



DISCUSSION PAPER

REDUCING RED TAPE FOR RETAIL SHOP LEASES: REVIEW OF THE *BUSINESS TENANCIES (FAIR DEALINGS) ACT*

Legal Policy Division

Department of the Attorney-General and Justice

68 The Esplanade, DARWIN NT 0800

GPO Box 1722, DARWIN NT 0801

Telephone: (08) 8935 7657 Facsimile: (08) 8935 7662

<http://www.nt.gov.au/justice/>

Consultation

You are invited to provide comments on this Discussion Paper 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 this Discussion Paper. 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 Discussion Paper is 31 January 2016.

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 Discussion Paper to ensure accuracy, it has been produced for the general guidance only of persons wishing to provide comments on the issues. The contents of the paper do not constitute legal advice or legal information and they do not constitute Government policy documents.

Table of Contents

1.	DISCUSSION PAPER ON REDUCING RED TAPE FOR RETAIL SHOP LEASES: REVIEW OF THE <i>BUSINESS TENANCIES (FAIR DEALINGS) ACT</i>	5
1.1	Background	5
1.2	This Discussion Paper	5
2.	GENERAL OUTLINE OF THE <i>BUSINESS TENANCIES (FAIR DEALINGS) ACT</i>	5
2.1	Legislative History	5
2.2	General Outline of the Act	6
3.	MECHANISMS EXTERNAL TO THE <i>BUSINESS TENANCIES (FAIR DEALINGS) ACT</i>	6
3.1	Protections Outside of the Act	6
3.1.1	<i>Law of Property Act</i>	6
3.1.2	Australian Consumer Law	7
3.1.3	Extension of Unfair Contract Provisions to Small Business	8
3.1.4	Code of Practice	9
4.	REVIEW OF THE <i>BUSINESS TENANCIES (FAIR DEALINGS) ACT</i>	10
4.1	Overall findings	10
4.2	Is there a need for the Act?	10
4.3	Summary of the Protections Proposed to be Retained in a Code of Practice	11
4.4	Assessment of the Provisions of the Act	13
4.4.1	Section 3 – objects of the Act	13
4.4.2	Section 5: Definitions	14
4.4.3	Sections 6 to 8: Exemptions	20
4.4.4	Part 2 (sections 12-16): Role of Commissioner of Business Tenancies (Office of Consumer Affairs)	30
4.4.5	Part 3: Rights and duties before retail shop lease entered into	31
4.4.6	Section 23: lease preparation costs	34
4.4.7	Section 24: key-money on grant of lease	35
4.4.8	Section 25: provision of signed/registered copies of leases	36
4.4.9	Section 26: Minimum Five Year Term and certificates	37
4.4.10	Section 27: rent not payable until fitout is completed	39
4.4.11	Section 28: Rent Reviews	40
4.4.12	Sections 29 to 31: review of current market rent	42
4.4.13	Section 32: turnover rent	45
4.4.14	Section 33: special rent - cost of fitout	47
4.4.15	Section 34: payments for unrelated land	47
4.4.16	Part 4, Division 2 (sections 35 to 37): sinking funds	48
4.4.17	Part 4, Division 3 (sections 38 to 42): Outgoings and expenditure statements	49
4.4.18	Section 43: Capital Costs - Environmental Upgrades	52
4.4.19	Section 44: depreciation	55
4.4.20	Section 45: contributions to interest	56

4.4.21	Section 46: notice of alterations and refurbishment	56
4.4.22	Section 47: disturbance	57
4.4.23	Section 48: relocations	58
4.4.24	Section 49: demolition	59
4.4.25	Section 50: rent for damaged premises	60
4.4.26	Section 51: refurbishments and refittings	61
4.4.27	Section 52: employment restrictions	61
4.4.28	Section 53: Assignment of Retail Shop Leases	63
4.4.29	Section 54: key-money on assignment prohibited	65
4.4.30	Sections 55 to 57: Consent to and information on assignment	65
4.4.31	Section 58: Provision of guarantees on assignment	66
4.4.32	Section 59: landlord's absolute discretion for certain consents	68
4.4.33	Section 60: obligations regarding extensions or termination of leases	69
4.4.34	Section 61: key-money for renewal or extension	70
4.4.35	Section 62: trading hours	70
4.4.36	Section 63: security deposits	71
4.4.37	Section 64: compulsion regarding conveyancing, legal or accountancy services	72
4.4.38	Section 66: disclosure of turnover information	74
4.4.39	Section 67: availability of statistical information	76
4.4.40	Section 68: advertising of tenant's business	77
4.4.41	Sections 69-72: advertising and promotion expenses	78
4.4.42	Section 73: termination because of inadequate sales	79
4.4.43	Section 74: prohibiting tenant's businesses elsewhere	80
4.4.44	Section 75: changes in core trading hours	81
4.4.45	Part 10 (sections 76 to 81) – unconscionable conduct in connection with retail shop lease	82
4.4.46	Parts 11 and 12: Dispute resolution for retail tenancy claims and appeals	84
4.4.47	Part 13 (sections 122 to 134): Business tenancies generally	87
4.4.48	Miscellaneous – franchise arrangements	89
4.4.49	Miscellaneous – removal of criminal offences	91
5.	RETAIL SHOP LEASE CODE OF PRACTICE	92
5.1	Suggested content for a Retail Shop Lease Code of Practice	93

1. DISCUSSION PAPER ON REDUCING RED TAPE FOR RETAIL SHOP LEASES: REVIEW OF THE BUSINESS TENANCIES (FAIR DEALINGS) ACT

1.1 Background

The *Business Tenancies (Fair Dealings) Act* (the Act) commenced operation in 1 July 2004. In November 2011, an Issues Paper was released inviting stakeholder submissions on the operation of the Act and whether the Act required reform.

In line with the Northern Territory Government's general position that provisions in legislation which imposed requirements on business (red tape) should be repealed unless those provisions can be justified, a Draft Report on the *Business Tenancies (Fair Dealings) Act* was released in July 2013 to elicit comment on the possible incorporation of amendments raised in submissions to the 2011 Issues Paper, and any further issues concerning the operation of the Act.

Submissions to the Issues Paper and the Draft Report are discussed at Chapter 4.4 below and are available on the Department of the Attorney-General and Justice's website: <http://www.nt.gov.au/justice/policycoord/lawmake/reports.shtml>

1.2 This Discussion Paper

Following consideration of the submissions to the Draft Report, the NT Government undertook an assessment of whether the policy objectives of the Act remained valid and whether the terms of the Act were the most appropriate vehicle for securing those objectives.

This Discussion Paper sets out that assessment and outlines the Government's preferred course of action on the governance scheme for retail business tenancy agreements.

2. GENERAL OUTLINE OF THE BUSINESS TENANCIES (FAIR DEALINGS) ACT

2.1 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, had been re-named as the *Commercial Tenancies Act*).

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*. The *Commercial Tenancies Act* contained the remnants of general tenancy legislation that provided processes for repossession of leased premises, tenant's rights of association and the mitigation of damages for breach of lease.

The *Commercial Tenancies Act* was repealed by the *Business Tenancies (Fair Dealings) Act*.

2.2 General Outline of the Act

The main purpose of the *Business Tenancies (Fair Dealings) Act* was to “establish a regulatory framework that promotes greater certainty, fairness and clarity in the commercial relationship between landlords and tenants... (of) shops and premises of a like nature”¹. A secondary purpose of the *Business Tenancies (Fair Dealings) Act* was the consolidation of provisions concerning evictions contained within the *Commercial Tenancies Act*.

To achieve these purposes, 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 1 000m² and have a tenancy that spans between six months and 25 years with the area being occupied for the purpose of carrying on a business.

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 the seeking of key-money);
- secondly, it regulates processes associated with leasing to ensure fairness (eg the requirement of disclosure statements); and
- thirdly, it sets out rules governing the interaction between landlords and tenants and defines terms (eg what constitutes outgoings).

3. MECHANISMS EXTERNAL TO THE BUSINESS TENANCIES (FAIR DEALINGS) ACT

3.1 Protections Outside of the Act

3.1.1 Law of Property Act

Part 8 (sections 81 to 152) of the *Law of Property Act* comprises what might be considered to be a codification of the underlying ‘common law’ regarding leases. The *Law of Property Act* applies to all leases however, section 114(1) of the *Law of Property Act* provides that the *Business Tenancies (Fair Dealings) Act* overrides the *Law of Property Act* in situations where both Acts cover the same subject matter². An example of where this might occur is in relation to a tenant not being obliged to pay rent if the premises are damaged or destroyed and is thus un-occupiable (section 50(1) of the *Business Tenancies (Fair Dealings) Act*; section 117 of the *Law of Property Act*).

In addition to the general overriding of the *Law of Property Act* that section 114(1) provides, section 114(2)(d) of that Act explicitly excludes the following matters which are covered in both the *Law of Property Act* and in the *Business Tenancies (Fair Dealings) Act* from operation of the *Law of Property Act*:

- rights of re-entry and forfeiture (section 124 *Business Tenancies (Fair Dealings) Act*; section 137 *Law of Property Act*); and

¹ Hansard 21 August 2003.

² Section 114(1) similarly provides that the *Housing Act* and the *Residential Tenancies Act* override the *Law of Property Act*.

- termination of tenancies (sections 125 to 130 *Business Tenancies (Fair Dealings) Act*; sections 144 to 150 *Law of Property Act*).

Notwithstanding the overriding of the *Law of Property Act* by section 114, a number of matters covered by the *Law of Property Act* are deemed to expressly apply to leases under the *Business Tenancies (Fair Dealings) Act*³ including:

- obligations impliedly imposed on the tenant to pay rent when due, and maintain during and return the premises at the end of the lease in good tenable order⁴; and
- right of entry by the landlord to facilitate inspection (on two days notice)⁵ or undertake necessary works or activities in compliance with a legal obligation to undertake such works/activities⁶.

These are both matters that are not expressly provided for under the *Business Tenancies (Fair Dealings) Act*.

While there is certainly an identifiable need to exclude the *Law of Property Act* from certain aspects covered by the *Business Tenancies (Fair Dealings) Act* so as to enable effective operation of the *Business Tenancies (Fair Dealings) Act*, it is equally apparent that the *Law of Property Act* has the ability to effectively manage a number of matters covered by the *Business Tenancies (Fair Dealings) Act*, such as forfeiture and termination of leases and recovery of premises.

3.1.2 Australian Consumer Law

Section 27(1) of the *Consumer Affairs and Fair Trading Act 1990* applies the Australian Consumer Law as a law of the Territory. The Australian Consumer Law is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

In the context of the Australian Consumer Law, a consumer is not necessarily limited to the traditional outlook of a natural person acting in an individual private capacity for personal consumption. Based on its construction, it is possible that the Australian Consumer Law offers protection for businesses entering into, and operating under, tenancy agreements.

Arguably, section 3(2) of the Australian Consumer Law contemplates certain business to business transactions falling within its ambit by only excluding goods which are either acquired for the purpose of resupply⁷, or goods which would be used up or transformed⁸ “in the course of a process of production or manufacture”⁹, or “in the course of repairing or treating other goods or fixtures on land”¹⁰. Indeed, similar limitations or exclusions are not evident for services supplied in a business to business context including ‘supplying’ interests in

³ Section 114(2)(c) *Law of Property Act*.

⁴ Section 117(1)(a) and (c) *Law of Property Act*.

⁵ Section 119(1)(a) *Law of Property Act*.

⁶ Section 119(1)(c) *Law of Property Act*.

⁷ Section 3(2)(a) Australian Consumer Law.

⁸ Section 3(2)(b) Australian Consumer Law.

⁹ Section 3(2)(b)(i) Australian Consumer Law.

¹⁰ Section 3(2)(b)(ii) Australian Consumer Law.

real property (ie retail shop leases)¹¹. Under this construction, it is possible that the misleading or deceptive conduct protections¹² and the unconscionable conduct protections¹³ within the Australian Consumer Law could be applied to certain activities associated with retail shop lease transactions.

There are however, some limitations with the Australian Consumer Law. Section 21(1) exempts listed public companies from the unconscionable conduct protections offered by section 21. This limitation however, should not affect most businesses that enter into retail shop leases as the majority of those businesses are small private entities and are not listed on the stock exchange. In any event, a similar exemption currently exists in the *Business Tenancies (Fair Dealings) Act*¹⁴.

3.1.3 Extension of Unfair Contract Provisions to Small Business

The *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) recently passed the House of Representatives and the Senate and was assented to on 12 November 2015. That Act amends the *Competition and Consumer Act 2010* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) to enable an extension of general consumer protection for unfair contractual provisions under section 23 of the Australian Consumer Law to small businesses. That extension would necessarily capture standard form retail shop lease contracts. While that Act has commenced, the extension of the unfair contractual provisions to small businesses do not commence until 12 November 2016¹⁵.

Over 80 written submissions were received on the Commonwealth's Consultation Paper entitled 'Extending Unfair Contract Term Protections to Small Businesses', the majority of which were supportive of extending current consumer provisions to small businesses¹⁶. Common themes raised in submissions included concerns around contractual terms which permitted "...one party to unilaterally vary terms, limit their obligations, terminate or renew the contract, or levy excessive fees"¹⁷. In the retail tenancy setting, several retail trade associations submitted that unfair contract terms should be expanded to cover retail leases due to a significant imbalance in bargaining power between small retailers and large landlords¹⁸.

There would appear to be strong support for mechanisms which address unconscionable conduct, not only in retail shop leases, but in broader inter-business dealings generally. On

¹¹ Section 2 Definitions *services* Australian Consumer Law.

¹² Section 18 Australian Consumer Law.

¹³ Section 20 and 21 Australian Consumer Law.

¹⁴ Section 6(d) *Business Tenancies (Fair Dealings) Act*.

¹⁵ Section 2(1) *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth).

¹⁶ <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms>

¹⁷ *Ibid.*

¹⁸ See for example submissions from Australian Retailers Association, The Pharmacy Guild of Australia and the Australian Newsagents' Federation:

<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms>

this basis, retention of selectively focused regimes, such as that within the *Business Tenancies (Fair Dealings) Act*, are difficult to justify, particularly from the perspective of overlap with general business consumer protections such as that now available under the Australian Consumer Law.

It is however noted that, in its response to the Commonwealth's Consultation Paper, the Shopping Centre Council stated "We are firmly of the view that it is not appropriate to simply 'extend' the existing unfair contract term provisions to business contracts without modification of those provisions to take into account the very different business to business context". The Shopping Centre Council expanded upon this, noting that "...existing state and territory retail tenancy legislation achieves the same objective as the proposed extension of unfair contract term provisions but does so in a much more direct and more comprehensive manner and with much greater certainty for all parties" and that "...the legislation is far superior in providing protections for small retail businesses, not only in negotiating the terms of leases but in the day-to-day administration of the lease". The Shopping Centre Council further noted that in "serious cases involving allegations of unconscionable conduct, retail tenants have the opportunity of bringing applications to the Australian Competition and Consumer Commission under the *Competition and Consumer Act* or to relevant state tribunals under the unconscionable conduct provisions of the relevant retail tenancy legislation".

3.1.4 Code of Practice

The Commonwealth's extension of unfair contract term protections to small businesses opens up the option for the Territory to consider whether unconscionable conduct in retail shop tenancies could be dealt with in the broader context of the *Consumer Affairs and Fair Trading Act*.

Part 13 of the *Consumer Affairs and Fair Trading Act* establishes a regime where a Code of Practice may be prescribed to govern dealings between a particular class of suppliers and consumers, or by a particular class of persons in relation to consumers¹⁹. For the purposes of that Act, a consumer is a person who acquires goods or services from a supplier²⁰. A person may be a natural person or a corporate entity²¹. The scope of services covered "includes any rights (including rights in relation to, and interests in, real or personal property),... granted or conferred under... a contract for or in relation to... the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction"²² (parentheses supplied), which includes leases.

As such, it appears to be within the scope of the *Consumer Affairs and Fair Trading Act* to establish a Code of Practice governing retail shop leases that retains the basic protections found in the *Business Tenancies (Fair Dealings) Act*. Such a Code may alleviate stakeholder concerns, such as that of the Shopping Centre Council, around generic applications of consumer protection in business settings.

¹⁹ Section 238 *Consumer Affairs and Fair Trading Act*

²⁰ Section 5 *Consumer Affairs and Fair Trading Act*

²¹ Sections 17 and 24AA *Interpretation Act*

²² Section 4(1) *services Consumer Affairs and Fair Trading Act*

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

4.1 Overall findings

Stakeholders contributing to the Issues Paper had a wide range of views and sought a variety of amendments, sometimes inconsistent with each other.

A number of stakeholders submitted that the *Business Tenancies (Fair Dealings) Act* should be repealed. Some 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 noted that the limited number of retail tenancy disputes since the Act commenced has demonstrated that the market is working efficiently and fairly. For these reasons, it was suggested that the Government should take every step to ensure that the existing regulatory burden on Territory businesses (both landlords and tenants) is removed or reduced.

Most stakeholders, however, noted that despite the problems and inefficiencies of the Act a number of amendments could be made which would assist to improve the Act's operation. There was general agreement that the policy objectives of the Act remain valid, however, stakeholders were of the view that not all policy aims of the scheme were being effectively met. The underlying theme from stakeholder comments surrounded the extent to which the objectives could be better achieved.

Many of the prohibitions in the Act are difficult to validate due to them being, in the main, a preventative response to relatively rare misconduct on the part of landlords. For example, it is likely rare for a landlord to engage in the conduct prohibited by section 53 (payment of amounts in relation to unrelated land) or by section 45 (imposing a requirement to pay the landlord's interest payments). While it is arguable that the prevalence of such practices is low due to the prohibitions, most stakeholders would nonetheless agree that these kinds of arrangements are unfair. It is however, another matter entirely to seek to frame the Act to anticipate every instance of unconscionable conduct that may arise.

4.2 Is there a need for the Act?

The purpose of the *Business Tenancies (Fair Dealings) Act*, as section 3 and the Second Reading Speech note, is "to establish a regulatory framework that promotes greater certainty, fairness and clarity in the commercial relationship between landlords and tenants, for certain small business tenancies"²³. As the discussion at Chapter 4.4 notes, stakeholder feedback would suggest that the Act is not necessarily achieving that purpose in its entirety.

Indeed, the Shopping Centre Council and the Property Council of Australia have questioned the base need to regulate retail tenancies while Ward Keller has questioned the efficacy of the regime, suggesting that compliance costs significantly outweigh any benefits derived from it.

On the other hand, the Law Society Northern Territory sees value in regulating business tenancies, however is of the view that the Act's present structure does not necessarily deliver the desired clarity and certainty.

²³ Hansard 21 August 2003.

As discussed above at 3.1.3, the Commonwealth's extension of unfair contract protections to small business also influences the need for the *Business Tenancies (Fair Dealings) Act*. The application of the Australian Consumer Law to matters that may arise out of contractual arrangements between businesses extends the scope of the Australian Consumer Law beyond the most serious acts of misleading, deceptive or unconscionable conduct to more routine leasing matters (such as restrictions on renewal²⁴).

It is against the background of the difficulty in validating aspects of the *Business Tenancies (Fair Dealings) Act*, the existence of other legislative schemes which generally cover business interactions (including leasing and tenancy matters), the availability of generic descriptions of such conduct as being unconscionable, and a general desire of Government to reduce red-tape that Government's response is framed: repeal the *Business Tenancies (Fair Dealings) Act* and establish a Code of Practice for certain matters specific to retail shop leases under Part 13 of the *Consumer Affairs and Fair Trading Act*.

4.3 Summary of the Protections Proposed to be Retained in a Code of Practice

The proposed Code of Practice for Retail Shop Leases seeks to retain those key provisions that regulate retail shop tenancies that are not adequately addressed in other regulatory regimes. The recommendations set out below are discussed in detail at 4.4 below and are addressed in the same order as they occur in the Act.

It is proposed that a Code of Practice include:

1. Section 3 – objectives of the Act

Retain objective (a): enhancing certainty and fairness in retail shop leasing.

2. Section 5 – definitions

Retain relevant definitions. Revise the definition of "retail shopping centre" so that only "shops and premises of a like nature" are captured.

3. Sections 6 to 8 – exemptions

Retain the current exemptions. Clarify that the 1 000m² threshold applies to total lettable area.

4. Section 9 – Act overrides retail shop leases

Retain.

5. Section 24 – key-money on grant of lease

Retain the current prohibition.

²⁴ Section 25(1)(e)

6. Section 28 – rent review

Retain the current policy objectives (i.e. restriction on frequency of rent reviews and restrictions on picking and choosing methods depending on which method produces the highest increase in rent).

7. Sections 29 to 31 – review of current market rent

Retain the current guidance offered by section 29.

8. Sections 35 to 37 – sinking funds

Retain the current governance requirements and scope limitations of sinking funds.

9. Section 54 – key-money on assignment prohibited

Retain the current prohibition.

10. Section 61 – key-money for renewal or extension

Retain the current prohibition.

11. Section 66 – confidentiality of turnover information

Retain the current disclosure prohibition.

12. Section 73 – termination because of inadequate sales

Retain the current prohibition.

13. Part 10 (sections 76 to 81) – unconscionable conduct in connection with retail shop lease

Retain the prohibition on unconscionable conduct and the subject matters contained in sections 79 and 80.

14. Part 13 (sections 122 to 134) – business tenancies generally

Retain the current prohibition on restrictions on a tenant's rights of association under section 133.

15. Miscellaneous – franchise arrangements

Franchise arrangements should be covered by the Code of Practice.

16. Miscellaneous – removal of criminal offences

Retain criminal penalties for breaches of the Code of Practice.

4.4 Assessment of the Provisions of the Act

As noted above, the *Business Tenancies (Fair Dealings) Act* has been the subject of some discussion since its introduction. The following compiles and assesses those discussions that arose through the 2011 Issues Paper and the 2013 Draft Report.

4.4.1 Section 3 – objects of the Act

Outline of the current position/issues

Section 3 of the Act sets out that the ‘Objects’ for the Act are to enhance:

- (a) the certainty and fairness of retail shop leasing arrangements between landlords and tenants;
- (b) the mechanisms available to resolve disputes concerning retail shop leases; and
- (c) the certainty and fairness of certain other aspects of business tenancies.

Discussion

The objects in section 3 set out in fairly specific terms what the legislation hopes to achieve. The question is whether these objectives are relevant and achievable.

As can be seen from the ensuing discussion, stakeholder feedback would indicate that the Act is not necessarily adding to certainty in retail tenancy matters. From the comments provided by stakeholders, two distinct themes have emerged as to possible remedy. The first theme involves the repeal of the Act in its entirety, or in the alternative, significantly amend the Act so that its scope and application is tightened. The second theme seeks to retain the Act in its entirety and enhance its operation by increasing the clarity of its application. While these divergent remedies are somewhat reflective of respective stakeholder positions, they also reflect that the Act is not fully achieving its objectives.

In order for the Act to achieve its objectives, those objectives need to be relevant to the subject matter. As can be seen through examples of the Act’s operation, some aspects would appear to be less pertinent than others. One such case is in relation to the manner in which parties approach the resolution of retail tenancy claims. As discussed at 4.4.46, the uptake of the dispute resolution mechanisms is somewhat tokenistic, which brings into question the relevance of objective (b).

On the basis of the discussions below, it would appear that only objective (a) would continue to hold primary relevance should the Act be repealed and a code of practice be instigated in its place.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, consideration could be given to retaining objective (a) in a code of practice.

4.4.2 Section 5: Definitions

Outline of the current position/issues

Section 5 of the *Business Tenancies (Fair Dealings) Act* sets out a number of specific terms and prescribes explicit meaning to them. The objective of section 5 is to provide clarity and certainty to the provisions within the Act and its overall operation.

Issues Paper submissions

“Retail shopping centre”:

The Issues Paper posed the question: “Should the mere fact that 5 or more shops are held under a common unit title be sufficient to make them a ‘retail shopping centre’?”. The question was framed from the perspective that while individual lots within a single units plan under the *Unit Titles Act*, or within a single unit title scheme under the *Unit Title Schemes Act*, may fall within the definition of a retail shopping centre due to those lots being used as shops, the application of the Act to those premises may nevertheless be inappropriate where those premises have separate owners. The basis for the question was “the shops are separately owned and there is no capacity for the body corporate (or an individual owner) under existing legislation to manage the shops within the centre”.

Stakeholders submitted various views on this issue. The Shopping Centre Council’s response to the question was: “No. Unless these have a common owner, there is no justification for them being considered a shopping centre. The tenants of these shops are still protected by the Act, assuming they meet the requirements of a ‘retail shop’”.

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

The National Retail Association held the opposite view, submitting that “(u)nder a retail shopping centre definition the body corporate should be required to consider the tenant in any action undertaken by the body corporate that could impact upon the quiet enjoyment of the tenant”. In making this recommendation, the National Retail Association noted “(t)here 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 (not) undertaken by the tenant’s landlord”.

“Retail shop”:

The Issues Paper sought comment on whether “(i)t is a problem that service businesses come within the operation of the *Business Tenancies (Fair Dealings) Act*”, noting that “(v)arious members of industry and professional associations have described the definition of “retail shop” as a “nightmare””.

The Property Council of Australia referred to its 2008 submission which called for amendments to the Act to prescribe a list of retail businesses to which the Act would apply in place of the present definition of 'retail shop'. The Property Council of Australia noted that inclusion of the phrase "retail provision of services" in the definition²⁵ raised uncertainty as "(c)ourts in other jurisdictions with similar definitions 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", including "real estate agents, lawyers, stockbrokers, banks, actuaries, accountants and in fact most service businesses", as well as "small manufacturing businesses in industrial areas such as Winnellie and Yarrowonga, where the business has a small retail service element". The Property Council of Australia indicated a preference for the New South Wales and Queensland models, which provide lists of the types of retail premises to which the Act applies, noting that the position of "(e)ither its on the list or its not" (sic) provides greater certainty.

