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ELIZABETHAE II REGINAE

A.D. 1990

No. 58 of 1990

An Act to amend the Landlord and Tenant Act, 1936, and to make a related amendment to the Commercial Tribunal Act, 1982.

[Assented to 29 November 1990]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Landlord and Tenant Act Amendment Act, (No. 2) 1990*.
- (2) The *Landlord and Tenant Act, 1936*, is referred to in this Act as "the principal Act".

Commencement

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

Interpretation

3. Section 54 of the principal Act is amended—

(a) by inserting after the definition of "premises" the following definitions:

"registerable form" in relation to a lease means the form appropriate for registration of the lease in the Lands Titles Registration Office or if the land to which the lease applies (or is to apply) is not under *The Real Property Act, 1886*, in the General Registry Office;

"related guarantee" in relation to a commercial tenancy agreement means a guarantee under which the guarantor guarantees the performance of obligations by the tenant under the commercial tenancy agreement;;

(b) by inserting after paragraph (a) of the definition of "shop premises" the following paragraph:

(ab) at which services are supplied to the public;;

and

(c) by inserting after the definition of "shopping complex" the following definition:

"small claim" means a small claim within the meaning of the *Local and District Criminal Courts Act, 1926*.;

Application of Part

4. Section 55 of the principal Act is amended—

(a) by striking out from paragraph (b) of subsection (1) “the prescribed limits” and substituting “\$200 000 per annum”;

(b) by striking out the word “or” between paragraphs (b) and (c) of subsection (2) and inserting after paragraph (c) of that subsection the following paragraphs:

(d) where the tenant is—

(i) a public company within the meaning of the *Companies (South Australia) Code*;

or

(ii) a subsidiary of such a company (as defined by the *Companies (South Australia) Code*);

(e) where the tenant is—

(i) a body corporate lawfully carrying on the business of banking;

or

(ii) a building society under the *Building Societies Act, 1975*;

(f) where the tenant is a body corporate whose principal business is insurance;

or

(g) where the tenant is—

(i) the Crown, or an agency or instrumentality of the Crown, in right of this State or any other State or Territory, or of the Commonwealth;

or

(ii) a municipal or district council.;

and

(c) by inserting after “specified provisions of this Part” in subsection (3) “(either unconditionally or subject to conditions)”.

Substitution of s. 56

5. Section 56 of the principal Act is repealed and the following section is substituted:

Distribution of jurisdiction between the Tribunal and the courts

56. (1) Subject to this section, an action involving a claim arising under or in respect of a commercial tenancy agreement to which this Part applies or a related guarantee should be commenced before the Commercial Tribunal.

(2) An action involving a claim arising under or in respect of a commercial tenancy agreement to which this Part applies or a related guarantee should be commenced before a court if—

(a) the action involves a claim (other than a claim for costs, interest or other incidental relief) that is unrelated to the commercial tenancy agreement or related guarantee;

(b) the action involves a small claim and no other claim (apart from a claim for costs, interest or both);

(c) the action involves a claim for personal injury;

- (d) the action involves a monetary claim in excess of the prescribed amount;
- or
- (e) it may be necessary to effect service on a party to the action outside the State.

(3) If an action that should have been commenced before the Tribunal is commenced before a court, or an action that should have been commenced before a court is commenced before the Tribunal, the action is not a nullity but the Tribunal or the court should transfer the action to the appropriate forum where it will proceed as if commenced in that forum.

(4) Subject to the regulations relating to the practice and procedure of the Tribunal, if an action is properly commenced before the Tribunal but the character of the action is subsequently changed by the addition or amendment of claims, or the introduction of cross claims, so that the action, if it had had that character at its inception, should have been commenced in a court, the Tribunal should transfer the action to a court.

(5) The court in which an action should be commenced, or to which an action should be transferred, under this section is a court which would apart from this Act have jurisdiction to grant relief of the relevant kind or amount.

(6) A court in which an action is commenced or to which an action is transferred in accordance with this section may exercise any of the powers conferred on the Tribunal under this Part in relation to a commercial tenancy agreement or a related guarantee.

