

Draft Consultation Report July 2013

REVIEW OF THE *BUSINESS TENANCIES (FAIR DEALINGS) ACT*

Legal Policy Division

Northern Territory Department of the Attorney-General and Justice (20051906) (PCD13/5937)

Closing date: 14 September 2013

This paper has been prepared for discussion purposes only and any views expressed are not to be taken to represent the views of the Northern Territory Government, the Northern Territory Attorney-General and Minister for Justice or the Department of the Attorney-General and Justice.

THIS PAGE INTENTIONALLY LEFT BLANK

TABLE OF CONTENTS

1. Report on the Business Tenancies (Fair Dealings) Act 2003.....	6
1.1 Background to the Report.....	6
1.2 Stakeholder consultations following release of the issues paper	6
2. Consultation on the draft report on the Business Tenancies (Fair Dealings) Act 2003 – further comments and submissions	7
3. Executive Summary.....	8
3.1 Overall findings.....	8
3.2 Suggested amendments to the legislation.....	8
3.3 Other issues (not otherwise discussed in any detail in this paper).....	9
4. General outline of the Business Tenancies (Fair Dealings) Act.....	11
4.1 Overview of the contents of the Act.....	11
4.2 Detailed summary of the contents of the legislation	11
5. Main purpose of the Business Tenancies (Fair Dealings) Act.....	15
6. Background to the Business Tenancies (Fair Dealings) Act	16
6.1 Legislative History	16
6.2 Commercial Tenancies Act	16
6.3 Law of Property Act	16
7. Operation of the legislation.....	18
7.1 Number of hearings	18
7.2 Anecdotal information.....	19
8. National context	20
8.1 State and Territory legislation	20
8.2 Productivity Commission Review	20
9. Discussion of the issues.....	23
9.1 Issues raised in the Issues Paper (December 2011).....	23
9.1.1 Rent Reviews - should the Act or Regulations be amended to prescribe further methods of rent review?.....	23
9.1.2 Application of the legislation to service businesses	25
9.1.3 Exclusion from operation of the Business Tenancies (Fair Dealings) Act of premises in an office tower that forms part of a retail shopping centre?.....	27
9.1.4 Assignment of Retail Shop Leases	27
9.1.5 Provision of guarantees on assignment – section 58	28
9.1.6 Retail Shopping Centre.....	28
9.1.7 The 1,000 Square Metre Exemption	30
9.1.8 Need for Part 13 (Business tenancies generally)	30
9.1.9 Minimum Five Year Term and certificates (section 26).....	31
9.1.10 Application of the Act - Government Tenancies	32
9.1.11 Disclosure Statements - within 7 days (section 19(1)).....	33
9.1.12 Waiver of the 7 day period by when the disclosure statement must be provided.....	34

9.2	Additional issues raised in the course of consultation	34
9.2.1	Outgoings.....	34
9.2.2	Provision of Written Expenditure Statement and advertising expenditure statements...	35
9.2.3	Trading hours	35
9.2.4	Provision of registered leases	36
9.2.5	Exclusion for “major lessees”	36
9.2.6	Environmental “outgoings”	36
9.3	Other red tape issues identified by the Department of the Attorney-General and Justice	
	37	
9.3.1	Red Tape review	37
9.3.2	section 17 (copy of lease)	37
9.3.3	section 27 (tenant’s disclosure statement)	38
9.3.4	section 22 (need to disclose pay for fixtures and fittings)	38
9.3.5	section 23 (landlord’s lease preparation costs).....	38
9.3.6	section 24 (key money on grant of lease)	38
9.3.7	section 25 (provision of signed/registered copies of leases).....	38
9.3.8	section 27 (rent not payable until fit out is completed)	39
9.3.9	section 29 (determination of current market rent)	39
9.3.10	section 32 (determination of turnover)	39
9.3.11	section 34 (payments for unrelated land)	39
9.3.12	section 32 (rules for sinking funds)	39
9.3.13	section 38 (recovery of outgoings).....	40
9.3.14	sections 45-46 (contributions to capital costs)	40
9.3.15	section 46 (disturbance).....	40
9.3.16	section 48 (relocations).....	40
9.3.17	section 49 (demolitions)	40
9.3.18	section 50 (rent for damaged premises).....	41
9.3.19	section 51 (refurbishments and refittings).....	41
9.3.20	section 52 (landlord’s control over tenant’s employees).....	41
9.3.21	section 53 (withholding of consent for assignments).....	41
9.3.22	section 54 (key-money for assignments).....	41
9.3.23	section 59 (landlord’s absolute discretion for certain consents)	42
9.3.24	section 60 (obligations regarding extensions or termination of leases)	42
9.3.25	section 61 (key-money for extensions).....	42
9.3.26	section 63 (security deposits)	42
9.3.27	section 64 (compulsion regarding conveyancing, legal or accountancy services).....	42
9.3.28	section 66 (disclosure of turnover information)	43
9.3.29	section 67 (availability of statistical information).....	43

9.3.30	section 68 (advertising)	43
9.3.31	sections 69-72 (provision of marketing plan).....	43
9.3.32	section 73 (termination because of inadequate sales).....	43
9.3.33	section 74 (prohibiting tenant’s businesses elsewhere).....	44
9.3.34	section 75 (changes in core trading hours).....	44
9.3.35	sections 76-81 (cause of action for unconscionable conduct)	44
9.3.36	Role of Commissioner for Business Tenancies (Office of the Consumer Affairs).....	44
10.	<i>Recent reviews and legislative reform elsewhere in Australia</i>	45
10.1	WA: Commercial leasing amendments to commence shortly	45
10.2	Queensland – Retail Shop Leases Act 1994.....	45
10.3	NSW: Retail Leases Act.....	47
11.	<i>Appendix A – summary of the matters dealt with by the Local Court</i>	50
12.	<i>Appendix B – summary of submissions made on the 2012 issues paper</i>	58

1. Report on the Business Tenancies (Fair Dealings) Act 2003

1.1 Background to the Report

Section 144 of the *Business Tenancies (Fair Dealings) Act* requires that the Act be reviewed within 7 years of the date on which the legislation received assent. Assent was given on 22 October 2003. The legislation commenced operation on 1 July 2004. The review was due for completion and tabling in Parliament by 22 October 2011.

The purpose of the review is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain valid for the purpose of securing those objectives.

In November 2011 an issues paper was released concerning the *Business Tenancies (Fair Dealings) Act*. It was published on the former Department of Justice website <http://www.nt.gov.au/justice/policycoord/lawmake/reports.shtml>.

In May 2013, the Attorney-General and Minister for Justice indicated that the provisions in the legislation that imposed requirements on business (red tape) should be repealed unless they can be justified.

1.2 Stakeholder consultations following release of the issues paper

Comments were sought by 31 January 2012 from stakeholders and the general public concerning the operation of the *Business Tenancies (Fair Dealings) Act* and options for reform of the Act.

The submissions received have been published on the website of the Department of the Attorney-General and Justice. A summary of the submissions of stakeholders is at Appendix A.

2. Consultation on the draft report on the Business Tenancies (Fair Dealings) Act 2003 – further comments and submissions

Owing to both the substantial period of time between the present (July 2013) and the December 2011 release of the issues paper and the change of government in the Territory in August 2012, the Attorney-General and Minister for Justice has approved the release for consultation and comment of this draft of the report prepared following the earlier consultation.

You are invited to provide comments on the draft review to the Department of the Attorney-General and Justice. Comments can be as short or informal as an email or letter, or it can be a more substantial document. Comments do not have to address all aspects of the Discussion Bill. Electronic copies should be sent whenever possible.

Comments should be sent to:

Director, Legal Policy
Department of the Attorney-General and Justice
GPO Box 1722,
DARWIN NT 0801

Or by email to Policy.AGD@nt.gov.au

The closing date for comments on this draft review is 14 September 2013.

Any feedback or comment received by the Department of the Attorney-General and Justice will be treated as a public document unless clearly marked as 'confidential'. In the absence of such clear indication, the Department of the Attorney-General and Justice will treat the feedback or comment as non-confidential.

Non-confidential feedback or comments will be made publicly available and published on the Department of the Attorney-General and Justice website. The Department of the Attorney-General and Justice may draw upon the contents of such and quote from them or refer to them in reports, which may be made publicly available.

Any requests made to the Department of the Attorney-General and Justice for access to a confidential submission, feedback or comment will be determined in accordance with the *Information Act* (NT).

Note: Although every care has been taken in the preparation of the draft report to ensure accuracy, it has been produced for the general guidance only of persons wishing to provide comments on the draft discussion Local Court Bill. The contents of the paper do not constitute legal advice or legal information and they do not constitute Government policy documents.

3. Executive Summary

3.1 Overall findings

Commentators and stakeholders to the review sought a variety of amendments. Some stakeholders (the Shopping Centre Council and Property Law Council) submitted that in relation to the *Business Tenancies (Fair Dealings) Act* overall that there was little justification for its existence. They suggested that no evidence was provided at the time of enactment of a market failure in the retail tenancy industry which required regulatory intervention. They also pointed out that the limited number of retail tenancy disputes over the period since the Act began operation has demonstrated that the market is working efficiently and fairly. For these reasons it was suggested that the Government should take every step in this Review to ensure that the existing regulatory burden on Territory businesses (both landlords and tenants) is removed or reduced.

Despite these global views on the legislation it seems more appropriate to address each of the specific issues raised in the consultation given that the absence of any significant problems in retail tenancies over the past nine years could well be attributed to the existence of this legislation (and its equivalents) elsewhere in Australia.

Additionally, in the consultations, there was no suggestion that the objectives are not current.

The objectives (see Part 5 of this Paper) remain current. The issue is the extent to which they could be better achieved by repealing or amending various provisions of the Act.

3.2 Suggested amendments to the legislation

Amendments rising out of the consultation process (issues raised in the issues paper)

1. That section 28(2) (rent reviews) be amended so that it does not limit the kinds of rent reviews that might be agreed to by the landlord and the tenant;
2. That the current provisions concerning the application of the Act to providers of services (eg lawyers, accountants and doctors) as well as retail shops be retained;
3. That section 7 (leases to which the Act does not apply) be amended so that the Act does not apply to office towers forming part of a shopping centre if the tower only contains premises that come within paragraph (a) of the definition of “retail shop”;
4. That section 53 of the Act be amended so that breach of the lease by a tenant is a ground on which a landlord may withhold consent;
5. That section 58 of the Act is amended so as to ensure a landlord ought to be entitled to insist on guarantees from the assignee when considering assignment and failing their provision be entitled to either refuse the assignment (or rely upon the original guarantees);

6. That paragraph (b)(iii) of the definition of retail shopping centre in section 5 be repealed so that it is irrelevant in determining common ownership of units that they form part of a single units plan or a single unit title scheme;
7. Retain the current exclusion in section 6(a) of the Act of tenants of premises that are 1000 square metres or more from all of the provisions of the Act other than Part 13 (business tenancies generally);
8. Retain Part 13 but amend section 114(2) of the *Law of Property Act* so that it refers to “business leases as defined in the *Business Tenancies (Fair Dealing) Act* rather than “leases within the meaning of the *Business Tenancies (Fair Dealing) Act*;
9. Amend section 7 so that the Act, other than Part 13, does not apply where the tenant is the Commonwealth of Australia or the Northern Territory of Australia;
10. Amend section 26 so as to remove the references to 5 year terms and certificates. It appears sufficient that the landlord be required to obtain a statutory declaration from the tenant to the effect that the tenant is aware that the term is only X years;
11. Amend sections 19 and 20 so that termination for mere failure to provide a timely disclosure statement can only be exercised within a period of 2 weeks following the actual provision of the disclosure statement. The outer limit of 6 months should remain and that the parties can, in writing, agree that a formal disclosure statement is not required; and
12. Amend the regulations so that they provide for the common national disclosure document as approved by Small Business Ministers.
13. Amend the Act so as remove any barriers to the introducing of sub metering of utility services;
14. Retain section 62 (dealing with operations during hours where trading might be unlawful); and
15. Amend section 5 and/or 40 so that a lease can provide that "a provision of a lease may require a lessee to pay to the lessor a contribution towards an environmental upgrade (regardless of whether it might be considered as capital expenditure).
16. Amend section 17 (removal of criminal sanction for failure to provide lease when negotiations commence); and
17. Repeal section 21 (Tenant’s disclosure statement).

3.3 Other issues (not otherwise discussed in any detail in this paper)

1. Do the dispute resolution provisions of Part 11 (as administered by the Commissioner for Consumer Affairs) serve any purpose;
2. Should the exemption regulations concerning certain airport leases (now expired) be amended or the Act amended so that the terminals of the airports at Darwin, Tennant Creek and Alice Springs are not covered by the Act (other than Part 13);
3. The 2013 Queensland Retail Shops Options paper (see Part 10.2 of this Paper) suggested that clarification is required about the extent to which the legislation applies to franchise arrangements where the franchisor (who is the tenant under the lease) grants the

franchisee a sub-lease or licence to occupy the leased shop from which the franchised business is conducted;

4. Whether the offences (criminal) should be retained or replaced by provisions that provide only for civil outcomes (eg damages) for breach of a provision of the legislation;
5. Should the definition of “turnover” be amended so that it is clear as to whether it includes on line sales; and
6. Should the unconscionable conduct test be replaced by the unfair conduct test.

