

17 August 2016

Mr John Chapman
Small Business Commissioner
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Business SA
Chamber of Commerce
and Industry South Australia

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Dear Mr Chapman

I write in response to your request for submissions on the Moss Review of the *Retail and Commercial Leases Act 1995* (the Act).

Working for your business.
Working for South Australia

Executive Summary

- Business SA strongly endorses the finding that the Act's application should remain based on rent and not lettable area, particularly to protect small business tenants operating in large premises.
- Business SA supports the recommendation for the Small Business Commissioner's role to be expanded to provide a low cost mediation, and if necessary, determination power for disputes up to \$100,000 in place of the Magistrates Court.
- Business SA strongly endorses no change to land tax provisions.
- Small businesses include franchises which are not typically themselves public companies and Business SA supports their inclusion under the Act.
- Business SA strongly supports bank guarantees being treated similarly to bonds and being limited to the equivalent of three months rental; to be held by the Small Business Commissioner.
- Business SA does not support mandatory registration of leases which while providing some level of transparency to the market, also raises questions of privacy and is more likely to mean additional red-tape which ultimately adds to the cost of doing business in South Australia.

Should you require any further information or have questions, please contact Andrew McKenna, Senior Policy Adviser, on (08) 8300 0000 or andrewm@business-sa.com.

Yours sincerely,

Anthony Penney
Executive Director, Industry and Government Engagement





Why this matter is important to South Australian businesses

As South Australia's Chamber of Commerce and Industry, Business SA is the peak business membership organisation in the State. Our members are affected by this matter in the following ways:

- The *Retail and Commercial Leases Act 1995*, like comparable legislation interstate, was originally introduced to protect the rights of small business retail and commercial tenants.
- There is often an imbalance of power between commercial landlords and small business tenants which necessitates a regulatory safety net.
- Any specific aspects of property lease regulation which are unnecessary to protect small business will only serve to add to the costs of doing business in South Australia, being counter to the economic growth small businesses need to expand and create jobs.
- Any legislative change should not be counter to promoting good commercial relationships between tenants and landlords which is fundamental to both small business success and good investment outcomes for landlords.

Key Policy Points

1. In line with Business SA's initial submission to the consultation on the review of the Act, we agree with Mr Alan Moss that the resources of a small business to pay rent is a more appropriate categorisation of whether or not such a business is considered a 'small business'. The predominant legislative definition of small business typically relates to turnover or number of employees and given both will vary over time, it is more appropriate that a small business is classified by rent paid.

Furthermore, we support Mr Moss' view that a lease should be able to come in and out of the Act depending on the regulatory threshold at any given point in time referring to the Full Court decision of the Supreme Court of South Australia as outlined in *WST Pty Ltd V GRE Pty Ltd and Ors (2012)*.

2. Having a low cost form of alternative dispute resolution, including mediation, provides an important avenue for small businesses to resolve disputes out of court. Business SA provides in principle support to revoking the role of the Magistrates Court in place of an expanded role for the Small Business Commissioner to mediate, and if necessary, determine disputes under the Act up to the value of \$100,000. Notwithstanding, it will be important that the choice of mediator specifically resides with the Small Business Commissioner.
3. As previously submitted, feedback provided by Business SA members suggests some landlords are requesting bank guarantees of up to six months' rent. We acknowledge Mr Moss' conclusion that bank guarantees should not be treated any differently to bonds, however Business SA seeks further clarification that any requirement for a bond and/or bank guarantee is limited to a combined three months' rental.

Business SA also supports both bonds and bank guarantees being held by the Small Business Commissioner.



4. Business SA acknowledges the high level arguments for and against mandatory lease registration referenced in the review of the Act. It is generally true that markets function better with higher degrees of transparency, a factor that has recently led to the ACCC making a series of recommendations in relation to improved transparency in the wholesale gas market. In the case of the wholesale gas market, the commodity being traded is homogenous and while transport costs vary by location, price discovery is relatively straightforward.

In the case of the commercial property market however, including retail and industrial property, the product is far from being homogenous and while mandatory lease registration may provide more transparency, it is questionable as to whether or not this is required given the general availability of information about asking rents and the relative ease in which deals can be ascertained from the market place; albeit recognising a small business may need to engage a property professional. Furthermore, the effective rent of a commercial property is determined after incentives and acknowledging the concerns of Mr Moss regarding the disclosure of incentives, it may not necessarily help small business to understand a face rent without knowing what, if any, incentives were provided to the tenant. Retail rents also vary from centre to centre based on a wide range of factors, including the actual nature of the tenancy's business.

Landlords may also do deals with tenants which are specifically tailored for their circumstances; in one example provided to Business SA a retail tenant was given a rent reduction due to difficult trading conditions but that was based on the nature of their business, not necessarily the broader conditions of the complex and as such they were very reluctant to support a change in legislation which meant the details of that lease were published. Another member advised us they were paying less rent than an adjoining premises and as such were not supportive of any moves to make lease details publicly available.

Business SA is also cognisant of the costs of any new regulation such as mandatory lease registration and the impact that has on the economy more broadly, including through such costs being passed back to tenants. In this instance, we are not convinced that the benefits of increased transparency in relation to small commercial leases would necessarily outweigh the foregone privacy of existing tenants and associated administrative costs; which might not appear significant but would at a minimum require the Small Business Commissioner to ensure compliance which in itself could be quite costly given the volume of small commercial leases struck in any given period.

5. While there is some merit in considering a legislative pathway for a failing small business to exit a lease if such a mechanism can help to enable the company to trade themselves out of a potentially insolvent situation, it is typically the case that a business will be at failing point when the lessor is notified and it is probably unlikely that a small business would be taking such an orderly approach to exiting their lease. Small businesses will generally attempt everything possible to remain in operation and it will not be a priority to think about an exit strategy with their lessor even if such a legislative provision were available.

If the Small Business Commissioner is going to further explore Mr Moss' recommendation that the Act be amended to provide a legislative pathway for an orderly exit from a lease by a failing business, careful consideration should be given to how such a mechanism impacts other creditors and whether or not South Australia wants to introduce a variation to how lease terminations are managed if it might risk the confidence of property investors.



6. Business SA supports Mr Moss' findings in relation to pro-forma leases and we do not see this as being necessary or the place of Government to provide. As previously discussed, property is not a homogenous product and as such it would be problematic to design a pro-forma contract to adequately deal with the nuances of each property, although we recognise this may be somewhat easier in shopping centres which have more broadly understood classifications.

Where pro-forma contracts work best is where the product is quite homogenous, for example in the grain industry. A tonne of a certain grade grain has specifications which are understood and measured at receival sites across the country and as such 95% of the trade relies on Grain Trade Australia terms and conditions.

We agree that any Government designed pro-forma lease is likely to contain considerably more clauses which are not necessary for the majority of agreements and would only serve to add to the costs and flexibility of transacting for both the small business tenant and the landlord. From the feedback provided by members, the most important aspect of good commercial outcomes are good commercial relationships between landlords and tenants which cannot be legislated or regulated for.