The Shopping Centre Council echoed the Property Council of Australia's call for adopting a list of the types of retail premises to which the Act applies. In support of the call, the Shopping Centre Council noted that the definition "retail provision of services" has "caught" "a range of non-retail service businesses, such as real estate agents, accountants, lawyers and stockbrokers" who are "generally 'sophisticated'" and "are usually not as dependant on location as retail tenants and they can therefore more conveniently change locations if they do not agree with lease terms". The Shopping Centre Council also noted that "(t)hey do not have the same extensive retail fit-out costs and requirements as retail businesses; outgoings are often different; terms of leases vary; and tenancy mixes are usually irrelevant. Significantly, once the lease transaction is entered into, the landlord's role is generally a passive one, whereas in a shopping centre, the landlord remains in a very active management role".

The National Retail Association submitted that, for equitable reasons, service businesses located in a shopping centre should be covered to ensure fair apportionment of outgoings. The National Retail Association further submitted that "(b)oth the definition of a retail store or the list of retail shops works effectively in the respective states, and despite many doomsayers predicting either method will provide a feast 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".

The Law Society Northern Territory did not believe that the inclusion of service businesses was a problem. The Law Society Northern Territory noted that "small service businesses are exposed to similar risks and do benefit from the protections in the Act". The Law Society Northern Territory contended that given the drafting of the definitions, it is clear that "the Act intends to cover small business operation including service businesses", however if there were an issue, it lay in the use of the words 'retail' and 'shop' and application of the terms 'retail shop lease' and 'retail shop', which could lead to misunderstanding. The Society preferred the use of 'business', 'business lease' and 'business premises' to avoid confusion.

²⁵ Section 5(1) *retail shop* (a).

Draft Report submissions

“Retail shopping centre”:

The Draft Report proposed: “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”.

While the majority of stakeholders (the Shopping Centre Council, Law Society Northern Territory and Property Council of Australia) supported the repeal of paragraph (b)(iii) of the definition, the National Retail Association queried the impact upon a tenant whose business suffered from an action of the body corporate.

“Retail shop”:

The Draft Report recommended “(t)hat 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” noting that it would “appear appropriate to retain a broad definition of “retail shop”” given “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”.

Ward Keller suggested that the scope of tenancies which are regulated by the *Business Tenancies (Fair Dealings) Act* be narrowed so that “any tenancies not within a retail shopping centre, as defined in the Act” are no longer covered. Ward Keller noted that “(t)he definition of retail shop is needlessly broad, particularly given that consistent with our experience, the Productivity Commission Report found “there is no convincing evidence that systemic imbalance of bargaining position exists outside of shopping centres””.

The Law Society Northern Territory held a contrary view, indicating that “the Act should continue to cover service businesses, such as medical and legal practices etc.”. The Law Society Northern Territory noted that “(t)he needs of a tenant operating a service business are not dissimilar to the needs of tenants operating businesses”. The Law Society Northern Territory did not agree with the prescription of lists to identify which business was covered by the Act, indicating that “(t)he use of lists in legislation tends to be effective when referring to specific exclusions, rather than as a means of defining broad categories” of inclusion as “it is very difficult to create an exhaustive list to give full effect to an intention to be inclusive”. The Law Society Northern Territory concluded that amending the Act to provide a list would likely “increase the prevailing confusion”.

The Property Council of Australia submitted that “(h)istorically, the intent of the legislation was not to include the premises of office or professional businesses. The original purpose of the Act was to regulate leasing of premises used for the retail sale of goods”. On that basis, the Property Council of Australia recommended that the definition be amended to reflect that position. The Property Council of Australia considered that exclusion of offices and service businesses would not affect the fair regulation of outgoings in shopping centres, noting “if this is not an issue in NSW or Queensland, we fail to see on what basis it could be considered an

issue in the NT". The Property Council of Australia did not support the use of a list "as it will still result in some uncertainty as to what retail shop businesses are covered and those which are not".

The National Retail Association submitted that "(a)ll shops within a shopping centre should be covered by the Act. If not covered, there are considerable opportunities for some tenants not paying their share of outgoings, plus it creates a second tier of leasing whereby matters of disclosure apply to some and not to others, matters such as compensation under section 47 for disruption as a result of an action of the landlord are not available to the tenant".

The Shopping Centre Council did not support the retention of the current provisions, noting that "(t)his would be a wasted opportunity to remove unnecessary regulation and business costs". The Shopping Centre Council further noted "(t)he argument that the retention of these provisions is necessary to ensure the fair regulation of outgoings in a shopping centre is wrong. It will be seen from the definition of a 'retail shopping centre' in section 5 of the Act that this would have no impact on shopping centres, as demonstrated by the experience in NSW and Queensland".

Discussion

"Retail shopping centre":

The discussion of this definition has focused on the issue of common ownership of units within a unit title scheme or under a single units plan. While it is correct that the nature of unit title does not on its own connote common ownership, paragraph (b)(iii) of the retail shopping centre definition does not imply common ownership. Indeed, on its construction, paragraph (b)(iii) does entirely the opposite. While paragraphs (b)(i) and (ii) directly relate to common ownership, paragraph (b)(iii) simply deems premises within a unit title as being a retail shopping centre where five or more of the premises are "used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services"²⁶. Paragraph (b)(iii) is therefore a matter of locational circumstance, rather than ownership.

In terms of the policy intent of paragraph (b)(iii), it would appear that the intent was to capture those units that effectively operate as a shopping centre but would otherwise not fall within the scope of the Act due to lack of common ownership. While it is correct that the definition of 'retail shop' would likely cover aspects of a particular shop within the unit complex²⁷, the term 'retail shopping centre' has broader connotations and specific applications within the Act, including outgoings²⁸, capital costs²⁹, notice of alterations³⁰, geographical restrictions³¹, and trading hours³². These broader applications take into account

²⁶ Section 5(1) *retail shopping centre* (a).

²⁷ Section 5(1) "*retail shop* means premises that are used wholly or predominantly for:

(a) the sale or hire of goods by retail or the retail provision of services (whether or not in a retail shopping centre)...".

²⁸ Section 38. See also section 5(1) *outgoings*.

²⁹ Section 43.

³⁰ Section 46.

³¹ Section 74.

that while the landlord may not be the common owner of all the units, due to the shared responsibility that unit titles create for common property (and related matters), the landlord will nevertheless have a degree of influence over the operation and management of the complex through membership of the Body Corporate.

As privity of contract prevents a tenant from pursuing rights under the lease or the Act against the Body Corporate in relation to those matters noted above, it is appropriate that the protections which are derived through the definition in paragraph (b)(iii) be retained. Those protections are not unduly arduous due to inbuilt limitations. For example, under section 47, the landlord will not be held liable in cases where the landlord is complying with “a duty imposed by or under an Act”³³, such as a Body Corporate’s rules or determinations made in accordance with the *Unit Titles Act* or the *Unit Title Schemes Act*. Section 47(3) also provides scope for the landlord to minimise exposure to potential breaches through declaring up front the machinations associated with the Body Corporate.

It is also noted that similar definitions to paragraph (b)(iii) exist in other jurisdictions’ retail tenancy legislation³⁴.

“Retail shop”:

The opening statement of the Second Reading Speech for the Business Tenancies (Fair Dealings) Bill noted: “The prime purpose of the bill is to establish a regulatory framework that promotes greater certainty, fairness and clarity in the commercial relationship between landlords and tenants, for certain small business tenancies. In the main, the regulatory provisions of the act will apply to shops and premises of a like nature”³⁵. The definition of retail shop identifies those certain small businesses as being those who sell or hire goods on a retail basis, or who provide retail services³⁶ and those businesses that operate in a retail shopping centre³⁷. The primary scope of the Act therefore is to provide certain protections for businesses that offer goods and services to the general public and those businesses that operate in a retail shopping centre. This approach would appear to be consistent with similar definitions of ‘retail shop’ provided in other jurisdictions’ retail tenancy legislation³⁸.

While ‘sophisticated’ ‘medium sized businesses’ like real estate agents, stockbrokers, accountants, lawyers and medical practices may not necessarily require shielding in all tenancy related matters, they nevertheless benefit from the protections and certainties

³² Section 75.

³³ Section 47(4)(b).

³⁴ Section 3 **retail shopping centre** (b)(ii), *Commercial Tenancy (Retail Shops) Agreements Act (1985)* (WA); section 8(b)(ii) *Leases (Commercial and Retail) Act (2001)* (ACT); section 3(1) “retail shopping centre” (b) *Retail and Commercial Leases Act (1995)* (SA).

³⁵ Hansard 21 August 2003.

³⁶ Section 5(1) **retail shop** (a).

³⁷ Section 5(1) **retail shop** (b).

³⁸ Section 3 **retail shop** (a) *Commercial Tenancy (Retail Shops) Agreements Act (1985)* (WA); section 12(1)(b) *Leases (Commercial and Retail) Act (2001)* (ACT); Schedule 1, clause 1 retail premises (b) Fair Trading (Code of Practice for Retail Tenancies) Regulations (1998) (Tas); section 3 “**retail shop**” (b) *Retail Leases Act (1994)* (NSW); Schedule – Dictionary retail shop (a) *Retail Shop Leases Act (1994)* (Qld).

offered by the Act³⁹. 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. In terms of application to small manufacturing businesses that have a small retail service element, it is noted that the definition of “retail shop” only applies to premises that are wholly or predominantly used for retail business. It is unlikely that an occasional retail sale would bring a business that predominantly undertakes wholesale or trade manufacturing within the scope of the Act.

While there may be distinctions between a retail business and a business that operates within a retail shopping centre (ie not necessarily a retail business), there is nevertheless an identified need to include those businesses that operate in a shopping centre within the scope of the Act. As the Law Society Northern Territory and the National Retail Association noted, those tenancies may face equity issues which may place them, and other tenants, at a disadvantage if there were a blanket exclusion. Non-retail businesses that operate in a shopping centre are nevertheless effectively “of a like nature” as they are operating in a retail setting and are thus exposed to those matters that are particular to shopping centre tenancies. On that basis, it would appear appropriate to retain the application of coverage to those businesses “of a like nature” (ie those businesses that operate in a retail setting).

Other considerations

The discussion at 4.4.3 below raises the question of whether the definition of “retail shopping centre” needs to be revisited in the context of office towers. The primary factor influencing the application of the Act is whether the business is operating in a retail setting. That is, the business is either a retail business (whether it be retailing goods or services), or is a business that is operating in a retail shopping centre. While there is a need to ensure that tenants have a level of protection, there is also a need to ensure that the application is balanced. In this context, the automatic inclusion of office tower tenancies within the scope of the Act simply by virtue of the office tower sitting on top of a shopping centre is questionable. Although there may be commonality in terms of a retail business and a non-retail business occupying premises within the same building, that may be where the “like nature” ceases where there is a reasonable degree of physical disassociation or separation between the retail and non-retail premises.

The New South Wales *Retail Leases Act* expressly excludes an office tower from operation of that Act⁴⁰. While the NSW approach is favoured by Property Council of Australia and the Shopping Centre Council, the ‘all or nothing’ approach does not necessarily allow for consideration of individual circumstances. The Western Australian *Commercial Tenancy (Retail Shops) Agreements Act* (1985) defines a retail shopping centre in a similar manner to that in the *Business Tenancies (Fair Dealings) Act*, with one noticeable qualification: “if the premises are in a building with 2 or more floor levels, (the retail shopping centre) includes only those levels of the building where a retail business is situated”⁴¹. Section 11(1) of the

³⁹ Banks on the other hand are likely to be complex corporate entities and would fall outside of the general scope of the Act by virtue of section 6(d)(i)(a).

⁴⁰ Section 5(d) *Retail Leases Act* (1994) (NSW).

⁴¹ Section 3(1) *Commercial Tenancy (Retail Shops) Agreements Act* (1985) (WA). Parentheses added.

Australian Capital Territory *Leases (Commercial and Retail) Act* also provides a clear distinction by excluding areas that are “geographically distinct (even if it is in the same building)⁴² from the areas in the shopping centre containing premises⁴³ that are either retail premises or small commercial premises⁴⁴.

It would be appropriate to amend the definition of “retail shopping centre” so that only “shops and premises of a like nature” are captured through the application of a geographical distinction such as that offered in section 11 of the ACT *Leases (Commercial and Retail) Act*.

Section 5 also provides definitions for: fitout obligations; key-money; outgoings; and retail shop lease. The absence of stakeholder discussion on these definitions suggests that they are non-contentious and are considered to be generally appropriate.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, consideration could be given to retaining relevant definitions within a code of practice with a revised definition of “retail shopping centre” so that only “shops and premises of a like nature” are captured.

4.4.3 Sections 6 to 8: Exemptions

Sections 6 to 8 limit the application of the *Business Tenancies (Fair Dealings) Act* over certain tenancies under certain circumstances. The policy intent behind the exemptions was to provide a level of flexibility in the operation of the Act, particularly in cases where the need for statutory protection of a tenant was not readily evident.

Section 6 excludes tenancies over premises that: have a lettable area of 1 000m² or more⁴⁵; are used for carrying out a business on behalf of the landlord⁴⁶; are leased by a listed corporation or its subsidiary⁴⁷; are located within a premises where the principal business carried out is a cinema or bowling alley and the shop is operated by the person who operates the cinema or bowling alley⁴⁸; or are of a class or description that has been exempted under the Regulations⁴⁹.

Section 7 limits the application of the Act to only that of Part 13 (repossession of the premises⁵⁰, tenant rights⁵¹ of association and mitigation of damages for breach of lease⁵²)

⁴² Parentheses supplied.

⁴³ Section 11(1)(b) *Leases (Commercial and Retail) Act* (2001) (ACT).

⁴⁴ Section 11(1)(a) *Leases (Commercial and Retail) Act* (2001) (ACT). Section 7 defines retail premises and commercial premises. Small commercial premises are defined in the Schedule Dictionary as “commercial premises with a lettable area of no more than 300m²”.

⁴⁵ Section 6(a).

⁴⁶ Section 6(b).

⁴⁷ Sections 6(d)(i) and (ii).

⁴⁸ Section 6(c).

⁴⁹ Section 6(e). There are presently no exempt premises under the Business Tenancies (Fair Dealings) Regulations.

⁵⁰ Sections 123 to 132.

⁵¹ Section 133.

⁵² Section 134.

where the term of the lease is of less than six months duration with no option to renew⁵³ or has not been otherwise renewed⁵⁴; where the term is for 25 years or more⁵⁵; or where a lease is of a class of lease exempted by the Regulations⁵⁶.

Section 8 provides that the Regulations may exempt a specified person, lease or shop⁵⁷, or a specified class of persons, leases or shops⁵⁸ from the operation of the Act either conditionally or unconditionally. There are presently no exempt persons, leases or shops under the Business Tenancies (Fair Dealings) Regulations.

Issues Paper submissions

The Issues Paper sought stakeholder input in relation to a number of exemptions that were considered to warrant further assessment:

The 1 000m² exemption:

The Issues Paper asked for stakeholder comment on whether the Act should be amended to express whether the 1 000m² exemption applied just to the lettable area of the shop, or extended to encompass non-retail spaces that may fall within the tenancy (such as rights to specific carparks or use of store rooms not directly attached to the shop).

While stakeholders who commented on the 1 000m² exemption were generally in agreement that this was a perceived issue and that there have been no actual problems with the application of the exemption, there was some divergence as to what comprised the lettable area of a shop.

The Shopping Centre Council noted that in its “14 years of existence we are unaware of this ‘problem’ ever being raised. It should be noted that the average specialty 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”. The Shopping Centre Council concluded that “(t)here is no need for an amendment to the Act”.

The National Retail Association indicated that “(t)he Act should be consistent with the majority of the other states and include the 1000 square metres 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”.

⁵³ Section 7(1)(a).

⁵⁴ Section 7(4).

⁵⁵ Section 7(1)(b).

⁵⁶ Section 7(1)(e). There are presently no exempt leases under the Business Tenancies (Fair Dealings) Regulations.

⁵⁷ Section 8(a).

⁵⁸ Section 8(b).

The Law Society Northern Territory on the other hand noted “the minority view is that the calculation of lettable area is limited to the shop floor where in the experience of the committee any calculation has included the total lettable area (eg car-parks, storage sheds). Despite the Law Society Northern Territory being unaware of any difficulties arising from this confusion, the Society accepts that a simple amendment could clarify the exemption”. The Law Society Northern Territory saw “no hardship arising from the calculation including the total lettable area”.

Office tower that forms part of a retail shopping centre:

The Issues Paper invited submissions on the question: *Should the Act exclude from its operation any premises in an office tower that forms part of a retail shopping centre?*

All stakeholders submitted that premises in an office tower that forms part of a retail shopping centre should be excluded from the operation of the *Business Tenancies (Fair Dealings) Act*.

The Property Council of Australia noted that “as it currently stands (the Act) results in many non-retail shop tenancies in office towers having to be treated as retail shop tenancies” due to the Act deeming the whole building as a shopping centre where there are five or more retail shops within that building. With “(m)ost recent large building developments in Darwin’s CBD (being) of a mixed-use type, with retail shops at ground level and other commercial or residential premises on other levels”, the Property Council of Australia recommended that “any premises in an office tower that forms part of a retail shopping centre” should be excluded from operation of the Act under section 6. In making that recommendation, the Property Council of Australia noted “(u)nder a similar section in the NSW legislation there is a clause that excludes premises in an office tower from operation of the Act”.

In agreeing with the proposition, the Shopping Centre Council noted the current “effect of bringing under the Act tenancies for which the Act has little relevance... (adding) unnecessary and costly regulatory burden on both lessors and lessees for no demonstrable reason”. The Shopping Centre Council further noted that section 5 of the *Retail Leases Act* (NSW) excluded “any premises in an office tower that forms part of a retail shopping centre”⁵⁹.

The National Retail Association took the view that “(o)ffice towers in shopping centres should not be included provided they pay their fair share of statutory charges and protection is provided to ensure that charges that should be allocated to the towers are not apportioned to retail shops”.

The Law Society Northern Territory noted that as “(t)he definition of retail shopping centre is aimed at premises used for the sale and hire of goods... offices above a retail shopping centre ought be excluded”.

⁵⁹ Section 5(d) *Retail Leases Act* [1994] (NSW).

Government Tenancies:

The Issues Paper posed the question: *Is there a need to exclude Government tenancies from the operation of the Act?*

The Shopping Centre Council offered qualified support for excluding government tenancies from the scope of the Act. The Shopping Centre Council noted that “(t)he fundamental principle of retail tenancy legislation should be the protection of small businesses from unfair market power and therefore, to quote from the objectives 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... 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 National Retail Association stated “Government tenancies do not necessarily need to be covered by the operation of the Act”.

The Law Society Northern Territory held the view that “there is a need to exclude government tenancies from the operation of the Act except from Part 13”.

Draft Report submissions

The Draft Report considered stakeholder input on the exemptions canvassed in the Issues Paper as well as matters raised by stakeholders that were in addition to those discussed in the Issues Paper. Possible policy responses canvassed in the Draft Report and stakeholder responses are outlined below.

The 1 000m² exemption:

On the basis of the submissions to the Issues Paper, the Draft Report proposed: *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).*

Stakeholders generally supported retention of the 1 000m² exemption. The Law Society Northern Territory stated “the current exclusion... is reasonable and should be retained”.

The National Retail Association noted that “(t)his exemption has been in existence since 1994 and was debated at length at the time and each review in all jurisdictions that have taken place since then. There have been no problems with the exemption that see any amendment being necessary”. The National Retail Association also noted that “(t)he majority of small businesses exceeding the floor limit are located in strip centres and do not have an imbalance in negotiating power, as they are in demand with retailers being one of the few tenants who have the capacity to fill the premises and run a successful business. They are usually supermarkets and bulky goods that do not operate from the larger centres”.

The Property Council of Australia supported retention of the 1 000m² exemption, however expressed the view “that Part 13 should only apply to retail and not all business tenancies”.

The Shopping Centre Council were also supportive of the retention of the 1 000m² threshold however, could “see no reason why there should be an exclusion relating to Part 13”.

Office tower that forms part of a retail shopping centre:

In noting stakeholder unity on the exclusion of office towers from the scope of the Act, the Draft Report proposed: *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”.*

In offering support for the proposal, the Shopping Centre Council reiterated its arguments put forward in its previous submission.

While supporting “the concept that the Act not apply to offices in towers where there may be some retail tenancies”, the Property Council of Australia queried the proposition “that the tower would contain only *premises which come within paragraph (a) of the definition of ‘retail shop’*”. In raising this query, the Property Council of Australia stated that it “would have thought a change to the definition of ‘retail shopping centre’ would be the appropriate way of dealing with this issue”.

The Law Society Northern Territory suggested the better way to address this issue is through amending the definition of retail shopping centre rather than the definition of retail shop, noting that “a tenancy meeting the ‘retail shop’ requirements can operate in complete isolation of the activities of the shopping centre located elsewhere in the same office tower”. The Law Society Northern Territory indicated that “the Act contains additional disclosure requirements on a tenancy subject to the ‘retail shopping centre’... which are not required of tenancies defined as a ‘retail shop’. Additional obligations should be imposed where they are warranted, that is where the tenancy is actually part of the shopping centre complex”.

The National Retail Association submitted that “(p)remises in an office tower within the shopping centre should be excluded unless that premises is a retail shop as defined under the Act”.

Government Tenancies:

The Draft Report proposed 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.*

The Shopping Centre Council supported the proposal.

The Law Society Northern Territory’s submission stated that it “has no objections to the Act, not applying to the Northern Territory of Australia and the Commonwealth of Australia, provided that Part 13 continues to apply”.

The Property Council of Australia agreed with exempting government from the operation of the Act however, saw “no reason why Part 13 should apply to Government tenancies, whose

commercial weight and standing, and financial capacity, does not warrant consumer protection of this nature”.

The National Retail Association noted that “(g)iven that local, territorial and federal government should be sophisticated there is no need for them to be covered by the Act”.

Airport Leases:

As part of an expanded discussion on operation of the *Business Tenancies (Fair Dealings) Act*, the Draft Report asked the following: *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)?*

The Shopping Centre Council submitted that “if all other retail shop leases in the Northern Territory are to be regulated (other than those specifically exempted in section 7) we see no justification for retail shop leases at the airports being exempted from the Act”.

The Property Council of Australia noted that “(a)irport leases on Commonwealth land should not be covered by the Act as the land is under a long term lease from the Commonwealth and is subject to extensive obligations under both the original sale agreement and the *Airports Act* (Cth). The *Airports Act* also contains specific obligations on the airport lessee companies in dealing with sub-lessees”. The Property Council of Australia also indicated that Part 13 should not apply to airport leases or sub-leases.

The Law Society Northern Territory stated that it was “not aware of any reasons why the exemption concerning airport leases should not be clarified, and if necessary extended and broadened to include the airports at Alice Springs and Tennant Creek. Whether this is done by amendment of the Act or regulations is of no concern to the Society”.

Exclusion for ‘major lessees’:

The Draft Report noted the provision of a separate class of lessee, a major lessee, in the Queensland *Retail Shop Leases Act*, however concluded that there was not a strong argument for establishing such a class of lessee in the Territory.

The Property Council of Australia and the Shopping Centre Council disagreed with the Draft Report’s conclusion. Both Councils held the view that the introduction of a major tenant classification in Queensland resulted in a reduction in red tape and cost for both landlords and ‘sophisticated’ tenants.

The National Retail Association questioned the need for a major lessee distinction, noting that “(n)o other jurisdiction other than Queensland has this provision”.

Discussion

The 1 000m² exemption:

The question originally posed related to whether there was a need to clarify that the lettable area related to the whole of the property to which the tenant was entitled to access on an exclusive basis (ie the shop itself and any non-shop areas that the lease covered such as specific carparks or store rooms that are not attached to the shop proper).

The conclusion that can be drawn from stakeholder comments is that there is no particular issue with either there being an exemption from the Act for leases with a lettable area exceeding 1 000m², or the assessment of that area being based on a calculation of total lettable area, not just the area contained within the actual shop itself. With the average retail shop comprising around 100m², as the Shopping Centre Council noted in its submission to the Issues Paper, such a move would not adversely impact upon tenants as the lease relates to the total lettable area, not the entirety of the premises in which the shop is located. It is difficult to conceive the average small (100m²) shop lease exceeding the 1 000m² threshold due to a lease entitlement to an exclusive carpark or store room. Although this would appear to be a non-issue, it would nevertheless be prudent to clarify that the 1 000m² threshold applies to the total lettable area given that that is what the lease itself would relate to.

Office tower that forms part of a retail shopping centre:

Through the definitions of retail shop and retail shopping centre⁶⁰, the *Business Tenancies (Fair Dealings) Act* applies to:

- any business located in a cluster of more than five premises that are used “wholly or predominantly for the sale or hire of goods by retail or the retail provision of services”⁶¹. The business itself does not necessarily have to be undertaking retail sales or services, rather the business merely has to be located in “premises used wholly or predominantly for:... the carrying on of a business in a retail shopping centre”⁶²; and
- any business that undertakes retail sales or services irrespective of whether they are located in a retail shopping centre⁶³.

By implication, the Act will apply to any business located in an office tower that forms part of a building that also has a shopping centre situated within it, or a business that retails goods or services wherever located, including a sole café located in a building that is otherwise just an office tower. While this is generally in keeping with the stated policy intent of the Act applying to “shops and premises of a like nature”, stakeholders have identified a need to ensure a distinction between those leases to which the Act was intended to apply, that is, leases entered into by small businesses who operate in a retail setting, and those that it was not (ie businesses who operate in a non-retail setting). As noted in 4.4.2, it would be

⁶⁰ Section 5(1).

⁶¹ Section 5(1) *retail shopping centre* (a).

⁶² Section 5(1) *retail shop* (b).