4. General outline of the Business Tenancies (Fair Dealings) Act

4.1 Overview of the contents of the Act

The *Business Tenancies (Fair Dealings) Act* regulates the conduct of landlords and tenants in “retail shops”. In broad terms retail shops are shops that have a lettable area of less than 1000 metres, a tenancy between 6 months and 25 years with the area being occupied for the purpose of carrying on a business.

Businesses covered are not limited to retail shops (see definition of retail shop in section 5 and the exclusions set out in sections 6 and 7 of the Act and regulation 10 (relating to airport retail shops) (which exemption has now expired).

The legislation regulates the conduct of landlords and tenants in the following general ways.

- Firstly, there are provisions that make illegal practices that are generally accepted as being unfair or unethical eg key money.
- Secondly, it regulates processes for the purpose of attempting to ensure fairness (eg provision of the lease document, requirement of disclosure statement).
- Thirdly, it sets rules and defines terms (eg regarding outgoings).

4.2 Detailed summary of the contents of the legislation

In more detail the provisions are:

- The landlord must ensure that there is a lease available when negotiations are commenced with a prospective tenant (section 17) (offence, maximum penalty of 100 penalty units);
- A tenant or a landlord has a right to compensation if they entered into a lease as a result of a false or misleading statement or representation (section 18);
- Landlord must provide the tenant with a disclosure statement at least 7 days prior to entering into a lease (section 19(1) (offence, maximum penalty of 100 penalty units). If the disclosure statement is not provided or if it contains information that is materially false or misleading, the tenant can, as a general rule, terminate the lease (section 20) ;
- Tenant must provide the landlord with a disclosure statement at least 7 days after being provided with the landlord’s disclosure statement (section 21(1) (offence, maximum penalty of 100 penalty units);
- The tenant has no liability to pay for fixtures, finishes etc, unless the liability is disclosed in the disclosure statement (section 22);

- Prescribing of circumstances in which a tenant can be required to pay for the landlord's lease preparation costs (section 23);
- The landlord is prohibited from seeking or accepting key money (section 24) (offence – penalty 100 penalty units), "key-money" is defined in section 5. It refers to payments for which the tenant receives "no consideration".
- Requirements concerning providing signed copies or registered copy of a lease (section 25);
- Minimum 5 year terms (section 26) (in the absence of a certificate from a legal practitioner or an accountant)
- For leases where there is agreement for a fit out, the tenant is not required to pay rent until the fit out is substantially complete (section 27);
- The lease must, if it provides for a rent review, contain details of how the rent is to be reviewed. It contains 5 options for rent review. If the rent review mechanism does not comply with one of the options, the rent can be reviewed on the basis of current market value, in the absence of agreement between the landlord and the tenant by a specialist retail-valuer appointed by the Commissioner of Business Tenancies. No such appointment has been made (section 28);
- If the rent is set by reference to current market rent, section 29 (and related sections 30-31) sets out how current market rent is determined;
- If the rent is set by reference to "turnover", section 32 sets out matters that cannot be included as turnover;
- The landlord cannot try to make the tenant responsible for payments in respect of "unrelated land" (section 34);
- If there is a sinking fund (for repairs and maintenance), section 35 (and related sections 36-37) set out what is deemed to apply in respect of the sinking fund;
- The only "outgoings" that are recoverable by the landlord from the tenant are those covered by the lease (section 38). The landlord is also required to provide estimates and expenditure statements regarding outgoings and required to give statements and reports regarding outgoings (section 40). There are also rules in sections 41 and 42 regarding outgoings;
- The landlord is prohibited from seeking to require that a tenant contribute to capital costs, depreciation or landlord's interest (sections 43-45);

- The landlord must not carry on renovations that adversely disturb a tenant's business unless notice of 2 months has been given or there is an emergency (section 46). There is also a right to compensation for the disturbance (section 47);
- If a lease provides the landlord with a right to relocate the tenant, section 48 contains various rules that apply in respect of such a relocation (including compensation);
- If a lease provides the landlord with a right to demolish the building, section 49 contains various rules that apply in respect of such a relocation (including compensation);
- If the building is damaged, section 50 sets out the rights of the tenant regarding matters such as rent;
- If a lease provides for refurbishment or refitting, it is void unless it gives an appropriate level of detail (section 51);
- If a lease provides for limits regarding the tenant's employees it is void except for matters relating to an employee's competence, behaviour and types of work (section 52);
- The landlord is entitled to withhold consent to assignment of a lease only in the circumstances set out in section 53 (and related sections 54-58);
- The landlord must not seek or accept key-money when a lease is being assigned (offence, section 54, maximum penalty 100 penalty units);
- A lease may provide that the landlord has an absolute discretion to refuse consent for subleases, tenant leaving possession or the tenant mortgaging or encumbering the leased property (section 59);
- Within the period of between 6 and 12 months of the end of a lease the landlord must either offer to extend the lease or inform the tenant that there will be no lease (section 60);
- The landlord must not seek or accept key-money when a lease is being extended (offence, section 61, maximum penalty 100 penalty units);
- A retail shop lease cannot require a tenant to trade when trading is otherwise unlawful (section 62);
- Section 63 regulates security deposits;
- Section 64 makes it an offence (maximum penalty 50 penalty units) for the landlord to complete the tenant to use a particular legal practitioner, accountant or conveyancing agent;

- For shops in a retail shopping centres (as defined in section 5) it is an offence for the landlord to disclose turnover information provided by the tenant (maximum penalty of 200 penalty units and or imprisonment for 12 months) (section 66);
- If a lease in a retail shopping centre requires the tenant to provide money in respect of the collection of statistics, the tenant has a right to receive the statistical information (section 67);
- A clause in a lease in a retail shopping centre is void if it requires that the tenant advertise the tenant's own business (section 68);
- If there is a requirement for the tenant in a retail shopping centre to pay an amount in respect of the centre's advertising, the landlords must provide a copy of the relevant marketing plan and other relevant material and information (sections 69-72);
- A clause in a lease in a retail shopping centre is void if it provides that the lease can be terminated because of inadequate sales (section 73);
- A clause in a lease in a retail shopping centre is void if it attempts to limit the tenant carrying on a business elsewhere (section 74);
- Core trading hours in a retail shopping centre cannot be changed unless a majority of the tenants agree (section 75);
- Part 10 (sections 76-81) provides a jurisdiction for the courts to deal with unconscionable conduct);
- Part 11 (sections 82-117) deals with disputes. Jurisdiction is shared between the Commissioner of Business Tenancies, the Local Court and the Supreme Court. In general terms the Commissioner deals with all disputes other than those relating to unconscionable conduct (under Part 10) or where the Commissioner has issued a certificate under section 104;
- Part 13, Division 2, sections 123-132 deals with repossessions;
- Part 13, Division 3, section 133 deals with the tenant's right of association;
- Part 13, Division 3, section 134 provides that the rules of contract dealing with mitigation of damages apply to actions in respect of leases; and
- Part 12 (sections 118-121) deals with appeals from decisions of the Commissioner of Business Tenancies to the Local Court.

The Act also establishes the statutory position of Commissioner of Business Tenancies. The Commissioner's main role is to deal with disputes.

5. Main purpose of the Business Tenancies (Fair Dealings) Act

The objectives of the Act are set out in section 3, namely to enhance:

- The certainty and fairness of retail shop leasing arrangements between landlords and tenants; and
- The mechanisms available to resolve disputes concerning retail shop leases; and
- The certainty and fairness of certain other aspects of business tenancies.

The main purpose of the *Business Tenancies (Fair Dealings) Act* was to establish a regulatory framework that promoted greater certainty, fairness and clarity in the commercial relationship between landlords, tenants and for certain small business tenancies. Mainly, the regulatory provisions of the Act sought to apply to shops and premises of a like nature.

A secondary purpose of the *Business Tenancies (Fair Dealings) Act* was the consolidation into the Act provisions concerning evictions contained within the *Commercial Tenancies Act* (which was repealed by the *Business Tenancies (Fair Dealings) Act*).

6. Background to the Business Tenancies (Fair Dealings) Act

6.1 Legislative History

The *Business Tenancies (Fair Dealings) Act* was enacted on 22 October 2003 and commenced operation on 1 July 2004. It replaced the remnant parts of the *Tenancy Act 1979* (which by then was called the *Commercial Tenancies Act*).

6.2 Commercial Tenancies Act

The *Commercial Tenancies Act* contained remnants of general tenancy legislation (*Tenancy Act*) that was enacted in 1979. The *Commercial Tenancies Act* contained provisions that:

- Provided a process for the repossession of premises (sections 41-50);
- Provided for the lessees right of association (section 55B); and
- Provided for the mitigation of damages for breach of lease (section 56).

The *Tenancy Act* was renamed as the *Commercial Tenancies Act* following the repeal of most of its provisions by the *Residential Tenancies (Consequential Amendments) Act 1999*.

6.3 Law of Property Act

Part 8 (sections 81-152) of the *Law of Property Act* comprises what might be considered to be a statutory form of the underlying “common law” regarding leases that are not subject to be specific legislation such as the *Residential Tenancies Act* and the *Business Tenancies (Fair Dealings) Act*.

Section 114 of the *Law of Property Act* operates so the provisions in the *Law of Property Act* yield to any provision in the *Residential Tenancies Act* and the *Business Tenancies (Fair Dealings) Act* that covers the same topic.

The following is a list of topics that are covered in both the *Law of Property Act* and in the *Business Tenancies (Fair Dealings) Act*.

- Obligations implied imposed on the tenant (or lessee as referred to in the *Law of Property Act*) (section 117);
- Powers of the landlord (or lessee as referred to in the *Law of Property Act*) (section 119). These include rights of inspection (on 2 days notice) and the right to make repairs, comply with legislation etc;
- Provision for use of short form covenants (sections 120 and 121);
- Provisions about repossession (section 122);
- Provisions about breaches of covenants to repair (section 123);

- Restrictions on re-entry/taking possession other than where the possession has been given up or there is an order of the Court (section 137-140);
- Termination of tenancies (sections 144-151); and
- Holding over without permission (doubling of rent) (section 152).

7. Operation of the legislation

7.1 Number of hearings

Number of matters heard in Courts and Tribunals pursuant to the *Business Tenancies (Fair Dealings) Act*

Courts:

A total of 27 matters have been heard in the Local Court of the Northern Territory concerning the *Business Tenancies (Fair Dealings) Act* since the Act commenced in 2004.

Of all the cases 3 were possession only and all the others were possession with unpaid rent.

	2008	2009	2010	2011	2012	Total*
Darwin	1	3	5	7	9	25
Nhulunbuy*	1	0	0	0	1	2
Total	2	3	5	7	10	27

Extracted from IJIS on 10 January 2013

* the 2008 case heard in Nhulunbuy was also heard in Darwin. The case is counted against Nhulunbuy only to avoid double counting.

Appendix A contains a summary of the proceedings in the various matters considered by the Local Court.

Matters handled by the Commissioner:

Year	Enquiries re business tenancy issues	Applications received under section 86	Conciliated under section Part 11, Division 3	Certificates issued under section 104 (so that the matter can be dealt with by a court)	Formal hearings held under Part 11, Division 4
2004-05	108 (most did not apply to the new Act)	2	2	0	0
2005-06	53 (most did not apply to the Act)	3	1	2	0
2006-07	41 (most did not apply to	1	0	0	1

Year	Enquiries re business tenancy issues	Applications received under section 86	Conciliated under section Part 11, Division 3	Certificates issued under section 104 (so that the matter can be dealt with by a court)	Formal hearings held under Part 11, Division 4
	the Act)				
2007-08	unknown	6	3	3	0
2008-09	11	4	3	1	0
2010-11	47 (no data on which applied to the Act)				
2011-12	31 (no data on which applied to the Act)	1	0	1	0
2012-13	43 (of which 19 did not apply to the Act)	2	0	2	0

7.2 Anecdotal information

The anecdotal information is to the effect:

- Major shopping centres comply with the legislation;
- Smaller shopping centres may not often comply; and
- For smaller sized business of landlords and tenants many of the regulatory requirements appear pointless.

8. National context

8.1 State and Territory legislation

Jurisdiction	Legislation	Comment
New South Wales	<i>Retail Leases Act 1994</i>	Recent review
Victoria	<i>Retail Leases Act 2003</i>	
Queensland	<i>Retail Shop Leases Act 1994</i>	Under current review, comments due 3.7.13
South Australia	<i>Retail and Commercial Leases Act 1995</i>	
Western Australia	<i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i> incorporating the <i>Retail Shops and Fair Trading Legislation Amendment Act (2006)</i>	Recent review
Tasmania	<i>Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998</i>	
Australian Capital Territory	<i>Leases (Commercial and Retail) Act 2001</i>	

8.2 Productivity Commission Review

In March 2008 the Productivity Commission conducted a comprehensive review of retail tenancies in Australia. Its report 'The Market for Retail Tenancy Leases in Australia' describes in detail the nature of the industry and the key operation and legal issues faced by the industry. The main findings in the Commission's report in relation to the NT and other jurisdictions are as follows:

Recommendation 1 of the Productivity Commission

State and Territory governments should take early actions to further improve transparency and accessibility in the retail tenancy market. They should:

- *Encourage the use of simple (plain English) language in all tenancy documentation.*
- *Provide clear and obvious contact points for information on lease negotiation, lease registration and dispute resolution.*
- *Encourage a one page summary of all key lease terms and conditions to be included in retail lease documentation.*

Recommendation 2 of the Productivity Commission

To increase the transparency of the market, State and Territory governments should, as soon as practicable, facilitate the lodgement by market participants of a standard one page lease summary at a publicly accessible site.