(7) In this section—

“the prescribed amount” means \$20 000.

(8) This section prevails over any inconsistent provisions in any other Part of this Act.

Insertion of ss. 61a and 61b

6. The following sections are inserted after section 61 of the principal Act:

Commercial tenancy agreements may be in registrable form

61a. (1) Where the tenant to a proposed commercial tenancy agreement requests that a lease embodying the terms of the agreement in registrable form be prepared, the landlord must, subject to subsection (2)—

(a) prepare a lease in accordance with the request;

and

(b) on tender by the tenant of the appropriate amount for any fees or expenses for which the tenant is legally liable, have the lease registered.

(2) Subsection (1) does not apply—

(a) if the term of the tenancy is to be for a period of one year or less;

(b) if the commercial tenancy agreement will not confer an exclusive right of occupation;

(c) if the landlord does not have a registered interest in the premises subject to the agreement.

or

(d) in any other case of a prescribed kind.

(3) A provision in a commercial tenancy agreement that purports to prevent registration of a commercial tenancy agreement in the Lands Titles Registration Office or in the General Registry Office is void.

Costs associated with the preparation of a written agreement

61b. (1) Subject to subsection (2), where a landlord requires that a written commercial tenancy agreement, or a memorandum of such an agreement, be prepared by the landlord, or a legal practitioner or other person who may lawfully act for a fee on behalf of the landlord, the costs of the preparation of the document, and of any attendances to which subsection (3) applies, must be borne by the landlord.

(2) Where—

- (a) the tenant requests that a lease embodying the terms of the commercial tenancy agreement in registrable form be prepared;

and

- (b) the landlord requires that the lease be prepared by the landlord, or a legal practitioner or other person who may lawfully act for a fee on behalf of the landlord,

the costs of the preparation of the document, and of any attendances to which subsection (3) applies, must be shared equally between the landlord and the tenant.

(3) This subsection applies to attendances on the tenant by the landlord, or a legal practitioner or other person acting on behalf of the landlord, in respect of—

- (a) the preparation or execution of any document that is intended to constitute the commercial tenancy agreement, or a memorandum of such an agreement, or of any lease;

or

- (b) any other prescribed matter,

other than attendances that are attributable to unreasonable and unjustifiable action on the part of the tenant.

Substitution of s. 62

7. Section 62 of the principal Act is repealed and the following section is substituted:

Provisions relating to written agreements prepared by or on behalf of landlords

62. (1) This section applies to a document—

- (a) that is intended to constitute a commercial tenancy agreement (or part of such an agreement), or a memorandum of such an agreement;

and

- (b) that has been prepared by the landlord or a legal practitioner or other person acting on behalf of the landlord.

(2) Where a document to which this section applies is presented to a tenant for execution—

- (a) the document must specify in a clear and concise manner—

- (i) where the tenancy is for a fixed term—the term of the tenancy and any agreement that the parties may have made in relation to extension or renewal of the term;

- (ii) the rent payable under the agreement or the method by which that rent is to be calculated and, if provision is made for review or alteration of rent during the term of the tenancy, the time and manner in which the review or alteration may be made;

and

(b) with each document that is presented to the tenant, there must be an accompanying written statement in the prescribed form—

(i) setting out in a clear and concise manner the information required by the regulations;

and

(ii) advising the tenant to read and sign the statement, and to read the document, before the tenant executes the document.

(3) The tenant should sign the statement before executing the document.

(4) When a tenant executes a document to which this section applies, a photocopy of the document, together with a photocopy of the statement provided under subsection (2) (b), must be given immediately to the tenant.

(5) The landlord must, upon execution of the document by the tenant, if the landlord has not already done so, execute the document.

(6) The landlord must comply with subsection (5) as soon as is reasonably practicable.