⁶³ Section 5(1) *retail shop* (a).

appropriate to amend the definition of “retail shopping centre” so that only “shops and premises of a like nature” are captured.

Government Tenancies:

Government tenancies are presently captured by the Act through operation of section 4 which “binds the Crown in right of the Northern Territory and, to the extent the power of the Legislative Assembly permits, the Crown in all its other capacities”. This provision is not unusual and may be found in many Territory Acts, either in the format of section 4 or some other variant, as well as around Australia.

In the Territory, equivalent provisions to section 4 are found in other Acts that relate to property leasing: *Caravan Parks Act*; *Law of Property Act*; *Residential Tenancies Act*; *Retirement Villages Act*.

Variations to section 4 that bind the Crown are also found in retail tenancy legislation in New South Wales⁶⁴, Western Australia⁶⁵; Queensland⁶⁶; Victoria⁶⁷; and Tasmania⁶⁸. Section 7 of the Australian Capital Territory’s *Interpretation Act* deems all Acts to bind the Crown unless otherwise specifically provided for. The ACT’s *Leases (Commercial and Retail) Act 2001* excludes “territory leases” from the leases to which that Act applies⁶⁹ however, that Act does not include a provision that rebuts the deeming against the Crown in all its personas. The result is that that Act most likely binds the Crown except in its right of the ACT. South Australia expressly excludes the Crown from application of the *Retail and Commercial Leases Act (1995)*⁷⁰.

At its base level, legislation enacted by parliament reflects the derogation of the Crown’s sovereignty to the Parliament to make such laws. Such derogation is subject to the Crown’s consent on the legislation so made in Parliament, as evidenced through the necessity for royal assent before a Bill becomes law. Notwithstanding the historical background to the initial derogation of the Crown’s sovereignty, the Crown in right of itself retains immunity or exemption from the laws of the land unless it expressly states that it is to be bound by a particular statute⁷¹.

Nevertheless, from a public policy perspective, there is an inherent desire that the Crown (in all its personas) be bound by the same rules which apply to its citizens generally. That policy is influenced by whether Crown immunity creates a risk or unfair benefit toward the Crown or potential adverse effect on third parties, against potential hindrance of government efficacy⁷².

⁶⁴ Section 83 *Retail Leases Act (1994)*.

⁶⁵ Section 4 *Commercial Tenancy (Retail Shops) Agreements Act (1985)*.

⁶⁶ Section 10 *Retail Shop Leases Act (1994)*.

⁶⁷ Section 14 *Retail Leases Act (2003)*.

⁶⁸ Section 14 *Australian Consumer Law (Tasmania) Act (2010)*.

⁶⁹ Section 12(6) *Leases (Commercial and Retail) Act 2001*.

⁷⁰ Section 4(c)(iv).

⁷¹ The judgement of Lord Diplock in *British Broadcasting Corporation v. Johns* (1965) Ch 32; [1964] 1 All ER 923 provides commentary on this topic.

⁷² <http://www.dpmc.govt.nz/cabinet/circulars/co02/4>.

In the case of retail tenancies, the Crown in right of the Territory is clearly of a capacity that would possess sophistication and market power as either landlord or tenant. As the Shopping Centre Council noted in its submission to the Issues Paper, one of the objects of the Act is to “the certainty and fairness of retail shop leasing arrangements between landlords and tenants”⁷³. With the ability for the government to exercise market influence either as a landlord or tenant, it would be appropriate on public policy grounds for government to be bound by the same rules.

Airport Leases:

In response to the question posed in the Draft Report, the Property Council of Australia took the view that airport leases should be exempt “as the land is under a long term lease from the Commonwealth and is subject to extensive obligations under both the original sale agreement and the *Airports Act* (Cth)”. While Part 2 of the *Airports Act*⁷⁴ deals with leasing and management of airports, it does not appear to go to retail tenancy matters arising through sub-leasing. It is also difficult to assess the nature of tenant protections contained in airport sale/head lease agreements due to commercial confidentiality and the lack of privity of contract. The absence of privity of contract would also raise barriers for tenants seeking to enforce any protections under the sale agreement/head lease.

Regulation 10 of the Business Tenancies (Fair Dealings) Regulations exempted from the operation of the Act under section 8 an airport retail shop lease for 6 months from the date on which the regulation came into effect. Regulation 10 was inserted by SL No. 42 of 2004 and commenced on 22 December 2004. Regulation 10 expired close to 10 years ago. While the genesis of the airport lease exemption is not entirely clear, there does not appear to have been sufficient need to warrant its continuation. As such, further consideration of the question is moot.

Exclusion for ‘major lessees’:

As the National Retail Association noted, Queensland is the only jurisdiction that has a class of “major lessee” tenants. The major lessee provisions in the Queensland *Retail Shop Leases Act* relate to: exempting the landlord’s requirement to provide a disclosure statement at least seven days prior to entering the lease⁷⁵; exempting the landlord’s requirement to provide a disclosure statement at least seven days prior to an assignment of a lease⁷⁶; exempting the lessee from the requirement to furnish financial and legal advice reports⁷⁷; and exempting provisions relating to timing and basis of rent reviews (subject to the obtaining of appropriate financial and legal advice and the lease stipulating the timing and basis of any rent review)⁷⁸. A major lessee is defined as “the lessee of 5 or more retail shops in Australia”⁷⁹.

⁷³ Section 3(a).

⁷⁴ *Airports Act* 1996 (Cth).

⁷⁵ Section 22(6)(a)(i) *Retail Shop Leases Act* 1994 (Qld).

⁷⁶ Section 22C(2)(a)(i) *Retail Shop Leases Act* 1994 (Qld).

⁷⁷ Section 22D *Retail Shop Leases Act* 1994 (Qld).

⁷⁸ Sections 27(8) and 27A(1A) *Retail Shop Leases Act* 1994 (Qld).

⁷⁹ Schedule – Dictionary *Retail Shop Leases Act* 1994 (Qld).

While it is arguable that a tenant who leases five or more shops would have a level of sophistication above those who only lease one, the degree of that sophistication may be challenged when applied to five separate leases in five different jurisdictions. This nuance may be best evidenced through the pursuit of national uniform disclosure documents. Nevertheless, while there may be a higher level of sophistication present, that sophistication does not necessarily translate to an equalling or shifting of the market power between the tenant and landlord. Such presumed sophistication and market positioning would be more readily apparent were the definition to apply solely to the host jurisdiction rather than nationally.

Other exemptions:

The *Business Tenancies (Fair Dealings) Act* contains a number of other exemptions or exclusions that were not the subject of stakeholder comment. Those exemptions include: premises used for carrying out a business on behalf of the landlord⁸⁰; premises leased by a listed corporation or its subsidiary⁸¹; premises located within a premises where the principal business carried out is a cinema or bowling alley and the shop is operated by the person who operates the cinema or bowling alley⁸²; premises of a class or description that has been exempted under the Regulations⁸³; where the term of the lease is of less than six months duration with no option to renew⁸⁴ or has not been otherwise renewed⁸⁵; where the term is for 25 years or more⁸⁶; where a lease is of a class of lease exempted by the Regulations⁸⁷; or where a specified person, lease or shop⁸⁸, or a specified class of persons, leases or shops⁸⁹ has been exempt from the operation of the Act either conditionally or unconditionally in the Regulations.

The absence of discussion on these exemptions suggests that they are non-contentious and are considered to be generally appropriate.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, consideration could be given to retaining the existing exemptions and exclusions within a code of practice with clarification as required to the 1 000m² total lettable area.

⁸⁰ Section 6(b).

⁸¹ Sections 6(d)(i) and (ii).

⁸² Section 6(c).

⁸³ Section 6(e).

⁸⁴ Section 7(1)(a).

⁸⁵ Section 7(4).

⁸⁶ Section 7(1)(b).

⁸⁷ Section 7(1)(e).

⁸⁸ Section 8(a).

⁸⁹ Section 8(b).

4.4.4 Part 2 (sections 12-16): Role of Commissioner of Business Tenancies (Office of Consumer Affairs)

Outline of the current position/issues

Part 2 of the *Business Tenancies (Fair Dealings) Act* establishes the statutory office of the Commissioner of Business Tenancies⁹⁰ and sets out the powers and functions of the Commissioner. The functions of the Commissioner of Business Tenancies are relatively broad, and range from investigating and researching matters relating to retail shop leases generally⁹¹ through to enforcement of breaches of the Act⁹². In addition to the general powers provided under section 12, additional powers are conferred on the Commissioner throughout the Act for specific matters⁹³.

Draft report submissions

Although not stated directly, the Discussion Paper posed the question: *Should there continue to be a role for a statutory officer such as the Commissioner of Business Tenancies (currently the Commissioner of Consumer Affairs), in the retail tenancy sphere?* The question was raised in the context of provisions not otherwise discussed that might be regarded as ‘red tape’ issues.

The Property Council of Australia provided general support to “any proposal that removes unnecessary red tape”, however did not specifically discuss the subject of the role of the Commissioner of Business Tenancies.

In responding to this topic, though the National Retail Association expressed a general disappointment with the apparent regard parties had toward mediation under Part 11, the Association did not offer comment on the roles and functions of the Commissioner of Business Tenancies.

Discussion

The question posed in the Discussion Paper draws from the Commissioner’s experience with the operation of the Act, and in particular Part 11. While 4.4.46 discusses the substantive aspects of Part 11, it is nevertheless appropriate to explore at a more general level the necessity for a statutory position such as that of the Commissioner of Business Tenancies.

While the involvement and intervention by a statutory officer is not necessarily required for general contractual disputes presently dealt with under Part 11, there is a stronger argument for retention of the Commissioner’s investigative and enforcement powers as well as the general function of consumer advocate/educator. If a Code of Practice were promulgated

⁹⁰ Section 12(1) and (2).

⁹¹ Section 12(3)(a).

⁹² Section 12(3)(d).

⁹³ For example: appoint a valuer for rent reviews (s28); conduct dispute resolution processes and inquire into and determine tenancy claims under Part 11.

under Part 13 of the *Consumer Affairs and Fair Trading Act*, the Commissioner of Consumer Affairs would be able to exercise the inherent oversight which that Act provides.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, consideration could be given to retaining oversight by the Commissioner of Consumer Affairs through establishing a code of practice under Part 13 of the *Consumer Affairs and Fair Trading Act*.

4.4.5 Part 3: Rights and duties before retail shop lease entered into

Outline of the current position/issues

Sections 17 to 22 of the *Business Tenancy (Fair Dealings) Act* govern the processes associated with pre-lease negotiations, setting out base requirements to be addressed before a lease is entered into. These requirements include the landlord providing a copy of the lease to the prospective tenant when negotiations commence⁹⁴, and the provision of certain information by the landlord to tenant⁹⁵ and vice versa⁹⁶. Failure to comply with pre-lease disclosure requirements may result in a penalty of up to 100 penalty units⁹⁷ and a tenant may terminate the lease in certain cases where the landlord has failed to provide the tenant with a disclosure statement⁹⁸. A tenant may also not be liable for contributions toward certain costs in cases where those costs are not listed in the landlord's disclosure statement⁹⁹ and may be entitled to compensation for pre-lease misrepresentations¹⁰⁰.

Issues paper submissions

Disclosure Statements:

The Property Council of Australia referred to its 2008 submission on the Act, which recommended a review of disclosure statements for retail shops outside of shopping centres on the basis that the disclosure requirements for tenancies outside of a shopping centre were "excessive" as they "largely reflect a shopping centre situation".

The Shopping Centre Council noted New South Wales, Victoria and Queensland's development of a uniform disclosure statement, indicating a preference for the Territory to adopt the New South Wales version. The Shopping Centre Council also recommended amending the requirement for a landlord to provide a tenant with a disclosure statement at least seven days before the retail shop lease is entered into so as to enable the seven day period to be waived.

⁹⁴ Section 17(b).

⁹⁵ Section 19 landlord's disclosure statement.

⁹⁶ Section 21 tenant's disclosure statement.

⁹⁷ Sections 17, 19(1) and 21(1).

⁹⁸ Section 20(1).

⁹⁹ Section 22.

¹⁰⁰ Section 18(1) and (2). A landlord may also be entitled to compensation for pre-lease misrepresentations on the part of the tenant (section 18(3)).

Draft report submissions

Provision of lease:

The draft report suggested that section 17 be amended so as to remove the criminal sanction for failure to provide lease when negotiations commence.

A number of stakeholders supported the recommended proposal (National Retail Association, Shopping Centre Council, Law Society Northern Territory and Property Council of Australia).

Disclosure Statements:

The Draft Report proposed:

- that sections 19 and 20 be amended so that termination for mere failure to provide a timely disclosure statement can only be exercised within a period of two weeks following the actual provision of the disclosure statement. The outer limit of six months should remain and that the parties can, in writing, agree that a formal disclosure statement is not required; and
- amend the regulations so that they provide for the common national disclosure document as approved by Small Business Ministers.

The Draft Report also proposed an option for the parties to agree in writing that a formal disclosure statement was not required, and suggested the removal of the need for a Tenant's Disclosure Statement.

The National Retail Association, the Shopping Centre Council, the Law Society Northern Territory and the Property Council of Australia all supported limiting the tenant's ability to terminate the lease for the landlord's failure to provide a disclosure statement to two weeks after receiving the statement.

Stakeholder responses were also supportive of continuing to require a tenant to provide a disclosure statement. The Law Society Northern Territory believed "the value in retaining such requirements exceeds the burden of red tape this section may present". The Property Council of Australia emphasised retention of the tenant disclosure statement as a mechanism for confirming that the tenant "acknowledges receipt and understanding of the landlord's disclosure statement". The Shopping Centre Council echoed the Property Council of Australia's views, stating that it "is still important that matters in Item 1 of Part B are acknowledged by the tenant even if the matters in Item 2 of Part B appear to duplicate Item 8 of Part A".

While the National Retail Association, the Shopping Centre Council, the Law Society Northern Territory and the Property Council of Australia were supportive of the proposal to adopt a national disclosure statement, the Property Council and the Shopping Centre Council recommended awaiting the outcome of ongoing discussions around format before modifying the existing statements. The National Retail Association expressed a preference toward the New South Wales format.

Separate to the Draft Report's proposal, the Property Council of Australia also raised concerns expressed by its members on the necessity for landlords to make representations and provide information from the lease in disclosure statements in circumstances where sophisticated major tenants have used their bargaining position to impose their own lease terms on the landlord. At issue was the potential for the landlord to be unduly exposed through disclosures made in cases where the landlord was not "properly familiar with the documents that have been submitted by the tenant". To alleviate this issue, the Property Council of Australia recommended "a review of the form of disclosure in these circumstances".

No liability for undisclosed contributions:

The National Retail Association supported the retention of section 22 on the basis that it "eliminates any ambiguity as to what the tenant is required to pay the landlord for Category 1 works and fixtures and fittings that are in the premises that the landlord deems to be his/her property".

Ward Keller Lawyers made reference to the potential for a landlord to contravene section 22 in circumstances where the parties wish to amend a lease to provide for the tenant's liability for payments and contributions. Ward Keller suggested that "there should be clear provision in the Act which permits a landlord to give an updated disclosure in circumstances where a retail shop lease is being amended".

Discussion

Provision of lease:

Ordinarily, it would be expected that a landlord would have a general form of the proposed lease at the time the premises was being let to facilitate negotiations and expedite the letting process. It would then follow that at least a draft of the proposed lease would be available when an offer is made to take up a lease. While it may not be reflective of efficient business practice to await an offer before a landlord elects to settle on preferred lease terms, it is highly debatable whether failure to provide a general form of the proposed lease at the start of negotiations should be a criminal offence.

Disclosure statements:

The basis of a disclosure statement is to simplify some of the more fundamental terms of the lease for ease of reference. While other materials may be used to discern the true intent of the parties and the meaning of certain clauses in the event of a dispute between the parties, at the fundamental level, the lease nevertheless remains the basis of the agreement between the landlord and the tenant. The necessity for a statutory requirement to provide the other party with a disclosure statement may therefore be open to examination given that the disclosure statements contain the very same information necessarily expected to be found in the lease: on the part of the landlord, the details of the premises, rent, permitted use, outgoings and so forth; on the part of a tenant, the tenant's execution of the lease is prima face evidence of the tenant's receipt of the lease, and at the very least, tacit understanding and acceptance of the terms. In this light, the provision of a statutory ability for a tenant to

terminate a lease for a landlord's failure to furnish a disclosure statement, or for providing an incomplete disclosure statement, is also questionable. Statutory avoidance of liability toward certain items that have been provided in a lease, but not a disclosure statement is also problematic as it alters the hierarchy of the contract.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of these provisions do not appear to be warranted.

4.4.6 Section 23: lease preparation costs

Outline of the current position/issues

Section 23 sets out the circumstances under which a landlord may impose in the lease a term that requires the tenant to pay the landlord's costs associated with preparing the lease. Those costs may include legal expenses or expenses associated with the negotiation, preparation and execution of the lease and costs associated with obtaining consents and approvals¹⁰¹.

Draft report submissions

The National Retail Association submitted that "(e)ach party should be responsible for their own costs. The tenant should be responsible for the cost associated with the registration of the lease. Costs associated with survey fees and mortgagee's consent are landlord's costs and should not be recoverable".

Discussion

The common law has over time developed the general notion that parties are entitled to contract as see fit, which necessarily include how the parties decide to allocate costs associated with the preparation of the agreement between them. The general notion is, however, not unfettered and has been restricted by the courts in cases where there has been an excessively uneven level of bargaining position between the parties¹⁰². Legislative intervention has also occurred in matters that have been traditionally seen as characterising that uneven bargaining position, codifying and enhancing the common law position, most notably in consumer and employment fields.

As presently drafted, section 23 does no more than confirm this general position and emphasise that those costs have to be reasonable¹⁰³, have to have been disclosed prior to

¹⁰¹ Section 23(4).

¹⁰² See for example the discussion of Lord Denning MR in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803.

¹⁰³ Section 23(2).

entering into the lease through the landlord's disclosure statement¹⁰⁴ and that the landlord has to provide a copy of the invoice to the tenant¹⁰⁵ when seeking payment/reimbursement.

These matters are somewhat fundamental when considering any transaction, be it personal or commercial, and at a base level, failure to consider such issues in the commercial setting would necessarily raise questions over business acumen aside from anything else. Nevertheless, it is likely that such matters would be captured by the Commonwealth's extension of unfair contract term protections to small businesses. On this basis, retention of a provision similar to section 23 at the Territory level is questionable.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.7 Section 24: key-money on grant of lease

Outline of the current position/issues

Section 24 prohibits the landlord from seeking or accepting key-money, prescribing a maximum penalty of 100 penalty units for an offence. 'Key-money' is defined in section 5 as being "money to be paid or a benefit to be given by way of a premium, or something similar in nature to a premium, where there is no real consideration given for the payment or benefit"¹⁰⁶ that is "in consideration of a benefit in connection with the granting, renewal, extension or assignment of a retail shop lease"¹⁰⁷.

The prohibition does not prevent a landlord from seeking a security deposit, rent in advance, recovery of expenses associated with the preparation of the lease, or payment for granting a franchise associated with the lease¹⁰⁸.

Draft Report submissions

The National Retail Association supported retention of section 24.

Discussion

At its base level, key-money is a payment from the tenant to the landlord of a sum over and above the rent due under the lease for the landlord to do no more than simply grant the lease. Such payments fall outside of the ordinary commercial considerations associated with deciding whether to enter a lease or not. The policy intent behind the prohibition on key-money is to restrict the scope of considerations associated with entering a lease to those matters directly related to commercial decisions about the lease itself.

¹⁰⁴ Section 23(1)(b).

¹⁰⁵ Section 23(1)(a).

¹⁰⁶ Section 5 subparagraph (a) key-money definition.

¹⁰⁷ Section 5 subparagraph (b) key-money definition.

¹⁰⁸ Section 24(4).

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, consideration could be given to including the substance of section 24 within a Code of Practice.

4.4.8 Section 25: provision of signed/registered copies of leases

Outline of the current position/issues

Section 25 sets out timeframes in which a landlord must register the lease (in cases where the lease is to be registered) and provide an executed and stamped copy of the lease to the tenant.

Issues Paper submission

The Shopping Centre Council considered the one month period for registration of a lease was too short. The Shopping Centre Council noted that it had reached agreement with the Australian Retailers Association to lobby for an increase the time period for registration in New South Wales to three months, although at the time of its submission, the Council noted that legislative change had yet to occur. The Shopping Centre Council recommended that the Territory similarly extend the time period to three months. The Shopping Centre Council also noted that section 25 would need to be amended to remove reference to stamp duty “since the payment of stamp duty on leases has been abolished”.

Draft Report submissions

The Shopping Centre Council reiterated its preference to extend the time period to three months, noting that “a proposal to impose a one month time limit on the registration of leases was considered and rejected” in the review of the Queensland *Retail Shop Leases Act*, thereby retaining the status quo of no time limit.

The Property Council of Australia supported increasing the period for registering a lease to three months on the proviso that “(section) 25(1)(c) remain as well”¹⁰⁹.

The Law Society Northern Territory noted that “practitioners are of the view that the timeframe of one month for registration of the lease is unachievable in practice... (and) it would be a better reflection of reality for the time frame... to be three months”.

The National Retail Association stated that “(t)he provision of a signed copy of the lease is essential”, noting that the lease “details all the rights and obligations for the tenants”. However, the National Retail Association did not discuss whether the lease should be registered or the timeframe in which it should occur.

¹⁰⁹ Section 25(1)(c) extends the timeframes by the extent necessary to factor for delays associated with obtaining consent from a head landlord or mortgagee.

Discussion

At its base level, a lease provides a tenant with a right to the exclusive possession¹¹⁰ of real property for a period of time. The effect of a lease creates an equitable interest in the land by the tenant, however, for the tenant to enforce or benefit from that interest (such as through a caveat on the title, or a mortgage), the lease must be in writing and registered on the title. An absence of registration does not affect the ability for the tenant to enforce the lease against the landlord, as the lease is a contract and thus enforceable under contract law. Registration does, however, record the tenant's equitable interest (derived from the lease) on the title which enables the tenant to enforce that interest against others not party to the lease.

While it would be expected that, given the commercial setting, a tenant would always insist on a written lease, it would appear that this is not always the case¹¹¹. The purpose of section 25 therefore is to imply a requirement for leases to be in writing through compelling a landlord to provide an executed copy of the lease to the tenant¹¹² within certain timeframes dependant on whether the lease is to be registered or not. Section 25 however, does not mandate the registration of the lease.

While mandating the provision of a written lease would seem to be a justified regulatory burden to protect the naive tenant and/or landlord, the level of sophistication associated with the commercial nature of retail tenancies tends to discount the need to legislate something that ought to occur as a matter of course. Mandating such a requirement also sits at odds with the fact that a lease has been defined as including oral agreements, and thus by their very nature, have not been reduced to writing¹¹³.

As the Shopping Centre Council noted in its submission to the Issues Paper, the requirement to pay stamp duty on leases was abolished on 1 July 2006¹¹⁴, except for circumstances where consideration under the lease is other than, or in addition to, the rent due under the lease. Retention of the general reference to stamping of leases would seem to be redundant, particularly given the prohibition on key-money (discussed above).

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

¹¹⁰ However exclusive possession is not required for there to be a valid lease under the *Business Tenancies (Fair Dealings) Act*: section 5(1), subparagraph (b) business lease definition.

¹¹¹ As evidenced through the reference to oral leases under section 5(1), subparagraph (b) business lease definition.

¹¹² Sections 25(1)(a) and (b)(ii).

¹¹³ See also the requirement to provide a copy of the proposed lease under section 17.

¹¹⁴ Section 43 *Treasury Legislation and Consequential Amendment Act 2006*: Act No. 19 of 2006

4.4.9 Section 26: Minimum Five Year Term and certificates

Outline of the current position/issues

Section 26 of the *Business Tenancies (Fair Dealings) Act* provides that the minimum term for a retail shop lease is to be 5 years. The 5 year period may be met through the lease period of the original lease, or through the aggregation of the original lease period plus any further periods of extension or renewal provided in the original lease¹¹⁵. An agreement or option to extend a lease will only count toward the 5 year period if it is contained in the original lease¹¹⁶. Where a lease does not meet the minimum 5 year term, section 26 extends the lease by the period required to meet the minimum period¹¹⁷.

A tenant may, however, request that the lease term be less than 5 years provided that the tenant obtains a certificate from a legal practitioner or an accountant that states the tenant has sought, and obtained, advice on the effect of the minimum 5 year period and the waiving of that period¹¹⁸.

Issues Paper submissions

The Property Council of Australia submitted that the requirement for a tenant to obtain a certificate for leases of less than five years should be replaced by the tenant completing a statutory declaration to the same effect.

The Shopping Centre Council recommended repeal of section 26, submitting that “there is no need for the protections of section 26”. The Council noted “(t)he equivalent provision in the Queensland *Retail Shop Leases Act* was removed more than a decade ago – incidentally, at the request of the major retailer association... and there have since been no moves by retailers to seek to reinstate it”. In regard to the option raised in the Issues Paper to replace the present certificate with a statutory declaration, the Shopping Centre Council indicated that this “would simply replace one piece of unnecessary red tape with another”.

The Law Society Northern Territory noted that while there had been some criticism of the need to obtain a certificate, the Society was nevertheless in favour of retaining the requirement “when balancing the consumer protection against the desire to minimise red-tape”.

The National Retail Association was of the view that “(g)iven the size of investment in a retail shop in fixtures, fittings and stock, which in most cases exceeds that of most household mortgages, tenants should seek expert business advice so that they fully understand what obligations they have to fulfil in entering into the lease”.

¹¹⁵ Section 26(1).

¹¹⁶ Section 26(2).

¹¹⁷ Section 26(3).

¹¹⁸ Section 26(4).

Draft report submissions

All stakeholders (the National Retail Association, the Shopping Centre Council, Ward Keller Lawyers, the Law Society Northern Territory and the Property Council of Australia) supported the removal of the minimum five year term.