Recommendation 3 of the Productivity Commission

State and Territory governments, in conjunction with the Commonwealth, should seek to improve the consistency and administration of lease information across jurisdictions in order to lower compliance and administration costs. They should:

- *Encourage the development of a national reference lease with a set of items (and terminology) to be included in all retail tenancy leases and in tenant and landlord disclosure statements.*
- *Institute nationally consistent reporting by administering authorities on the incidence of tenancy enquiries, complaints and dispute resolution.*

Recommendation 4 of the Productivity Commission

The significance of jurisdictional differences in the provisions for unconscionable conduct, as applying to retail tenancies, should be detailed by State and Territory governments in conjunction with the Commonwealth, and aligned, where practicable.

Recommendation 5 of the Productivity Commission

State and Territory governments in conjunction with the Commonwealth should facilitate the introduction, by landlords and tenant organisations in the industry, of a voluntary national code of conduct for shopping centre leases that is enforceable by the ACCC. The code should:

- *include provisions for standards of fair trading, standards of transparency, lodgement of leases, information provision and dispute resolution; and*
- *avoid intrusions on normal commercial decision making in matters such as minimum lease terms, rent levels, and availability of a new lease.*

Recommendation 6 of the Productivity Commission

State and Territory governments should remove those key restrictions in retail tenancy legislation that provide no improvement in operational efficiency, compared with the broader market for commercial tenancies.

Recommendation 7 of the Productivity Commission

As unnecessarily prescriptive elements of retail tenancy legislation are removed, State and Territory governments should seek, where practicable over the medium term, to establish nationally consistent model legislation for retail tenancies, available to be adopted in each jurisdiction.

Recommendation 8 of the Productivity Commission

While recognising the merits of planning and zoning controls in preserving public amenity, States and Territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.

9. Discussion of the issues

9.1 Issues raised in the Issues Paper (December 2011)

9.1.1 Rent Reviews - should the Act or Regulations be amended to prescribe further methods of rent review?

Outline of the current position

Section 28 of the *Business Tenancies (Fair Dealings) Act* provides that if a retail shop lease allows for a review of the rent payable under the lease or under a renewal of the lease, the lease is to state a number of matters including:

- When the reviews are to take place; and
- The basis or formula on which the reviews are to be made.

Section 28 further sets out if the basis or formula on which a rent review is to be made is to be either, a fixed percentage; an independently published index of prices or wages; a fixed annual amount; the current market rent of the retail shop lease; a basis or formula prescribed by the Regulations.

A provision of a retail shop lease is void to the extent that it precludes or prevents a reduction of rent or limits the extent to which rent may be reduced.

Submissions

The Shopping Centre Council and Law Society Northern Territory submitted that section 28 of the *Business Tenancies (Fair Dealings) Act* dealing with rent reviews should be amended so that it is similar to section 18(3) of the *Retail Leases Act* (NSW).

Section 18(3) of the NSW *Retail Leases Act* relevantly provides:

18 Restrictions on adjustment of base rent

(1) In this section:

base rent means rent, or that component of rent, which comprises a specified amount of money (whether or not there is provision for the amount to change).

Note. Turnover rent (rent determined by reference to the lessee's turnover) is not base rent because turnover rent is not a specified amount of money (it varies according to the lessee's turnover).

(2) A retail shop lease must not provide for a change to base rent less than 12 months after the lease is entered into and must not provide for a change to that rent less than 12 months after

any previous change to that rent. This subsection does not apply to a change to base rent by a specified amount or specified percentage.

Note. For example, subsection (2) prevents a lease providing for an increase to current market rent more than once in 12 months. It does not prevent a lease providing for the rent to increase by \$100 every 6 months. Nor does it prevent a lease providing for the rent to be increased to current market rent after 12 months and then to be increased by 2% every 6 months after that.

(3) A provision of a retail shop lease is void to the extent that it:

(a) reserves or has the effect of reserving to one party a discretion as to which of 2 or more methods of calculating a change to base rent is to apply on a particular occasion of a change to that rent, or

(b) provides for a method of calculating a change to the base rent but reserves or has the effect of reserving to one party a discretion as to whether or not the base rent is to be changed in accordance with that method on a particular occasion, or

(c) provides for base rent to change on a particular occasion in accordance with whichever of 2 or more methods of calculating the change would result in the higher or highest rent.

(4) If a retail shop lease provides for a change to base rent in a way that has the potential to cause that rent to decrease (such as a provision for the rent to change to current market rent), a provision of the lease is void to the extent that it:

(a) prevents or enables the lessor or any other person to prevent base rent decreasing pursuant to the change, or

(b) limits or specifies, or allows the limitation or specification of, the amount by which the base rent is to decrease.

In the course of consultation it was suggested that rent reviews as set in section 28 'are very inflexible and, among other things, prevent combination rent reviews being negotiated between lessor and lessee'.

It was also suggested that the NSW provisions provide flexibility while still protecting lessees against lessors 'picking and choosing' among methods of rent reviews and selecting the method most advantageous at the relevant time of the review.

Unlike some other jurisdictions, the NT legislation does not regulate the frequency of rent reviews.

Discussion/Assessment:

It is necessary from the point of view of both landlords and tenants that the legislation operates so that parties consider the rent review issue when they are entering into the lease.

However, it is also necessary that the rent review method that is agreed should be clear with certainty of operation. The Act tries to achieve these objectives by setting out (and limiting) the various types of rent increase and then having as a default rent review, a review based on market rent.

Nonetheless, it seems appropriate that section 22(2) be amended so that the kinds of rent reviews are no longer prescribed.

9.1.2 Application of the legislation to service businesses

This issue relates to the definition of 'retail shop'

Outline of the current position

Section 5 of the *Business Tenancies (Fair Dealings) Act* defines 'retail shop' as premises that are used wholly or predominantly for: the sale or hire of goods by retail or the retail provision of services (whether or not in a retail shopping centre); or the carrying on of a business in a retail shopping centre; or the carrying on of a business of a class or description that is prescribed by the Regulations.

The Issues Paper sought comment on whether it is a problem that service businesses come within the operation of the *Business Tenancies (Fair Dealings) Act*.

The QLD *Retail Leases Act* allows for a list of the relevant retail services to be covered by the Act as set out in a schedule to the *Retail Leases Act*.

Submissions

All stakeholders submitted that there are currently definitional issues with the *Business Tenancies (Fair Dealings) Act* and particularly the definition of 'retail shop'.

The Property Law Council, Shopping Centre Council and National Retail Association submitted that the definition of 'retail shop' be changed – so that there is a list of prescribed retail businesses. This is quite possibly the same as Queensland *Retail Shop Leases Act* approach, which includes the 'list' in a schedule to the Regulations. The Law Society Northern Territory submitter that the inclusion of a list would further add to the definitional issue and the Society supports the replacement of the phrase retail shop with 'business tenancy'.

The Law Society Northern Territory did not support using a list of prescribed businesses, as this would only further expand the confusion, and result in anomalies.

The Property Law Council of Australia and the Shopping Centre Council both submitted that there were issues with service businesses coming within the operation of the *Business Tenancies (Fair Dealings) Act*.

The Law Society Northern Territory submitted that it is not a problem that service businesses come under the *Business Tenancies (Fair Dealings) Act* and they should remain covered. The Law Society Northern Territory submitted that small service businesses are exposed to similar risks and do benefit from the protections in the Act.

The Property Law Council of Australia and the Shopping Centre Council submitted that in the Northern Territory this has meant that a range of non-retail service businesses, such as real estate agents, accountants, lawyers and stock-brokers have been 'caught' by an Act which is irrelevant to their businesses.

The National Retail Association submitted that the inclusion of service businesses in the *Business Tenancies (Fair Dealings) Act* only becomes a problem when they are not located in a shopping centre. For reasons of outgoing recoveries, all tenants in shopping must be covered if those recoveries are going to be fair and equitable.

It was suggested that difficulties arise from the use of the words 'retail' occurring 419 times in the Act and "shop" occurring 295 times in the Act. These words along with 'retail shop lease' and 'retail shop' are used as all-encompassing terms throughout the *Business Tenancies (Fair Dealings) Act*. The exact nature of this problem is unclear.

The Property Law Council submitted that 'uncertainty has arisen due to the problematic definition in the Act of 'retail provision of services'. Courts in other jurisdictions with similar definitions to the Northern Territory *Business Tenancies (Fair Dealings) Act*, such as Victoria, have interpreted "retail provision of services" to include professional practices.

This issue is canvassed on page 30 of the 2013 Queensland Retail Shops Options paper with no clear view being offered.

Assessment/Discussion

If the legislation is to continue to regulate issues concerning outgoings and other matters that affect shopping centres as a whole it would appear appropriate to retain a broad definition of "retail shop". Additionally, many of the key prohibitions, such as those relating to key-money and unconscionable conduct appear to have equal application to both shop proprietors and the providers of professional and other services.

It is not obvious as to what is the problem with the use of the terms "retail shop" and "retail shop lease" given that they refer to separate things. It is accepted that the use of "retail shop" so that it includes offices is potentially the source of some confusion. The problem is not one as to justify wholesale changes in the terminology used throughout the Act.

9.1.3 Exclusion from operation of the Business Tenancies (Fair Dealings) Act of premises in an office tower that forms part of a retail shopping centre?

Outline of the current position

The definition of retail shopping centre as currently provided in the *Business Tenancies (Fair Dealings) Act* covers premises in an office tower that forms part of a retail shopping centre. This is despite the fact that the *Business Tenancies (Fair Dealings) Act* is aimed at premises used for the sale and hire of goods. All stakeholders submitted that premises in an office tower that forms part of a retail shopping centre should be excluded from operation of the *Business Tenancies (Fair Dealings) Act*.

The 2013 Queensland Retail Shops Options paper suggested that there was broad support from the Queensland submissions to the 2011 issues paper to excluding premises in an office tower if they are not used wholly or predominantly for carrying on a retail business.

Assessment/discussion:

If an office tower standing, in effect, above a shopping centre, contains no retail shops, there seems no clear rationale for applying the Act to the leased premises in the tower.

It appears appropriate to amend the *Business Tenancies (Fair Dealings) Act* similar to section 5 of the NSW *Retail Leases Act*, which provides that; ‘any premises in an office tower that forms part of a retail shopping centre are excluded from the operation of the Act’. This would then mean that leasing of offices in these kinds of office towers would, like all other office towers, be subject to the *Law of Property Act* and the greater freedom to agree on terms and conditions of the lease.

9.1.4 Assignment of Retail Shop Leases

Outline of the issues

Part 6 of the *Business Tenancies (Fair Dealings) Act* concerns assignment of retail shop leases. Section 53 provides for circumstances when consent to assignment may be withheld. Pursuant to section 53 a landlord is entitled to withhold consent to the assignment of a retail shop lease in any of the following circumstances (and is not entitled to withhold that consent in any other circumstances):

- If the proposed assignee proposes to change the use to which the shop is put;
- If the proposed assignee does not have the financial resources or retailing skills that will enable the proposed assignee to fulfil all the obligations of the lease; or
- If the tenant has not complied with the provisions of the lease mentioned in sections 56(providing of information about assignee) and 57 (financial standing of assignee).

Submissions

All stakeholders supported amendment of the *Business Tenancies (Fair Dealings) Act* to clearly state that assignment need not be consented to if the tenant is in breach of the lease. This would reflect actual current practice.

Assessment/Discussion:

Amend the *Business Tenancies (Fair Dealings) Act* to make it clearer that assignment need not be consented to if there is a breach.

9.1.5 Provision of guarantees on assignment – section 58

Outline of the issues

Section 58 provides for the release of (the assignor's) guarantors on assignment.

Section 58 relevantly provides that:

“A former tenant who has assigned a retail shop lease in respect of a retail shop that was to continue to be an ongoing business, and any guarantor or covenantor of the former tenant, is not liable to pay to the landlord money in respect of amounts payable by the assignee if:

- a) the former tenant gave the landlord and the proposed assignee a copy of the assignor's disclosure statement in accordance with section 56(c); and*
- b) the disclosure statement does not contain any information that is false, misleading or materially incomplete”.*

Submissions

All stakeholders submitted that section 58 is a problem which needs to be fixed. The problem is that the landlord ought to be entitled to insist on guarantees from the assignee when considering assignment and failing their provision be entitled to either refuse the assignment (or rely upon the original guarantees).

Assessment/Discussion:

Amend section 58 to ensure landlord ought to be entitled to insist on guarantees from the assignee when considering assignment and failing their provision be entitled to either refuse the assignment (or rely upon the original guarantees.)

9.1.6 Retail Shopping Centre

The issue is whether the mere fact that 5 or more shops are held under a common unit title (under the *Unit Titles Act* or the *Unit Title Schemes Act*) is sufficient to make them a 'retail shopping centre'.

Outline of the issues

'Retail shopping centre' is defined in section 5 as a cluster of premises that has all of the following attributes:

- a) at least 5 of the premises are used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services;
- b) the premises:
 - (i) are all owned by the same person; or
 - (ii) all have (or, if leased, would have) the same landlord or the same head landlord; or
 - (iii) all comprise lots within a single units plan under the *Unit Titles Act* or within a single unit title scheme under the *Unit Title Schemes Act*;
- c) the premises are located:
 - (i) in one building; or
 - (ii) in 2 or more buildings that are either adjoining or separated only by common areas or other areas owned by the owner of the retail shops;
- d) the cluster of premises is promoted as, or generally regarded as constituting, a shopping centre, shopping mall, shopping court or shopping arcade.