(7) A fully executed copy of the document (with the statement required under subsection (2) (b) attached) must be delivered to the tenant within 28 days after the payment of any stamp duty chargeable on it under the *Stamp Duties Act, 1923*, or, if the document is to be registered under *The Real Property Act, 1886*, or the *Registration of Deeds Act, 1935*, within 28 days after a copy is made available for collection from the Lands Titles Registration Office or the General Registry Office following registration (unless the tenant has undertaken responsibility to stamp and, if appropriate, register the document).

(8) A landlord who fails to comply with a provision of this section is guilty of an offence.

Penalty: Division 9 fine.

(9) Subject to subsection (10), non-compliance with this section does not affect the validity of a commercial tenancy agreement.

(10) If—

(a) a landlord—

(i) fails to provide a written statement to a tenant under subsection (2);

(ii) provides a written statement that is not true and correct in a material respect;

or

(iii) fails to provide a copy of a document to a tenant under subsection (4);

and

(b) on the application of the tenant, the Tribunal is satisfied that, in the circumstances, an order under this subsection is justified,

the Tribunal may, by order, to such extent as may be appropriate and fair in the circumstances—

(c) avoid the commercial tenancy agreement, in whole or part;

(d) vary the commercial tenancy agreement;

(e) direct the landlord to refund money paid under the commercial tenancy agreement;

(f) require the landlord to pay compensation to the tenant;

(g) deal with any ancillary or incidental matter.

(11) The Tribunal should, in considering an application under subsection (10), take into account—

(a) the gravity of, and the circumstances surrounding, the landlord's actions;

(b) the conduct of both the landlord and the tenant in relation to the commercial tenancy agreement and any negotiations surrounding the making of the agreement;

(c) the extent of any loss suffered, or likely to be suffered, by the tenant as a result of the landlord's actions;

(d) the effect that making an order, or not making an order, would have on each party,

and may take into account such other matters as the Tribunal thinks fit.

Provision relating to payments on sale or assignment void unless approved by Tribunal

8. Section 63 of the principal Act is amended—

(a) by striking out paragraph (a) of subsection (1) and substituting the following paragraph:

(a) that arises under an agreement between a landlord and a tenant (whether or not a commercial tenancy agreement)—

(i) upon or in respect of the sale or disposal of a business conducted in premises subject to a commercial tenancy agreement between the landlord and tenant;

or

(ii) upon or in respect of the assignment of rights under a commercial tenancy agreement between the landlord and tenant or the subletting of premises subject to such an agreement;;

(b) by striking out from subsection (2) “A contractual provision” and substituting “A provision in an agreement”;

(c) by striking out from subsection (3) “contractual”;

and

(d) by striking out from subsection (4) “a commercial tenancy agreement” and substituting “an agreement”.

Implied warranty that premises reasonably fit for business of tenant

9. Section 66 of the principal Act is amended—

(a) by striking out from subsection (1) “are structurally” and substituting “will, for the duration of the agreement, be structurally”;

and

(b) by inserting after subsection (2) the following subsections:

(3) Where—

(a) a commercial tenancy agreement includes the warranty referred to in subsection (1);

(b) the tenant assigns his or her rights under the agreement, or sublets the premises subject to the agreement;

and

(c) the premises continue to be used for a business of the same kind, the person who obtains a right to occupy the premises by virtue of the assignment or subletting may sue on the warranty in his or her own right.

(4) In any proceedings for breach of the warranty referred to in subsection (1), it is a defence for the landlord to prove—

(a) that the premises were structurally suitable for the relevant purpose at the time that the commercial tenancy agreement was entered into;

and

(b) that any change in the structural suitability of the premises is not attributable to any act or omission of the landlord.

Insertion of ss. 66a and 66ab

10. The following sections are inserted after section 66 of the principal Act:

Provision for five-year terms

66a. (1) Subject to this section, where—

(a) the right of occupancy conferred by a commercial tenancy agreement is for a term of less than five years (not being a right that arises if the tenant holds over after the expiration of the term);

and

(b) the agreement makes no provision for extension or renewal of the tenancy so that its aggregate term will equal or exceed five years,

this section applies to the agreement.