Discussion

The imposition of a five year minimum term seems somewhat arbitrary and would appear to be historically based on a presumed establishment period for a new small business. In the absence of any rationale to suggest otherwise, section 26 not only impinges on the freedom to contract as parties see fit, but may well impact the viability of the tenant's business through reducing flexibility to adjust to changing circumstances while exposing a landlord to additional 'tenant risk'.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.10 Section 27: rent not payable until fitout is completed

Outline of the current position/issues

In leases where a tenant's obligation to pay rent only commences upon taking possession of the retail shop, section 27 implies a term into the lease stating that the tenant is not obliged to pay rent or other amounts (such as outgoings) in cases where the landlord is obliged under the lease to undertake fitout of the shop and has failed to substantially comply with that obligation¹¹⁹. Section 27 also prohibits a landlord from denying possession to a tenant merely due to the non-compliance¹²⁰.

Draft Report submissions

The National Retail Association supported retention of this section.

The Property Council indicated support for retention of section 27 "but only in circumstances where the tenant is not in occupation of the premises and trading".

Discussion

Section 27 codifies the general notion that a landlord should not be entitled to the benefit of rental payments in circumstances where the landlord is in breach of a fundamental term of the lease, in this case fitting out the shop.

The necessity of this codification is, however, questionable. The failure of a landlord to meet a requirement to fitout the shop would ordinarily be considered to be an actionable breach of

¹¹⁹ Section 27(2)(a).

¹²⁰ Section 27(2)(b).

contract regardless of whether the fitout was to take place prior to occupation, or at some other point during the lease. In addition to the common law remedy of specific performance, the tenant could also have recourse to a claim for unjust enrichment that the breach accrued. In circumstances where the landlord held the fitout out as an inducement to enter the lease, a tenant may also rely upon unconscionable conduct.

In the absence of compelling evidence to the contrary, retention of section 27 is difficult to justify.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.11 Section 28: Rent Reviews

Outline of the current position

Where a retail shop lease allows for a review of the rent payable under the lease or under a renewal of the lease, section 28 of the *Business Tenancies (Fair Dealings) Act* requires a number of matters to be stated in the lease, including when the reviews are to take place and the basis or formula on which the reviews are to be made¹²¹. Section 28 further sets out the basis or formula on which a rent review is to be made¹²². A lease may not preclude or prevent a reduction of rent when the agreed formula is applied¹²³ and a rent review clause will be void where it does not specify how the review is to be made¹²⁴. Where a rent review provision fails to comply with the requirements of section 28, the landlord and tenant must agree to the rate of rent that is to be charged, otherwise the rent is to be determined by a specialist retail valuer appointed by the Commissioner of Consumer Affairs¹²⁵.

Issues Paper submissions

The Issues Paper posed the following question: “Should the Act or Regulations be amended to prescribe further methods of rent review?”

That question was predicated upon a comparison with section 18(3) of the *Retail Leases Act 1994* (NSW) which essentially prohibited the inclusion of more than one method for calculating rent within a lease¹²⁶. As a result of that comparison, the Issues Paper noted that

¹²¹ Section 28(1).

¹²² Section 28(2) provides that the review is to be on the basis of 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; or a basis or formula prescribed by the Regulations. The Business Tenancies (Fair Dealings) Regulations do not presently prescribe a basis or formula for rent review.

¹²³ Section 28(3).

¹²⁴ Section 28(6).

¹²⁵ Section 28(7).

¹²⁶ Section 18(3) of the *Retail Leases Act 1994* (NSW) provided:
(3) A provision of a retail shop lease is void to the extent that it:

“(t)he main intent of section 28(2) (of the *Business Tenancies (Fair Dealings) Act*) is to ensure that landlords cannot specify two or more methods of rent review and then use whichever one produces the best results from their perspective. Arguably, section 28(2) goes further than this by also prescribing the types of rent reviews that can occur”.

The Law Society Northern Territory did not support amending either the Act or Regulations in order to prescribe further methods of rent review. The Law Society Northern Territory indicated that, as it stood, section 28 was “probably more prescriptive than necessary”, and expressed a preference for something closer to section 18(3) of the *Retail Leases Act* (NSW).

The Shopping Centre Council also expressed a preference for replacing section 28 with a provision similar to that of section 18(3) of the *Retail Leases Act* (NSW). The Shopping Centre Council stating that the rent review provisions under section 28 “are very inflexible and, among other things, prevent combination rent reviews being negotiated between lessor and lessee”. The Shopping Centre Council noted that “(s)uch reviews were permissible, by agreement, in all jurisdictions except Victoria and the Northern Territory and are very common within the retail tenancy industry”.

The National Retail Association held a contrary view, noting “provisions covering rent reviews in all the retail legislation have sought to include rent review provisions that were clear, easily understood and gave the landlord the right to only one type of review in any one year. However, a number of landlords then sought to introduce reviews based on formulae that attempted to circumvent the legislation. Hence the introduction of regulations specifying what type or (sic) reviews were to apply and providing that, the insistence of the current market rate being lower, the rent could go down”. The National Retail Association concluded that “(b)ased on the evidence across the whole of the states and territories there is no evidence of any additional methods to be added. The current listings are working effectively”.

Draft Report submissions

The Draft Report made a recommendation that section 28(2) be amended so that it does not limit the kinds of rent reviews that might be agreed to by the landlord and the tenant.

In response to the recommendation, the Law Society Northern Territory expressed the view that parties to a tenancy agreement should have an ability to choose how rent would be calculated during a rent review, however indicated that “some legislative parameters are worthwhile to ensure rental formulas in leases do not become overly complex or convoluted”, preferring that the Act “continue to list options for the calculation of rent, rather than allowing the parties to formulate any method at all (is) as proposed”. The Law Society Northern Territory then suggested that if the section were to be amended, its preference

(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.

would be that the parties “have the ability to choose more than one of the rent review methods listed in section 28(2)” or a combination thereof.

The Property Council of Australia noted that “(t)he proposed change does not appear to achieve anything other than what is in the current legislation”. The Property Council of Australia suggested that there was “market tolerance” for “relaxation of the rent review clause to allow parties some discretion in choosing between different formulas i.e. allow the landlord to choose between, say, a CPI or a fixed percentage increase”.

The National Retail Association suggested that, rather than there being a need to prescribe further methods, section 28(2) should be retained “as elimination of this section will see the reversion to the type of provisions that prevented rents from going down when clearly the index or the market indicated they should”.

The Shopping Centre Council reiterated its position in its response to the Issues Paper.

Discussion

It is clear from the above stakeholder comments that rent review mechanisms are a significant element of the lease arrangement and that, as such, parties need to give due consideration to the rent review issue when they are entering into the lease. It also seems clear that the rent review method that is agreed to between a landlord and tenant should be clear, unambiguous and have certainty of operation.

Arguably, section 28 tries to achieve those objectives by setting out the basis on which rent variations may be considered when conducting a rent review. While some stakeholders have a preference to adopting the New South Wales version of rent reviews, the perceived flexibility of that preference is not necessarily evident in the manner in which the New South Wales provision is drafted. Section 18(3) of the *Retail Leases Act 1994* (NSW) appears to prohibit the inclusion of more than one method for calculating rent within a lease unless both parties agree to which method(s) should be applied, and when, at the time of entering into the lease. In this light, it would appear that the limiting aspect of section 28 is that section 28(2) restricts the basis for rental variation to one factor, rather than an agreed combination. It could be argued that the New South Wales provision adds complexity to what should otherwise be a relatively simple and unambiguous assessment.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, consideration could be given to including a provision similar to section 28 within a Code of Practice.

4.4.12 Sections 29 to 31: review of current market rent

Outline of the current position/issues

Sections 29 to 31 govern the processes associated with determining rent levels where the lease provides for rent to be paid on the basis of current market value. Section 29 sets out matters that are to be implied in a retail lease that provides for rent to be charged on the

basis of current market rates, including factors that can be considered when determining market rent¹²⁷ as well as matters that are excluded from consideration of market rent¹²⁸. Section 29 also provides a dispute resolution mechanism based on a determination of a specialist retail valuer¹²⁹.

Where a retail lease provides for an option to renew or extend the lease based on market rent, section 30 implies into that lease a right for the tenant to seek a determination of current market rent any time between three and six months prior to the last day on which the option may be exercised¹³⁰, and sets out the processes associated with determining the rent¹³¹ and the timeframe for exercising the option to renew¹³². Section 30 also provides a safeguard for the landlord, imposing an obligation on the tenant to pay for the cost of the market rent assessment where the option to renew is not taken up¹³³.

Section 31 governs the manner in which a valuer may deal with information provided under section 29, making it an offence¹³⁴ to either use the information for purposes other than determining the market rent under the lease¹³⁵, or disclose the information to another person¹³⁶ without authorisation¹³⁷. The valuer will also be liable for any loss or damage suffered by the landlord or tenant as a result of the unauthorised use or disclosure¹³⁸.

Draft report submissions

The National Retail Association supported the retention of section 29.

Discussion

Section 29 reflects generally accepted methods for calculating market rent and dispute resolution processes¹³⁹. While these matters are relatively straight forward, it may nevertheless be appropriate to retain similar provisions in a code of practice to provide guidance to landlords and tenants.

¹²⁷ Section 29(1)(a), including (i) the lease itself; (iii) gross rent less landlord's outgoings payable by the tenant; (iv) rent concessions.

¹²⁸ Section 29(1)(b) excludes the tenant's goodwill and the tenant's fixtures and fittings.

¹²⁹ Section 29(1)(c)-(g), (2) and (3).

¹³⁰ Section 30(1)(a).

¹³¹ Section 30(1)(c)(i): market rent to be determined at the time of the request in accordance with section 29.

¹³² Section 30(1)(c)(ii): within 21 days after notification of the determination.

¹³³ Section 30(1)(e). In the event that the option is exercised, the landlord and tenant are to share the cost of the determination equally (section 30(1)(d)).

¹³⁴ Punishable by imprisonment for 12 months or 200 penalty units.

¹³⁵ Section 31(1)(a).

¹³⁶ Section 31(1)(b);

¹³⁷ Section 32(2) authorises the use or disclosure of information provided under section 29 where: both the landlord and tenant consent (section 31(2)(a)); required by a court or the Commissioner (section 31(2)(b)); or for the purpose of making a determination under section 29 (section 31(2)(c)).

¹³⁸ Section 31(3).

¹³⁹ See: ANZVGN 9 Assessing Rental Value (*Australia and New Zealand Valuation and Property Standards*, The Australian Property Institute); IVGN 2 Valuation of Lease Interests (*International Valuation Standards*, International Valuation Standards Council).

Section 30 codifies matters that would be generally considered as ancillary to the exercising of an option to renew/extend a lease at market rent. Ordinarily, where a lease is sufficiently detailed to the extent that it includes an options clause, it would arguably be reasonable to expect that the lease would also provide details on the manner in which the option could be exercised. The necessity for section 30 is therefore questionable.

Section 31 goes to the professional conduct of a valuer. Valuers are not required to be registered in the Northern Territory and there is no general legislation governing conduct or disciplinary matters. As such, section 31 fills that void in relation to regulating unauthorised disclosure of information in a retail tenancy setting. Outside of the retail tenancy setting, membership of professional body appears to be the extent to which a valuer would be subject to professional conduct regulation in relation to matters such as that covered by section 31¹⁴⁰. In terms of seeking legal redress for an unauthorised disclosure, an aggrieved party would have to rely upon the common law¹⁴¹ outside of a retail tenancy setting.

Given the dichotomy between the regulation of valuers under *Business Tenancy (Fair Dealings) Act* and the otherwise self-regulation by industry, the appropriateness of section 31 is unclear. This lack of clarity is further compounded by different regimes around the nation.

Valuers must be registered in Queensland¹⁴², New South Wales¹⁴³ and Western Australia¹⁴⁴. In Victoria valuers are not required to be registered¹⁴⁵, however a code of conduct for valuers applies based upon a Code of Ethics published by the Australian Property Institute¹⁴⁶. In South Australia, while valuers are not required to be registered, valuers are required to obtain authorisation from the Commissioner of Consumer Affairs in order to undertake property valuations for real estate agents¹⁴⁷. Under the *Land Valuers Act 1994 (SA)*, valuers may be subject to a code of practice prescribed by regulations¹⁴⁸ and disciplinary action in the Administrative and Disciplinary Division of the District Court of South Australia¹⁴⁹. In Tasmania, registration of valuers¹⁵⁰ was dispensed with in 2001 following enactment of the *Land Valuers Act 2001*. Notwithstanding the removal of registration requirements, valuers are subject to disciplinary actions by the Director-General under Part 2 of that Act.

¹⁴⁰ Section 5(1) of the *Business Tenancies (Fair Dealings) Act* defines a specialist retail valuer as being “a valuer having not less than 5 years experience in valuing retail shops”. While the Act does not define whom a valuer may be, section 4(1) of the *Valuation Act* defines a valuer as being “a person who is a Fellow or an associate member of the Australian Institute of Valuers Incorporated, and includes a person who, in the opinion of the Minister, possesses equivalent qualifications”. Along with other valuer based institutes, the Australian Institute of Valuers is now known as the Australian Property Institute.

¹⁴¹ either an express breach of contract or implied through the engagement of a valuer and/or breaches of fiduciary duty established through a principal/agent relationship.

¹⁴² Section 63(1) *Valuers Registration Act 1992 (Qld)*.

¹⁴³¹⁴³ Section 6(1) *Valuers Act 2003 No 4 [NSW]*.

¹⁴⁴ Section 23(1) *Land Valuers Licensing Act 1978 (WA)*.

¹⁴⁵ Section 2(1) definition of registered valuer under the *Valuation of Land Act 1960 (Vic)* was repealed by No. 91/1994 section 3(1)(a).

¹⁴⁶ <http://www.dtpli.vic.gov.au/property-and-land-titles/valuation/the-valuation-profession>

¹⁴⁷ Section 24G *Land and Business (Sale and Conveyancing) Act 1994 (SA)*.

¹⁴⁸ Section 24(2)(a) *Land Valuers Act 1994 (SA)*.

¹⁴⁹ Section 11 *Land Valuers Act 1994 (SA)*.

¹⁵⁰ under the *Valuers Registration Act 1974 (Tas)*.

The issue of regulation of valuers is clearly vexed and to a large extent goes beyond the subject of this Discussion Paper. Nevertheless, in the context of this Paper, the regulation of valuers specifically for retail tenancy matters is, as noted above, questionable. As such, it would seem appropriate from a consistency perspective to rely upon self-regulation across all matters.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, consideration could be given to including a provision similar to section 29 within a Code of Practice, however retention of sections 30 and 31 do not appear to be warranted.

4.4.13 Section 32: turnover rent

Outline of the current position/issues

Turnover rent is an alternative method of determining the rent of a lease property and is often applied as a means of risk sharing between the landlord and tenant. Under this model, a lease will typically provide two components for determining rent: a base level or fixed amount set below the market rate for the property; plus a percentage based on the tenant's turnover.

Section 32 sets out matters to be considered when determining what constitutes turnover¹⁵¹, and provides mechanisms to enable adjustment of rent payable based on actual turnover results¹⁵².

Draft report submissions

The draft report posed the question: "Should the definition of 'turnover' be amended so that it is clear as to whether it includes on line sales"?

The Law Society Northern Territory was of the view that "online sales should be included in the definition of sales if the premises are being used in any way in the conduct of those sales".

The Property Council of Australia submitted that "(i)nternet sales should only be excluded if the sale does not involve any use of the retail shop. If the sale does involve use of the shop in some way... then there is no justification for excluding the sale from the definition of turnover", thereby ensuring that activities involving "...collection and/or distribution of goods from transactions made over the internet" would be covered. The Council suggested that the wording of section 9 of the Queensland *Retail Shop Lease Act* be adopted so as ensure all 'business carried on in a leased shop'¹⁵³ was captured.

The Shopping Centre Council mirrored the Property Council of Australia's views.

¹⁵¹ Section 32(1) provides a list of considerations that are excluded in the determination of turnover.

¹⁵² Sections 32(2) to (4).

¹⁵³ Section 9(1) of the *Retail Shop Lease Act* 1994 (Qld) provides "**Turnover** of a business carried on in a leased shop is the gross sales of the business for any particular period". Section 9(2) of the Queensland Act provides for substantially the same exclusions to that in section 35(1).

The National Retail Association did not offer comment on this item.

Discussion

In terms of risk mitigation, turnover rents are seen as an avenue to reduce a tenant's exposure when starting up a business or entering into a new lease, as well as providing a buffer against high fixed costs in the event of an unexpected downturn. From a landlord's perspective, turnover rents provide an avenue to maximise investment over the short term, rather than over the long term through periodic rent increases. Turnover rent also provides the landlord with a more direct method of monitoring tenant performance, which reduces the risk of unexpected default, while providing the landlord with additional rental income without recourse to annual reviews when the tenant's business is performing well.

Although stakeholders desire amendment to section 32 to expressly state that turnover includes internet sales that occur through the shop's premises, the current wording seems clear enough that matters such as internet sales are not excluded when calculating turnover. Section 32(5) provides that turnover "includes gross takings, gross receipts, gross income and similar concepts". By analogy, if an item does not fall within any of the exclusion categories, it may be considered. Where a lease provides for calculation of rent based on turnover, that calculation can only relate to activities associated with the business carried on in that leased shop. To consider otherwise would result in drawing on considerations that fall outside of the lease, such as the tenant's business activities independent of the leased premises (such as turnover of another shop). Indeed section 32(1)(e) appears to state as much¹⁵⁴.

The matters excluded from consideration of turnover under section 35(1) reflect general accounting principles of turnover representing the total value of the replacement of inventory sold over a given period¹⁵⁵ or "the total ordinary income that the entity derives in the income year in the ordinary course of carrying on a business"¹⁵⁶, with the qualification that, in terms of application to rental calculations, turnover is to relate to that portion attributable to business conducted in the leased premises.

In terms of the general accounting principles, matters such as returns to shippers, wholesalers or manufacturers¹⁵⁷, discounts allowed to customers in the normal course of business¹⁵⁸ and delivery charges¹⁵⁹ all fall outside of the accounting consideration of turnover as they are not income generating activities. Indeed, discounts are costs¹⁶⁰ associated with trade and delivery

¹⁵⁴ Section 32(1)(e) excludes "the price of merchandise exchanged between shops of the tenant if the exchange is made solely for the convenient operation of the business of the tenant and not for the purpose of concluding a sale made at or from the shop to which the lease relates" from the assessment of turnover.

¹⁵⁵ See for example: Kirkwood et al, *Accounting An Introductory Perspective*, Third Edition, Longman Cheshire 1992 pp584-5; Hoffett and Edwards, *Accounting in Australia*, Fourth Edition, John Wiley and Sons, 1996 pp257-9.

¹⁵⁶ Section 328.120(1) *Income Tax Assessment Act 1997* (Cth).

¹⁵⁷ Section 32(1)(f).

¹⁵⁸ Section 32(1)(h).

¹⁵⁹ Section 32(1)(k).

¹⁶⁰ Arguably an intangible cost that is not able to be reconciled in the accounts as it is the difference between a potentially higher level of revenue that is forgone so as to achieve the actual (tangible) level of revenue generated from the sale. The corollary being the absence of any revenue if the sale did not occur at the higher price.

charges represent on-passing of such costs to the customer. Return of stock to a supplier does not generate sales and thus does not generate income.

Given that section 32 codifies generally accepted accounting principles, its retention is questionable.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.14 Section 33: special rent - cost of fitout

Outline of the current position/issues

Section 33 clarifies that the *Business Tenancies (Fair Dealings) Act* does not prohibit a landlord from seeking an additional level of rent or special rent over and above the ordinary rent associated with an unfurnished shop “to cover the cost of fitout, fixtures, fittings and equipment installed or provided by the landlord at the landlord’s expense”¹⁶¹.

Discussion

The absence of any discussion on section 33 by stakeholders suggests that the provision reflects a common position that it is acceptable for a landlord to recoup outlays for fitout on an incremental basis as part of the overall rent levied. Given this subject appears to be non-contentious, it is questionable whether section 33 is of any benefit.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.15 Section 34: payments for unrelated land

Outline of the current position/issues

Under section 34, a landlord may not seek payment of rent or other costs for land that is not related¹⁶² to either the location¹⁶³ of the retail shop, or is connected with trading¹⁶⁴ or conducting business¹⁶⁵ in that retail shop.

Draft report submissions

The National Retail Association supported retention of this section.

¹⁶¹ Section 33.

¹⁶² Section 34(1).

¹⁶³ Section 34(2)(a).

¹⁶⁴ Section 34(2)(b)(ii).

¹⁶⁵ Section 34(2)(b)(i).

Discussion

Section 34 codifies a general position that it may be reasonable for a landlord to include costs associated with land other than land that the leased premises is located on where there is a nexus that benefits the tenant's business or trade.

A ready example would be where a retail shop (and the shopping centre) is located on one parcel of land (and is thus subject to the retail tenancy lease) and the carpark that services the shopping centre is on an adjoining parcel of land (and is thus not subject to the retail tenancy lease). In such circumstances, it may be reasonable for the landlord to seek rent (for a tenant's direct use of car parks) or other payments (such as maintenance and repair) to ensure that the carpark is accessible to customers who may frequent the tenant's shop.

In the absence of specific legislative provision, the position behind section 34 could be maintained by prohibitions on unconscionable/unfair conduct.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.16 Part 4, Division 2 (sections 35 to 37): sinking funds

Outline of the current position/issues

In the event that a retail tenancy lease requires tenant contributions towards a sinking fund, Part 4, Division 2 of the *Business Tenancies (Fair Dealings) Act* imposes certain conditions on such funds. In addition to fund management¹⁶⁶ and reporting¹⁶⁷ obligations, Part 4, Division 2 limits the scope of sinking funds to that of major repairs and maintenance of the building and plant and equipment¹⁶⁸ in which the retail shop is located.

Draft report submissions

The National Retail Association supported retention of this provision.

Discussion

Broadly, a sinking fund is a special account into which contributions are made with a view of establishing a pool of funds for a specific purpose, or set of purposes. The nature of a sinking fund will vary depending upon its purpose, which will in turn determine who contributes to the fund, the level of those contributions and the application of the accumulated funds. The application of sinking funds can range from a method of guaranteeing corporate bond

¹⁶⁶ For example, sinking funds must be held in interest bearing accounts under section 35(b). There may only be one sinking fund operational at a time (section 36(2)). Contributions must not exceed more than five per cent of the landlord's total outgoings (section 36(3)), and contributions may not be sought where the fund's balance exceeds \$250 000 (section 36(4)).

¹⁶⁷ The landlord must provide the tenant with sinking fund expenditure statements (section 35(h)).

¹⁶⁸ Section 35(e) and section 43(3).

issuances¹⁶⁹ through to funding property maintenance of communal assets under a unit title¹⁷⁰.

Part 4, Division 2 limits the scope of sinking funds to that of major repairs and maintenance of the building and plant and equipment in which the retail shop is located, distinguishing between repairs and maintenance and capital works (acquisitions)¹⁷¹.

Although building/plant repair expenses should ordinarily rest with the landlord as the owner of the asset¹⁷², permitting the establishment of sinking funds to meet repairs and maintenance requirements can be justified on the grounds that as the tenant derives significant direct benefit from such activities, contribution to such expenses ought not to be unreasonable. As this position sits outside of the general proposition that capital costs are costs of the owner and should be accounted for accordingly in the owner's financial records, retention of some governance guidelines over sinking funds would be warranted.

Recommendation

Should the *Business Tenancies (Fair Dealings) Act* be repealed, consideration could be given to including similar provisions within a Code of Practice.

4.4.17 Part 4, Division 3 (sections 38 to 42): Outgoings and expenditure statements

Outline of the current position/issues

Part 4, Division 3 of the *Business Tenancies (Fair Dealings) Act* sets out tenant liability towards a landlord's outgoings and implies certain reporting procedures into the lease to enable the landlord to account those outgoings to the tenant. The Act defines outgoings as the expenses directly attributable to the operation, maintenance or repair of the building and any rates, taxes, levies, premiums or charges payable by the landlord because the landlord is the owner or occupier of the building¹⁷³.

Under section 38, for a tenant to be liable to meet outgoings, the lease must specify the type¹⁷⁴ and amount¹⁷⁵ of outgoings and how they are intended to be recovered by the landlord¹⁷⁶. Costs associated with advertising are excluded as outgoings under this section¹⁷⁷.

Section 39 implies a requirement in all retail shop leases that the landlord must provide the tenant with an estimate¹⁷⁸ of outgoings each financial period¹⁷⁹. Section 39 also requires a

¹⁶⁹ In this context, the sinking fund is an accumulating pool of funds to repay/buy back the bond issue at the end of its term.

¹⁷⁰ Section 36 of the *Unit Titles Act*.

¹⁷¹ See section 5(1) 'outgoings'; and Part 4, Division 4 (sections 43, 44 and 45).

¹⁷² See discussion at Chapter 4.4.18

¹⁷³ Section 5(1).

¹⁷⁴ Section 38(1)(a).

¹⁷⁵ Section 38(1)(b).

¹⁷⁶ Section 38(1)(c).

¹⁷⁷ Section 38(2).

¹⁷⁸ Section 39(a).

landlord to make a written expenditure statement that details all outgoing expenditure available for inspection by the tenant¹⁸⁰ at least twice each accounting period¹⁸¹.

In addition to the requirement under section 39 to make the expenditure statement available to the tenant for inspection, section 40 requires the landlord to provide a formal¹⁸² statement to the tenant within three months of the end of the relevant accounting period. The statement must be accompanied by an auditor's report¹⁸³ except where the statement relates only to water, sewerage and drainage rates and charges, council rates and charges and insurance¹⁸⁴.

