

Property Alert September 2010

The effects of the *Retail and Commercial Leases Regulations 2010 (SA) (No. 199 of 2010)* and the *Retail and Commercial Leases Variation Regulations 2010 (SA) (No. 200 of 2010)*

Retail and Commercial Leases Variation Regulations 2010 (SA) (Variation)

Section 4(2)(a) of the *Retail and Commercial Leases Act 1995 (SA)* (**Act**) provides that the Act does not apply to a lease where 'the rent payable under the lease exceeds \$250,000 per annum or, if a greater amount is prescribed by regulation, that amount' (**Rent Threshold**).

The Variation comes into operation on 4 April 2011. It prescribes a new Rent Threshold of \$400,000 per annum. This means that the Act will not apply to any lease entered into on or after 4 April 2011 which has a commencing rent exceeding \$400,000 per annum.

It is **not** clear whether a lease which is in operation prior to 4 April 2011 and which requires payment of an annual rent in excess of \$250,000 (and therefore is excluded from the operation of the Act prior to 4 April 2011) will be captured by the Act after the Variation comes into effect.

Since the commencement of the Act in 1995, members of the property industry have debated whether a lease, which is captured by the Act on its commencement date, can cease to be governed by the Act during the term of that lease. For example, where the rent payable under a lease (which is initially captured by the Act) is increased during the term to an amount which exceeds the relevant Rent Threshold.

Equally, it is not clear whether a lease which is not governed by the Act on the lease commencement date can later become governed by the Act, due to a change in circumstances. The legislature has provided no clear guidance in respect of these issues.

These issues were considered by the Supreme Court of Victoria in *Towercom Pty Ltd v Strathfield Group Ltd*

[2000] VSC 370 (**Case**) per O'Bryan J, in the context of equivalent Victorian legislation (the *Retail Leases Act 2003 (Vic)*). In the Case, the Court decided that the relevant legislation may cease to apply where the circumstances of a lessee change during the term. On the facts of the Case, it was held that the legislation ceased to apply when the lessee changed from being a private company to a public company.

As the Case is Victorian, this decision is only 'persuasive'. However, it does give some indication of how a Court may view a change in the circumstances of the lessee during the term of a lease.

Relevantly, the Court also considered that the same reasoning applies to rent exceeding the Rent Threshold during the term of a lease.

We have been informed by the Office of Consumer and Business Affairs (**OCBA**) that it is the intention of the Government that the Variation will only relate to leases entered into on and from 4 April 2011.

However, this intention is not reflected in the text of the Variation.

The Variation does not clarify whether the prescribed Rent Threshold is inclusive or exclusive of GST. The cautious approach is to assume that the Rent Threshold is exclusive of GST.

Retail and Commercial Leases Regulations 2010 (SA) (2010 Regulations)

On 1 September 2010, the *Retail and Commercial Leases Regulations 2010 (SA)* (**2010 Regulations**) replaced the *Retail and Commercial Leases Regulations 1995 (SA)* (as amended) (**1995 Regulations**).

The 2010 Regulations differ from the 1995 Regulations in

a number of respects. This alert addresses the four most significant differences.

Prescribed notices and documents

The 1995 Regulations set out prescribed forms for the following notices, clauses and documents referred to in the Act:

- disclosure statement (under section 12(3a) of the Act);
- assignor's disclosure statement (under section 45A of the Act);
- warranty of fitness for purpose (under section 18 of the Act);
- certified exclusionary clause (under section 20K(3) of the Act);
- notice of request for determination of current market rent (under section 36(1)(b) of the Act); and
- abandoned goods notice (under section 76(3) of the Act).

The 2010 Regulations **only** prescribe the following forms:

- disclosure statement (under section 12(3a) of the Act); and
- assignor's disclosure statement (under section 45A of the Act).

The form of the disclosure statement and the form of the assignor's disclosure statement have changed. From 1 December 2010, disclosure statements must be served in the form prescribed by the 2010 Regulations. From 1 September 2010 to 30 November 2010 either form of disclosure statement can be served.

The new form of assignor's disclosure statement must be served even where the lease was entered into before the 2010 Regulations come into operation. This supports the view that the Variation applies to leases entered into before the Variation comes into operation.

One significant difference between the 1995 prescribed disclosure statement and the 2010 prescribed disclosure statement is that it appears that the lessor **must personally sign** the 2010 version.

Please note that the sections of the Act relating to the notices which have not been prescribed in the 2010 Regulations, continue to apply. The form of these notices is no longer prescribed, but in some circumstances, specified information must be included. For example, the 2010 Regulations specify the information required to be included with respect to the warranty of fitness for

purpose and with respect to the abandoned goods notice. The 2010 Regulations do not specify information to be included in the certified exclusionary clause or the notice of request for determination of current market rent.

Certain related bodies corporate excluded from the Act

Under regulation 4 of the 2010 Regulations, a lease will be excluded from the application of the Act if:

- the lessor is a body corporate and the lessee or lessees have a controlling interest in the body corporate; or
- the lessor and the lessee are both bodies corporate and the same person or persons have a controlling interest in both bodies corporate.

This will permit corporations, in certain circumstances, to structure their assets in leasehold arrangements without having to comply with the provisions of the Act.

The same issues discussed in section 1 of this alert arise in relation to this regulation. It is not clear whether the Act now applies to a lease entered into prior to 1 September 2010 between parties which now fall within the ambit of this regulation.

Core trading hours

The 2010 Regulations do not contain the notes which were included in regulation 10 of the 1995 Regulations. These notes repeated the requirements under the Act.

However, as and from 7 July 2003 these notes were incorrect as they stated that the core trading hours of a shopping centre must not exceed 65 hours a week. On 7 July 2003, section 61 of the Act was amended to provide that the core trading hours of a shopping centre must not exceed 54 hours a week and do not include any time on a Sunday.

This created some minor ambiguity between the Act and the 1995 Regulations. As these notes have not been included in the 2010 Regulations, this ambiguity has been resolved.

Liquor Licensing

Regulations 4(2), 4(3) and 4(4) of the 1995 Regulations provide that certain sections of the Act do not apply to licensed premises (as defined in the *Liquor Licensing Act 1997* (SA)).

Sections of the Act which did not apply to licensed premises include:

- section 18 (warranty of fitness for purpose);
- section 43 (grounds on which consent to assignment can be withheld);
- section 44 (premium on assignment of a lease prohibited);
- section 45 (procedure for obtaining consent to assignment);
- section 45A (liability of lessee following assignment of lease); and
- section 46 (lessor may reserve right to refuse to sublease, mortgage).

These regulations have not been included in the 2010 Regulations. Therefore from 1 September 2010 all provisions of the Act will apply to leases of licensed premises (which are otherwise captured by the provisions of the Act).

Again, the issues discussed in section 1 of this alert are relevant to this regulation. We consider that all sections of the Act now apply to a lease of licensed premises which was entered into prior to 1 September 2010 (and is otherwise captured by the provisions of the Act), as currently there is no provision in the 2010 Regulations which saves the 1995 Regulations, to the extent they apply to licensed premises. We have been informed by the OBCA that there will be a Ministerial Exemption granted with respect to licensed premises until 4 April 2011 and then the provisions of the 1995 Regulations will no longer apply to leases over licensed premises where the Act applies. We have not seen the Ministerial Exemption and cannot comment on this issue definitively.

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