Northern Territory Government

DEPARTMENT OF JUSTICE www.nt.gov.au

BUSINESS TENANCIES (FAIR DEALINGS) ACT

ISSUES PAPER NOVEMBER 2011

Submissions should be sent to:

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Closing date for submissions is 31 January 2012.

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BACKGROUND

The Business *Tenancies (Fair Dealings) Act* (the Act) was enacted on 22 October 2003. It commenced operation on 1 July 2004.

Pursuant to section 3 of the Act, its main objects are to enhance:

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

The regulatory provisions of the Act apply in respect of all retail tenancies, including those within large retail centres and local centres, and retail businesses operating out of office buildings. It also covers businesses such as accountants and physiotherapists operating as small businesses. The Act does not cover large businesses where the lettable space is over 1,000 square metres or those businesses operated by a listed corporation. The Act also contains provisions dealing with repossession of premises and freedom of association, which were formerly located in the *Commercial Tenancies Act*.

In the event of a dispute, the Act has the aim of establishing a speedy, low cost procedure for resolving disputes. In the first instance a dispute must, except in certain limited circumstances, be referred to the Commissioner of Business Tenancies. The Commissioner will generally refer the matter for mediation or conciliation, where the parties will attempt to resolve the matter between themselves. No court action can be taken without the Commissioner providing a certificate stating that conciliation has failed or that the Commissioner is of the view conciliation would not resolve the dispute.

The Commissioner also has a relatively small jurisdiction for the hearing and determination of disputes at inquiry up to the value of $10,000. Above this amount proceedings may be taken in the Local Court or the Supreme Court, in line with those court's usual jurisdictions. The Commissioner is to ensure that, where possible, a matter is resolved within 28 days. Appeals against decisions of the Commissioner at the inquiry may be made to the Local Court.

The Act is administered by the Department of Justice through the Office of Consumer Affairs.

Tenancies that are not caught by the Act are covered by Part 8 of the *Law of Property Act*, which deals with the rights, powers and obligations of the parties, lease renewals, and lease assignments and terminations.

DEVELOPMENTS

1. Amendments to the Act

The Act has been amended in various minor ways on several times since 2003. Most of these amendments were consequential to amendments to other legislation. However, in 2007 the Act was amended so as to exclude from its operation (except

under Part 13 of the Act) leases to a tenant that is a foreign listed public company or a subsidiary of such a company.[1]

The Act has recently been amended by the *Justice and Other Legislation Amendment Act 2011* (the 2011 Act). The 2011 Act amends the Act such that accountants (as defined), as well as legal practitioners, may issue certificates of exemption under section 26 of the Act. The 2011 Act commenced on 21 September 2011.

Action is also being taken to adopt the new national harmonised landlord disclosure statement.

2. Recent/Proposed Amendments Elsewhere

Queensland

The *Criminal Code and Other Legislation Amendment Act 2011* (QLD) commenced on 4 April 2011 and amends various acts, including the *Retail Shop Leases Act 1994* (QLD) (the RSL Act). The amendments ensure that rent reviews are not avoided under 'ratchet' clauses preventing decreases in rent and to entitle assignees from lessees to claim compensation under section 43 of the Act (e.g. in relation to the lessor taking actions that restrict an assignees access to, or use of, the leased shop or for the making of misrepresentations during the negotiation of a lease).

New South Wales

On 10 January 2011, NSW released for comment an exposure draft bill, 'The Retail Leases Amendment Bill 2011'. The explanatory material provides that the proposed legislation will, if enacted:

(a) "simplify the procedures for the various disclosure statements that lessors and lessees are required to provide;

(b) make it clear that shop premises in an office tower that forms part of a retail shopping centre are not excluded from the operation of the Act if they are used for a retail shop business listed in schedule 1 of the Act;

(c) vary provisions for a lessor's disclosure statement to make it clear that a lessor's disclosure statement is required when a lease is renewed and to enable a lessee to require a lessor's disclosure statement before exercising an option to renew a lease;