(2) This section does not apply to a commercial tenancy agreement—

(a) if the term of the tenancy is two months or less and the tenant has before entering into the agreement sought and received independent advice from a legal practitioner and the legal practitioner has signed a certificate in the prescribed form as to the giving of that advice;

(b) if the tenant is the landlord's spouse, parent, grandparent, step-parent, child, grandchild, step-child, brother or sister, or the spouse of the landlord's child, grandchild, step-child, brother or sister;

or

(c) —

(i) if the landlord is a body corporate and the tenant or tenants have a controlling interest in the body corporate;

or

(ii) if the landlord and the tenant are both bodies corporate and the same person or persons have a controlling interest in both bodies corporate.

(3) The tenant under a commercial tenancy agreement to which this section applies may apply in writing to the landlord for extension of the term of the tenancy so that the tenancy will expire—

(a) on the fifth anniversary of the date of the commencement of the tenancy;

or

(b) on some specified earlier date.

(4) An application under subsection (3) should be made—

(a) within 21 days after a notice served on the tenant by the landlord under subsection (5) takes effect;

or

(b) if no such notice has been served—not later than three months before the expiration of the term of the tenancy conferred by the commercial tenancy agreement,

unless the Commercial Tribunal is satisfied that the failure to make the application within time was occasioned by mistake, absence from the State, or other reasonable cause.

(5) The landlord under a commercial tenancy agreement to which this section applies may serve on the tenant—

(a) if the tenancy is for a term of six months or less—on or before the commencement of the tenancy;

(b) in any other case—not earlier than six months, and not later than three months, before the expiration of the term of the tenancy,

a notice in the prescribed form requiring the tenant to decide whether or not the tenant will make an application under this section.

(6) A notice under subsection (5) takes effect—

(a) if served before the commencement of the tenancy—on the commencement of the tenancy;

(b) in any other case—at the time of service of the notice on the tenant.

(7) If—

(a) a tenant applies to the landlord under subsection (3);

and

(b) at the expiration of one month from the date of the application the landlord and the tenant have not agreed to an extension of the tenancy on mutually agreed terms,

either may apply to the Commercial Tribunal.

(8) On an application under subsection (7), the Tribunal may extend the tenancy for such term (being a term that expires on or before the fifth anniversary of the date on which the tenancy first took effect) and on such terms and conditions as it considers just.

(9) The Tribunal should, in considering an application under subsection (7), take into account—

(a) the relative bargaining positions of the landlord and tenant at the time the commercial tenancy agreement was entered into;

(b) any proposals of the landlord for a new tenancy between the landlord and the tenant;

(c) any plans of the landlord for the future use or development of the premises;

(d) any prospect the tenant may have of obtaining other comparable premises;

(e) any breaches by the tenant of the commercial tenancy agreement, and may take into account such other matters as the Tribunal thinks fit.

(10) Where an application is made to the Commercial Tribunal under this section, the tenancy to which the application relates continues upon the same terms and conditions (subject to any modifications stipulated by the Tribunal) until the application is determined.

Ability of landlord to move tenant to other premises

66ab. (1) Where—

(a) the term of a tenancy is extended under section 66a;

and

(b) the premises form part of a shopping complex,

the landlord is entitled, subject to this section, to require the tenant to move his or her business to other premises in the shopping complex.

(2) Where—

(a) a landlord proposes to require a tenant to move his or her business to other premises in pursuance of subsection (1);

or

(b) a landlord has (apart from this section) the right under the commercial tenancy agreement to require the tenant to move his or her business to other premises and proposes to exercise that right,

then the landlord must, at least three months before the business is to be moved, notify the tenant of the requirement, of the premises to which the business is to be moved, and of the date on or before which the business is to be moved.

(3) A tenant may, within one month after receiving notice under subsection (2) or such longer period as the Commercial Tribunal may allow, apply to the Tribunal for relief against the requirement.

(4) On an application under subsection (3), the Tribunal may—

(a) annul the requirement;

or

(b) make any adjustment of rights between the landlord and tenant that may be just in view of the requirement (and for that purpose may vary the terms of the commercial tenancy agreement or any proposed commercial tenancy agreement that is to take effect in substitution).