Section 41 implies an adjustment mechanism into leases for the purpose of addressing over and under payments of outgoings by a tenant¹⁸⁵. Adjustments are to be undertaken within one month of provision of the formal expenditure statement¹⁸⁶ based on the difference between the contribution made by the tenant and the actual expenditure of the landlord¹⁸⁷. Contributions to repairs and maintenance sinking funds, in accordance with section 35, and the landlord's expense thereof are excluded from the adjustment assessment¹⁸⁸.

Where an outgoing is not able to be attributed directly to a particular shop, section 42 requires the outgoing to be calculated on a proportional basis based on the ratio of lettable area of the shop to the total lettable area of all the shops to which the outgoing is applicable¹⁸⁹.

Issues paper submissions

Although these provisions did not form part of discussions in the Issues Paper, the Shopping Centre Council raised issue with the requirement under section 39(c) and (d) for a landlord to make written expenditure statements available twice in each accounting period. This recommendation was informed by New South Wales' 2005 repeal of similar requirements, which the Council noted was supported by "retail associations when it was discovered that very few tenants availed themselves of this statement".

The National Retail Association also raised the subject of outgoings for discussion, in terms of the ability for outgoings to support promotion of sustainable practices. The Association noted that "current processes in which landlords apportion outgoings to individual tenants may not

¹⁷⁹ Section 39(b)(i). Section 39(b)(ii) also requires an estimate statement to be provided prior to entering the lease.

¹⁸⁰ Section 39(c).

¹⁸¹ Section 39(d).

¹⁸² Set out "in accordance with relevant principles and disclosure requirements of applicable accounting standards" – section 40(c).

¹⁸³ Section 40(e).

¹⁸⁴ Section 40(h)(i). Such a statement must be accompanied by copies of invoices/receipts or other proof of payment – section 40(h)(ii).

¹⁸⁵ Section 41(a).

¹⁸⁶ Section 41(b).

¹⁸⁷ Section 41(c).

¹⁸⁸ Sections 41(d) and (e).

¹⁸⁹ Sections 42(a) and (b).

recognize specific sustainability initiatives implemented by individual retailers". The Association was of the view that tenants "require incentives and capacity to reduce their energy and water consumption", and that consideration should be given to amending the Act "to ensure that retailers are encouraged through discernible reductions in outgoings to introduce measures that contribute to reductions in energy, water and waste". The Association suggested that the introduction of sub-metering could assist in this regard by providing "tenants influence and accountability for their usage and allow them to directly benefit" from energy and water saving initiatives.

Draft report submissions

Sub-metering:

The draft report suggested that the Act be amended so as to remove any barriers to the introduction of sub-metering of utility services.

All stakeholders agreed with the recommended amendment, though the Shopping Centre Council and the Property Council of Australia indicated that they were not aware of any existing barriers to installing sub-meters. There was, however, some divergence in terms of who should be liable for the expense. This aspect is discussed further below at 4.4.18 (capital costs).

Written expenditure statements:

The draft report stated that "(i)t 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"¹⁹⁰.

Shopping Centre Council noted that the proposed amendments were a partial reflection of its recommendation to repeal the requirement to provide expenditure statements, however renewed its call for repeal on the grounds that the proposed amendments would retain an "unnecessary administrative burden on landlords". The Property Council of Australia reiterated the Shopping Centre Council's recommendation.

The National Retail Association offered general agreement to the proposed amendments.

Discussion

In respect of the specific issue of sub-metering, there seems to be general consensus on the desire to implement such measures, rendering legislative intervention superfluous.

With regards to outgoings generally, there also appears to be a level of consensus around whether it is necessary to legislate a requirement that landlords furnish tenants with expenditure statements. Should the Shopping Centre Council's observations on tenant

¹⁹⁰ Discussion on section 70(b) can be found at Chapter 4.4.41.

indifference to seeking expenditure statements be reflective of practices in the Territory, retention of these sections is questionable.

At its base level, the provisions act as a safeguard requiring a landlord to prove to a tenant that monies collected for outgoings were in fact expended on outgoings. The heart of the issue however is not the provision of documentation, but the actual expenditure itself. There is no express requirement for a landlord to actually deal with the funds, including applying the funds to the outgoings outlined in the estimate, however the adjustments requirement under section 41(c) would address any such anomaly.

The provisions do not have enforcement mechanisms or sanctions, other than through a retail tenancy claim under Part 11 of the Act. As such, a tenant remains reliant on either the common law to ensure that contributions toward outgoings are dealt with appropriately, or the unconscionable conduct provisions within section 79.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of these provisions do not appear to be warranted.

4.4.18 Section 43: Capital Costs - Environmental Upgrades

Outline of the current position/issues

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 as well as "rates, taxes, levies, premiums or charges payable by the landlord" due to the landlord's ownership or occupation of the building.

Section 43 prohibits the landlord recovering from the tenant an amount in respect of capital costs of the building¹⁹¹ or plant associated with the building¹⁹². Tenant contributions to sinking funds that provide for capital works are also prohibited¹⁹³.

Issues paper submissions

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 Shopping Centre Council suggested that this was not a particularly difficult drafting exercise and could be achieved without turning on its head the fundamental principle that capital expenditure cannot be recovered but operational expenditure can.

¹⁹¹ Section 43(1).

¹⁹² Section 43(2).

¹⁹³ Section 43(3).

The Shopping Centre Council noted that section 54N of the New South Wales *Local Government Act* overrode the *Retail Leases Act* by permitting environmental upgrade agreement initiatives to be recoverable from tenants.

Draft report submissions

The draft report recommended “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)”. The draft report recommendation contained a typographical error that should have made reference to section 43 rather than section 40. Stakeholders appear to have taken that error into account in their responses.

The Shopping Centre Council and Property Council of Australia supported the recommendation.

While the Law Society Northern Territory appreciated the increasing prevalence of environmental sustainability measures in property management, it nevertheless noted that the concept “of a tenant being required to pay additional amounts for capital improvements above the rental amount, could significantly and unfairly disadvantage tenants”. The Law Society Northern Territory noted the importance and need for preserving “the notion that capital costs should be borne by the landlord” and cautioned against “watering down this concept by making available to the landlord a new category of charges that include for payments for upgrades to capital”. The Law Society Northern Territory raised concern that “such a provision may be used by landlords to require a tenant to subsidise their own desire to increase the value of their property through additional improvements”, noting “(n)ot all capital improvements that may be desired by a landlord will necessarily be of benefit to the tenants and their tenancies and in such a situation it would be unfair to require the tenant to subsidise the landlord's upgrades”.

The Law Society Northern Territory’s “other concern is the likelihood that charging under such a category could be used by landlords to collect payments for upgrades that are not actually undertaken during the term of the tenant's tenancy, or not undertaken at all”, concluding that “(a)dditional charges also open the possibility for abuse”.

The Law Society Northern Territory suggested that alternative methods for addressing landlord costs, including increasing rents at the end of the lease or through rent review mechanisms, or negotiating voluntary contributions by a tenant, could also achieve the same result without recourse to amending the Act.

The National Retail Association did not agree with the proposed amendments.

Discussion

Two Australian jurisdictions, New South Wales and Victoria, have implemented building environmental upgrade schemes¹⁹⁴ and the topic is also being explored in South Australia. As the Shopping Centre Council noted, the New South Wales scheme permits landlords seeking contribution from tenants¹⁹⁵, overriding the prohibition on contribution to capital costs under section 23 of the *Retail Leases Act 1994 (NSW)*¹⁹⁶. Under the Victorian scheme, contributions from the occupier of the building are voluntary¹⁹⁷. South Australia has recently introduced the Local Government (Building Upgrade Agreements) Amendment Bill 2015¹⁹⁸, which provides for either voluntary contribution on the part of the tenant, or in the absence of that agreement, a tenant contribution on a basis similar to that in New South Wales.

In its submission to consultation on the South Australian draft Local Government (Building Upgrade Agreements) Amendment Bill, Business SA¹⁹⁹ objected to inclusion of compulsory tenant contribution due to “the risk of full cost savings not eventuating back to the tenant” and the benefit landlords obtain even without tenant contribution as the building upgrade finance scheme “enables a cheaper form of finance for capital improvements”, noting that “this has been proven interstate”. Business SA contended that “(t)o date, the vast majority of BUF projects in both States have been landlord driven without triggering tenant contributions. This implies landlords are using BUF as an economical form of off-balance sheet finance in order to make capital improvements to improve energy efficiency in their buildings. Such capital improvements impact positively on effective gross rents and a building’s environmental credentials, factors which can be used to both retain existing tenants and attract new tenants”.

The base comparison between the schemes in operation are that one melds the capital versus operational distinction, while the other preserves it. What can be said of both schemes is that while the tenant may accrue some cost reductions during the tenancy, the landlord accrues ongoing capital gain through modernised assets and increased profitability through ability to market as eco-friendly. The landlord will also be able to obtain accounting and taxation benefit from the depreciation of the upgrade, whereas the tenant will not. On the other hand, it would appear that no net benefit accrues to the tenant, with the theory that the contribution would be offset through a reduction in other costs due to the improved

¹⁹⁴ New South Wales see: <http://www.environment.nsw.gov.au/business/upgrade-agreements.htm>; Victoria see: <http://sustainablemelbournefund.com.au/services/environmental-upgrade-agreements/>

¹⁹⁵ Section 54N(1) *Local Government Act 1993 (NSW)*.

¹⁹⁶ Section 54(8) *Local Government Act 1993 (NSW)* regards the contribution as an outgoing for the purposes of the *Retail Leases Act 1994*.

¹⁹⁷ Section 27N(1)(b)(iii) *City of Melbourne Act 2001 (Vic)*; section 181B(1)(b)(iv) *Local Government Legislation Amendment (Environmental Upgrade Agreements) Act 2015 (Vic)*.

¹⁹⁸

[http://www.legislation.sa.gov.au/LZ/B/CURRENT/LOCAL%20GOVERNMENT%20\(BUILDING%20UPGRADE%20AGREEMENTS\)%20AMENDMENT%20BILL%202015/B_AS%20INTRODUCED%20IN%20LC/LOCAL%20AGREEMENTS%20AMENDMENT%20BILL%202015.UN.PDF](http://www.legislation.sa.gov.au/LZ/B/CURRENT/LOCAL%20GOVERNMENT%20(BUILDING%20UPGRADE%20AGREEMENTS)%20AMENDMENT%20BILL%202015/B_AS%20INTRODUCED%20IN%20LC/LOCAL%20AGREEMENTS%20AMENDMENT%20BILL%202015.UN.PDF)

¹⁹⁹ http://www.environment.sa.gov.au/files/sharedassets/public/climate_change/buf/buf-consultation-2014-submission-business-sa.pdf.

efficiency. Indeed, in the case of tenants in New South Wales at least, the actual savings may be less than the contribution²⁰⁰.

Section 43 codifies general accounting propositions that capital costs are costs of the owner and are accounted for accordingly in the owner's financial records. The absence of section 43 would not appear to have an adverse impact on the application of commonly accepted accounting practices. Modification of standard accounting practices has the potential to unduly add complexity to business transactions.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.19 Section 44: depreciation

Outline of the current position/issues

Section 44 prohibits a landlord seeking tenant contribution to depreciation of the landlord's assets.

Draft report submissions

The National Retail Association supports the retention of this section.

Discussion

Depreciation is an accounting treatment for assets that distributes the cost of the asset over its life. Depreciation is a capital cost in nature and has two applications: one for accounting purposes; the other for taxation. For accounting purposes, depreciation acknowledges the decrease in value the asset has over time due to age, wear, obsolescence and alike to record 'fair value' of the asset at the end of its anticipated useful life and thus its influence on the balance sheet. For taxation purposes, depreciation is applied to offset the expense of the asset against income derived in the period the asset was used.

The discussion above at 4.4.18 regarding capital verses operational expenses applies equally to depreciation.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

²⁰⁰ Section 54N(4) *Local Government Act 1993* (NSW) provides "The methodology (used to calculate the contribution) may permit both savings made directly by the lessee and a proportion of savings made by all occupants of the relevant building to be counted towards the cost savings made by the lessee".

4.4.20 Section 45: contributions to interest

Outline of the current position/issues

Section 45 voids a lease clause which requires the tenant to pay an amount in respect of interest, or other charges, incurred by the landlord in respect of amounts borrowed by the landlord.

Draft report submissions

The National Retail Association supports the retention of this section.

Discussion

Interest, in this situation, is a capital cost, representing the cost associated with debt financing for capital injections into the business or capital acquisitions of the business. The discussion above at 4.4.18 regarding capital versus operational expenses applies equally to interest.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.21 Section 46: notice of alterations and refurbishment

Outline of the current position/issues

This section implies a term in the lease that the landlord must give the tenant two months' notice of a proposed alteration or refurbishment of the building where that alteration is likely to adversely affect the business of the tenant²⁰¹. The requirement for the two months' notice may be waived in cases of emergency provided that as much notice as is reasonably practical has been provided²⁰².

Draft report submissions

The National Retail Association supports the retention of this section.

Discussion

The timeframe provided under section 46 is less than that required for alterations or refurbishments that necessitate relocation of the tenant under section 48²⁰³. While it may be assumed that the differing timeframes relate to differing scopes of works and thus differing levels of potential disruption, the current framing of those provisions does not necessarily enable a ready drawing of such a distinction.

²⁰¹ Section 46(a).

²⁰² Section 46(b).

²⁰³ Section 48(b) requires at least three months' notice.

The reasonable provision of notice for alterations or refurbishment of the building does, however, appear to offer a level of protection to certain claims for disturbance under section 47. While that may limit the implications of the covenant of quiet enjoyment²⁰⁴, the absence of a right of acceptance by the tenant, or linkage to other courses of action (such as negotiation over potential impact on the tenant) diminishes any such limitation section 46 may have on the covenant of quiet enjoyment.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.22 Section 47: disturbance

Outline of the current position/issues

Section 47 implies into retail leases that a landlord is liable to pay the tenant reasonable compensation for loss or damage in circumstances where the landlord fails to rectify certain matters, including failing to:

- provide access to the shop²⁰⁵;
- prevent disruption of the tenant's trading²⁰⁶;
- rectify a breakdown of plant or equipment²⁰⁷; or
- clean, maintain or repair the shopping centre²⁰⁸.

Draft report submissions

The National Retail Association supports the retention of this section.

Discussion

Section 47 codifies the common law doctrine of quiet enjoyment. The doctrine implies a covenant in all leases that the tenant is entitled to beneficial occupation and use of the premises. The doctrine extends beyond the notion of the tenant having a right to occupy the premises in 'peace and quiet' to a right to full benefit of the premises free from interruption. A breach of the quiet enjoyment covenant may range from restricted access to the premises, or parts thereof²⁰⁹, a failure to address a nuisance caused by another²¹⁰, to failure to maintain or repair the premises²¹¹.

²⁰⁴ Discussed further in Chapter 4.4.22.

²⁰⁵ Sections 47(1)(a) and (b).

²⁰⁶ Sections 47(1)(c) and (d).

²⁰⁷ Section 47(1)(e).

²⁰⁸ Section 47(1)(f).

²⁰⁹ For example, see: *Chartered Trust plc v Davies* (1997) 49 EG 135.

²¹⁰ For example, see: *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1.

²¹¹ For example, see: *Reiss v Helson* [2001] NSWSC 486.

Given the large body of law on this subject, the necessity of section 47 is questionable.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.23 Section 48: relocations

Outline of the current position/issues

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

In order for the relocation to be valid, the relocation must be associated with a refurbishment, redevelopment or extension to the building which contains the tenant's business and that refurbishment, redevelopment or extension cannot be carried out practicably without vacant possession of the tenant's shop²¹². In addition, section 48 provides that:

- an alternative shop is to be made available within the retail shopping centre²¹³;
- the rent for that alternative shop is to be the same as that for the leased shop, with market value of the proposed shop to determine any variation²¹⁴; and
- the tenant is to be compensated for reasonable costs of the relocation²¹⁵.

Draft report submissions

The National Retail Association supports the retention of this section.

Discussion

As with demolition clauses (section 49), relocation clauses are not unusual to leases generally. While the implied duty of good faith applies to reliance upon lease terms, the proposed development does not have to be reasonable or appropriate in the eyes of the tenant, nor does the commercial motivation of the landlord play a factor. The simple presence of a sufficient or genuine proposal will validate activation of a relocation clause²¹⁶.

In the absence of a statutory provision, general contract law would prevail, requiring the clause to be an unambiguous representation of the parties' intent in the event that the clause is called upon. The matters covered by section 48 are not extraordinary and are capable of being incorporated into any lease.

²¹² Section 48(a).

²¹³ Section 48(b).

²¹⁴ Section 48(c).

²¹⁵ Section 48(g).

²¹⁶ See for example *Skiwing Pty Ltd v Trust Company of Australia* [2006] NSWCA 276 which considered the New South Wales equivalent to section 48 - section 34A of the *Retail Leases Act 1994* (NSW).

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.24 Section 49: demolition

Outline of the current position/issues

If a lease provides the landlord with a right to terminate the lease in the event that the landlord decides to demolish²¹⁷ the building, section 49 contains various conditions that apply in respect of such a termination (including compensation).

In order for the termination to be valid, the landlord must provide at least six months' notice of the proposed termination and the proposed demolition must be undertaken within a reasonable time after the termination²¹⁸. Where the tenant was required to fit out the shop under the lease, the landlord must compensate the tenant for that fit out²¹⁹. In the event that the demolition is not carried out within a reasonable time, the landlord is liable for damages for early termination²²⁰.

Draft report submissions

The National Retail Association supports the retention of this section.

Discussion

As with relocation clauses (section 48), demolition clauses are not unusual to leases generally. While the implied duty of good faith applies to terminations of a lease, the proposed development does not have to be reasonable or appropriate in the eyes of the tenant, nor does the commercial motivation of the landlord play a factor. The simple presence of a sufficient or genuine proposal will validate termination under a demolition clause²²¹.

In the absence of a statutory provision, general contract law would prevail, requiring the clause to be an unambiguous representation of the parties' intent in the event that the clause is called upon. The matters covered by section 49 are not extraordinary and are capable of being incorporated into any lease.

²¹⁷ Under section 49(6), demolition also includes substantial repair, renovation or reconstruction that cannot be undertaken without vacant possession of the shop.

²¹⁸ Sections 49(1)(a) and (b).

²¹⁹ Section 49(4).

²²⁰ Section 49(3), unless the landlord establishes that there was in fact a genuine proposal to demolish the building within that time..

²²¹ See for example *Blackler v Felpure Pty Ltd* [1999] NSWSC 958 which considered the New South Wales equivalent to section 49 - section 35 of the *Retail Leases Act 1994* (NSW).

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.25 Section 50: rent for damaged premises

Outline of the current position/issues

Section 50 implies into all leases a reduction in, or waiver of, rent and outgoings in the event that the building containing the shop is damaged²²². A right to terminate the lease is also implied where the repair of the building is either impractical or undesirable²²³, where the landlord has not repaired the building within a reasonable time²²⁴, or otherwise by agreement²²⁵.

The section does not prevent the landlord from recovering damages from the tenant in respect of the damage (if caused by the tenant)²²⁶ and voids a lease provision that seeks to limit the liability of a party to pay compensation to the other party²²⁷.

Draft report submissions

The National Retail Association supports the retention of this section.

Discussion

This section codifies general propositions under contract law, including the covenant of quiet enjoyment discussed above at 4.4.22. In the ordinary course, where a premises is not able to be occupied or used, or its occupation/use diminished, specific performance will come into play, entitling the tenant to seek a reduction/waiver/termination due to the non-performance. Section 117(1)(b) of the *Law of Property Act* also codifies this position. If the Business Tenancies (Fair Dealings) Act were repealed, the *Law of Property Act* would continue to provide a similar statutory safeguard.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

²²² Sections 50(1)(a) and (b).

²²³ Section 50(1)(c).

²²⁴ Section 50(1)(d).

²²⁵ Section 50(3).

²²⁶ Section 50(1)(d).

²²⁷ Section 50(2).

4.4.26 Section 51: refurbishments and refittings

Outline of the current position/issues

Under section 51, a provision for refurbishment or refitting in a lease is void unless the provision gives an appropriate level of detail on the general nature, extent and timing of the required refurbishment or refitting.

Draft report submissions

The National Retail Association supported the retention of this section.

Discussion

Under the general law of contract, where a clause is ambiguous or lacking in specificity, that clause will be construed against the person who drafted the clause, or upon whom the clause is intended to benefit. Where possible, the ordinary meaning will be attributed to the clause, or reasonable intent implied into the clause. Where that is not possible, the clause will be read down or considered void.

Given the nature of refurbishment/refitting, a reasonable amount of detail, even if that information is contained in an annexure, is required in order to determine what the obligations are before the clause can be enforced for want of compliance.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.27 Section 52: employment restrictions

Outline of the current position/issues

Section 52(1) voids a lease provision that imposes limitations on the tenant's rights in regard to employing people of its own choosing. Notwithstanding that general prohibition, a lease may contain clauses that specify a minimum level of competence and behaviour expected of a tenant's employees or prohibit work from being carried out on specified items of the landlord's property²²⁸. Section 52(2)(c) also permits clauses which require "the tenant to comply with the requirements of an industrial award, industrial agreement or enterprise agreement (such as a construction site agreement) affecting a retail shopping centre in which the shop is situated".

Draft report submissions

The National Retail Association supports the retention of this section.

²²⁸ Section 52(2).

Discussion

It is conceivable that a landlord may wish to impose certain conditions on shop employees so as to ensure certain standards are maintained within the shopping centre to maintain general safety and customer satisfaction. The doctrine of privity of contract however prevents the landlord from imposing conditions directly on a tenant's employees. As only the parties to the contract can be bound by the contract, it is not possible for the landlord to impose employment conditions on the tenant's employees²²⁹.

Other than through the imposition of general conditions of entry²³⁰, the most effective way a landlord can address the situation is to include clauses in the lease that reaffirm the tenant's position as being vicariously liable for its employees actions and ascribing matters/actions that will reduce that liability if complied with. Such clauses may, however, infringe the doctrine of restraint of trade²³¹.

The doctrine of restraint of trade seeks to balance the conflicts that may arise between the freedom to contract as the parties wish, against the equally important notion of the ability to trade unencumbered²³². The more notable examples of restraint of trade clauses are found in business sales contracts, whereby the parties agree that the vendor shall not establish a new business of the same ilk to that being sold within a certain time or geographical location so as to 'protect' the goodwill of the business being sold.

Clauses such as that contemplated by section 52(2)(c) are not foreign to general commercial contracts, nor indeed are clauses that require an employer to ensure that its employees, agents and contractors abide by occupational health and safety policies, confidentiality requirements and other such operational matters of a host organisation. While they impose restraints on the employer, they do not necessarily infringe against the doctrine as they are generally in the interest of not only the landlord, but also the employee, and thus the public. On the other hand, clauses that specify the employment of a specific employee, or limit the tenant's right to employ persons of the tenant's own choosing would necessarily fail. Matters such as minimum standards of competence would necessarily be subject to the reasonableness test.

Retention of section 52 is questionable given that there is a significant body of law that currently address those matters outside of retail tenancy agreements.

²²⁹ Under certain circumstances, the doctrine does not apply to third parties such as agents. Section 56 of the *Law of Property Act* also provides a right for a third party to seek enforcement of a contractual obligation that is made in benefit of the third party.

²³⁰ which may possibly be enforceable under the *Trespass Act*, although would most likely have to apply to all who enter, including customers, making enforcement difficult at best.

²³¹ and the *Competition and Consumer Act 2010* (Cth).

²³² *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company* (1894) AC 535 arguably settled the modern doctrine, setting out the public policy position as one that restrictions (outside of set down in law) on individual liberty to trade, without nothing more, were against the public interest and thus void. The 'without nothing more' aspect established the reasonableness test whereby restraint may be reasonable where it was in the interests of both parties and the public as a whole.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.28 Section 53: Assignment of Retail Shop Leases

Outline of the current position/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. Under section 53, a landlord is entitled to withhold consent to the assignment of a retail shop lease in any of the following 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 section 57 (financial standing of assignee)²³³.

A landlord is not entitled to withhold consent to an assignment of a lease in any other circumstances.

Issues paper submissions

The Shopping Centre Council submitted that landlords should have the right to withhold consent “unless all breaches of the lease are remedies or the assignee undertakes to remedy the breach”. The Law Society Northern Territory questioned whether section 53 was being observed and noted that “forcing the landlord to assignment of the lease without rectification of defects (particularly rent) would be unfair to both landlord and assignee” (parentheses supplied). The Law Society indicated support for an amendment that permitted a landlord withholding consent if the existing tenant were in breach of the lease, noting that “(t)his would reflect current practice”.

The National Retail Association did not support amendment to section 53, indicating that “(t)he landlord has other statutory provisions 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”. The National Retail Association commented that “(i)n 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 premises and meet all their obligations”.

²³³ Section 53(1).

Draft report submissions

The Shopping Centre Council, the Law Society Northern Territory and the Property Council of Australia supported amending section 53 to enable a landlord to withhold consent to an assignment when the tenant is in breach of a lease. The National Retail Association also supported amending section 53 with the proviso that consent should be withheld when the tenant "...has not made any attempt to rectify the default when given notice to do so".

Discussion

Based on stakeholder feedback on the Issues Paper, the Draft Report proposed amending the *Business Tenancies (Fair Dealings) Act* to make it clearer that assignment need not be consented to if the tenant is in breach of the lease.

Arguably the circumstances set out in section 53 which enable a landlord to withhold consent are somewhat limited. In addition to the comments noted above, the Shopping Centre Council separately questioned the inability to withhold consent of an assignment in the situation where the assignee does not provide a guarantor²³⁴. Even if section 53 were amended to include additional grounds for withholding consent, the application of a prescriptive list could continue to raise obstacles in an area that is necessarily subject to the particular circumstances surrounding individual requests for assignment.