(d) make it clear that the termination of a lease for a failure to provide a complete and accurate lessor's disclosure statement does not affect a lessee's right to compensation for a pre-lease misrepresentation;

(e) make it clear that when the act applies to a lease, it continues to apply during holding over by a lease,

(f) add the cost of outgoings to the list of costs that a lessee is not required to contribute to unless the liability is disclosed in the lessor's disclosure statement;

(g) provide that if the lessor and lessee cannot agree on the maximum cost of, or a formula for calculating the cost of, fit-out works before the lease is

[1] *Justice Legislation Amendment Act 2007*, Part 4.

entered into, the maximum cost is to be determined by an independent quantity surveyor;

(h) require all retail shop leases that are for a term of 3 years or more to be registered under the *Real Property Act 1900* and to include a summary statement for the lease;

(i) make it clear that the decision to enter into a retail shop lease for a term of less than the minimum 5 years is at the discretion of the lessee;

(j) provide for the publication of guidelines for the assistance of the parties to a retail shop lease in connection with arrangements for providing a bank guarantee as security for the performance of the lessee's obligations under the lease;

(k) make it clear that a prohibition against a lease containing a provision that prevents or limits a rent decrease when rent is adjusted extends to a rent adjustment that occurs on the exercise of an option to renew;

(l) prohibit the recovery from a lessee of any outgoings attributable to land tax;

(m) allow a specialist retail valuer to require a lessor to provide an updated lessor's disclosure statement for the purposes of a valuation of current market rent;

(n) increase from 2 months to 6 months the period of notice required to be given to a lessee of an alteration or refurbishment that is likely to adversely affect the business of the lessee;

(o) require a lessor, if practicable, to offer alternative accommodation of reasonably comparable commercial value when relocating a lessee, and to enable a lessee to recover the lessee's depreciated fit-out costs if the alternative accommodation offered is not of reasonably comparable commercial value and the lessee terminates the lease;

(p) provide that a lessee cannot be required under the lease to make any repairs or improvements after notice of termination on the ground of proposed demolition is given to the lessee (other than repairs for the purposes of ensuring the safety or security of a building);

(q) require a provision of a lease for the refurbishment or refitting by the lessee to specify when it is required and to sufficiently specify what is required to allow the lessee to make a reasonably accurate assessment of costs;

(r) make it clear that it is the responsibility of the lessee to provide sufficient information to the lessor to enable the lessor to be reasonably satisfied as to whether any circumstances exist that entitle the lessor to withhold consent to the assignment of a retail shop lease;

(s) simplify the drafting of the procedure to be followed by a lessee to obtain the consent of the lessor to an assignment of lease;

(t) entitle a lessee after the end of a retail shop lease to a refund of unexpended contributions made by the lessee towards advertising and promotion of a retail shopping centre; and

(u) clarify the operation of provisions that impose a time limit on when certain claims can be made under the act."

Western Australia

On 21 June 2011 the Commercial Tenancy (Retail Shops) Agreements Amendment Bill 2011 was introduced in the upper House of the Parliament of Western Australia. If passed the proposed amendments will:

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

South Australia

The Small Business Commissioner Bill 2011 (the Bill) was introduced to the Upper House of the Parliament of South Australia on 14 September 2011. The Bill provides a framework for the establishment of a Small Business Commissioner in South Australia. Under this framework the Small Business Commissioner's functions will include mediating retail tenancy disputes between small business and landlords. As a result, the Bill provides for the necessary consequential amendments to the *Retail and Commercial Leases Act 1995*.

3. Productivity Commission Report

In 2008 the Productivity Commission released its report 'The Market for Retail Tenancy Leases in Australia' (the PC Report). The PC Report examined the retail tenancy lease market in Australia. As part of the report the Commission was asked to:

- make recommendations for improving the retail tenancy market in Australia; and
- to identify, and where practicable quantify, the likely benefits and costs of those recommendations for retail tenants, landlords, investors and the community generally.