Submissions

Stakeholders submitted various views with respect to this issue. The Property Law Council submitted that there was no issue with reference to 5 or more shops held under common title to ensure they fall within the definition of 'retail shopping centre'.

The Law Society Northern Territory submitted that the issue with the definition of 'retail shopping centre' concerned a strata titled shopping centre falls within the definition of a 'retail shopping centre' because the various units "all comprise lots within a single units plan under the *Unit Titles Act* or within a single unit title scheme under the *Unit Title Schemes Act*."

The Law Society Northern Territory recommended the deletion of subparagraph (b)(iii) from the definition.

The National Retail Association submitted that under the retail shopping centre definition the body corporate should be required to consider the tenant in any action undertaken but the body corporate that could impact upon the quiet enjoyment of the tenant.

Assessment/Discussion

The form of title should not be determinative of whether or not the land is a retail shopping centre. The purpose of paragraph (b) of the definition of retail shopping centre is to identify premises that have a common owner. Units under either of the two Unit Titles Acts don't have common owners simply because they form a single units plan or a single unit title scheme.

It is appropriate that paragraph (b)(iii) of the definition of retail shopping centre in section 5 be repealed so that it is irrelevant in determining common ownership of units that they form part of a single units plan or a single unit title scheme.

9.1.7 The 1,000 Square Metre Exemption

Outline of the issue

Section 6 of the *Business Tenancies (Fair Dealings) Act* sets out circumstances in which 'retail shops' are excluded from the operation of Act (other than the general provisions of Part 13).

One of these exemptions is for shops that have a lettable area of '1000 square metres or more'.

Submissions

All stakeholders submitted that this was a perceived issue and that there have been no actual problems with this provision and the 1000 square metre reference.

Assessment/Discussion:

The issue appears to be that of drawing the boundary of what kinds of premises should be subject to the protections of the legislation. The background to the exclusion is the assumption that only well-resourced sophisticated tenants will have a shop that exceeds 1000 square metres. It is assumed that they will have lawyers and financial advisors and other experts such that they are well able to look after themselves.

No amendment. Retain 1000 metre exemption in section 6.

9.1.8 Need for Part 13 (Business tenancies generally)

Part 13 of the *Business Tenancies (Fair Dealings) Act* concerns all business tenancies. It provides for matters of a general nature including such matters as repossession of business premises (Division 2), tenant's right of association and mitigation of damages.

These provisions were originally taken from the *Commercial Tenancies Act*.

Submissions

The Property Law Council and Shopping Centre Council submitted that Part 13 should be repealed as Part 13 covers similar territory to that of the *Law of Property Act* and the relevant common law.

The Shopping Centre Council submitted that Part 13 does not offer a commercial tenant any greater protection than the *Law of Property Act* and the common law.

The Property Law Council submitted there are currently two Acts that regulate commercial tenancies in the Northern Territory, being: Part 8 of the *Law of Property Act*; and Part 13 of the *Business Tenancies (Fair Dealings) Act*.

The *Law of Property Act* provides sufficient protection for commercial tenancies other than retail shop tenancies.

The Law Society Northern Territory and the National Retail Association were in favour of retaining and amending Part 13.

The Law Society Northern Territory submitted that the *Business Tenancies (Fair Dealings) Act* should have broad application with explicit exclusions. The Society also suggested that there is no apparent no overlap with the *Law of Property Act*. Further, Part 13 should apply to all business tenancies. In addition the Society would recommend that Part 13 also apply to Government tenancies.

The National Retail Association submitted Part 13 should not be removed or reformed other than to provide for the exclusion of non-retail premises except those premises located within shopping centres. Further it noted that the vast majority of landlords involved in disputes under the various Acts are the smaller landlords.

Assessment/Discussion:

On a conceptual level, it appears odd to have general business tenancy provisions in both the *Law of Property Act* and in the *Business Tenancies (Fair Dealings) Act*. Legally, there is no apparent problem given that section 114 of the *Law of Property Act* fairly carefully deals with overlap issues. Section 114(2)(d) identifies the sections of the *Law of Property Act* that do not apply to leases within the meaning of the *Business Tenancies (Fair Dealings) Act*. This relationship could probably be made clearer by using the term “business leases” in section 114(2)(d) rather than “leases”.

Part 13 also contains provisions such as sections 133 (right of association and mitigation of damages) that are not covered in the *Law of Property Act*

It seems appropriate to retain Part 13 but amend section 114(2) of the *Law of Property Act* so that it refers to “business leases as defined in the *Business Tenancies (Fair Dealings) Act* rather than “leases within the meaning of the *Business Tenancies (Fair Dealing) Act*.”

9.1.9 Minimum Five Year Term and certificates (section 26)

Outline of the issues

Section 26 of the *Business Tenancies (Fair Dealings) Act* provides that term for a retail shop lease, together with a further term or terms provided for by an agreement or option for the

acquisition by the tenant of a further term as an extension or renewal of the lease, is not to be less than 5 years.

Section 26(4) provides that where a legal practitioner or accountant certifies that they have explained to the tenant or prospective tenant the effect of term of the retail lease, the terms provided for by an agreement for option for acquisition as an extension or renewal of the lease and that the giving of the certificate will result in this section not applying to the lease.

Submissions

The Shopping Centre Council submitted there is no need for the protections of section 26. The equivalent provision in the Queensland *Retail Shop Leases Act* has been removed. Further, in respect of the option that the present certificates in section 26 be replaced by a statutory declaration, this would simply amount to replacing one piece of unnecessary red tape with a new one. The Shopping Centre Council recommended repeal of section 26.

The Property Law Council submitted that the disclosure requirements for retail shops not located in retail shopping centres should be reviewed in consultation with industry to better reflect the requirements of landlords and tenants outside of retail shopping centres. Further, the need for a legal certificate for leases of less than 5 year lease terms should be replaced by a statutory declaration by the tenant.

The Law Society Northern Territory submitted that the Society is in favour of retaining the legal certificate requirement when balancing the consumer protection against the desire to minimise red-tape.

Assessment/Discussion:

The imposition of 5 year minimum terms seems somewhat arbitrary. It seems preferable that the 5 year minimum term be the starting point of the negotiations but with a tenant and a landlord having a more simple way of reaching a decision.

It appears sufficient that the landlord be required to obtain a statutory declaration from the tenant to the effect that the tenant is aware that the term is only X years.

9.1.10 Application of the Act - Government Tenancies

Outline of the issues

The legislation binds the crown. The issue is whether government tenancies should be excluded from the regulatory aspects of the legislation.

Submissions

All stakeholders submitted that government tenancies should be excluded from the operation of the *Business Tenancies (Fair Dealings) Act*.

The Shopping Centre Council submitted that the fundamental principle of retail tenancy legislation should be the protection of small businesses from unfair market power and therefore, to quote from the objects in section 3, to ensure "the certainty and fairness of retail shop leasing arrangements between landlord and tenants".

No landlord has equivalent market power of a government agency (whether that is a Federal, Territory or local government agency) and such agencies do not need the protections of the Act since they are sophisticated tenants. In keeping with this fundamental principle, government tenancies (Federal, Territory and local) should be excluded from the coverage of the Act (where the agency is the lessee).

The Law Society Northern Territory submitted that there is a need to exclude Government tenancies from the operation of the Act except from Part 13.

The 2013 Queensland Retail Shops Options paper canvasses this issue (at page 31-31) without a clear view being offered.

Assessment/Discussion:

The Act is stated as binding the crown. This means that Governments must comply with the Act (whether as landlord or tenant).

However, there appears to be little point in obliging landlords to comply with the Act where the tenant is the Commonwealth of Australia or the Northern Territory of Australia.

It appears appropriate to amend section 7 so that the Act, other than Part 13, does not apply where the tenant is the Commonwealth of Australia or the Northern Territory of Australia.

9.1.11 Disclosure Statements - within 7 days (section 19(1))

Outline of the issues

Section 19(1) of the *Business Tenancies (Fair Dealings) Act* requires that the landlord ensure that the tenant is given a landlord's disclosure statement for a retail shop lease at least 7 days before the retail shop lease is entered into by the tenant. The form is prescribed by the Business Tenancies (Fair Dealings) Regulations.

It should be noted that the Department of the Attorney-General has agreed in principle to the use of the national disclosure statement as agreed to by Small Business Ministers some time ago.

Submissions

The Shopping Centre Council recommended that the NSW disclosure statement be adopted in the Northern Territory.

Assessment/Discussion:

There is a nationally agreed disclosure statement. This should be adopted in the NT.

9.1.12 Waiver of the 7 day period by when the disclosure statement must be provided.

Issue

Section 19(1) makes it an offence for a landlord to fail to provide a copy of the disclosure statement at least 7 days before the lease is signed. Section 20 goes on to provide for the circumstances in which a tenant may terminate the lease in the period of 6 months following the commencement of the lease arising out of a failure to provide the disclosure statement or if the statement contained information that is materially false or misleading.

Submission

The Shopping Centre Council submitted that the requirement that a landlord must provide a tenant with a disclosure statement at least 7 days before the retail shop lease is entered into (section 19(1)) be amended to enable the 7 day period to be waived.

Assessment/Discussion

It appears appropriate to amend section 20 so that:

- The right to terminate for mere failure to provide a timely disclosure statement can only be exercised within a period of 2 weeks following the actual provision of the disclosure statement. The outer limit of 6 months should remain; and
- The parties can agree, in writing, that a formal disclosure statement is not required.

9.2 Additional issues raised in the course of consultation

Stakeholders also made a number of submissions in relation to issues not raised in the Issues Paper as follows:

9.2.1 Outgoings

Submission

The National Retail Association submitted in relation to Outgoings and Sustainable Practices, that tenant's require incentives and capacity to reduce their energy and water consumption.

The current processes in which landlords apportion outgoings to individual tenants may not recognise specific sustainability initiatives implemented by individual retailers. Changes to the Act may be needed to ensure that retailers are encouraged through discernible reductions and outgoings to introduce measures that contribute to reductions in energy, water and waste. A standard introduction of sub-metering would give tenants influence and accountability for their usage and allow them to directly benefit from the introduction energy efficient lighting and

water efficient devices. Sub-metering would also allow larger retail tenants to pursue collective power pricing arrangements.

Assessment/Discussion

It appears that the Act should be amended so as to remove any barriers to the introducing of sub metering of utility services.

9.2.2 Provision of Written Expenditure Statement and advertising expenditure statements

Submission

The Shopping Centre Council made a number of submissions with respect of other issues such as Written Expenditure Statement Available for Examination (twice each accounting period).

Sections 39(c) and 39(d) require that a landlord must make available for examination by the tenant a written expenditure statement (twice in each accounting period) in relation to outgoings.

The Shopping Centre Council indicated these sections should be deleted from the Act. Overall, very few tenants availed themselves of this statement. New South Wales has removed this similar provision/requirement

Similarly, the requirement in section 70(b) requiring the landlord to make available an expenditure statement concerning advertising and promotion expenditure should be removed. The reason being is that very few tenants availed themselves of this statement. New South Wales has removed this similar provision/requirement,

Assessment/Discussion

It appears appropriate to amend sections 39(c) and 39(d) (dealing with Written Expenditure Statement) and 70(b) (dealing with advertising expenditure) so as to replace the obligation to provide these statements with an obligation to only do so on request.

9.2.3 Trading hours

Submission

Section 62 provides that a provision in a shop lease is void if it operates to require trading at a time that is otherwise unlawful.

It has been submitted that since trading hours are not regulated in the Northern Territory, this provision is unnecessary and should be repealed.

Assessment/Discussion

Whilst the NT does not have any current laws relating to trading hours there may be other laws (eg under emergencies legislation, *Planning Act* or the *Liquor Act*) that may operate to limit trading hours.

There is no particular reason to remove section 62.

9.2.4 Provision of registered leases

Submission

Section 25 sets a time limit on registration of leases of one month after the lease has been returned to the landlord.

The Shopping Centre Council recommended that limit be increased to three months in the Northern Territory.

Assessment/Discussion

Once a lease has been registered, one month appears sufficient time to provide a registered copy to the tenant.

9.2.5 Exclusion for “major lessees”

Queensland’s *Retail Shop Leases Act* creates a separate category of 'lessee' called a ‘major lessee’(defined as "the lessee of 5 or more retail shops in Australia"),

The reason being that many of the procedural requirements of the Act (for example, the timing and bases of rent reviews) do not apply if the lessee is a 'major lessee', this is appropriate given that a lessee of five or more retail shops (i.e. a chain retailer) is a very experienced retailer, particularly when it comes to lease negotiations and therefore such retailers do not need the same regulatory protections as a small (and often first time) retailers.

Assessment/Discussion

There appears to be no strong reason for drawing this distinction.

9.2.6 Environmental “outgoings”

Submission

Section 5 of the Act defines 'outgoings', among other things, as "a landlord's outgoings on account of the expenses directly attributable to the operation, maintenance and repair" of the building.

Section 43(2) prohibits the landlord recovering from the tenant "an amount in respect of capital costs of plant."

'Capital' versus 'operational' distinction needs to be revisited in case of environmental sustainability measures, many of which are being mandated by governments. Many of the sustainability measures require capital expenditure by the lessor, and are not recoverable, although the major (and sometimes the only) beneficiary is the tenant.