Where a commercial lease contains a clause that provides discretion to the landlord on consent or otherwise for an assignment of the lease to a third party (or other dealings in the lease such as sub-lease or mortgage), such clauses usually confer the power in a negative form. Typical wording of such clauses is in a fashion not too dissimilar to: 'the tenant shall not assign the lease to a third party without the consent of the landlord *and such consent of the landlord may not be unreasonably withheld*' (emphasis added). Although the test of reasonableness in terms of withholding consent is, to an extent, subject to the interests of the person granting the consent, such refusal nevertheless must be reasonable under all the circumstances.

The application of the reasonableness test under a clause such as that above may address stakeholder concerns as to the circumstances under which consent may be legitimately refused. It may also address circumstances such as that raised by the National Retail Association, where genuine efforts to rectify defaults have been undertaken by the tenant to little or no avail. Under such circumstances, it may be reasonable and indeed in the interest of the landlord to consent to assignment of a lease in default to minimise both the landlord and tenant's ongoing exposure.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

²³⁴ The issue of guarantors on assignment is discussed further below (see Chapter 4.4.29 Section 54: key-money for assignments).

4.4.29 Section 54: key-money on assignment prohibited

Outline of the current position/issues

Similar to section 24, this provision prohibits the seeking or acceptance of key-money in connection with the granting of consent to the assignment of a retail shop lease. Section 54(1) prescribes a maximum penalty of 100 penalty units.

The prohibition does not prevent a landlord from seeking a security deposit, rent in advance, recovery of expenses associated with the granting of consent to the assignment, or payment for granting a franchise associated with the lease²³⁵.

Issues paper submissions

The Shopping Centre Council noted that ambiguity exists between section 54²³⁶, which permits a landlord seeking a guarantee from an assignee when granting an assignment, and the inability to withhold consent of the assignment for want of a guarantee under section 53²³⁷.

Draft report submissions

The National Retail Association agreed with retention of the prohibition on key-money.

Discussion

The general principles associated with retention of a provision similar to section 24 within a Code of Practice apply equally to section 54.

If the Act is to be retained, the ambiguity noted by Shopping Centre Council could be rectified by amendment to section 53 to clarify the circumstances when consent to an assignment may be withheld, rather than amending provisions relating to key-money under section 54.

Recommendation

Should the *Business Tenancies (Fair Dealings) Act* be repealed, consideration could be given to including a similar provision within a Code of Practice.

4.4.30 Sections 55 to 57: Consent to and information on assignment

Outline of the current position/issues

Sections 55 to 57 provide for administrative requirements associated with the seeking of an assignment. These provisions imply certain processes into all retail shop leases including a

²³⁵ Section 54(4).

²³⁶ While section 54 prohibits the seeking of key-money on assignment of a lease, section 54(4)(c) does not prevent a landlord "securing performance of the assignee's obligations under the lease by requiring the provision of a bond, security deposit or a guarantee from the assignee or another person".

²³⁷ Section 53 limits the ability for a landlord to withhold consent to an assignment to certain circumstances. Those circumstances do not include the want of a guarantor.

requirement for the tenant to submit a request for assignment to the landlord in writing²³⁸ and a requirement that the tenant provide certain information to the landlord²³⁹ and prospective assignee²⁴⁰.

Section 55 also requires the landlord to consider a request for assignment expeditiously²⁴¹ and deems the landlord to have consented to the assignment if the landlord has not advised the tenant in writing of the landlord's consent or withholding of consent within 42 days of the request being made²⁴².

Discussion

The matters covered by sections 55 to 57 are procedural in nature and are generally reflective of clauses found in standard commercial lease agreements. The necessity for codification of such matters is limited.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of these provisions do not appear to be warranted.

4.4.31 Section 58: Provision of guarantees on assignment

Outline of the current position/issues

Section 58 provides for the release of the tenant and the tenant's guarantors from liability under the lease on assignment of an ongoing lease to a new tenant. The release from liability is subject to the assignment relating to a lease that houses an ongoing business²⁴³ and the tenant having given an assignor's disclosure statement to the landlord and the new tenant²⁴⁴.

The assignor's disclosure statement is to state whether the most recent landlord's disclosure statement has been supplied to the new tenant; that the assignee has been advised of outstanding notices in respect of the lease (either from the landlord or from any authority); that the assignee has been advised of any encumbrances on the lease or fixtures and fittings within the retail shop; and whether the landlord has conferred rent concessions or other benefits during the term of the lease²⁴⁵.

²³⁸ Section 55(a)

²³⁹ Section 57 requires the tenant to provide the landlord with information on the financial standing and business experience of the proposed assignee.

²⁴⁰ Section 56 requires the tenant to provide the prospective assignee with a copy of the latest landlord disclosure statement and an assignor's disclosure statement.

²⁴¹ Section 55(b).

²⁴² Section 55(c).

²⁴³ Section 58 (preamble).

²⁴⁴ Section 58(a) requires a former tenant to give the landlord and the proposed assignee a copy of the assignor's disclosure statement in accordance with section 56(c).

²⁴⁵ Section 56(d) requires the statement to contain the information outlined in Form 2 of the Schedule to the Business Tenancies (Fair Dealings) Regulations.

Issues paper submissions

The Shopping Centre Council suggested that there was “no justification for the release of guarantors once an assignment takes place”. The Council predicated this position on the basis that, in the absence of the ability for the landlord to undertake a due diligence assessment of the assignee, release of the current guarantors would place a risk on the landlord. The Council indicated that that risk arose through the ambiguity that exists between section 54²⁴⁶, which permits a landlord seeking a guarantee from an assignee when granting an assignment, and the inability to withhold consent of the assignment for want of a guarantee under section 53²⁴⁷.

The National Retail Association noted that “(t)he 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”.

The Law Society Northern Territory submitted 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 on the original guarantee)”²⁴⁸.

Draft report submissions

Stakeholders supported amending the Act to permit the landlord requiring fresh guarantees from the assignee as a condition of the assignment. However stakeholders differed on whether the landlord should be entitled to rely on the existing guarantee in the case where an assignee refused to provide such guarantees. The majority (the Shopping Centre Council, the Law Society Northern Territory and the Property Council) supported the proposition that the existing guarantee should carry over with the assignment in such circumstances. The National Retail Association did not.

Discussion

Section 58 is quite clear that when a lease is assigned to another, the guarantor is released from any liability where the existing tenant has given an assignor’s disclosure statement to the landlord and the new tenant.

The ability to rely upon a guarantee that predated the assignment applies an unacceptable level of risk to a third party guarantor who would no longer have ‘skin in the game’. It is arguable that section 58 would give guarantors some level of concern as it is presently drafted, the implication being that the guarantee remains on foot after an assignment in the event that the existing tenant fails to provide the requisite disclosures. Legislating

²⁴⁶ As noted above, while section 54 prohibits the seeking of key-money on assignment of a lease, section 54(4)(c) does not prevent a landlord “securing performance of the assignee’s obligations under the lease by requiring the provision of a bond, security deposit or a guarantee from the assignee or another person”.

²⁴⁷ As noted above, section 53 limits the ability for a landlord to withhold consent to an assignment to certain circumstances. Those circumstances do not include the want of a guarantor.

²⁴⁸ Parentheses supplied.

continuation of the guarantee post assignment in cases where the incoming tenant fails to provide its own guarantee would arguably increase the risk to guarantors to the point where guarantors would become hesitant in providing guarantees. This would exacerbate the position of the landlord, not alleviate it.

The submissions from the Shopping Centre Council, the Law Society Northern Territory and the Property Council of Australia suggest that there is a deficiency or ambiguity in the interpretation and operation of sections 53 and 58. As discussed above, if the Act is to be retained, that ambiguity could be rectified by amendment to section 53 rather than section 58. The pragmatic position would be no new guarantees equals no assignment.

With regard to the specifics of section 58, ordinarily under contract law, a guarantor's obligations would be discharged upon discharge of the tenant's. Where a tenant has assigned the lease to another, the guarantor's obligations would come to an end. Statutory limitation of this position through the imposition of a condition precedent (the tenant providing a disclosure statement), has the potential of constituting an unreasonable burden on the part of the guarantor, particularly one who is not in a position to influence the tenant's actions. As the material required in the disclosure statement does not appear to go directly to the provision of the guarantee (i.e. the safety net in the event that the tenant defaults), the need to impose this condition on the guarantor is questionable. The matters considered under the disclosure statement are matters which generally fall within the scope of due diligence assessments on the part of the prospective assignee.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.32 Section 59: landlord's absolute discretion for certain consents

Outline of the current position/issues

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

Draft report submissions

The National Retail Association supports retention of this provision.

Discussion

While this provision codifies the general proposition that as the owner of the property, the landlord retains the overarching right to deal with the property notwithstanding the granting of certain rights to another under a lease, this provision goes beyond the standard position that consent for a tenant to sublease or obtain a mortgage not be unreasonably refused.

As the inclusion of clauses that permit certain dealings with the consent of the lessor is common in commercial tenancy contracts, the necessity for section 59 is questionable, particularly where the standard practice is one of reasonable discretion, not unfettered.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.33 Section 60: obligations regarding extensions or termination of leases

Outline of the current position/issues

Under section 60, a landlord must, within the period of between 6 and 12 months of the end of a lease²⁴⁹, either offer to extend or renew the lease, or advise of the landlord's intent not to offer an extension/renewal. In the case that the landlord offers an extension/renewal, that offer is to contain the proposed terms²⁵⁰ and the offer cannot be revoked within one month of it being made²⁵¹.

In the event that the landlord neither offers to extend the lease nor advises of an intent not to extend/renew, the landlord must, on request of the tenant, extend the lease by such a period that gives effect to the lease ending 6 months after the landlord actually gives the notice²⁵².

The provisions under section 60 do not apply in cases where the tenancy agreement contains an options clause or where the parties have agreed to renew the lease²⁵³.

Draft report submissions

The Property Council of Australia advocated for the provision to be repealed. The Council noted that "it requires unnecessary action on the part of landlords and creates uncertainty for tenants" as "the landlord is required to send a letter to the tenants advising them that the lease will terminate on the expiration of the lease". The Council noted that "(t)his creates a situation where a landlord is required to make a statement to the tenant which may not in fact turn out to be the end result... (which) can cause uncertainty for the tenant with respect to any ongoing tenancy when subsequently the parties may well end up negotiating a satisfactory new lease arrangement".

The National Retail Association supported retention of this provision, noting "it has worked well in all jurisdictions and when understood both parties will negotiate a new lease".

²⁴⁹ Or six and three months respectively for leases under 12 months duration (section 60(6)).

²⁵⁰ Section 60(1)(a).

²⁵¹ Section 60(2).

²⁵² Section 60(3).

²⁵³ Section 60(5).

Discussion

Section 60 provides for what should ordinarily be considered good practice in terms of not only contract management but relationship management as well. As the exclusions under section 60(5) exemplify, this is an issue that landlords and tenants ought to be able to manage between themselves without recourse to legislative intervention.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.34 Section 61: key-money for renewal or extension

Outline of the current position/issues

Similar to section 24, this provision prohibits the seeking or acceptance of key-money when a lease is being extended or renewed. Section 61(1) prescribes a maximum penalty of 100 penalty units.

The prohibition does not prevent a landlord from seeking a security deposit, rent in advance, recovery of expenses associated with the renewal/extension, or payment for granting a franchise associated with the lease²⁵⁴.

Draft report submissions

The National Retail Association supported retention of this provision.

Discussion

The general principles associated with retention of a provision similar to section 24 within a Code of Practice apply equally to section 61.

Recommendation

Should the *Business Tenancies (Fair Dealings) Act* be repealed, consideration could be given to including a similar provision within a Code of Practice.

4.4.35 Section 62: trading hours

Outline of the current position/issues

Section 62 voids a provision in a shop lease that requires the tenant to trade at a time that is otherwise unlawful.

²⁵⁴ Section 61(4).

Issues paper submissions

The Shopping Centre Council of Australia noted that “(s)ince trading hours are not regulated in the Northern Territory, this provision is unnecessary” and recommended its removal from the Act.

Draft report submissions

The draft report suggested that section 62 (dealing with operations during hours where trading might be unlawful) be retained.

The Property Council of Australia, the Law Society Northern Territory and the National Retail Association supported retaining section 62.

The Shopping Centre Council reiterated its view that section 62 was unnecessary.

Discussion

Prior to its repeal in 1991²⁵⁵, the *Early Closing Ordinance 1912-1959* governed trading hours of retailers in the Northern Territory. Although retail trading hours have not been generally regulated since the *Early Closing Ordinance* was repealed, selective legislative provisions continue to exist in relation to trading hours²⁵⁶.

While it could be argued that retention of this provision assists in clarifying that a clause would be void if it contravenes a law, the codification of a well understood maxim, in this instance, may be superfluous. The specific law relating to trading has not been on the Territory’s statute book for some time, and laws that provide for specific restrictions in certain cases have sufficient overriding imperative and robust enforcement mechanisms in their own right.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.36 Section 63: security deposits

Outline of the current position/issues

Section 63 requires the landlord to hold security deposits on trust for the tenant and to not deal with the monies held in any manner other than that which the landlord has a lawful entitlement to do. Such lawful entitlements include the ability to decide whether the deposit

²⁵⁵ *Statute Law (Miscellaneous Amendments) Act* No. 77 of 1991 section 5.

²⁵⁶ For example, the Director-General may impose conditions on a liquor license restricting “the days when and times during which licensed premises may be open for the sale of liquor” under section 31 of the *Liquor Act*; section 24(1) of the *Emergency Management Act* empowers an authorised officer to “direct the owner or person in charge of a place of business...to close the place to the public for a specified period”.

is to be held in the landlord's account, or that of an agent (where Part V of the *Agents Licensing Act* will apply) and orders relating to the security deposit under Part 11.

Draft report submissions

The National Retail Association supports the retention of this section.

Discussion

Section 63 codifies the position that the security deposit (and the interest earned on that deposit) is the tenant's monies held by the landlord as the tenant's guarantee to meet its obligations under the tenancy agreement. Section 63 further codifies a general principle that the security deposit need not be in the form of money and that a guarantee from a bank or other third party may be sufficient alternatives in managing the risk of a tenant's default.

Other than the above matters, the *Business Tenancies (Fair Dealings) Act* is silent on the subject of security deposits. The implication is that the subject of security deposits is generally a contractual matter between the landlord and tenant, with the common law to apply. Other key matters, such as quantum of the deposit, are therefore subject to agreement between the parties. In this light, retention of section 63 is questionable.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.37 Section 64: compulsion regarding conveyancing, legal or accountancy services

Outline of the current position/issues

Sections 19 and 26 of the *Business Tenancies (Fair Dealings) Act* requires a tenant to obtain advice from a legal practitioner²⁵⁷ in cases where the tenant wishes to waive either the time limit relating to provision of a landlord's disclosure statement or the minimum term for which a lease is entered into. Both sections require the provision of a certificate that states the tenant has been advised of the nature of the protections offered under the respective sections and that the tenant understands that those sections will not apply to the lease in the event a certificate is issued. It is a requirement under each section that the practitioner be independent of the landlord.

Section 64 makes it an offence (maximum penalty 50 penalty units) for a person to compel the tenant to use a particular legal practitioner, accountant or conveyancing agent nominated by the landlord. In addition to giving effect to the requirement of independent advice under sections 19 and 26, section 64 codifies, to an extent, the conflict of interest principles by requiring the landlord to pay for the services²⁵⁸. Section 64 provides further protection against potential conflicts of interest through invalidating certificates issued under either

²⁵⁷ Under section 26(4) an accountant may also issue a certificate.

²⁵⁸ Section 64(2).

section 19²⁵⁹ or 26²⁶⁰ in cases where the tenant did not understand the implications of the certificate.

Draft report submissions

The National Retail Association supported retention of this section.

Discussion

The underlying objective of section 64 is to avoid incidences of potential (and indeed actual) conflicts of interest between the tenant, the landlord, and the landlord's advisors/agents. In cases where there is a pre-existing relationship between a landlord and an advisor that has been recommended to the tenant by the landlord, there is a risk that a perceived conflict of interest may arise in terms of the ability for that advisor to advise a tenant fully and impartially. This perception is compounded somewhat where there is a level of compulsion associated with that referral.

The ramifications of an actual conflict of interest can be significant, however given the professions to which section 64 applies are governed by conduct rules that specifically address such situations, the potential incidence of an actual conflict arising seems marginal.

The Law Society Northern Territory's Rules of Professional Conduct and Practice (the Rules) contain a statement of general principle that "Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests."²⁶¹

While the Rules hold the fiduciary duty towards a client as paramount, the Rules do not prohibit a legal practitioner from acting on behalf of more than one client in a single matter. Rather, the Rules set down the circumstances under which such an arrangement may take place and the consent that is required of the clients²⁶². The Rules are however restrictive in relation to such practices, compelling the legal practitioner to cease acting for all parties in the event that continuing to act for all parties would be contrary to the interests of one of the parties²⁶³. The Rules further set out a general prohibition on acting for a client where the client's interest "is, or would be, in conflict with the practitioner's own interest"²⁶⁴.

The Accounting Professional and Ethical Standards Board's APES 110 Code of Ethics for Professional Accountants (the Code) has similar rules and standards for accountants. Section 220 of the Code provides "A Member in Public Practice shall take reasonable steps to identify circumstances that could pose a conflict of interest. Such circumstances may create threats to compliance with the fundamental principles. For example, a threat to... objectivity

²⁵⁹ Section 64(3).

²⁶⁰ Section 69(4).

²⁶¹ Rules of Professional Conduct and Practice: Law Society Northern Territory May 2005 p7.

²⁶² Rule 7.2.

²⁶³ Rule 7.3.

²⁶⁴ Rule 8.2.

or confidentiality may... be created when a Member in Public Practice performs services for clients whose interests are in conflict or the clients are in dispute with each other in relation to the matter or transaction in question.”²⁶⁵ The Accounting Professional and Ethical Standards Board’s rules on management of conflict of interest with multiple clients are similar to that of the Law Society.

The Australian Institute of Conveyancers Northern Territory Division also obliges members to adhere to a Code of Conduct however, that Code is not publicly available.

While there may be an argument that a practitioner may gain a benefit from accepting referrals from a landlord as part of maintaining an ongoing/long term client relationship with that landlord, the cost to the practitioner outweighs any such benefit due to the requirement to cease acting for both parties. The practitioner’s exposure is further compounded by the risk of adverse professional disciplinary action.

It is arguable that given the potential significance of such an issue, and the extent to which the professional conduct rules cover the matter, such matters would attract a degree of focus, if not in the public sphere, then at least within the respective industry. As the incidence of coercion and resulting conflicted advice is not known, it would be reasonable to assume, at face value at least, that it is not such a significant issue that warrants retention of specific provisions. The remedies available under section 64 would also be available under Part 10 unconscionable conduct provisions and the common law (against the practitioners).

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.38 Section 66: disclosure of turnover information

Outline of the current position/issues

As noted above in the discussion on rental calculation methods, information on the tenant’s turnover²⁶⁶ is often sought in retail tenancy leases. While this information is highly sensitive and confidential to the tenant, its provision is nevertheless necessary to enable the determination of rent in cases where a percentage of turnover forms part or all of the rental consideration.

Given the sensitivities associated with contractually agreeing to disclose confidential information to another party and the risks associated with loss of control over that information, section 66(1) makes it a criminal offence for a landlord of a retail shopping centre to disclose turnover information provided by the tenant. The penalty for an offence is reasonably significant: maximum penalty of 200 penalty units and/or imprisonment for 12

²⁶⁵ APES 110 Code of Ethics for Professional Accountants: Accounting Professional and Ethical Standards Board December 2010 p31.

²⁶⁶ Under section 32(5) of the Act, turnover is defined as including: “gross takings, gross receipts, gross income and similar concepts”. Section 32(1) provides a list of factors that are excluded from the calculation of turnover.

months. Section 66(2) permits disclosure under certain select circumstances, including where the tenant has consented to the disclosure and where the landlord is complying with an order of the court or requirement of a statute.

Draft Report submissions

The National Retail Association supported retention of this section.

A number of stakeholders (Law Society Northern Territory, Property Council and Shopping Centre Council) supported the general proposition that criminal offences should be removed from the Act. The Law Society Northern Territory further indicated that provisions should be civil in nature.

Discussion

Although predicated on the basis of shared benefit between landlord and tenant²⁶⁷, it is arguable that both parties benefit equally from such arrangements. Indeed, if that were the case, it would be standard practice for both parties to disclose their trading positions to each other when determining rent. Nevertheless, it is one of the accepted methods for determining rent within the commercial tenancy arena.

While the National Retail Association supports retention of the provision, its rationale is not articulated in its submission. A general theme, however, can be constructed from submissions to the Commonwealth's Consultation Paper *Extending Unfair Contract Term Protections to Small Businesses* in terms of tenant perceptions of imbalances in the bargaining position between landlords and tenants due to information asymmetry and the manner in which tenants' confidential data is applied.

The Australian Retailers Association noted that the provision "of sales and performance outcomes under the guise of 'turnover rental', or other such contractual clauses contained in the lease... has grossly compounded the significance of... imbalance..." between landlords and tenants in terms of information asymmetry and the volume of data available to landlords from sources such as "'portfolio averages', 'category occupancy costs' or such third party resources as 'URBIS industry averages', when seeking to set the terms and conditions of a lease contract". Although not necessarily a problem in the Territory, the Australian Retailers Association further noted that "In practice, while there may appear to be a market of competing shopping centre owners, these are in fact shared ventures where centres may be 25 or 50 percent joint-owned by consortium. The sharing of turnover figures relevant to individual retailers, leading to greater inequity in the marketplace for retailers attempting to negotiate with these consortium landlords, has become one of the industry's most significant issues."

In their submissions to the Commonwealth's Consultation Paper, the Pharmacy Guild of Australia, Lease1, and the Australian Newsagents Federation also raised similar issues with requirements to provide turnover information and the application of that information.

²⁶⁷ See discussion above at 4.4.13.

While a large amount of market data appears to exist that would assist a landlord in determining rents, it is an accepted proposition that tenant specific information is required if turnover rent is to be calculated accurately. Given this, and the perceptions of tenant peak bodies over potential misapplication of that data, retention of disclosure prohibitions appears warranted.

Recommendation

Should the *Business Tenancies (Fair Dealings) Act* be repealed, consideration could be given to including a similar provision within a Code of Practice.

4.4.39 Section 67: availability of statistical information

Outline of the current position/issues

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).

Draft Report submissions

The National Retail Association supports the retention of this section noting that “there is an opportunity for the stakeholders to commence discussions with a view to negotiating a voluntary Code of Practice to provide more statistical information which will add further to the availability of the information”.

Discussion

This provision does not have an enforcement mechanism or sanction, other than through a retail tenancy claim under Part 11 of the Act for failure to provide the requisite information. In order for a tenant to obtain the statistics in cases where data is not forthcoming from a landlord voluntarily, the tenant would either need to negotiate inclusion of a clause in the lease that compelled the landlord to provide the data and then seek to enforce it through a retail tenancy claim, or in the absence of such a clause, seek to argue that the requirement to financially contribute to a data gathering exercise created an implied term that the contribution instilled a level of ownership and thus rights in and to the statistics and products produced from the data.

Notwithstanding the positive right instilled by section 67, a tenant nevertheless remains reliant on either the common law or the unconscionable conduct provisions within section 79 to enforce those rights. As such rights can be implied under the common law, the appropriateness of codifying the right while relying on the common law to resolve disputes over that right is questionable.

The National Retail Association’s comments that stakeholders would benefit through discussions on methods and arrangements to undertake more statistical assessments is sensible and has the ability to lead to further understanding and enhancing the industry. This would be best achieved through a cooperative approach between stakeholders (possibly including a voluntary code of practice) rather than through statutory mandates.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.40 Section 68: advertising of tenant's business

Outline of the current position/issues

This provision voids a clause in a retail shopping centre lease where that clause requires the tenant to advertise the tenant's own business.

Draft Report submissions

The National Retail Association supports retention of this section.

Discussion

The provision seeks to enshrine the base proposition that business operators should be able to conduct their affairs as they see fit (within the bounds of the law). In this particular case, that freedom relates to a business operator's decision as to whether the business's model requires self-promotion in order to maintain viability, and avoiding unnecessary costs where self-promotion is not required.

While there may be some justification on the part of a landlord to include such a provision as a means of ensuring that a tenant has sufficient exposure, the use of such clauses is nevertheless questionable. Businesses who locate in shopping centres do so to leverage off the combined draw to passing customers, reducing the necessity for self-promotion. In this context, it is the shopping centre as a whole that may need to advertise in order to generate that volume of passing trade required to maintain viability of the centre (and thus the business therein). In that context, it may be reasonable for a shopping centre lease to include requirements for tenants to contribute to global advertising, rather than compel individual self-promotion however such contribution would necessarily need to be weighed against the landlord ensuring sufficient promotion of the centre in order to sustain the centre's business model generally.

Just as inclusion of clauses contemplated by section 68 are questionable, so too is retention of section 68 itself. As such clauses do not protect the legitimate business interests of the landlord (other than by reducing advertising expenses on the part of the landlord), those clauses would likely fall within the scope of unconscionable conduct (in particular section 79(2)(b)). There is also a high likelihood that they would also be picked up under the extension of unfair contract term protections to small business.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted.

4.4.41 Sections 69-72: advertising and promotion expenses

Outline of the current position/issues

Sections 69 to 72 insert certain processes associated with tenant contribution towards advertising and promotion into shopping centre leases. Where there is a lease requirement for the tenant in a retail shopping centre to pay an amount in respect of the centre's advertising and promotions, the landlord must provide the tenant with a copy of its marketing plan and other relevant material and information²⁶⁸. The landlord is also required to make available to the tenant a written statement every six months of all expenditure by the landlord on advertising and promotion which the tenant is required to contribute towards²⁶⁹ and provide an audited statement annually²⁷⁰. Unspent tenant contributions are to be rolled-over for future advertising/promotional activities²⁷¹.