The Commission's recommendations are set out below. In short the recommendations 'seek to reduce unwarranted constraints on the retail tenancy market, improve the efficiency with which it operates and provide a pathway to lowering compliance, administration and information search costs'.[2]

[2] Productivity Commission Report, *The Market of Retail Tenancy Leases in Australia*, Inquiry Report No. 43, p 247.

Recommendation 1

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

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

Recommendation 2

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

Recommendation 3

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

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

Recommendation 4

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

Recommendation 5

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

- Include provisions for standards of fair trading, standards of transparency, Lodgement of leases, information provision and dispute resolution; and
- Avoid intrusion of normal commercial decision making in matters such as minimum lease terms, rent levels, and the availability of a new lease.

Recommendation 6

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

Recommendation 7

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

Recommendation 8

While recognizing the merits of planning and zoning controls in preserving public amenity, states and territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilization.

WHY AN ISSUES PAPER?

Pursuant to section 144 of the Act the Minister is required to review the Act after 7 years of its operation.

Given the number of issues raised both in this jurisdiction and others, it is prudent that stakeholders be given an opportunity to express their views in relation to the operation of the Act and how, if at all, they may wish to see it improved.

PURPOSE OF ISSUES PAPER

The purpose of this paper is to give a direction to discussion about the issues raised by stakeholders relating to the Act, and to elicit public comment on these issues.

The issues raised are not intended to be exhaustive, and commentators are invited to identify other issues in their submissions.

PROCESS

The Minister for Justice and Attorney-General, the Hon Delia Lawrie MLA, is calling for submissions on the issues raised in this paper, and on any other issue relating to the Act that may not have been identified.

Policy options and recommendations for change will be further developed by the Department of Justice from the submissions received. It is intended to provide a report to Government on those issues.

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ISSUES

1. Rent Reviews

Subsection 28(2) of the Act provides:

> "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; a fixed annual amount;
>
> (c) a fixed annual amount;
>
> (d) the current market rent for the retail shop lease;
>
> (e) a basis or formula prescribed by the Regulations."

This contrasts with the equivalent provision in NSW's *Retail Leases Act 1994*, subsection 18(3), which provides;

> "A provision of a retail shop lease is void to the extent that it:
>
> (a) reserves or has the effect of reserving to one party a discretion as to which of 2 or more methods of calculating a change to the 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."

This means that section 28(2) prevents any other method of review unless such other method is prescribed by the Regulations. No such regulations have been made.

The main intent of section 28(2) 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.

1.	Should the Act or Regulations be amended to prescribe further methods of rent review?

2. Definition of 'retail shop'

Aside from Part 13 (Business Tenancies Generally), the Act only applies to 'retail shop leases', being leases in respect of premises used as a 'retail shop'. The definition of 'retail shop' is a broad one, covering any premises 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);

(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.[3]

Note, however, that sections 6 to 8 of the Act do provide certain exemptions and exceptions.

Due to its breadth, businesses such as real estate agents, stockbrokers and other service businesses are caught by this definition. In contrast, other jurisdictions prescribe the kinds of businesses that are to be considered as retail shops in lists.

Various members of industry and professional associations have described the definition of "retail shop" as a "nightmare[4]".

3. Is it a problem that service businesses come under the Act?
4. Should the Act exclude from its operation any premises in an office tower that forms part of a retail shopping centre?
5. Should the Act define 'retail shop' by way of a list of prescribed retail businesses?

3. Assignment of Retail Shop Leases

(a) Consent subject to defaults being remedied

Part 6 of the Act deals with the assignment of retail shop leases. Section 53 of the Act sets out the circumstances in which a landlord may withhold consent to the assignment of a lease:

> '(a) if the proposed assignee proposes to change the use to which the shop is put;
>
> (b) if the proposed assignee does not have the financial resources or retailing skills that will enable the proposed assignee to fulfill all the obligations of the lease;
>
> (c) if the tenant has not complied with the provisions of the lease that are referred to in section 56 and, if applicable, section 57.'