The Shopping Centre Council recommended that the Government consider amendments to the Act to ensure that section 43(2) (and possibly section 5) does not discourage the introduction of sustainability measures in shopping centres, particularly when those sustainability measures have been mandated by the Government itself. The Council suggests that this is not a particularly difficult drafting exercise and can be achieved without turning on its head the fundamental principle that capital expenditure cannot be recovered but operational expenditure can.

NSW: Section 54N of the *Local Government Act* overrides the equivalent provisions (section 23) of the NSW *Retail Leases Act* in relation to its environmental upgrade agreement initiatives. This section states that "a provision of a lease may require a lessee to pay to the lessor a contribution towards an environmental upgrade charge payable under an environmental upgrade agreement that relates to the premises that are the subject of the lease." This states further that the section "applies despite section 23 of the *Retail Leases Act 1994* . . ."

Assessment/Discussion

Amend section 5 and/or 40 so that a lease can provide that 'a provision of a lease' may require a lessee to pay to the lessor a contribution towards an environmental upgrade (regardless of whether it might be considered as capital expenditure)

9.3 Other red tape issues identified by the Department of the Attorney-General and Justice

9.3.1 Red Tape review

The following provisions of the legislation might be considered to be red tape. The following discussing does not include issues already considered in Parts 9.1 and 9.2).

9.3.2 section 17 (copy of lease)

Lease available when negotiations are commenced with a prospective tenant (section 17).

Common-sense would suggest that the proposed general lease should be available when an offer is made.

However, it does not seem appropriate to impose a criminal sanction. As this criminal sanction is the main purpose of section 17 it appears to follow that the criminal sanction in section 17 be repealed.

9.3.3 section 27 (tenant's disclosure statement)

This obligation appears to serve little practical purpose. It appears appropriate that the section be repealed.

9.3.4 section 22 (need to disclose pay for fixtures and fittings)

The tenant has no liability to pay for fixtures, finishes etc, unless the liability is disclosed in the disclosure statement (section 22).

One of the key objectives of the Act is to limit the areas in which there can be disputes. This section operates to lay down a basic principle – which is that is the landlord's responsibility to make it clear what are the tenant's responsibilities regarding fixtures, finishes etc.

9.3.5 section 23 (landlord's lease preparation costs)

Prescribing of circumstances in which a tenant can be required to pay for the landlord's lease preparation costs (section 23).

One of the key objectives of the Act is to limit the areas in which there can be disputes. This section operates to lay down a basic principle – which is that is the landlord's responsibility to make it clear what are the tenant's responsibilities for lease preparation costs.

9.3.6 section 24 (key money on grant of lease)

The landlord is prohibited from seeking or accepting key money (section 24) (offence – maximum penalty 100 penalty units), "key-money" is defined in section 5. It refers to payments for which the tenant receives "no consideration".

This is a core provision of most business and residential tenancy legislation. It (along with similar provisions concerning renewals and assignments) is designed to ensure that landlords are not in a position to, in effect, blackmail a tenant into signing a lease for reasons unrelated to a commercial dealing.

9.3.7 section 25 (provision of signed/registered copies of leases)

Requirements concerning providing signed copies or registered copy of a lease (section 25).

The lease is, in effect, a tenant's title to the land. It would be expected that, in a commercial dealing, a tenant would always insist on getting a lease. Nonetheless, this sometimes does not occur. When the legislation was enacted one of the key concerns of tenants was that of being

provided with the signed copy of the lease. Provision of the lease does seem to be a justified regulatory burden.

9.3.8 section 27 (rent not payable until fit out is completed)

For leases where there is agreement for a fit out, the tenant is not required to pay rent until the fit out is substantially complete (section 27).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.9 section 29 (determination of current market rent)

If the rent is set by reference to current market rent, section 29 (and relates sections 30-31) sets out how current market rent is determined.

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.10 section 32 (determination of turnover)

If the rent is set by reference to “turnover”, section 32 sets out matters that cannot be included as turnover.

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.11 section 34 (payments for unrelated land)

The landlord cannot try to make the tenant responsible for payments in respect of “unrelated land” (section 34).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.12 section 35 (rules for sinking funds)

If there is a sinking fund (for repairs and maintenance), section 35 (and related sections 36-37) set out what is deemed to apply in respect of the sinking fund.

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.13 section 38 (recovery of outgoings)

The only “outgoings” that are recoverable by the landlord from the tenant are those covered by the lease (section 38). The landlord is also required to provide estimates and expenditure statements regarding outgoings and required to give statements and reports regarding outgoings (section 40). There are also rules in sections 41 and 42 regarding outgoings.

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.14 sections 45-46 (contributions to capital costs)

The landlord is prohibited from seeking to require that a tenant contribute to capital costs, depreciation or landlord’s interest (sections 43-45).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements. See recommendation 16 (Part 3.3) for suggested changes in some of the detail concerning this provision for environmental capital costs.

9.3.15 section 46 (disturbance)

The landlord must not carry on renovations that adversely disturb a tenant’s business unless notice of 2 months has been give or there is an emergency (section 46). There is also a right to compensation for the disturbance (section 47).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.16 section 48 (relocations)

If a lease provides the landlord with a right to relocate the tenant, section 48 contains various rules that apply in respect of such a relocation (including compensation).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.17 section 49 (demolitions)

If a lease provides the landlord with a right to demolish the building, section 49 contains various rules that apply in respect of such a relocation (including compensation).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.18 section 50 (rent for damaged premises)

If the building is damaged, section 50 sets out the rights of the tenant regarding matters such as rent.

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.19 section 51 (refurbishments and refittings)

If a lease provides for refurbishment or refitting, it is void unless it gives an appropriate level of detail (section 51).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.20 section 52 (landlord's control over tenant's employees)

If a lease provides for limits regarding the tenant's employees it is void except for matters relating to an employee's competence, behaviour and types of work (section 52).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.21 section 53 (withholding of consent for assignments)

The landlord is entitled to withhold consent to assignment of a lease only in the circumstances set out in section 53 (and related sections 54-58)

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements. However, see recommendation 4 for a proposed modification of this provision.

9.3.22 section 54 (key-money for assignments)

The landlord must not seek or accept key-money when a lease is being assigned (offence, section 54, penalty 100 penalty units).

This activity is generally regarded as criminal rather than as a regulatory burden.

9.3.23 section 59 (landlord's absolute discretion for certain consents)

A lease may provide that the landlord has an absolute discretion to refuse consent for subleases, tenant leaving possession or the tenant mortgaging or encumbering the leased property (section 59).

This is a section that sets out a consensus view of what is basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.24 section 60 (obligations regarding extensions or termination of leases)

Within the period of between 6 and 12 months of the end of a lease the landlord must either offer to extend the lease or inform the tenant that there will be no lease (section 60).

Arguably, this is an issue that landlords and tenants ought to be able to handle themselves. However, it was not raised in the consultations. There is no apparent reason to repeal the section because it provides for what should be good practice.

9.3.25 section 61 (key-money for extensions)

The landlord must not seek or accept key-money when a lease is being extended (offence, section 61, maximum penalty 100 penalty units).

This activity is generally considered to be criminal rather than regulatory.

9.3.26 section 63 (security deposits)

Section 63 regulates security deposits.

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.27 section 64 (compulsion regarding conveyancing, legal or accountancy services)

Section 64 makes it an offence (maximum penalty 50 penalty units) for the landlord to complete the tenant to use a particular legal practitioner, accountant or conveyancing agent.

It is difficult to imagine that this section ever being used or that a conveyance, legal practitioner or accountant would ever permit themselves to be in this kind of conflict role.

Nonetheless, this is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is

to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.28 section 66 (disclosure of turnover information)

For shops in a retail shopping centres (as defined in section 5) it is an offence for the landlord to disclose turnover information provided by the tenant (maximum penalty of 200 penalty units and or imprisonment for 12 months) (section 66).

This is regarded as criminal, rather than regulator, misbehaviour.

9.3.29 section 67 (availability of statistical information)

If a lease in a retail shopping centre requires the tenant to provide money in respect of the collection of statistics, the tenant has a right to receive the statistical information (section 67).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.30 section 68 (advertising)

A clause in a lease in a retail shopping centre is void if it requires that the tenant advertise the tenant's own business (section 68).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.31 sections 69-72 (provision of marketing plan)

if there is a requirement for the tenant in a retail shopping centre to pay an amount in respect of the centre's advertising, the landlords must provide a copy of the relevant marketing plan and other relevant material and information (sections 69-72).

It is proposed that this information need only be made available if a request is made.

9.3.32 section 73 (termination because of inadequate sales)

A clause in a lease in a retail shopping centre is void if it provides that the lease can be terminated because of inadequate sales (section 73).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.33 section 74 (prohibiting tenant's businesses elsewhere)

A clause in a lease in a retail shopping centre is void if it attempts to limit the tenant carrying on a business elsewhere (section 74).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.34 section 75 (changes in core trading hours)

Core trading hours in a retail shopping centre cannot be changed unless a majority of the tenants agree (section 75).

This is a section that sets out a consensus view of what is a basic fair position to take in a practical area where there may be difficulties. It should be retained if the legislation is to retain the objective of providing for certainty and fairness in retail shop leasing arrangements.

9.3.35 sections 76-81 (cause of action for unconscionable conduct)

Part 10 (sections 76-81) provides a jurisdiction for the courts to deal with unconscionable conduct).

No problem has been identified. If some or all of the regulatory rules in the Act are repealed this kind of section would be the main basis on which tenants could seek to avoid unfair activities by landlords.

9.3.36 Role of Commissioner for Business Tenancies (Office of the Consumer Affairs)

The Commissioner of Consumer Affairs has advised that the *Business Tenancies (Fair Dealings) Act* rarely comes before the office. Enquiries often resulting in one or other of the parties only seeking a certificate to pursue the matter in the courts. The reasons for this kind of outcome being that conciliations between the parties are usually well advanced by the time that the parties come to the office, and the cost of hearings that might occur before the Commissioner (of around \$5,000) which is borne by each party equally is preferred to be spent on legal fees instead of gaining a decision which can, in any event, be appealed to the court.

The Commissioner considers that the role and function of this office in administering this function should be considered within the red tape reduction exercise.

10. Recent reviews and legislative reform elsewhere in Australia

10.1 WA: Commercial leasing amendments to commence shortly

Amendments to WA's *Commercial Tenancy (Retail Shops) Agreements Act 1985* commenced on 1 January 2013. The primary aim is that of facilitating equitable leasing arrangements between landlords and tenants and providing access to low cost dispute resolution mechanisms.

The *Commercial Tenancy (Retail Shops) Agreements Act 1985* (regulates the relationship between landlords and tenants in retail shop premises in Western Australia. The Act focuses on the need for transparency of information and fairness in retail tenancy lease contracts.

The *Commercial Tenancy (Retail Shops) Agreements Amendment Act* provides for the following:

- Allow tenants to make more informed leasing decisions by requiring landlords to include additional information in the disclosure statements provided to tenants;
- Enhance security of tenure by protecting the rights of tenants with respect to options to renew and shopping centre redevelopments or relocations;
- Improve the negotiating power of tenants by prohibiting landlords from passing on certain legal fees to tenants;
- Assist in the preparation of more consistent and equitable rent reviews by requiring landlords and tenants to supply valuers with relevant leasing information; and
- Prohibit misleading and deceptive conduct and give the State Administrative Tribunal the jurisdiction to hear claims in relation to misleading and deceptive conduct.

10.2 Queensland – Retail Shop Leases Act 1994

The QLD Department of Justice and Attorney-General and Justice in May 2013 released an Options paper concerning the statutory review of the *Retail Shop Leases Act 1994* (QLD). Submissions on the Options Paper were sought by 3 July 2013.

The *Retail Shop Leases Act 1994* has the object of promoting efficiency and equity in the conduct of certain retail businesses in Queensland. The *Retail Shop Leases Act 1994* seeks to establish a framework for addressing the imbalance in access to information and negotiating power between landlords and small retail tenants through mandatory minimum standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.

The *Retail Shop Leases Act 1994* operation is being reviewed to ensure its provisions remain appropriate. This is a statutory review required to be undertaken by the Attorney-General on a seven yearly basis (section 122).

The objectives of the review were stated as being to identify opportunities for:

- Improving the efficiency and effectiveness of the *Retail Shop Leases Act 1994*;
- Reducing red tape for tenants and landlords and leaving appropriate matters to commercial negotiation or education, rather than legislating;
- Continuing to address imbalance in access to information and negotiating power, while not interfering with commercial arrangements or outcomes;
- Aligning with the position in other jurisdictions (where this improves the *Retail Shop Leases Act 1994*) for enhanced operational efficiency and legal certainty for landlords and tenants operating across jurisdictions; and
- Clarifying the meaning of provisions, as appropriate.

Submissions on the earlier 2011 discussion paper were received from thirty-three interested stakeholders, including retailer, industry, legal and valuation representative bodies.

Sub-missions to the QLD 2011 Discussion Paper revealed that there is broad in-principle stakeholder agreement that legislation governing retail shop leasing arrangements remains appropriate

Many stakeholders indicated as a foundation for their submissions, strong support for various findings and recommendations of the Productivity Commission in its 2008 report entitled *The Market for Retail Tenancy Leases in Australia*.

Tenants Submissions to the Qld 2011 Discussion Paper:

The broad themes of tenants' submissions, also considered in the 2008 Productivity Commission Report, were:

- security of tenure;
- occupancy costs (including rent and fit out costs);
- transparency;
- disclosure; and
- unconscionable conduct.

Other key areas of concern for tenant submitters were extending protections under the Act to franchisees and compensation for business disturbance, relocation and demolition.