(5) The Tribunal should in considering an application under subsection (3), take into account the interests of the landlord, the tenant, and the other tenants that have premises in the shopping complex.

(6) The Tribunal cannot annul the requirement unless satisfied that the proposed move would have a seriously adverse, and enduring, effect on the tenant's business.

Insertion of s. 67a

11. The following section is inserted immediately after section 67 of the principal Act:

Abandoned goods

67a. (1) Where a commercial tenancy agreement is terminated and goods are left on the premises that were subject to the agreement, the landlord may, after the

expiration of two days from the termination of the agreement, remove and destroy or dispose of the goods if—

(a) the goods are perishable foodstuffs;

or

(b) the value of the goods is less than the total estimated cost of the removal, storage and sale of the goods.

(2) Where a commercial tenancy agreement is terminated, the landlord must store in a safe place and manner for a period of not less than 60 days any goods left on the premises that were subject to the agreement and not removed for destruction or disposal under subsection (1).

(3) A landlord must before the expiration of seven days after he or she has stored goods under subsection (2)—

(a) where the tenant has informed the landlord of a forwarding address—send a notice to the tenant at that address in the form prescribed for the purposes of this paragraph;

(b) send to any other person who has to the knowledge of the landlord an interest in the goods and whose name and address are known to or reasonably ascertainable by the landlord, a notice in the form prescribed for the purposes of this paragraph;

and

(c) cause a notice in the form prescribed for the purposes of this paragraph to be inserted in a newspaper circulated generally throughout the State.

(4) A person who has a lawful right to goods removed and stored under subsection (2) may at any time before the goods are sold under subsection (5) reclaim the goods upon paying to the landlord the reasonable costs of the removal and storage of the goods.

(5) Where goods are stored under subsection (2) and have not been reclaimed within 60 days after the day on which they were removed and stored, the landlord must as soon as practicable after the expiration of that period cause them to be sold by public auction.

(6) If goods are stored, removed and sold by public auction under this section, the landlord—

(a) may retain out of the proceeds of the sale the reasonable costs of removing, storing and selling the goods;

and

(b) may retain out of the proceeds of sale of goods belonging to the tenant any amount owed by the tenant under the commercial tenancy agreement.

(7) Where goods are sold under this section, the landlord must pay—

(a) to the tenant;

or

(b) if the landlord does not know the whereabouts of the tenant—to the Tribunal, the balance of the proceeds of sale remaining after deduction of the amounts that the landlord is entitled to retain under subsection (6).

(8) The Landlord must, when making a payment to the Tribunal under subsection (7), furnish the Tribunal with a notice containing the prescribed information.

(9) Any money paid to the Tribunal under subsection (7) will be paid into the Fund.

(10) Where an application is made to the Tribunal by a person claiming any amount paid into the Fund under this section, the Tribunal may, upon being satisfied that the person is entitled to the amount, order that the amount be paid to the person.

(11) Where goods are sold by public auction under this section, the purchaser will, unless he or she has actual notice of any interest in the goods of any person other than the tenant, acquire a good title to the goods in defeasance of any such interest.

(12) Where a dispute arises between a landlord and a tenant in respect of goods to which this section applies, the Tribunal may, upon application by either party to the dispute, order the payment of any amount or make such other order as the Tribunal considers appropriate in the circumstances.

Power of Tribunal to act in any matter

12. Section 68 of the principal Act is amended—

(a) by striking out subsection (1) and substituting the following subsection:

(1) Subject to this Part, an action for relief under this section may be commenced by application to the Tribunal by any party (or former party) to a commercial tenancy agreement to which this Part applies or to a related guarantee.;

(b) by striking out paragraphs (a), (b), (c) and (d) of subsection (2) and substituting the following paragraphs:

(a) conciliate between the parties and attempt to achieve settlement of any matter by agreement;

(b) by order—

(i) restrain any action in breach of the agreement or a related guarantee, or in breach of any law;

or

(ii) require any action in performance of the agreement or a related guarantee, or to ensure compliance with any law;