The Draft Report proposed amending these provisions so that the information need only be made available if a request is made.

Issues Paper submissions

Although these provisions did not form part of discussions in the Issues Paper, the Shopping Centre Council included a recommendation that the requirement to provide advertising and promotion expenditure statements be repealed.

Draft Report submissions

The draft report stated that "(i)t 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".

The National Retail Association offered general agreement to the proposed amendments.

The Shopping Centre Council noted that the proposed amendments were a partial reflection of its recommendation to repeal the requirement to provide expenditure statements, however renewed its call for repeal on the grounds that the proposed amendments would retain an "unnecessary administrative burden on landlords". The Property Council of Australia reiterated the Shopping Centre Council's recommendation.

Discussion

At its base level, the provisions act as a safeguard that requires a landlord to prove to a tenant that monies collected for advertising were in fact spent on advertising. The provisions do not have enforcement mechanisms or sanctions, other than through a retail tenancy claim under Part 11 of the Act for failure to provide the requisite documentation.

²⁶⁸ Section 69

²⁶⁹ Section 70

²⁷⁰ Section 71

²⁷¹ Section 72

The heart of the issue however is not the provision of documentation, but the actual expenditure itself. Aside from the rolling over of unexpended funds, there is no express requirement for a landlord to actually deal with the funds, including applying the funds to the advertising/promotions outlined in the plan, or refunding unexpended funds. Indeed, there is no time limit for expending the funds, or the duration that funds may be rolled over. It is therefore conceivable, though unlikely, that a landlord may collect contributions over several accounting periods, not expend them and instead pool those funds.

Presently, in order for a tenant to satisfy itself that the contribution would be expended within the accounting period in which it was paid, that tenant would either need to negotiate inclusion of a clause in the lease that compelled the landlord to spend the contribution in accordance with the plan and then seek to enforce it through a retail tenancy claim, or in the absence of such a clause, seek to argue that the collection of a contribution created an implied term that the contribution would be expended in a timely and appropriate manner. Despite sections 69 to 72, a tenant remains reliant on either the common law to ensure that contributions toward advertising are dealt with appropriately or the unconscionable conduct provisions within section 79.

While the proposed amendments would reduce the compliance burden on landlords, even as presently drafted, sections 69 to 72 do not appear to afford enhanced protection for tenants. As noted above, sections 69 to 72 do not address the underlying mischief that plans and statements might identify regardless of whether they were provided voluntarily or by compulsion. Other mechanisms have to be relied upon by tenants in that regard. Should the Shopping Centre Council's observations on tenant indifference to seeking advertising plans or expenditure statements be reflective of practices in the Territory, retention of these sections is questionable.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of these provisions does not appear to be warranted.

4.4.42 Section 73: termination because of inadequate sales

Outline of the current position/issues

This provision voids clauses in retail shop leases that provide for termination of the lease in the case of inadequate sales or turnover performance of the tenant (section 73).

Draft Report submissions

The National Retail Association supports the retention of this section.

Discussion

While there may be some justification on the part of a landlord to include provisions covered by section 73 in a lease agreement as a means of ensuring that a tenant has sufficient cash-flow to meet rental payments, the use of such clauses is nevertheless questionable.

While a landlord would be expected to have specific knowledge of the tenant's lease costs (rent, outgoings and alike), landlords will not be experts in the nuances of every tenant's business environment. As such, clauses that rely on sales or turnover performance become somewhat arbitrary, often failing to account for the vagaries of business (such as seasonality).

Another argument that could be offered in support of inclusion of such clauses is that as tenants of shopping centres (and thus the business model of the shopping centre itself) rely upon volume throughput of passing customers, the landlord is required to ensure that each tenants' business is contributing to that throughput through minimum guarantees of turnover or sales. Such an argument however fails to take into account that one 'under-performing' shop would not, on its own, undermine the viability of either its neighbouring businesses or the shopping centre. On the other hand, a shopping centre's viability may well be influenced if the majority of shops within it are under-performing, however the root cause of that may well relate to an inappropriate mix of shops, which is within the control of the landlord. Nevertheless, there are more standard methods available to address such concerns, including not renewing a lease at the end of its term, or early termination through mutual consent.

Such clauses are unilateral in nature and while not necessarily restrictive in the legal sense, they may be considered unfair, particularly in the absence of mechanisms permitting redress by the tenant. There is also the likelihood that such provisions will be picked up under the extension of unfair contract term protections to small businesses.

Recommendation

Should the *Business Tenancies (Fair Dealings) Act* be repealed, consideration could be given to including a similar provision within a Code of Practice.

4.4.43 Section 74: prohibiting tenant's businesses elsewhere

Outline of the current position/issues

Section 74 of the *Business Tenancies (Fair Dealings) Act* voids clauses in leases that purport to limit the tenant carrying on business elsewhere either during, or after a lease has expired²⁷².

Draft Report submissions

The National Retail Association supports the retention of this provision.

Discussion

The section 74 prohibition reflects and codifies the general consensus on the freedom to conduct business and the common law prohibition on unreasonable restraint of trade²⁷³. At its base level, the doctrine of restraint of trade prohibits contractual clauses which restrict a person's freedom to engage in trade or employment on the basis that to permit otherwise

²⁷² Section 75(1)

²⁷³ For general discussions on restraint of trade see for example: N Rochow, *Toward a Modern Reasoned Approach to the Doctrine of Restraint of Trade*, [2014] WA Jurist 25; P Butt, *Restraint of Trade and Restrictive Covenants*, (2012) 86 ALJ 729; J D Heydon, *Restraint of Trade in the High Court*, (1976) 50 ALJ 290.

would be contrary to public policy of an inherent freedom to conduct one's affairs unhindered by anything other than the law.

The doctrine however does provide exemptions in certain circumstances where the restraint is necessary to protect legitimate business interests such as the goodwill of a business upon sale or intellectual property, and is subject to tests of reasonableness and the flow of due consideration or benefit to both parties. A further consideration is whether the restraint is in the public interest, in terms of not impinging the public's general interest in markets being competitive in nature.

The *Competition and Consumer Act 2010* (Cth) has replaced most of the common law in relation to restraint of trade, legislating the prohibition of that conduct which would previously have fallen within the doctrine (Part IV Division 2). The *Competition and Consumer Act* has not replaced the common law entirely – section 4M preserves the doctrine of restraint of trade except where it conflicts with that Act and section 51(2) exempts certain contracts from the application of Part IV, whereupon the common law doctrine would continue to apply (examples include employment contracts, partnership agreements, sale of a business).

Although restraint of trade provisions, such as that contemplated by section 74, are prohibited under section 45 of the *Competition and Consumer Act*, that prohibition is limited to contracts in which one of the parties is a corporation. While section 45 of the *Competition and Consumer Act* should apply to the majority of shopping centre tenancy agreements as it would be expected that at least one of the parties would be a corporate entity (the landlord), it is conceivable that both parties may be natural persons. In that event, the common law doctrine on restraint of trade would apply, prohibiting such provisions on the grounds that they do not protect the legitimate business interests of either party and impinge the general public policy of minimising anti-competitive practices.

With the exception of the National Retail Association offering general support for retention of this provision, the lack of comment from other stakeholders suggests a level of indifference over the value of the provision. With there being a well-established body of law prohibiting clauses contemplated by section 74, that provision is difficult to justify in the absence of evidence supporting its retention.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of this provision does not appear to be warranted. However if there was a sufficient call from stakeholders, consideration could be given to including a similar item within a Code of Practice.

4.4.44 Section 75: changes in core trading hours

Outline of the current position/issues

This provision provides that core trading hours in a retail shopping centre cannot be changed unless a majority of the tenants agree (section 75).

At its base, the intent of this provision is to set in place a standard or core set of trading hours within which businesses within a retail shopping centre are expected to be open in order to provide the leverage of throughput of prospective customers required for viability of the shopping centre as a collective. It is premised on the notion that the co-location of a number of retailers within the one place provides a drawcard to customers whereupon a customer for one particular store may provide 'drop in trade' (or 'passing trade') for others due to the convenience of the co-location, and it is upon this that shopping centres and tenants base their business and operational models. This drawcard is however reliant on businesses being open for trade, with its effect diminishing proportionately by the number of retailers who are closed whilst the shopping centre is open.

Section 75 does not regulate the times or days which constitute core trading hours, reflecting that that is a matter best decided by the shopping centre operator and its tenants on the basis of their business models²⁷⁴. Section 75 however does limit the ability for a shopping centre operator to unilaterally change the core trading hours to the detriment of the majority of its tenants²⁷⁵. This requirement of consensus reflects the notion that the initial core trading time was set by communal agreement on the basis of business models that had mutual reliance on pass through exposure, and any changes to trading times would necessarily need to support those business models.

Draft Report submissions

The National Retail Association supported retention of this provision.

Discussion

The intent of the provision is to strike a balance between the operating requirements of the shopping centre operator and the majority of its tenants. With only the National Retail Association supporting retention of this provision, the lack of comment from other stakeholders suggests a level of indifference to mandating such a term.

Recommendation

Should the *Business Tenancies (Fair Dealings) Act* be repealed, consideration could be given to including a similar balancing item within a Code of Practice if there was sufficient support from stakeholders.

4.4.45 Part 10 (sections 76 to 81) – unconscionable conduct in connection with retail shop lease

Outline of the current position/issues

Part 10 (sections 76 to 81) of the *Business Tenancies (Fair Dealing) Act* provides jurisdiction for the courts to deal with unconscionable conduct in the retail tenancy context. Sections 79

²⁷⁴ Section 75(2) excludes the initial fixing of trading hours in a new shopping centre. It is assumed here that the market will determine the optimum trading hours for any new shopping centre, upon which the operator and tenants will settle on mutually agreed times of core trading.

²⁷⁵ Section 75(1)

and 80 prohibit landlords and tenants respectively from engaging in “conduct that is, in all the circumstances, unconscionable”²⁷⁶, and provide an extensive, though not exhaustive list of matters which a court may have consideration to when determining whether unconscionable conduct has occurred²⁷⁷. Those matters include undue influence²⁷⁸; the relative bargaining position of each party²⁷⁹; and any applicable industry code (or other industry code)²⁸⁰. Unconscionable conduct in the retail tenancy context has not been judicially considered in the Northern Territory.

Issues Paper submissions

Amongst the items raised in the 2011 Issues Paper, the 2008 Productivity Commission’s Report: *The Market for Retail Tenancy Leases in Australia* was noted, including Recommendation 4 that provided:

“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.”

The item did not elicit stakeholder comments.

Draft Report submissions

Although the Productivity Commission’s recommendation was not discussed further in the Issues Paper, the issue was further explored in the 2013 Draft Report, which posed the question: *“Should the unconscionable conduct test be replaced by the unfair conduct test?”*

Following brief discussion, the Draft Report concluded that there was no evidence of problems with the unconscionable conduct test.

Stakeholders were broadly in agreement that the unconscionable conduct test should remain. The Law Society Northern Territory stated “The unconscionable conduct test should be retained at this stage and not replaced with an unfair conduct test”.

The Shopping Centre Council did not support the Draft Report’s question, noting that “The Draft Report provides no evidence that such a move is justified or necessary. Moves in other jurisdictions to replace ‘unconscionable conduct’ with ‘unfair conduct’ have been unsuccessful”. The Shopping Centre Council further noted that “...the new Federal Government made an election undertaking to extend the unfair contract provisions of the Australian Consumer Law (contained in the *Competition and Consumer Act*) to business-to-business transactions”, concluding “...there can certainly be no justification for amending the unconscionable conduct provisions in Part 10 of the Act.” The Property Council of Australia mirrored the Shopping Centre Council’s views.

²⁷⁶ sections 79(1) (landlord) and 80(1) (tenant)

²⁷⁷ sections 79(2) and 80(2).

²⁷⁸ Sections 79(2)(d) and 80(2)(d)

²⁷⁹ sections 79(2)(a) and 80(2)(a)

²⁸⁰ sections 79(2)(g) and (h) and 80(2)(g) and (h)

The National Retail Association agreed with the Draft Report's conclusion on this item.

Discussion

As discussed above at 3.1.4, the Commonwealth Government's extension of general consumer protection for unfair contractual provisions to small businesses opens up the option for the Territory to consider whether unconscionable conduct in retail shop leases could be dealt with in the broader context of the *Consumer Affairs and Fair Trading Act*.

From the discussion at 3.1.4, it would appear to be within the scope of Part 13 of the *Consumer Affairs and Fair Trading Act* to establish a Code of Practice governing business tenancies which retains the basic protections around unconscionable conduct presently found in the *Business Tenancies (Fair Dealings) Act*. Such a Code may alleviate stakeholder concerns such as that of the Shopping Centre Council around generic applications of consumer protection in business settings.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, the prohibition on unconscionable conduct and the subject matters contained in sections 79 and 80 should be retained in a Code of Practice established under Part 13 of the *Consumer Affairs and Fair Trading Act*.

4.4.46 Parts 11 and 12: Dispute resolution for retail tenancy claims and appeals

Outline of the current position/issues

Part 11 (sections 82 to 117) of the *Business Tenancies (Fair Dealings) Act* sets out a process for managing disputes between landlords and tenants. Part 11 requires that the parties attempt to resolve their issue through conciliation²⁸¹. Where that conciliation fails to reach agreement, the Commissioner of Business Tenancies may conduct an inquiry into the dispute²⁸² and determine the dispute in favour of one party or another (or in any combination thereof) as considered appropriate²⁸³. The Commissioner's determination is binding on the parties; however any order made may be appealed in the Local Court²⁸⁴.

Part 12 (sections 118 to 121) provides a mechanism for a party to an application under Part 11 to appeal a retail tenancy order in the Local Court²⁸⁵.

Draft Report submissions

Under the topic of "Other issues (not otherwise discussed in any detail in this paper)" (Chapter 3.3), the Draft Report raised the question: "Do the dispute resolution provisions of Part 11 (as administered by the Commissioner of Consumer Affairs) serve any purpose?"

²⁸¹ See ss85 and 86 *Business Tenancies (Fair Dealings) Act*

²⁸² Section 98

²⁸³ Section 102.

²⁸⁴ Section 119.

²⁸⁵ Section 119(1).

The Law Society Northern Territory viewed the dispute resolution provisions as “useful and necessary” and was of the belief that Part 11 “should not be reduced in scope”. The Property Council of Australia also supported retention of Part 11, seeing “no reason for these to be removed”.

The National Retail Association noted that “it is disappointing that mediation is not taken as the first course of dispute resolution rather than proceeding directly to court”. The National Retail Association further suggested that “consideration should be given to an education process, as evidence from other jurisdictions, indicates that matters are resolved through good mediation”.

The Shopping Centre Council understood that the “provisions are not utilised... (and saw) little point in their retention”.

Discussion

Both the Supreme Court²⁸⁶ and the Local Court²⁸⁷ have jurisdiction to hear unresolved tenancy disputes, and are conferred with the powers the Commissioner has when determining a claim²⁸⁸. A matter however cannot proceed before a court unless the Commissioner certifies that the parties have failed to resolve the retail tenancy claim at conciliation, and are unlikely to do so if the matter proceeded to an inquiry²⁸⁹. In such circumstances, the Commissioner must issue a certificate to that effect before an inquiry is conducted²⁹⁰ (a ‘section 104 certificate’).

While a majority of responses to the Draft Report were in line with the broader consensus that alternative dispute resolution processes were generally preferable to litigation in the first instance²⁹¹, the preference of parties in retail tenancy disputes in the Territory, at least anecdotally going by the practices observed by the Commissioner, appears to be one of litigate first, and perhaps negotiate prior to trial.

According to the Commissioner of Business Tenancies, the dispute resolution provisions as set out in Part 11 are seldom accessed for alternative dispute resolution purposes. Rather, the Commissioner’s experience is that the provisions are generally used for the purposes of obtaining a section 104 Certificate to enable court proceedings to ensue; noting that most applicants were at a stage where discussions and negotiations had broken down and the parties had little desire for further mediation/conciliation at additional cost when considered against the likelihood of a retail tenancy order being immediately appealed to the Local Court. Such preference undermines the intent behind Part 11, and indeed reduces Part 11 to a ‘red tape’ compliance exercise – litigation cannot proceed in the absence of a section 104 certificate.

²⁸⁶ Section 105(1).

²⁸⁷ Section 105(2).

²⁸⁸ Section 106.

²⁸⁹ Section 85.

²⁹⁰ Section 104(1).

²⁹¹ See for example: *The Resolve to Resolve — Embracing ADR to improve access to justice in the federal jurisdiction*, 2009, The National Alternative Dispute Resolution Advisory Council.

Arguably Part 11 reflects best practice alternative dispute resolution theory, compelling parties to attempt to resolve their retail tenancy issue outside of the court system. In practice however, Part 11 appears to be considered by parties to a business tenancy dispute as a perfunctory step in the litigation process. If this is the case, there would appear to be a duplication of alternative dispute resolution requirements – Part 11, and those imposed upon parties through court rules.

As part of the general case management process under the *Local Court Rules*, the Registrar must “fix a date, time and place for a conciliation conference”²⁹². During that conference, the Court may either attempt to conciliate the matter, refer the matter to mediation, or “...give the directions it thinks necessary for the expeditious determination of the proceedings” (including setting the matter down for hearing)²⁹³.

Division 3²⁹⁴ specifically deals with retail tenancy claims. The Division reiterates the requirement for there to be a section 104 Certificate prior to commencement of proceedings²⁹⁵ and then applies the general case management process, including the holding of a conciliation conference²⁹⁶ once proceedings are afoot.

Within the Supreme Court Rules, mediation between the parties is ordered at the discretion of the presiding Judge or the Master as part of the overall case management process²⁹⁷ of all civil matters.

In this light, retention of Part 11 is difficult to justify on the grounds of both its actual application and from a ‘red-tape’ compliance perspective. In the Local Court setting, the Rules mandate pre-trial conciliation and if a business tenancy dispute was of such a quantum or complexity that it necessitated an action in the Supreme Court, it is likely that mediation would be ordered as part of the case management process. Discontinuance of Part 11 would not alienate recourse to alternative dispute resolution, however on the face of it, would remove duplicate processes, potentially reducing costs and streamlining ultimate resolution of a retail tenancy dispute. By implication, retention of Part 12 would be superfluous due to redundancy.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, retention of the dispute resolution and appeals mechanisms is not warranted.

²⁹² Rule 32.01(1) *Local Court Rules*

²⁹³ Rules 34.04(2) and (3) *Local Court Rules*

²⁹⁴ Part 30 *Local Court Rules*

²⁹⁵ Rule 30.07(a)

²⁹⁶ Rule 30.09

²⁹⁷ See Orders 48.06(4)(a) and 48.13(1) *Supreme Court Rules*

4.4.47 Part 13 (sections 122 to 134): Business tenancies generally

Outline of the current position/issues

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)²⁹⁸, tenant's right of association²⁹⁹ and mitigation of damages³⁰⁰.

Issues Paper submissions

The Property Council of Australia and Shopping Centre Council submitted that Part 13 of the *Business Tenancies (Fair Dealings) Act* 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 further submitted that Part 13 does not offer a commercial tenant any greater protection than the *Law of Property Act* and the common law.

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 and that there was no apparent overlap with the *Law of Property Act*. Further, the Society submitted that Part 13 should apply to all business tenancies, including government tenancies.

The National Retail Association disagreed with the repeal of Part 13, indicating that "it should not be removed or reformed other than to provide for the exclusion of non-retail premises except those premises located within shopping centres". The National Retail Association further noted that, as the vast majority of landlords involved in disputes in other jurisdictions were smaller landlords, retention of Part 13 was necessary.

Draft Report submissions

The draft report recommended the retention of Part 13 with an amendment to 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*'.

The Shopping Centre Council and Property Council of Australia opposed the recommendation. The Property Council of Australia submitted that Part 13 should only apply to retail and not to all business tenancies. The Shopping Centre Council's position remained unchanged from that noted above.

The Law Society Northern Territory reiterated its support for retention of Part 13 of the Act and for amendment of section 114 of the *Law of Property Act* "so that it refers to a defined

²⁹⁸ Sections 124-132.

²⁹⁹ Section 133.

³⁰⁰ Section 134.

term under the *Business Tenancies (Fair Dealings) Act*, instead of the existing reference to leases within the meaning of the Act”.

The National Retail Association simply noted that “(t)he Northern Territory is the only jurisdiction that contains such provisions... (and that) other jurisdictions have experienced no difficulties in relying on other Acts in respect of repossession of premises”.

Discussion

At face value, there is a degree of overlap between Part 13 and those provisions within Part 8 of the *Law of Property Act* relating to certain rights, powers and obligations of landlords and lessees generally. Legally, there is no issue with multiple Acts dealing with ostensibly the same subject matter where either of those Acts limits the substantive application of otherwise differing legislative regimes. This is the case presently in relation to business tenancies, where section 114 of the *Law of Property Act* fairly carefully deals with this issue.

Specifically, section 114(2)(c) of the *Law of Property Act* identifies the sections of that Act that apply to leases within the meaning of the *Business Tenancies (Fair Dealings) Act*, with section 114(2)(d) of the *Law of Property Act* detailing the sections that do not apply to those leases. While this relationship could probably be made clearer by using the term ‘business leases’ in section 114(2)(c) and (d) of the *Law of Property Act* rather than ‘leases’, there is nevertheless a clear legislative distinction placed on the operative scope of both Acts³⁰¹. The *Law of Property Act* regulates certain aspects of leases generally, whereas the *Business Tenancies (Fair Dealings) Act* is intended to comprehensively regulate specific tenancies that retail businesses may take up.

While there are similarities in overall subject matter, there are some notable differences between the two Acts, which extends the *Business Tenancies (Fair Dealings) Act* beyond the scope of the *Law of Property Act*. Part 13 of the *Business Tenancies (Fair Dealings) Act* contains provisions that enshrine a right of association³⁰² and the common law notion of mitigation of loss³⁰³ which are not specifically legislated for in the *Law of Property Act*. Part 13 also provides a mechanism for a landlord to seek vacant possession in the event that the premises is declared a drug premises under the *Misuse of Drugs Act*³⁰⁴. That difference aside, Part 13’s repossession mechanisms are, on the whole, generally compatible with the mechanisms provided in the *Law of Property Act*. If the *Business Tenancies (Fair Dealings) Act* is repealed, the *Law of Property Act* would seem to adequately cover repossession matters.

The policy issues associated with tenants’ rights of association, given the nature of that issue, would however need to be retained in some form. Given that this is essentially a matter that relates to conduct, inclusion within a Code of Conduct would seem more appropriate than amendment to the *Law of Property Act*.

³⁰¹ This intention to distinguish is further supported by the fact that s114(2)(a) and(b) specifically applies certain sections and excludes other sections of the *Law of Property Act* in respect of tenancies that are regulated by the *Residential Tenancies Act*.

³⁰² Section 133.

³⁰³ Section 134.

³⁰⁴ Section 126.

With regard to declared drug premises, repeal of the *Business Tenancies (Fair Dealings) Act* would remove the mechanism for a landlord to seek vacant possession on such circumstances alone. This would further align the processes for terminating shopping centre tenancies within other commercial tenancies. On that basis, retention of a provision similar to section 126 of the *Business Tenancies (Fair Dealings) Act* does not appear to be necessary.

On the matter of statutory provisions that enshrine the common law notion of mitigation, it is likely that this was perceived necessary in the *Business Tenancies (Fair Dealings) Act* due to the codification of a strict process for gaining vacant possession. As the *Law of Property Act* does not have such a regimented regime, retention of a provision similar to section 127 of the *Business Tenancies (Fair Dealings) Act* does not appear to be necessary. Arguably the common law continues to apply in these circumstances, negating the necessity of such a provision.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, guarantees surrounding a tenant's right of association should be retained within a Code of Conduct.

4.4.48 Miscellaneous – franchise arrangements

Outline of the current position/issues

The 2013 Draft Report raised, under Section 3.3 *Other issues (not otherwise discussed in any detail in this paper)*, that a Queensland review was considering the policy position around the application of retail tenancy legislation 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. While the outcome of that Queensland review is pending, the issue can be summarised as: whether it is appropriate that the definition of 'lease' be narrowed to exclude from the Act franchisees operating under a right or license to operate out of a premises under a franchise agreement.

Draft Report Submissions

The Property Council of Australia and Shopping Centre Council both submitted that they are unaware of any problems occurring in the Northern Territory, however the Shopping Centre Council went on to note that the current definition of lease could result in "...the franchisor being the lessor and the franchisee being the lessee under a retail shop lease. There is no relationship created between the (actual) landlord and the franchisee" where the franchise agreement requires the franchisee to operate out of a premises that is leased by the franchisor from a third party landlord. The Shopping Centre Council indicated that this may be "...problematic because it results in a franchisor being required to give disclosure about matters which may not be within the knowledge of the franchisor; being obliged to take steps (such as rectifying defects) in relation to matters which are beyond the franchisor's control; and being exposed to claims in relation to those matters".

The Shopping Centre Council concluded its comments on franchises: "...it is appropriate that the definition of 'lease' be narrowed to exclude from the Act a right or license to operate premises. This would mean that a franchisee would not be entitled to the protections for retail tenants under the Act and the landlord would only have procedural or other obligations in relation to the franchisor (the lessee). The relationship between the lessee (franchisor) and the franchisee, as it relates to obligations and protections under the Act, should be addressed in the franchise agreement and, if necessary, the Franchising Code of Conduct."

The Law Society Northern Territory submitted that "...it is of the view that business leases in the context of franchise arrangements should be subject to the Act, and is not clear as to the reason why franchisees should not be afforded the same protections that are afforded to other business owners".