Landlord Submission to the 2011 Qld Discussion Paper:

Key themes of landlord submissions were:

- clarifying the operation of the legislation to promote certainty;
- removing unnecessary regulation; and

- confining the legislation to the principle of protecting only small business as against large businesses which are capable of safeguarding their own interests.

Submissions were supportive of the recommendations in the 2008 PC Report for:

- reducing the level of prescription in retail shop lease legislation to increase the flexibility of landlords and tenants in lease negotiations and improve the economic efficiency of business decisions; and
- reducing inconsistencies in the regulation of retail and commercial tenancies and in the regulation of tenancies across jurisdictions, to reduce compliance costs to businesses.

10.3 NSW: Retail Leases Act

NSW released for comment an exposure draft bill, 'The Retail Leases Amendment Bill 2011'. The draft legislation has not progressed but explanatory material provided that the proposed legislation will, if enacted:

- a) "simplify the procedures for the various disclosure statements that lessor and lessees are required to provide;
- b) make it clear that shop premises in an office tower that forms part of a retail shopping centre are not excluded from the operation of the Act if they are used for a retail shop business listed in schedule 1 of the Act;
- c) vary provisions for a lessor's disclosure statement to make it clear that a lessor's disclosure statement is required when a lease is renewed and to enable a lessee to require a lessor's disclosure statement before exercising an option to renew a lease;
- d) make it clear that the termination of a lease for a failure to provide a complete and accurate lessor's disclosure statement does not affect a lessee's right to compensation for a pre-lease misrepresentation;
- e) make it clear that when the act applies to a lease, it continues to apply during holding over by a lease,
- f) add the cost of outgoings to the list of costs that a lessee is not required to contribute to unless the liability is disclosed in the lessor's disclosure statement;
- g) provide that if the lessor and lessee cannot agree on the maximum cost of, or a formula for calculating the cost of, fit-out works before the lease is entered into, the maximum cost is to be determined by an independent quantity surveyor;
- h) require all retail shop leases that are for a term of 3 years or more to be registered under the *Real Property Act 1900* and to include a summary statement for the lease;

- i) make it clear that the decision to enter into a retail shop lease for a term of less than the minimum 5 years is at the discretion of the lessee;
- j) provide for the publication of guidelines for the assistance of the parties to a retail shop lease in connection with arrangements for providing a bank guarantee as security for the performance of the lessee's obligations under the lease;
- k) make it clear that a prohibition against a lease containing a provision that prevents or limits a rent decrease when rent is adjusted extends to a rent adjustment that occurs on the exercise of an option to renew;
- l) prohibit the recovery from a lessee of any outgoings attributable to land tax;
- m) allow a specialist retail valuer to require a lessor to provide an updated lessor's disclosure statement for the purposes of a valuation of current market rent;
- n) increase from 2 months to 6 months the period of notice required to be given to a lessee of an alteration or refurbishment that is likely to adversely affect the business of the lessee;
- o) require a lessor, if practicable, to offer alternative accommodation of reasonably comparable commercial value when relocating a lessee, and to enable a lessee to recover the lessee's depreciated fit-out costs if the alternative accommodation offered is not of reasonably comparable commercial value and the lessee terminates the lease;
- p) provide that a lessee cannot be required under the lease to make any repairs or improvements after notice of termination on the ground of proposed demolition is given to the lessee (other than repairs for the purposes of ensuring the safety or security of a building);
- q) require a provision of a lease for the refurbishment or refitting by the lessee to specify when it is required and to sufficiently specify what is required to allow the lessee to make a reasonably accurate assessment of costs;
- r) make it clear that it is the responsibility of the lessee to provide sufficient information to the lessor to enable the lessor to be reasonably satisfied as to whether any circumstances exist that entitle the lessor to withhold consent to the assignment of a retail shop lease;
- s) simplify the drafting of the procedure to be followed by a lessee to obtain the consent of the lessor to an assignment of lease;
- t) entitle a lessee after the end of a retail shop lease to a refund of unexpended contributions made by the lessee towards advertising and promotion of a retail shopping centre; and
- u) clarify the operation of provisions that impose a time limit on when certain claims can be made under the act."

However, the exposure draft Bill has not been proceeded and recently the NSW Government indicated that it is currently preparing an issues paper on the review of *Retail Leases Act (NSW)* for public release. It is anticipated the NSW Issues Paper will be released later in 2013.

11. Appendix A – summary of the matters dealt with by the Local Court

Summary of Matters that Proceeded to the Local Court regarding the *Business Tenancies (Fair Dealings) Act*

There have been 24 matters. All of them concerned possession for unpaid rent and 3 were possession only.

Matter 1

Court order:

1. Warrant of possession to recover possession of land
2. Respondent to pay the outstanding amount of rent including interest
3. Respondent to pay Applicant any costs to return premises to good and substantial repair, order and condition.
4. Responded pay applicants costs of the proceedings

Applicant was the sublessee and the respondent was the underlessee entered into an underlease. Term 12 months with right to extent for further five years

Applicant served the respondent a notice pursuant to sections 125, 127 and 130 of the *Business Tenancies (Fair Dealings) Act*.

Matter 2

Warrant and Seizure of Sale

Court Ordered: Possession of the premises. Respondent to pay Applicant \$7,700 for deposit and outstanding rent.

Respondent to pay Applicants legal costs

Facts: lease entered for 5 years. Rent to be paid monthly. Notice to quit issue pursuant to failure to pay rent. Lease referred to requirement to seek legal advice pursuant to section 26(4) that Legal Practitioners certificate required if the prospective tenant requires a lease for a period under 5 years term.

Issue: Default of lease – default of payment of rent and security.

Applicant applied pursuant to section 131 and 132 of the *Business Tenancies (Fair Dealings) Act* and section 140(1) of the Law of Property Act and Rule 30.03 of the Local Court Rules.

Sought: Possession allowing applicant to reclaim the premises

Respondent to pay the applicant the amount of \$7,700 being unpaid deposit and all outstanding rent

Respondent to pay Applicants legal costs.

Matter 3

Court order: Pursuant to section 132 of the *Business Tenancies (Fair Dealings) Act* respondent to pay \$16,157.62 to the Applicant by way of outstanding rent, interest and damage, together with costs taxed.

Matter 4

Court order:

1. By consent warrant of possession issued against the respondent in the event the respondent fails to vacate the premises.
2. The unregistered lease between the Applicant and Respondent be terminated
3. Respondent to pay the arrears in rent the sum of \$3,296.62 within 30 days
4. Respondent remove plant and equipment and any rubbish from the leases from the leased premises.
5. Vacate property and leave in a neat and clean condition. If not removed by the due date Applicant have the right to dispose of the costs of the Respondent.
6. Pursuant to clause 9.2 of the Lease, the Respondent to pay the agree cost of \$506 being costs incidental to the application

Notice to Quit also issued pursuant to section 125 of the *Business Tenancies (Fair Dealings) Act*.

Matter 5

Court Order: Application Withdrawn. Applicant out of time

Applicant Sought: Respondent to vacate premises.
Debt to be repaid, \$17, 277.44 within 30 days

Form 30A (Rule 30.03(1))

Applicant applied pursuant to section 131(1) of the *Business Tenancies (Fair Dealings) Act* for:

1. Tenant vacate premises immediately
2. Warrant that the landlord has repossession of the shop
3. Costs incidental to the proceedings (total rent owing \$14, 108.55)

Notice to quit pursuant to section 125 *Business Tenancies (Fair Dealings) Act*.

Matter 6

Court order: No order

Orders Sought:

1. Warrant of possession authorising officer of the court or a member of the Police Force to evict the tenant
2. Tenant/Respondent to pay the Applicant \$4, 950 for rental arrears due.
3. Respondent to pay Applicant's costs incurred.

Applicant made pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act* or section 48 of the *Tenancy Act*

Also Notice of Tenancy pursuant to section 146 of the Law of Property Act (deliver up possession of the premises)

Note: Specific reference in the lease document Explanatory Notes – term of the lease 5 years including options for renewal totalling 5 years. Reference to prospective tenant requiring lease of less than 5 years then under section 26(4) of the *Business Tenancies (Fair Dealings) Act*, a legal practitioner's certificate is required.

Matter 7

Court order:

1. Vacate hearing
2. Application adjourned sine die
3. Either party to apply at liberty upon giving 4 weeks' notice.

No order as to costs.

Applicant Sought: Application under section 131 and 132 of the *Business Tenancies (Fair Dealings) Act* for the following orders:

1. Warrant of possession in favour of the applicant to recover possession of the land;
2. No longer than 5 days after date of order in relation to the order (i.e. Possession for applicant 5 days after order 1).
3. Respondent to pay all outstanding amount of rent to Applicant (\$90, 770.19)
4. Respondent to pay applicant any costs incurred including returning premises to good and substantial repair, order and condition in all respects
5. Respondent to pay the Applicant's costs of these proceedings
6. Such other orders as the court deems fit.

Note in this matter the Respondent filed an objection to the jurisdiction of the Local Court to hear the matter as there was an agreement made under a Land Use Agreement (concerning Native Title)

Matter 8

Court order: Pursuant to section 132 of the *Business Tenancies (Fair Dealings) Act* the Respondent is to pay the amount of \$7, 980.18 being rent and other payments agreed pursuant to the lease.

Note: Warrant of seizure and sale also granted pursuant to rule 44.02(2)

Applicant sought: Issue for warrant and execution including \$7, 980.18 (rent arrears) \$140.56 (interest) Practitioners fees \$100.65, Filing fee - \$50 and Bailiffs Fees \$148.50. Total being \$8, 425.89

Matter 9

Court order: Satisfied as to service of the application and the grounds for warrant of possession:

(a) warrant of possession authorised a licenced bailiff to evict the respondent

(b) the respondent to pay the applicant \$12,622.49 for arrears of rent.

Applicant sought: Pursuant to the Local Court Rule 30.03(1) Form 30A pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act* the following orders:

1. Warrant of possession authorising member of the Police Force to evict the Respondent from the premises
2. Respondent to pay the Applicant \$12, 622.49 for rent and continuing until possession of the premises
3. Such further orders as the Court deems fit.

Matter 10

Court order: Satisfied on the Balance of Probabilities that the Notice to Quit was served in a proper manner and complied with the provision of the Fair Trading and Business Tenancies Act. The period of the notice was one month and that has expired pursuant to section 131 of the Act. Warrant of possession to issue in favour of the Applicant enforceable.

Application made pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act* for a warrant of possession

Reason: Termination of monthly lease and failure to pay rent.

Matter 11

Court order: Lister for pre-hearing

Judgment entered for the plaintiff against the defendant in the amount of \$22, 200.00

Application: Parties entered into Deed of Settlement and Release. Matter settled at conciliation conference. Defendant to pay Plaintiff \$27, 750.00 in instalments of \$2, 775.00. Defendant only made two instalments in accordance with the Deed.

Applicant sought settlement of claim minus the total amount paid by the defendant leaving \$22, 200 due and payable to the plaintiff.

Matter 12

Court order:

1. Warrant of possession authorising bailiff to evict the respondent
2. Respondent to pay the applicants \$7,110.00 for damage to premises pursuant to section 132 *Business Tenancies (Fair Dealings) Act*
3. Respondent to pay applicants costs in the amount of \$1,500

Applicant sought: Warrant of possession authorising licenced bailiff to evict the Respondent from the premises

Respondent to pay the Applicant \$2, 392.50 including GST for rent and continuing until possession of the premises is obtained and \$7, 110.00 for damage to the premises in the amount of \$9, 502.50

Such further order as the court deems fit.

Matter 13

Court order: Consent Order.

1. Respondent owes landlord rent in the amount of \$35, 858.28
2. Respondent to pay normal rent every month when it is due and pay the arrears in lump sum instalments with the first lump sum payment in the sum of \$3000 and thereafter every month until arrears have been paid in full
3. In the event of default of payment, respondent agrees to have default judgement entered for the balance of the remaining amount owing on an application by the landlord
4. Respondent has been advised to seek independent legal advice and sought legal advice and agrees to the minutes of consent orders
5. if in default, the defendant shall pay the expenses of the landlord at the fixed sum of \$880
6. If default of any terms of this agreement, the respondent shall pay the interest at the rate of 10% on the remaining balance of the rent owing to the landlord.
7. Tenancy application dismissed.

Matter 14

Court order: Judgment entered for the Applicant in the amount of \$2, 106.84

Notice of demand and notice to quit premises served. Warrant of ejectment and order for tenant to pay outstanding rent. Termination and possession of property.

Matter 15

Court order: Matter discontinued. No order as to costs

Applicant gives notice application discontinued.
Resolved dispute between parties out of court.

Facts: Lease for term of 10 years. Annual rent \$258, 384.44 monthly instalments \$21, 532.47. Base rent increases by 4.5% per annum on each anniversary date.

Issue: Non-payment of rent.

Note: Lease registered pursuant to section 45 of the *Land Title Act*.

Rent Review: Market rent review to be determined in accordance with section 29 of the *Business Tenancies (Fair Dealings) Act*. Regard must be had amongst other things to the provisions of the relevant lease.

NB: Specific clause in lease agreement reference to the *Business Tenancies (Fair Dealings) Act*. 'In the event of any inconsistency between the provisions of the lease and the Act:

- (a) If the provision in the Act is expressed to be subject to the provisions for a lease, the provisions of the lease shall prevail; and
- (b) If the provisions of the Act cannot be modified or excluded, the provision of the Act shall prevail and the inconsistent provision of this lease shall be excluded or read down to the extent of the inconsistency.

