregarded.

(2) Section 19(2)—delete "four weeks' rent" and substitute:

3 months' rent (exclusive of GST)

(3) Section 19(5), penalty provision—delete "\$1 000" and substitute:

\$1 500

14—Amendment of section 20—Repayment of security

(1) Section 20(4)—delete "seven" and substitute:

14

(2) Section 20(5)—delete "seven" and substitute:

14

15—Insertion of section 20AA

After section 20—insert:

20AA—Return of bank guarantees

(1) A lessor who receives a bank guarantee for a lease must return the original bank guarantee to the lessee within 2 months (the *maximum return period*) after the lessee completes performance of the obligations under the lease for which the bank guarantee is provided as security.

Maximum penalty: \$8 000.

(2) A lessor is not required to return a bank guarantee if it has expired or been cancelled.

(3) The maximum return period does not run for any period during which the matter of the lessor's entitlement to claim or realise the bank guarantee is the subject of proceedings pending in a court.

(4) A lessor who is unable to return an original bank guarantee is able to satisfy the requirement under this section, or an order of a court to return the bank guarantee, by providing any consent or release necessary to have the bank guarantee cancelled.

(5) A lessor is liable to pay to the lessee compensation for—

(a) any loss or damage suffered by the lessee as a result of any failure by the lessor to return a bank guarantee in compliance with this section, or an order of a court; and

(b) reasonable costs incurred by the lessee in connection with the cancellation of a bank guarantee because the lessor was unable to return the original bank guarantee in compliance with this section, or an order of a court.

(6) This section applies to a bank guarantee whether given in respect of a lease entered into or renewed before or after the commencement of this section.

(7) In this section—

5 *bank guarantee* means a guarantee from an ADI for the performance of the lessee's obligations under the lease.

16—Amendment of section 20B—Minimum 5 year term

Section 20B(3)(b)—delete "with the consent of the lessor and the period of holding over does not exceed 6 months"

17—Amendment of section 20K—Certified exclusionary clause

Section 20K(3)—delete subsection (3) and substitute:

(3) A *certified exclusionary clause* is a provision of a retail shop lease in respect of which a certificate signed by the Commissioner, or a lawyer who is not acting for the lessor, is endorsed on the lease to the effect that—

15

(a) the Commissioner or lawyer (as the case may be) has, at the request of the prospective lessee, explained the effect of the provision and how this Part would apply in relation to the lease if the lease did not include that provision; and

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(b) the prospective lessee gave the Commissioner or lawyer (as the case may be) apparently credible assurances that the prospective lessee was not acting under coercion or undue influence in requesting or consenting to the inclusion of the provision in the lease.

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(4) The Commissioner may require payment of a fee prescribed by the regulations for the provision of a certificate under this section.

18—Amendment of section 20L—Premium for renewal or extension prohibited

Section 20L(2)(a)—delete "\$10 000" and substitute:

30

\$15 000

19—Amendment of section 20M—Unlawful threats

Section 20M, penalty provision—delete "\$10 000" and substitute:

\$15 000

20—Amendment of section 23—Reviews to current market rent

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Section 23(1)(c)—delete "President of the Australian Institute of Valuers and Land Economists (SA Division) Inc." and substitute:

Chair of the South Australian State Committee of the Australian Property Institute Limited (or the holder of such other office representing property interests in the State prescribed by the regulations)

21—Amendment of section 24—Turnover rent

Section 24(5), penalty provision—delete "\$1 000" and substitute:

\$1 500

**22—Amendment of section 32—Lessor to provide auditor's report on
outgoings**

- (1) Section 32(b)—delete "*Corporations Law*" first and second occurring and substitute in each case:

Corporations Act 2001 of the Commonwealth

- (2) Section 32(e)—after "other than" insert:

the emergency services levy,

**23—Amendment of section 35—Determination of current market rent under
options to renew**

Section 35(1)(c)—delete "President of the Australian Institute of Valuers and Land Economists (SA Division) Inc." and substitute:

Chair of the South Australian State Committee of the Australian Property Institute Limited (or the holder of such other office representing property interests in the State prescribed by the regulations)

24—Amendment of section 44—Premium on assignment prohibited

Section 44(2)(a)—delete "\$10 000" and substitute:

\$15 000

25—Amendment of section 51—Confidentiality of turnover information

Section 51, penalty provision—delete "\$10 000" and substitute:

\$15 000

**26—Amendment of section 55—Lessor to provide auditor's report on
advertising and promotion expenditure**

Section 55(c)—delete "*Corporations Law*" first and second occurring and substitute in each case:

Corporations Act 2001 of the Commonwealth

27—Amendment of section 75—Vexatious acts

Section 75, penalty provision—delete "\$5 000" and substitute:

\$8 000

28—Amendment of section 77—Exemptions

- (1) Section 77(2)—after "Magistrates Court" insert:

or the Commissioner

- (2) Section 77(4), penalty provision—delete "\$500" and substitute:

\$800

29—Substitution of section 80

Section 80—delete the section and substitute:

80—Regulations

- 5
- (1) The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.
- (2) Without limiting the generality of subsection (1), the regulations may—
- 10
- (a) be of general or limited application; and
- (b) confer powers or impose duties in connection with the regulations on the Minister or the Commissioner; and
- (c) prescribe codes of practice to be complied with by lessors and lessees; and
- (d) prescribe fees in respect of any matter under this Act and provide for their payment, recovery or waiver; and
- 15
- (e) exempt a specified person or class of persons, or a specified transaction or class of transactions, from compliance with this Act or a specified provision of this Act, either absolutely or on conditions or subject to limitations; and
- (f) make provision of a saving or transitional nature consequent on the commencement of specified provisions of this Act or specified regulations under this Act; and
- 20
- (g) make different provision according to the classes of persons, or the matters or circumstances, to which they are expressed to apply; and
- 25
- (h) incorporate, adopt, apply or make prescriptions by reference to, with or without modifications, any document formulated or published by any body or authority as in force at a particular time or from time to time; and
- 30
- (i) impose penalties not exceeding \$2 000 for contravention of a regulation.
- (3) If a document formulated or published by any body or authority as in force at a particular time or from time to time is incorporated, adopted, applied or referred to in the regulations—
- 35
- (a) a copy of the document must be kept available for public inspection, without charge and during ordinary office hours, at an office or offices specified in the regulations; and
- (b) evidence of the contents of the document may be given in any legal proceedings by production of a document apparently certified by the Minister to be a true copy of the document.
- 40

Part 3—Amendment of *Landlord and Tenant Act 1936*

30—Insertion of section 13A

After section 13 insert:

13A—Jurisdiction of the Magistrates Court

- 5 (1) The Magistrates Court has jurisdiction to hear and determine any application or other proceeding under this Part.
- (2) If a proceeding before the Magistrates Court involves a monetary claim, or property with a value, that exceeds the amount by reference to which the jurisdictional limit of the Magistrates Court is fixed, the
10 Magistrates Court must on the application of a party to the proceeding refer the proceeding to the District Court.
- (3) If a proceeding is referred to the District Court, the Court has, in addition to the powers that it has apart from this section, the powers that the Magistrates Court has under this Part.

31—Amendment of section 24—Adverse claims

Section 24(2)—delete subsection (2) and substitute:

- 15 (2) The Magistrates Court, on hearing a claim under subsection (1), may make such orders, including orders as to costs, as the Court thinks fit.