Discussion

The type of situation conveyed by the Shopping Centre Council effectively creates a sub-lease arrangement. As with all sub-lease arrangements, the franchisor may minimise its exposure through providing the same disclosures given to it by the landlord, and/or negotiating both the head and sub-lease to transmit those rights and responsibilities between the franchisee and the landlord, as would be the case for any ordinary commercial lease/sub-lease. It is therefore possible to manage other considerations within the head-lease, including through provisions which create beneficial obligations to non-party franchisees, in a similar manner that a sub-lease/license would contain provisions that sees the franchisee indemnifying the franchisor for damage to the premises/non-payment of rent and alike. Further, as a 'major lessee', franchisors are arguably in a position which enables them to negotiate terms with the landlord that account for the franchise arrangement, including the ability to assign the lease to another without impinging on the franchisor's 'rights' to the 'head-lease'.

The Commonwealth recently amended the Franchising Code of Conduct (*Competition and Consumer (Industry Codes—Franchising) Regulation 2014*). Under the 'new code' which took effect from 1 January 2015, franchisors are to disclose to the franchisee any incentives or financial benefits it may receive under a 'head-lease', in addition to the present obligation of providing a copy of the franchisor's lease to the franchisee.

The obligation for franchisors to disclose their leasing arrangements provides a strong indication that the obligations and rights under the 'head-lease' are of paramount consideration when managing the franchise relationship. Nevertheless, though the Franchising Code of Conduct may increase franchisee awareness of the nature, terms and conditions of the franchise arrangement, including the franchisor's rights/interests in the business premises, it does not necessarily assist franchisees in dealing with tenancy/licensing matters outside of the general good faith provisions.

As issues surrounding franchise tenancy arrangements have not been canvassed in any depth in the Territory, it seems prudent to maintain the status quo at the present time. It should be noted, given the Commonwealth's involvement in franchise regulation, any inconsistency between the Territory's tenancy regime and the Franchising Code will see the Franchising Code prevail, consistent with the constitutional subordination of Territory law.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed, application of a Code of Conduct should include franchise arrangements.

4.4.49 Miscellaneous – removal of criminal offences

Outline of the current position/issues

The *Business Tenancies (Fair Dealings) Act* currently has twelve offences, with penalties ranging from 50 penalty units³⁰⁵ to 1 000 penalty units³⁰⁶. Three of those offences also attract terms of imprisonment of up to 12 months in addition to monetary penalties³⁰⁷.

Draft Report Submissions

Under the discussion of other issues not canvassed through the Issues Paper, the Draft Report asked “whether the offences (criminal) should be retained or replaced by provisions that provide only for civil outcomes (e.g. damages) for breach of a provision of the legislation”.

A number of stakeholders (Law Society Northern Territory, Property Council of Australia and Shopping Centre Council) supported the removal of criminal offences from the Act, with the Law Society indicating that provisions should be civil in nature.

Discussion

As with criminal provisions, civil penalties are a form of statutory regulation that seeks to dissuade certain behaviours/actions, the differential being the contravention of which results in financial sanction rather than criminal prosecution. Subject to their scope, civil penalties may be sought by the agency or authority responsible for administration of the governing Act, or an individual impinged by the conduct regulated against. The matter is generally heard by a court or tribunal on the less arduous test of the balance of probabilities (in the absence of statutory setting of the requisite standard), with regard to the level of infraction, its nature and consequences. Unlike criminal offences, civil penalties are not open to general defences in the absence of specification in the legislation.

Penalties may be pecuniary in nature, such as payment of a monetary penalty to the Crown, financial compensation to an individual or a form of restitution. Civil penalties can also involve non-financial sanctions such as disqualifications, directives, undertakings, and can extend to prohibitive or mandatory injunctions or other consequences.

Corresponding regimes elsewhere in Australia have varying criminal sanctions, ranging from an absence of penalties³⁰⁸, through reasonable compensation for losses³⁰⁹, to maximum fines of \$11 000³¹⁰.

³⁰⁵ *Business Tenancies (Fair Dealings) Act*: sections 36(1) through (4) for breaching conditions associated with sinking funds, and section 64 for compelling a tenant to use the services of a nominated practitioner.

³⁰⁶ Section 133(2) impinging upon a tenant’s rights of association.

³⁰⁷ Sections 31(1), 66(1), and 124.

Given that the Code of Practice would seek to regulate the more serious transgressions in contractual dealings between landlords and tenants, the imposition of criminal penalties for breaches of the Code appears, on the whole, to be the most appropriate method for enforcement of fundamental principles of the landlord/tenant relationship.

Recommendation

If the *Business Tenancies (Fair Dealings) Act* is repealed and a Code of Practice is established, consideration should be given to retaining criminal penalties for breaches of the Code.

³⁰⁸ Western Australia - *Commercial Tenancy (Retail Shops) Agreements Act*.

³⁰⁹ See for example Queensland – s22(4) *Retail Shop Leases Act*.

³¹⁰ See for example New South Wales – ss14, 40 and 45 *Retail Leases Act* attract maximum fines of 100 penalty units.

5. RETAIL SHOP LEASE CODE OF PRACTICE

As discussed above, the proposed Retail Shop Lease Code of Practice seeks to retain those key provisions that regulate retail shop tenancies which are not adequately addressed in other regulatory regimes. The suggested content for a code of practice set out below is based on the discussions in Chapter 4 and is provided as the basis for further input from stakeholders.

5.1 Suggested content for a Retail Shop Lease Code of Practice

1. Objectives

The objects of this Code are to enhance the certainty and fairness in retail shop leasing between landlords and tenants.

2. Definitions

Commissioner means the Commissioner of Consumer Affairs.

key-money means money to be paid or a benefit to be given:

- (a) by way of a premium, or something similar in nature to a premium, where there is no real consideration given for the payment or benefit; and
- (b) in consideration of a benefit in connection with the granting, renewal, extension or assignment of a retail shop lease.

landlord in relation to a retail shop lease, means the person who grants or proposes to grant the right to occupy a retail shop under a retail shop lease and includes a sublandlord and a landlord's or sublandlord's heirs, executors, administrators and assigns.

retail shop means premises that are used wholly or predominantly for:

- (a) the sale or hire of goods by retail or the retail provision of services (whether or not in a retail shopping centre); or
- (b) the carrying on of a business in a retail shopping centre; or
- (c) the carrying on of a business of a class or description that is prescribed by the Regulations.

retail shop lease means an agreement under which a person grants or agrees to grant to another person, for valuable consideration, a right of occupation of premises for the use of the premises as a retail shop:

- (a) whether or not the right is a right of exclusive occupation; and
- (b) whether the agreement is express or implied; and
- (c) whether the agreement is oral or in writing, or partly oral and partly in writing.

retail shopping centre means 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;

however, if the premises are in a building with 2 or more floor levels, or are geographically distinct (even if in the same building) from areas in the shopping centre containing premises that are retail shops, the retail shopping centre includes only those levels or areas of the building(s) where those retail shops are located;

specialist retail valuer means a valuer having not less than five years' experience in valuing retail shops.

tenant in relation to a retail shop, means the person who has the right to occupy the retail shop under a retail shop lease and includes a subtenant and a tenant's or subtenant's heirs, executors, administrators and assigns.

3. Exemptions

Retail Shops:

This Code does not apply to any of the following retail shops:

- (a) a shop that has a total lettable area of 1 000 square metres or more;
- (b) a shop that is used wholly or predominantly for the carrying on of a business by the tenant on behalf of the landlord;
- (c) a shop within premises where the principal business carried on at the premises is the operation of a cinema or bowling alley and the shop is operated by the person who operates the cinema or bowling alley;
- (d) a shop that is leased to:
 - (i) a listed corporation (as defined in section 9 of the *Corporations Act 2001*); or

- (ii) a subsidiary (as defined in section 9 of the *Corporations Act 2001*) of a listed corporation; or
 - (iii) a body corporate whose securities are listed on a financial market outside Australia and the external territories that is a member of the World Federation of Exchanges; or
 - (iv) a subsidiary (as defined in section 9 of the *Corporations Act 2001*) of a body corporate mentioned in subparagraph (iii);
- (e) premises of a class or description prescribed by the Regulations to be exempt from this Code.

Retail Shop Leases:

- (1) This Code does not apply to any of the following retail shop leases:
- (a) leases for a term of less than 6 months, where there is no right for the tenant to extend the lease (whether by means of an option to extend or renew the lease or otherwise);
 - (b) leases for a term of 25 years or more (with the term of a lease taken to include any term for which the lease may be extended or renewed at the option of the tenant);
 - (c) leases entered into before the commencement of this section;
 - (d) leases entered into under an option that was granted, or an agreement that was made, before the commencement of this section;
 - (e) a lease of a class or description prescribed by the Regulations to be exempt from this Code or a provision of this Code.
- (2) This Code does not apply to:
- (a) a lease mentioned in this section that is assigned to another person after the commencement of this section; or
 - (b) a holding over by the tenant after the end of the term of a lease mentioned in subsection (1)(c).
- (3) For subsection (1)(a), a provision of a lease that provides for holding over by the tenant at the end of the term of the lease is not taken to confer a right on the tenant to extend the lease if it operates, in effect, at the discretion of the landlord.
- (4) Despite this section:
- (a) if the term of a retail shop lease is less than 6 months; and
 - (b) the tenant is continuously in possession of the retail shop for 6 months or more under the lease because of the lease being renewed one or more times or being continued (or both);
 - (c) this Code applies to the lease on and from the day on which the tenant has continuously been in possession of the retail shop for 6 months.

Other exemptions:

This Code does not apply where the Regulations have exempted from the operation of this Code or a provision of this Code either unconditionally or subject to conditions:

- (a) a specified person, retail shop lease or retail shop; or
- (b) a specified class of persons, retail shop leases or retail shops.

4. Code overrides retail shop leases

- (1) This Code operates despite the provisions of a retail shop lease.
- (2) A provision of a retail shop lease is void to the extent that the provision is inconsistent with a provision of this Code.
- (3) A provision of an agreement or arrangement between the parties to a retail shop lease is void to the extent that the provision would be void if it were in the lease.

5. Key-money on grant of lease

- (1) A person must not, as landlord or on behalf of the landlord, seek or accept key-money in connection with the granting of a retail shop lease.
- (2) A provision of a retail shop lease is void to the extent that it requires or has the effect of requiring key-money in connection with the granting of the lease.
- (3) If a person contravenes this section then, whether or not the person is found guilty of an offence against subsection (1), the tenant is entitled to recover from the landlord as a debt:
 - (a) a payment made by; or
 - (b) the value of any benefit conferred by.

The tenant and accepted by or on behalf of the landlord in contravention of this section.

- (4) This section does not prevent a landlord:
 - (a) requiring payment by the tenant of a reasonable sum for legal or other expenses incurred in connection with the preparation and entering into of the retail shop lease; or
 - (b) receiving payment of rent in advance; or
 - (c) securing performance of the tenant's obligations under the retail shop lease by requiring the provision of a bond, security deposit or a guarantee from the tenant or another person (such as a requirement that the directors of a company that is the tenant guarantee performance of the company's obligations under the lease); or
 - (d) seeking and accepting, from a purchaser of the business, payment for goodwill of a business (but only to the extent that the goodwill is attributable to the conduct of the business by the landlord); or

- (e) seeking and accepting payment for plant, equipment, fixtures or fittings that are sold by the landlord to the tenant in connection with the granting of the lease; or
- (f) seeking and accepting payment for the grant of a franchise in connection with the granting of the retail shop lease.

6. Rent review

- (1) If a retail shop lease provides for a review of the rent payable under the lease or under a renewal of the lease, the lease is to state:
 - (a) when the reviews are to take place; and
 - (b) the basis or formula on which the reviews are to be made.
- (2) The basis or formula on which a rent review is to be made is to be one of the following:
 - (a) a fixed percentage;
 - (b) an independently published index of prices or wages;
 - (c) a fixed annual amount;
 - (d) the current market rent of the retail shop lease;
 - (e) a basis or formula prescribed by the Regulations.
- (3) 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.
- (4) Subsection (3) does not apply to a provision that uses:
 - (a) a basis or formula mentioned in subsection (2)(a), (b) or (c); or
 - (b) a basis or formula prescribed under subsection (2)(e) that is also prescribed as a basis or formula to which subsection (3) does not apply.
- (5) A rent review is to be conducted as early as practicable within the time provided by the lease, and if the landlord has not initiated the review within 90 days after the end of that time the tenant may initiate the review.
- (6) A rent review provision in a retail shop lease is void if the lease does not specify how the review is to be made.
- (7) If a provision in a retail shop lease that provides for a review of the rent payable under the lease does not comply with subsection (2), the rent is to be:
 - (a) as agreed between the landlord and tenant; or
 - (b) if there is no agreement within 30 days after the landlord gives the tenant, or the tenant gives the landlord, a written notice specifying an amount of rent for the purposes of the review – the amount determined as the current market rent of the retail premises by a specialist retail valuer appointed by the Commissioner.
- (8) The landlord and the tenant are to pay the costs of the valuation under subsection (7) in equal shares.

7. Review of current market rent

- (1) A retail shop lease that provides for rent to be changed to current market rent, or that provides an option to renew or extend the lease at current market rent, is taken to include provisions to the following effect:
 - (a) the current market rent is the rent that would reasonably be expected to be paid for the shop, determined on an effective rent basis, having regard to the following matters:
 - (i) the provisions of the lease;
 - (ii) the rent that would reasonably be expected to be paid for the shop, in a free and open market between a willing landlord and a willing tenant in an arm's length transaction, if it were unoccupied and offered for renting for the same or a substantially similar use to which the shop may be put under the lease;
 - (iii) the gross rent, less the landlord's outgoings payable by the tenant;
 - (iv) rent concessions and other benefits that are frequently or generally offered to prospective tenants of unoccupied retail shops;
 - (b) for paragraph (a), the current market rent is not to take into account the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings on the retail shop premises;
 - (c) if the landlord and the tenant do not agree as to what the actual amount of that rent is to be, the amount of the rent is to be determined by a valuation carried out by:
 - (i) a specialist retail valuer appointed by agreement between the parties to the lease; or
 - (ii) if the parties cannot agree as to who is to be appointed under subparagraph (i) – a specialist retail valuer appointed by the Commissioner;
 - (d) in determining the amount of current market rent, a specialist retail valuer must take into account the matters set out in paragraph (a);
 - (e) the landlord must, not later than 14 days after a request by a specialist retail valuer appointed under paragraph (c), supply the valuer with all relevant information about leases for retail shops situated in the same building or retail shopping centre to assist the valuer to determine the current market rent;
 - (f) a valuation for paragraph (c) is to be in writing, to contain detailed reasons for the specialist retail valuer's determination and to specify the matters to which the valuer had regard in making his or her determination;
 - (g) the parties to the lease are to pay in equal shares the costs of a valuation by a specialist retail valuer.
- (2) A specialist retail valuer appointed under subsection (1)(c) must make the valuation of current market rent not later than one month after accepting the appointment.

- (3) A specialist retail valuer must refer non-compliance with subsection (1)(e) to the Commissioner and the Commissioner may deal with that non-compliance as the Commissioner deems appropriate.

8. *Sinking funds*

Sinking fund for major repairs and maintenance:

If a retail shop lease provides for the establishment of a sinking fund to fund provision for major items of repair or maintenance, the lease is taken to include provisions to the following effect:

- (a) an amount paid by the tenant in respect of the landlord's outgoings on account of those major items of repair or maintenance is to be paid into the sinking fund;
- (b) so much of the balance standing to the credit of the sinking fund as remains unexpended from time to time for a purpose for which the sinking fund was established is to be held by the landlord in an account bearing interest;
- (c) amounts paid by the tenant for credit of the sinking fund, and the net interest earned by the landlord on the sinking fund, are not to be applied by the landlord for a purpose other than payment of outgoings for which the sinking fund was established;
- (d) the landlord is liable to contribute to the sinking fund a deficiency attributable to a failure by the landlord, or a predecessor in title of the landlord, to comply with paragraph (c);
- (e) the major items of repair or maintenance for which contribution to the sinking fund may be required by the tenant are limited to repair or maintenance of:
 - (i) a building, or plant and equipment of a building, in which the retail shop is situated; or
 - (ii) if the retail shop lease relates to a retail shop situated in a retail shopping centre – the buildings, plant and equipment and areas used in association with the retail shopping centre;
- (f) the landlord must keep full and accurate accounts of all money received or held by the landlord in respect of the sinking fund;
- (h) the landlord must give the tenant, on the request of the tenant, a sinking fund statement containing details of expenditure during the period from the fund on items for which the tenant is required to contribute;
- (i) a sinking fund statement provided by a landlord to a tenant is to be prepared in accordance with the relevant principles and disclosure requirements of applicable accounting standards.

Limits on sinking funds:

- (1) This section applies to the landlord under a retail shop lease that provides for the establishment of a sinking fund to fund provision for major items of repair or maintenance.

- (2) The landlord must not establish more than one sinking fund at any one time in respect of retail shop leases for retail shops situated in the same building or retail shopping centre.
- (3) The landlord must not require or accept contributions to the sinking fund in respect of a retail shop situated in a retail shopping centre that total an amount that is more than 5% of the total of the landlord's estimated outgoings for the year concerned in respect of the retail shopping centre.
- (4) The landlord must not require or accept contributions by a tenant to the sinking fund if the amount outstanding to the credit of the sinking fund is more than \$250 000.

Repayment from sinking fund after destruction etc. of building:

- (1) This section applies to the landlord under a retail shop lease of a retail shop that provides for the establishment of a sinking fund to fund provision for major items of repair or maintenance.
- (2) If the building or retail shopping centre in which the retail shop is located is destroyed or demolished or the retail shopping centre ceases to operate, the landlord must repay to each tenant liable to contribute to the sinking fund the amount payable to the tenant determined in accordance with subsection (3).
- (3) The amount payable to the tenant is that proportion of the total amount outstanding to the credit of the sinking fund that is equal to the proportion that the lettable area of the tenant's retail shop bears to the total lettable area of all the shops in respect of which contributions are required to be made to the fund.
- (4) In this section:

landlord and **tenant** mean the persons who were the landlord and tenant, respectively, under a retail shop lease immediately before the destruction or demolition of the building or immediately before the retail shopping centre ceased to operate.

9. Key-money on assignment prohibited

- (1) A person must not, as landlord or on behalf of the landlord, seek or accept key-money in connection with the granting of consent to the assignment of a retail shop lease.
- (2) A provision of a retail shop lease is void to the extent that it requires or has the effect of requiring key-money in connection with the granting of consent to the assignment of the lease.
- (3) If a person contravenes subsection (1) then, whether or not the person is found guilty of an offence against that subsection, the tenant is entitled to recover from the landlord as a debt:
 - (a) a payment made by; or
 - (b) the value of any benefit conferred by;

the tenant or assignee and accepted by or on behalf of the landlord in contravention of this section.

- (4) This section does not prevent a landlord:
- (a) requiring payment by the tenant or assignee of a reasonable sum for legal or other expenses incurred in connection with the assignment of the lease; or
 - (b) receiving payment of rent in advance; or
 - (c) securing performance of the assignee's obligations under the lease by requiring the provision of a bond, security deposit or a guarantee from the assignee or another person (such as a requirement that the directors of a company that is the assignee guarantee performance of the company's obligations under the lease); or
 - (d) seeking and accepting, from a purchaser of the business, payment for goodwill of a business, but only to the extent that the goodwill is attributable to the conduct of the business by the landlord; or
 - (e) seeking and accepting payment for plant, equipment, fixtures or fittings that are sold by the landlord to the tenant or assignee in connection with the granting of consent to the assignment of the lease; or
 - (f) seeking and accepting payment for the grant of a franchise in connection with the granting of consent to the assignment of the lease.

10. *Key-money for renewal or extension*

- (1) A person must not, as landlord or on behalf of the landlord, seek or accept key-money in connection with the renewal or extension of a retail shop lease.
- (2) A provision of a retail shop lease is void to the extent that it requires or has the effect of requiring key-money in connection with the renewal or extension of the lease.
- (3) If a person contravenes subsection (1), the tenant is entitled to recover from the landlord as a debt:
- (a) a payment made; or
 - (b) the value of a benefit conferred by the tenant and accepted;
- by or on behalf of the landlord in contravention of this section, whether or not the person is found guilty of an offence against that subsection.
- (4) This section does not prevent a landlord from:
- (a) requiring payment by the tenant of a reasonable sum in respect of legal or other expenses incurred in connection with the renewal or extension of the lease; or
 - (b) receiving payment of rent in advance; or
 - (c) securing performance of the tenant's obligations under the renewed or extended lease by requiring the provision of a bond or security deposit or a guarantee from the tenant or another person; or
 - (d) seeking and accepting payment for the grant of a franchise in connection with the renewal or extension of the lease.

11. Confidentiality of turnover information

- (1) If a retail shop lease requires the tenant to provide information to the landlord concerning the turnover of the business of the tenant, the landlord must not disclose or communicate to a person the information provided by the tenant.
- (2) Subsection (1) does not prevent the landlord communicating or disclosing information provided by the tenant as required by the lease if the information is communicated or disclosed:
 - (a) with the consent of the tenant; or
 - (b) in a document giving aggregate turnover information about a retail shopping centre in a manner that does not disclose information relating to the turnover of an individual tenant's business; or
 - (c) in compliance with a requirement of a court or as part of court proceedings; or to the Commissioner where exercising a function under the Act or this Code; or
 - (d) in compliance with a requirement made by or under an Act; or
 - (e) to the landlord's professional advisers (such as legal or financial advisers), or to the proper officer of a financial institution, in good faith, to assist in enabling the landlord to obtain financial accommodation; or
 - (f) in good faith to a prospective purchaser of the retail shop or the building of which it forms part.

12. Termination because of inadequate sales

A person must not, as landlord or on behalf of the landlord, terminate a lease on the ground that the tenant or the business of the tenant has failed to achieve specified sales or turnover performance.

13. Unconscionable conduct in connection with retail shop lease

Definitions:

In this section:

applicable industry code, see section 51ACA(1) of the *Competition and Consumer Act 2010* (Cth).

industry code, see section 51ACA(1) of the *Competition and Consumer Act 2010* (Cth).

Unconscionable conduct of landlord in retail shop lease transactions:

- (1) A landlord must not, in connection with a retail shop lease, engage in conduct that is, in all the circumstances, unconscionable.

- (2) Without limiting the matters to which the Commissioner may have regard in determining whether a landlord has contravened subsection (1), the Commissioner may have regard to the following:
- (a) the relative strengths of the bargaining positions of the landlord and the tenant;
 - (b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the landlord;
 - (c) whether the tenant was able to understand any documents relating to the lease;
 - (d) whether undue influence or pressure was exerted on, or unfair tactics were used against, the tenant or a person acting on behalf of the tenant by the landlord or a person acting on behalf of the landlord in relation to the lease;
 - (e) the amount for which, and the circumstances in which, the tenant could have acquired an identical or equivalent lease from a person other than the landlord;
 - (f) the extent to which the landlord's conduct towards the tenant was consistent with the landlord's conduct in similar transactions between the landlord and other similar tenants;
 - (g) the requirements of an applicable industry code;
 - (h) the requirements of another industry code, if the tenant acted on the reasonable belief that the landlord would comply with the code;
 - (i) the extent to which the landlord was willing to negotiate the terms and conditions of any lease with the tenant;
 - (j) the extent to which the landlord unreasonably failed to disclose to the tenant:
 - (i) intended conduct of the landlord that might affect the interests of the tenant; and
 - (ii) risks to the tenant arising from the landlord's intended conduct (being risks that the landlord should have foreseen would not be apparent to the tenant); and
 - (k) the extent to which the landlord and the tenant acted in good faith.

Unconscionable conduct of tenant in retail shop lease transactions:

- (1) A tenant must not, in connection with a retail shop lease, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without limiting the matters to which the Commissioner may have regard in determining whether a tenant has contravened subsection (1), the Commissioner may have regard to the following:
- (a) the relative strengths of the bargaining positions of the tenant and the landlord;
 - (b) whether, as a result of conduct engaged in by the tenant, the landlord was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the tenant;

- (c) whether the landlord was able to understand any documents relating to the lease;
- (d) whether undue influence or pressure was exerted on, or unfair tactics were used against, the landlord or a person acting on behalf of the landlord by the tenant or a person acting on behalf of the tenant in relation to the lease;
- (e) the amount for which, and the circumstances in which, the landlord could have granted an identical or equivalent lease to a person other than the tenant;
- (f) the extent to which the tenant's conduct towards the landlord was consistent with the tenant's conduct in similar transactions between the tenant and other similar landlords;
- (g) the requirements of an applicable industry code;
- (h) the requirements of another industry code, if the landlord acted on the reasonable belief that the tenant would comply with the code;
- (i) the extent to which the tenant was willing to negotiate the terms and conditions of any lease with the landlord;
- (j) the extent to which the tenant unreasonably failed to disclose to the landlord:
 - (i) intended conduct of the tenant that might affect the interests of the landlord; and
 - (ii) risks to the landlord arising from the tenant's intended conduct (being risks that the tenant should have foreseen would not be apparent to the landlord); and
- (k) the extent to which the tenant and the landlord acted in good faith.

14. *Tenant's right of association*

- (1) A provision of a retail shop lease is void to the extent that it has the effect of preventing or restricting the tenant from joining, forming or taking part in any activities of a tenants association or other similar body or of penalising the tenant in any way for doing so.
- (2) A landlord must not:
 - (a) refuse to renew a retail shop lease (whether or not the right to renew was a condition of the lease) for the reason that the tenant has joined or is or was a member of a body or association of persons the objects of which include the mutual advancement of their business interests, whether in relation to the business carried on at the premises to which the lease relates or elsewhere; or
 - (b) purport to exercise a power or right to terminate a retail shop lease for the reason that the tenant has joined or is or was a member of a body or an association mentioned in paragraph (a); or
 - (c) threaten or otherwise indicate that a retail shop lease will not be renewed if the tenant joins or becomes a member of a body or an association mentioned in paragraph (a).