(c) order the payment of any amount payable under the agreement or a related guarantee;

(d) order the payment of compensation for loss or damage caused by any breach of the agreement or a related guarantee;

(da) grant relief from the operation of any provision of the agreement or a related guarantee;

(db) where rights of occupation conferred by a commercial tenancy agreement have been forfeited or have otherwise terminated for a reason other than the expiration of the term of the agreement—order reinstatement of those rights on such terms as may be just;;

(c) by striking out the word “or” between paragraphs (f) and (g) of subsection (2); and

(d) by inserting after paragraph (g) of subsection (2) the following word and paragraph:

or

(h) make such other order as the Tribunal thinks fit.

Investment of Fund

13. Section 70 of the principal Act is amended by striking out from subsection (2) “after consultation with the Tribunal”.

Substitution of s. 74

14. Section 74 of the principal Act is repealed and the following section is substituted:

Summary proceedings

74. (1) Offences against this Act are summary offences.

(2) A prosecution for an offence against this Act must be commenced within two years after the date on which the offence is alleged to have been committed, or within such further period as the Minister may in a particular case, allow.

(3) A document apparently signed by the Minister and stating that the Minister allows an extension of the period for commencing a particular prosecution will be accepted, in the absence of proof to the contrary, as proof of the fact so stated.

Regulations

15. Section 75 of the principal Act is amended by inserting after its present contents (now to be designated as subsection (1)) the following subsection:

(2) Without limiting the generality of the foregoing, those regulations may—

- (a) prescribe codes of practice to be complied with by landlords and tenants;
- (b) impose penalties (not exceeding a division 10 fine) for breach of, or failure to comply with, the regulations.

Penalties

16. The principal Act is further amended in the manner set out in the schedule.

Amendment of the Commercial Tribunal Act, 1982

17. The *Commercial Tribunal Act, 1982*, is amended—

(a) by striking out subsection (2) of section 20 and substituting the following subsection:

(2) The appeal lies as of right if—

(a) it involves a question of law;

(b) it relates to a decision or order of the Tribunal in proceedings under Part IV of the *Landlord and Tenant Act, 1936*;

or

(c) it arises from proceedings related to contempt of the Tribunal,

but otherwise lies only by leave of the Tribunal or the Supreme Court.;

and

(b) by inserting after subsection (2) of section 26 the following subsections:

(3) The regulations may provide a means by which a party to proceedings before the Tribunal may obtain judgment or an order in the proceedings without any form of adjudication if—

(a) the proceedings are not defended, or notice of defence is not given, as required by the regulations;

or

(b) the other party to the proceedings fails to attend a hearing in relation to the proceedings after being given reasonable notice of the time and place of the hearing.

(4) The Tribunal may, if the justice of the case so requires, set aside a judgment or order given or obtained under subsection (3).

Transitional provisions

18. The amendments effected by sections 4, 6, 7, 9 and 10 apply only in relation to commercial tenancy agreements entered into on or after the commencement of this Act.

SCHEDULE**Further amendments to the Landlord and Tenant Act, 1936**

Provision Amended	How Amended
Section 57 (1)	Strike out "Four hundred dollars" and substitute "Division 9 fine".
Section 58 (1)	Strike out "Four hundred dollars" and substitute "Division 9 fine".
Section 58 (2)	Strike out "Four hundred dollars" and substitute "Division 9 fine".
Section 59 (1)	Strike out "Four hundred dollars" and substitute "Division 9 fine".
Section 60	Strike out "Six hundred dollars" and substitute "Division 8 fine".
Section 62a (1)	Strike out "\$400" and substitute "Division 9 fine".
Section 62a (3)	Strike out "\$400" and substitute "Division 9 fine".
Section 62a (5)	Strike out "\$400" and substitute "Division 9 fine".
Section 72 (3)	Strike out "is guilty of an offence and liable to a penalty not exceeding one thousand dollars" and substitute: is guilty of an offence. Penalty: Division 7 fine.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

D. B. DUNSTAN, Governor