

## Property Alert

# How does the SA leasing legislation apply to a lease as the rent increases during the term of a lease?

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### Introduction

The *Retail and Commercial Leases Act 1995 (SA)* (**Act**) only applies to most commercial and retail leases in South Australia.

The rent payable under the lease is relevant when determining whether or not the Act applies.

The Full Court of the Supreme Court of South Australia in *WST Pty Ltd v GRE Pty Ltd*<sup>1</sup>, has given guidance on how to apply the Act as the rent payable increases during the term of the lease.

### The Legislation

Section 4(2)(a) of the Act provides that the Act does not apply to a retail or commercial lease if the rent payable under that lease exceeds \$250,000 per annum.

On 4 April 2011 that amount was increased to \$400,000 pursuant to regulations.

Section 30 of the Act provides that an applicable lease cannot require a lessee to pay land tax.

### The Facts

GRE Pty Ltd took a lease from WST Pty Ltd for a term of 10 years with one right of renewal of 10 years. The lease

commenced on 21 May 2006 and the commencing rent was \$210,000. The Act applied to the lease.

The lease included a provision requiring the lessee to pay land tax except where the lease 'is a "retail shop lease" to which the [Act] applies'.

The rent was subject to annual review and by 21 May 2011, the rent was \$250,415.39.

From 21 May 2011, the lessor sought to recover land tax from the lessee for the period following that date on the basis that the rent threshold of \$250,000 had been exceeded. The lessee refused to pay the land tax on the basis that as from 4 April 2011, the prescribed rent threshold was \$400,000.

### The Court's Decision

The Court held that the lease will remain a retail shop lease until such time as the rent exceeds the applicable threshold amount whatever it may be, from time to time. Therefore, the lessee was not liable to pay land tax from 21 May 2011 as the annual rent payable at that time was below the then applicable threshold of \$400,000.

Importantly, Justice Grey held that "If, at any time, the annual rent payable exceeds the then applicable threshold, the lessee will be liable to pay land tax assessed on the land"<sup>2</sup>.

The Court was not persuaded by the Lessor's argument that the threshold when the lease was entered into was the threshold to govern the lease for the duration of its term. The Court made specific reference to clauses in the lease that showed that the parties acknowledged that the lease was subject to the Act and the regulations made under the Act.

Any changes to the Act during the term of the lease were relevant when determining whether or not the Act applied to the lease.

## Conclusion

Depending on when a lease was signed, there may have been some uncertainty for lessors and lessees as to whether or not the Act applies when the rent is between \$250,000 and \$400,000 per annum. This decision has clarified that position.

Lessors and lessees can now have some confidence that the Courts of South Australia generally support the view that a lease can cease to be governed by the Act when the rent increases beyond the then applicable threshold.

## Unresolved Issues

Section 4(2)(c) of the Act provides that it does not apply to a "retail shop lease" if the lessee is a public company, an ADI, a body corporate which carries on the business of insurance or the Crown or an agency or instrumentality of the Crown. The question of whether the Act would cease to apply if a lease was assigned from an individual person or private company to one of the types of entities listed in that section was not discussed in the case. However, it can be inferred from the Court's reasoning in the case that the Act would cease to apply.

The Court also did not discuss whether the Act would commence application if the annual rent was above the threshold and later reduced, for example by way of an agreement between the parties. Again from the Court's

reasoning in this case, it can be inferred that the Act would apply from the date the rent fell below the threshold.

The Court also did not consider the effect of the change in the threshold on a lease for which the annual rent was above \$250,000.00, but under \$400,000.00 on 4 April 2011. From the decision, and notably the Court's comment that at the time of entering into the lease the parties should be taken to have contemplated that the annual rent threshold may change, it could be inferred that leases to which the Act did not apply on 3 April 2011, became captured by the Act on 4 April 2011 when the threshold was changed. Accordingly, a lessee who is paying land tax under a "retail shop lease" with a rent less than \$400,000.00, and above \$250,000.00, may have an argument that it should not be required to pay such land tax.

Finally, since the introduction of the GST legislation, lessors and lessees have been unclear as to whether the threshold is inclusive or exclusive of GST. This point remains unclear. The conservative approach is to assume that the threshold is exclusive of GST.

For further information please contact:

**Sian Rees**  
Partner

+61 8 8236 1356  
srees@thomsonslawyers.com.au

**Eu Ming Lim**  
Partner

+61 3 8080 3606  
elim@thomsonslawyers.com.au

**Melinda Graham**  
Partner

+61 2 8248 3410  
mgramham@thomsonslawyers.com.au

**Chris O'Shea**  
Partner

+61 7 3338 7526  
coshea@thomsonslawyers.com.au

<sup>1</sup> *WST Pty Ltd v GRE Pty Ltd & Ors* [2012] SASCF 146

<sup>2</sup> *25, WST Pty Ltd v GRE Pty Ltd & Ors* [2012] SASCF 146

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