Facts: Notice to quit. Due to failure to pay rent. Failure to fit out premises.

Application made pursuant to section 131 and 132 of the *Business Tenancies (Fair Dealings) Act*.

Matter 16

Court order: Judgement debtor to pay \$30 per week to Darwin Local Court

1. Warrant of possession
2. Respondent to pay outstanding rent fixed and allowed at \$3,465.00
3. Respondent to pay applicant's costs fixed and allowed at \$648.90

Application sought and made application pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act* and part 30 of the Local Court Rules.

Matter 17

Court Order: Application pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act* or section 48 of the *Tenancy Act*.

Order Sought:

1. Warrant of possession issue authorising an officer of the court or a member of the Police Force to evict the Respondent
2. Respondent to pay the Applicant's \$10,850.46 for rent arrears and continuing \$366.82 per month until possession of the premises.
3. Such further orders as the Court deems fit.

Matter 18

Court Order: Application in accordance with the *Business Tenancies (Fair Dealings) Act* section 131 and 132 for warrant of ejection and order for outstanding rent (unpaid rent and outgoings in the amount of \$4,179.99).

Matter 19

Court order: Issue warrant of possession. Order made pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act*.

Court satisfied of service:

- a) warrant of possession;
- b) respondent to pay applicant \$17,418.38 for rent in arrears continued at \$2,887.50 per month.

Notice to Quit.

Application: Pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act* or section 48 of the *Tenancy Act*.

NB: Lease refers to section 26(4) of the *Business Tenancies (Fair Dealings) Act* requirement for legal practitioners certificate.

Matter 20

Court order:

1. Warrant of possession to allow bailiff to evict;
2. Respondent to pay Applicant \$17, 814.76 for rent in arrears and costs of \$1, 500 total of \$19, 314.76
3. Respondent entitled to pay said amount of \$19, 314.76 by instalments of \$500 per week with first instalment due 7 days after date of orders if there be a stay of execution in respect of such payment of \$19, 314.76 unless weekly payment on arrears for more than 14 days.

Note: This matter was a consent order made pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act*.

Matter 21

Warrant of possession granted and executed.

Court order:

1. Warrant of possession
2. Defendant to pay plaintiff \$5, 650.43

Made pursuant to section 131 and 132 of the *Business Tenancies (Fair Dealings) Act*. Requested warrant of ejection and order for outstanding rent.

Matter 22

Court order: Issued warrant of service for sale.

1. Warrant of possession in favour of the Applicant. Issued authorising a Bailiff to evict the respondent from the property
2. warrant to evict
3. The respondent to pay the applicant \$51, 653 for arrears of rent and continuing \$3, 630.00 per month until possession of the property, plus costs \$1, 500.

Order made pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act*.

Note: Lease registered pursuant to section 65 of the *Land Title Act*.

Matter 23

Court order: Application withdrawn and dismissed

Application made pursuant to section 48 of the *Tenancy Act* for warrant of possession.

Note: Parties entered into agreement to quit and deliver up possession of the premises given pursuant to section the *Business Tenancies (Fair Dealings) Act*.

Matter 24

Court order:

1. Warrant of possession granted
2. Make no order as to payment of outstanding rent
3. Respondent to pay the applicants costs assessed at 25% of the Supreme Court Scale

Application pursuant to section 131 of the *Business Tenancies (Fair Dealings) Act* for warrant of possession authorising an officer of the court or a member of the Police Force to evict the tenant from the premises. Also sought payment of outstanding rent pursuant to section 132 of the *Business Tenancies (Fair Dealings) Act*.

12. Appendix B – summary of submissions made on the 2012 issues paper

Business Tenancies (Fair Dealings) Act Review – Submissions and Issues Raised

	Organisation Submission			
	<p>Shopping Centre Council (SCCA)</p> <p>Overall comment: We accept that the Government is unlikely to repeal this legislation although this would not be a radical step.</p> <p>SCCA argued in 2003 that there was little justification for the introduction of the <i>Business Tenancies (Fair Dealings) Act</i>. No evidence was provided of a market failure in the retail tenancy industry which required regulatory intervention. The limited number of retail tenancy disputes over the seven and a half years since the Act began operation has demonstrated that the market is working efficiently and fairly, For this reason the Government should take every step in this Review to ensure that the existing regulatory burden on Territory businesses (both landlords and tenants) is removed or reduced.</p>	<p>Property Law Council</p> <p>Overall comment: The Property Council has previously made a submission to the Northern Territory Government on the <i>Business Tenancies (Fair Dealings) Act 2007</i>, and therefore will limit commentary in this submission to the issues affecting commercial properties. For a more detailed response to each of the issues in the paper, please refer to the submission from the Shopping Centre Council of Australia, which we support.</p>	<p>Law Society Northern Territory</p> <p>Executive summary: This primary submission of the Society is that people should have clarity about when a lease will be covered by the Act and when it will not. The Society submits that there is significant confusion created by the use of retail shop and other like phrases in the Act. In the Society's view the preferable position is an Act with broad application and explicit exceptions.</p>	<p>National Retail Association (NRA)</p> <p>Overall comment: NRA submits that changes should be considered on the basis that they improve the efficiency and effectiveness of the legislation or contribute to a move towards harmonisation of the legislation throughout Australia.</p>
Issue	Shopping Centre Council (SCCA)	Property Law Council	Law Society Northern Territory	National Retail Association (NRA)
1. Should the	Yes.	N/A	The term 'rent	The intent of

<p>Act or Regulations be amended to prescribe further methods of rent review?</p>	<p>Section 28 dealing with rent reviews was taken from the Victorian <i>Retail Leases Act</i>.</p> <p>These provisions are very inflexible and, among other things, prevent combination rent reviews being negotiated between lessor and lessee.</p> <p>Such rent reviews are permissible, by agreement, in all jurisdictions except Victoria and the Northern Territory and are very common within the retail tenancy industry.</p> <p>The relevant provisions in NSW and Queensland operate effectively and are not opposed by retailer associations. They provide flexibility while still protecting lessees against lessors 'picking and choosing' among methods of rent reviews and selecting the method most advantageous at the relevant time of the review.</p> <p>Recommend that section 18(3) of the NSW <i>Retail Leases Act</i> replace the current section 28(2).</p>		<p>review' is not entirely accurate particularly when referring to fixed percentage and fixed annual increases, these are in fact expressions of rent rather than a review.</p> <p>Additionally the methods particularised in the Act are probably more prescriptive than necessary and the</p> <p>Preference would be for something similar to section 18(3) of the <i>Retail Leases Act (NSW)</i>. The Act or Regulations should not be amended to prescribe further methods of rent review.</p>	<p>section 28(2) must remain.</p> <p>Based on evidence across all of the states and territories there is no evidence of any additional methods to be added. The current listings are working effectively.</p>
---	--	--	--	---

<p><u>2. Definition of 'retail shop'</u></p> <p>Q3. Is it a problem that service businesses come under the Act?</p>	<p>Yes</p> <p>In the Northern Territory this has meant that a range of non-retail service businesses, such as real estate agents, accountants, lawyers and stockbrokers, have been 'caught' by an Act which is irrelevant to their businesses.</p> <p>The issue of what is a retail service is resolved by the use of a schedule or list of the relevant retail services to be covered by the Act. This is similar to the approach adopted in the Queensland <i>Retail Shop Leases Act</i>. Although this requires the 'list' to be kept up to date, this is far more convenient than the constant problem of court or tribunal definitions of "retail provision of services", which has created uncertainty in jurisdictions such as Victoria.</p> <p>This problem can be conveniently overcome by adopting the approach of the NSW <i>Retail Leases Act</i> or the Queensland <i>Retail Shop Leases Act</i>.</p>	<p>Recommendation : Amend the <i>Business Tenancies (Fair Dealings) Act</i> to define "retail shop" by way of a list of prescribed retail businesses.</p> <p>Definitional issues within the Act have resulted in tenancies other than retail shop tenancies being subject to the Act, or having to be treated as if they are subject to the Act because of definitional uncertainties in the Act.</p> <p>Definition of "retail provision of services"</p> <p>Uncertainty has arisen due to the problematic definition in the Act of "retail provision of services". Courts in other jurisdictions with similar definitions to the Northern Territory Act, such as Victoria, have interpreted "retail provision of services" to include</p>	<p>No. It is not a problem that service businesses come under the Act and they should remain covered.</p> <p>Small service businesses are exposed to similar risks and do benefit from the protections in the Act.</p> <p>Difficulties arise from the use of the words 'retail' occurring 419 times in the Act and 'shop' occurring 295 times in the Act.</p> <p>These words along with "retail shop lease" and "retail shop" are used as all-encompassing terms throughout the Act.</p> <p>On their ordinary meanings these would not include services businesses and a person could be excused from assuming that services businesses were excluded, but for the definitions of these terms in the Act. It is</p>	<p>The inclusion of service businesses in the Act only become a problem when they are not located in a shopping centre. For reasons of outgoing recoveries, all tenants in shopping must be covered if those recoveries are going to be fair and equitable.</p>
---	--	---	---	---

	<p><u>Preference would be the Queensland approach</u> which includes the 'list' in a schedule to the Regulations which means it can be more conveniently updated. Adoption of this approach would be a major step towards reducing unnecessary and costly business 'red tape' in the Northern Territory.</p>	<p>professional practices.</p> <p>Under this definition many medium sized and “sophisticated” businesses supplying services to other businesses are caught in the net of the legislation.</p> <p>The <u>Queensland legislation is the preferred model</u> as the list is contained as a schedule in the Regulations rather than the Act itself, and can be easily amended to accommodate new types of retail shops.</p>	<p>apparent from these definitions that the Act intends to cover small business operations including service businesses.</p> <p><u>Submission</u> that where the terms are a general reference “business,” “business lease,” and “business premises” should be used to avoid confusion.</p>	
<p>4. Should the Act exclude from its operation any premises in an office tower that forms part of a retail shopping centre?</p>	<p>Yes.</p> <p>This has the effect of bringing under the Act tenancies for which the Act has little relevance. This adds an unnecessary and costly regulatory burden on both lessors and lessees for no demonstrable reason.</p> <p>In the NSW <i>Retail Leases Act</i>, under section 5, "any premises in an office tower that forms part</p>	<p>Recommendation : Exclude from operation of the Act any premises in an office tower that forms part of a retail shopping centre.</p> <p>Act as it current stands results in many non-retail shop tenancies in office towers having to be treated as retail shop tenancies.</p> <p>Reference to</p>	<p>The definition of retail shopping centre is aimed at premises used for the sale and hire of goods.</p> <p>Offices above a retail shopping centre ought be excluded from being within a retail shopping centre and the higher level of regulation (in Part 9) that goes with that status.</p>	<p>Office towers in shopping centres should not be included provided they pay their fair share of statutory charges and protections provided to ensure that charges that should be allocated to the towers are not apportioned</p>

	of a retail shopping centre" are excluded from the operation of the Act.	NSW Retail Leases Act as a possible example.	<u>Recommendation</u> : The Office tower above a shopping centre should be treated the same as any other office tower under the Act.	to retail shops.
5. Should the Act define 'retail shop' by way of a list of prescribed retail businesses?	Yes. Preference would be the Queensland <i>Retail Shop Leases Act</i> approach which includes the 'list' in a schedule to the Regulations.	Amend the <i>Business Tenancies (Fair Dealings) Act</i> to define "retail shop" by way of a list of prescribed retail businesses. Definitional issues within the Act have resulted in tenancies other than retail shop tenancies being subject to the Act, or having to be treated as if they are subject to the Act because of definitional uncertainties in the Act. Definition of "retail provision of services" This uncertainty has arisen due to the problematic definition in the Act of "retail provision of services". Courts in other jurisdictions with similar definitions	No. The Society notes that a difficult arises with the use of the phrase "retail shop" throughout the Act discussed above. The Society accepts that the Act applies broadly despite the use of "retail shop". In the Society's view further definition of this clause is not helpful. The Society supports the replacement of the phrase retail shop with "business tenancy". Society does not support using a list of prescribed businesses, as this would only further expand the confusion, and result in anomalies.	Both the definition of a retail store or the list of retail shops works effectively in the respective states, and despite many 'doomsdayers' predicting either method would provide a feat for the legal profession, evidence indicates this is not the truth. Only those seeking to avoid coverage will describe the definition as a nightmare and they should more closely look at the evidence from those states that use this method.

		to the Northern Territory Act, such as Victoria, have interpreted “retail provision of services” to include professional practices. Under this definition many medium sized and “sophisticated” businesses supplying services to other businesses are caught in the net of the legislation.	Society further submits that if further businesses are to be excluded other than those already expressly excluded in the Act then a prescribed list would be appropriate.	
<p><u>3. Assignment of Retail Shop Leases</u></p> <p>(a) Consent subject to defaults being remedied</p> <p>Q6. Is this an actual problem or merely a perceived one?</p>	Lessors should have the ability to withhold consent to an assignment unless all breaches of the lease are remedied or the assignee undertakes to remedy the breach. If the Act is amended to enable this, this is a matter that can be addressed in leases.		<p>The Society questions whether section 53 of the Act is being observed.</p> <p>Submits that forcing the landlord to assignment of the lease without rectification of defects (particularly rent) <u>would be unfair to both landlord and assignee.</u></p> <p>Society would support amendment of the Act to clearly state that assignment need not be consented to if there is breach. This</p>	The landlord has other statutory provision to rectify a default and the majority of leases will clearly enunciate what rights the landlord has to force the tenant to rectify the default. In many cases landlords are only too happy to see a recalcitrant tenant sell his business and move on, allowing a new tenant to take over the

			would reflect current practice.	premises and meet all their obligations.
<p>(b) Provision of guarantees on assignment</p> <p>Q7. Is this an actual problem or merely a perceived one?</p>	<p>Yes. This is a real problem. Section 58 provides the release of (the assignor's) guarantors on assignment.</p> <p>There is no justification for the release of guarantors once an assignment takes place. The lessor is left carrying a risk without having the ability to conduct (on the assignee) the sort of due diligence that would have taken place (on the assignor) when the lease was entered into, Often assignments are a case of joint owners A and B agreeing to assign the lease to owner B, This means the original guarantors are released on the assignment even though the circumstances (to the lessor) have not changed.</p> <p>Section 54 (Key money on assignment prohibited) specifically excludes (in s.5a(a)(c)) from the definition of key money the</p>	N/A	<p>Yes. Section 58 is a problem which needs to be fixed.</p> <p>The landlord ought be entitled to insist on guarantees from the assignee when considering assignment and failing their provision be entitled to either refuse the assignment (or rely upon the original guarantees.)</p>	<p>The guarantors to the original lease should be released in the event of an assignment and if required the landlord should seek new guarantors in respect to the incoming tenant. There is nothing preventing the landlord imposing this requirement as a condition of the assignment.</p>

	<p>circumstances of a landlord "securing performance of the assignee's obligations under the lease by requiring the provision of a guarantee from the assignee or another person. " This would seem to suggest that the Parliament envisaged that lessors could seek guarantees from assignees. On the other hand, the circumstances in which a landlord can refuse an assignment (in section 53) are expressed as exhaustive and these do not include failure to provide a guarantee.</p> <p>This ambiguity should be removed and section 53 should be amended to expressly enable a lessor to require new guarantees as a condition of the assignment. This would redress the present unfairness.</p>			
<p><u>Retail Shopping Centre</u></p> <p>Q8. Should the mere fact that 5 or more shops are held under a</p>	<p>No. Unless these have a common owner, there is no justification for them being considered a shopping centre.</p>	<p>N/A</p>	<p>The problem is that under that the current Act, a strata titled shopping centre falls within the definition of a "retail shopping centre" because the various units</p>	<p>Under the retail shopping centre definition the body corporate should be required to consider the</p>

<p>common unit title be sufficient to make them a 'retail shopping centre'?</p>			<p>“all comprise lots within a single units plan under the <i>Unit Titles Act</i> or within a single unit title scheme under the <i>Unit Title Schemes Act.</i>”</p> <p>Society seeks the deletion of subparagraph (b)(iii) from the definition.</p> <p>Submission that a single landlord (i.e. common ownership) should be the determining factor, not the fact that the premises are all in the same strata titled building or are on the same strata titled lot.</p> <p>These are separately held titles and their individual owners have no power to manage theme collectively.</p>	<p>tenant in any action undertaken by the body corporate that could impact upon the quiet enjoyment of the tenant. There have been instances in other states where an action of the body corporate in undertaking work on the property has forced the tenant to close for a prolonged period without any compensation available because the action was taken by the tenant’s landlord.</p>
<p><u>The 1,000 Square Metre Exemption</u></p> <p>Q9 Is this an actual problem or merely a perceived one?</p>	<p>Is a perceived problem.</p> <p>In the SCCA's 14 years of existence we are unaware of this 'problem' ever being raised.</p> <p>The average speciality</p>	<p>N/A</p>	<p>The Society is aware that the minority view is that the calculation of lettable area is limited to the shop floor where in the experience of the committee</p>	<p>The Act should be consistent with the majority of the other states and include the 1000 square meters</p>

	shop in a shopping centre only comprises around 100 square metres, A retail shop which borders on 1,000 square metres is usually a 'major' tenant or a 'mini major' tenant. These have the business acumen, bargaining strength and leasing experience not to require the protections of retail tenancy legislation.		any calculation has included the total lettable area (e.g. car-parks, storage sheds). Despite the Society being unaware of any difficulties arising from this confusion the Society accepts that a simple amendment could clarify the exemption. The Society sees no hardship arising from the calculation including the total lettable area.	exemption as it applies to the retail space of the store and not of the block upon which the store may be located, as in the instance of a strip shop. There has been no actual problem with this provision in those jurisdictions where it applies.
<u>The 1,000 Square Metre Exemption</u> Q10. Should the Act be amended to clarify this exemption?	No need for an amendment to the Act,	N/A	See above	The Act should not apply to commercial premises unless the particular premises have a lease in a shopping centre and are liable under the lease for their correct share of outgoings (in the property of the size of the store to the centre as a whole).
<u>Part 13 of the Act</u> -	Yes.	Part 13 of the <i>Business</i>	In favour of amendment of	The argument put forward

<p><u>Commercial Tenancies</u></p> <p>Q11. Should Part 13 be removed from the Act or reformed?</p>	<p>Part 13 is couched in the obligations under the <i>Law of Property Act</i> and the relevant common law.</p> <p>Part 13 does not offer a commercial tenant any greater protection than the <i>Law of Property Act</i> and the common law. Part 13 simply muddies the waters and should be repealed.</p>	<p><i>Tenancies (Fair Dealings)</i> should be removed as regulation of tenancies other than retail shops over and above the <i>Law of Property Act</i> is not justified by Northern Territory market conditions.</p> <p>There are currently two Acts that regulate commercial tenancies in the Northern Territory, that being:</p> <p>Part 8 of the <i>Law of Property Act</i>; and</p> <p>Part 13 of the <i>Business Tenancies (Fair Dealings) Act</i>.</p> <p>The <i>Law of Property Act</i> provides sufficient protection for commercial tenancies other than retail shop tenancies.</p>	<p>Part 13 rather than the more complex processes under other Acts. The Act should have broad application with explicit exclusions. There should be no overlap with the <i>Law of Property Act</i>.</p> <p>Part 13 should apply to all business tenancies. In addition the Society would recommend that Part 13 also apply to Government tenancies.</p>	<p>by the Property Council of Australia does not stand scrutiny in respect of small landlord. Perusal of the cases decided in various tribunals in other states will show that the vast majority of landlords involved in disputes under the various Acts are the smaller landlords. Part 13 should not be removed or reformed other than to provide for the exclusion of non-retail premises except those premises located within shopping centres.</p>
<p><u>Certificates</u></p> <p>Q12. Minimum Five Year Term (section 26)</p>	<p>There is no need for the protections of section 26. The equivalent provision in the</p>	<p>The disclosure requirements for retail shops not located in retail shopping centres</p>	<p>Society accepts that there certificate system provided by section 26 has</p>	

	<p>Queensland <i>Retail Shop Leases Act</i> was removed.</p> <p><u>Statutory Declaration</u></p> <p>The present certificates in section 26 be replaced by a statutory declaration would simply replace one piece of unnecessary red tape with another (admittedly less costly) piece of red tape,</p> <p>Section 26 should simply be repealed.</p>	<p>should be reviewed in consultation with industry to better reflect the requirements of landlords and tenants outside of retail shopping centres.</p> <p><u>Statutory Declaration</u></p> <p>The need for a legal certificate for leases of less than 5 year lease terms should be replaced by a statutory declaration by the tenant.</p>	<p>been the subject of criticism however when balancing the consumer protection against the desire to minimise red-tape the Society is in favour of retaining the requirement.</p>	
<p><u>Application of the Act - Government Tenancies</u></p> <p>Q13. Is there a need to exclude Government tenancies from the operation of the Act?</p>	<p>Yes, The fundamental principle of retail tenancy legislation should be the protection of small businesses from unfair market power and therefore, to quote from the objects in section 3, to ensure "the certainty and fairness of retail shop leasing arrangements between landlord and tenants". No landlord has equivalent market power of a government agency (whether that is a Federal, Territory or local government agency) and such agencies do</p>	N/A	<p>There is a need to exclude Government tenancies from the operation of the Act except from Part 13.</p>	<p>Government tenancies do not necessarily need to be covered by the operation of the Act.</p>

	<p>not need the protections of the Act since they are sophisticated tenants, In keeping with this fundamental principle, government tenancies (Federal, Territory and local) should be excluded from the coverage of the Act (where the agency is the lessee).</p>			
Other Matters Raised for Consideration				
Disclosure Statement	<p>Recommend that the NSW disclosure statement be adopted in the Northern Territory.</p> <p>Note NSW and Victoria have adopted a 'disclosure statement</p>			<p>Outgoings and Sustainable Practices</p> <p>Tenants require incentives and capacity to reduce their energy and water consumption. The current processes in which landlords apportion outgoings to individual tenants may not recognize specific sustainability initiatives implemented by individual</p>

				<p>retails. Changes to the Act may be needed to ensure that retailers are encouraged through discernible reductions and outgoings to introduce measures that contribute to reductions in energy, water and waste. A standard introduction of sub-metering would give tenants influence and accountability for their usage and allow them to directly benefit from the introduction of energy efficient lighting and water efficient devices. Sub-metering would also allow larger retail tenants to pursue collective power pricing arrangements.</p>
Disclosure	Recommend that the			

<p>Statement within 7 days (section 19(1))</p>	<p>requirement that a landlord must provide a tenant with a disclosure statement at least 7 days before the retail shop lease is entered into (section 19(1)) be amended to enable the 7 day period to be waived. This provision can work against the interests of both the lessor and the lessee, This does not pose a risk for tenants as the lessor is still obliged to provide the lessor disclosure statement and draft lease before the lessee enters into the lease. It is only the 7 day period which would be waived. Section 19(6) provides that this time limit may be waived on provision of a certificate by a legal practitioner but this is costly and cumbersome. There is no justification for such a requirement.</p>			
<p>Written Expenditure Statement Available for Examination (twice each accounting period)</p>	<p>The requirement of sections 39(c) and 39(d) that a landlord must make available for examination by the tenant a written expenditure statement (twice in each accounting period) in relation to outgoings should be</p>			

	<p>deleted.</p> <p>Reason: very few tenants availed themselves of this statement. NSW have also removed this similar provision/requirement</p>			
	<p>requirement in section 70(b) requiring the landlord to make available an expenditure statement concerning advertising and promotion expenditure should be deleted.</p> <p>Reason: very few tenants availed themselves of this statement. NSW have also removed this similar provision/requirement</p>			
Section 62 – Trading Hours	<p>Section 62 of the Act should be deleted, Since trading hours are not regulated in the Northern Territory, this provision is unnecessary.</p>			
Section 144 – Review of Act	<p>Section 144 of the Act should be repealed. Reviews of the Act should only be carried out if there is evidence (for example, from retail tenancy disputes) that the</p>			

	<p>Act is not working properly. It has been the experience of other jurisdictions that such reviews merely add to the amount of regulation. This would also be a saving of Northern Territory government resources,</p>			
<p>Section 75- Time Limit for Registration of Leases</p> <p>Section 75 – Reference to Stamp Duty</p>	<p>section 25 sets a time limit on registration of leases of one month after the lease has been returned to the landlord. This period is too short</p> <p>We recommend that this time limit be increased to three months in the Northern Territory.</p> <p>Payment of stamp duty on leases has been abolished, this section will also need to be amended to remove the reference to stamp duty.</p>			
<p>Creation of Separate Category of Lessee – ‘Major Lessee’</p>	<p>Queensland <i>Retail Shop Leases Act</i> creates a separate category of 'lessee' called a 'major lessee'(defined as "the lessee of 5 or more retail shops in Australia"),</p> <p>Reason: Many of the procedural</p>			

	<p>requirements of the Act (for example, the timing and bases of rent reviews) do not apply if the lessee is a 'major lessee', This is appropriate given that a lessee of five or more retail shops (i.e. a chain retailer) is a very experienced retailer, particularly when it comes to lease negotiations and therefore such retailers do not need the same regulatory protections as a small (and often first time) retailer,</p>			
<p>Section 5 and section 43(2) ('capital' versus 'operational' distinction)</p>	<p>Section 5 of the Act defines 'outgoings', among other things, as "a landlord's outgoings on account of . . the expenses directly attributable to the operation, maintenance and repair" of the building.</p> <p>Section 43(2) prohibits the landlord recovering from the tenant "an amount in respect of capital costs of plant."</p> <p>'capital' versus 'operational' distinction needs to be revisited in case of environmental sustainability measures, many of which are being</p>			

	<p>mandated by governments. Many of the sustainability measures require capital expenditure by the lessor, and are not recoverable, although the major (and sometimes the only) beneficiary is the tenant.</p> <p>Recommend that the Government consider amendments to the Act to ensure that section 43(2) (and possibly section 5) does not discourage the introduction of sustainability measures in shopping centres, particularly when those sustainability measures have been mandated by the Government itself. This is not a particularly difficult drafting exercise and can be achieved without turning on its head the fundamental principle that capital expenditure cannot be recovered but operational expenditure can.</p> <p>NSW: Section 54N of the <i>Local Government Act</i>) overrides the</p>			
--	---	--	--	--

	<p>equivalent provisions (section 23) of the NSW <i>Retail Leases Act</i> in relation to its environmental upgrade agreement initiatives. This section states that "a provision of a lease may require a lessee to pay to the lessor a contribution towards an environmental upgrade charge payable under an environmental upgrade agreement that relates to the premises that are the subject of the lease." This states further that the section "applies despite section 23 of the Retail Leases Act 1994 . . ."</p>			
--	---	--	--	--