Section 53 does not allow a landlord to refuse to consent to an assignment in any other circumstances, even if the tenant is in default. Paragraph (c) only allows for breaches of lease provisions included under sections 56 and 57 to be considered, which are limited to disclosure obligations and information that has to be provided upon an assignment.

It is normal commercial practice for landlords to consent subject to breaches being remedied on or before assignment, so in the case of rental arrears, the landlord is paid as part of the settlement process. It is in both the landlord and the assignee's interests that breaches are remedied before the assignee takes over.

6. Is this an actual problem or merely a perceived one?

(b) Provision of guarantees on assignment

[3] No such regulations have been prescribed.
[4] 21 September 2011, meeting of the Property Law Taskforce

Section 58 provides that if appropriate notice is given, any guarantor of the assignor is not liable to pay to the landlord money in respect of amounts payable by the assignee.

However, there is no express power given to a landlord to refuse to consent to an assignment on the basis that that the assignee has not provided directors' guarantees, when at the same time, the landlord is obliged to release any guarantees given on behalf of the assignor.

The Act could be amended to make it plain that a landlord is entitled to insist when considering an application for assignment, that the tenant provides appropriate guarantees.

7. Is this an actual problem or merely a perceived one?

4. Retail Shopping Centre

Section 5 of the Act defined 'retail shopping centre" so that premises that 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* may (assuming various other attributes)[5] constitute a retail shopping centre.

These Acts provide a form of title. Apart from common responsibilities and obligations in respect of common property and for restrictions contained in articles of association there is no necessary connection between 'lots' in a units plan that would make them readily amenable to regulation of the kind contemplated by Part 9 of the Act. That is, 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.

8. 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'?

5. The 1000 Square Metre Exemption

Section 6(a) provides that the Act does not apply to a retail shop having a lettable area of 1000 square metres or more. Reading this literally it would seem that the exemption applies in respect of the retail space of the retail shop. However, the lease itself may extend to non-retail space (possibly not even that adjoined to the retail space) such as storerooms and car parks.

Whilst this problem is more perceived than real it is also understood that the misunderstanding is fairly common.

9. Is this an actual problem or merely a perceived one?
10. Should the Act be amended to clarify this exemption?

6. Part 13 of the Act – Commercial Tenancies

[5] Such as being predominantly used for retail, being co-located and being promoted or generally regarding as consisting a shopping centre

In June 2008, following the release of the PC Report, the Property Council of Australia (PCA) made a submission to the Northern Territory Government on the Act entitled 'Cutting red tape for non-retail tenancies in the Northern Territory'.

Recommendation 3 sought the removal of Part 13 (Business Tenancies Generally) from the Act on the basis that Part 8 of the *Law of Property Act* provides sufficient protection for commercial tenancies in the NT.

The PCA provided the following reasons:

> "Most commercial premises in the Northern Territory, with the exception of the large shopping centres are owned by local family businesses, which are themselves more often than not small and medium enterprises. In many cases the tenants are operating businesses with a higher turnover than their landlord.
>
> Outside of the large shopping centres, the prospect for misuse of market power that the Act was designed to overcome does not exist in the Northern Territory…
>
> Key differences between retail and non-retail businesses also make many of the protections of the *Business Tenancies (Fair Trading) Act* irrelevant or undesirable for non-retail businesses, such as:
>
> - Non-retail businesses are generally not as dependent on location as a retail tenants.
> - Non-retail businesses do not have the same extensive retail fit-out costs as retail shops and do not have the need to recover such costs over a five year period. They are also more willing and able to change premises.
> - Non-retail businesses often seek leases with terms of less than five years, as they prefer to keep their options open and have the choice of leasing commercial premises with better facilities or with lower rent."

The PCA also highlighted comments made by the Productivity Commission in the PC Report indicating that retail tenancy legislation tends to impact upon a range of agreements where it is not required.

However, Part 13 of the Act merely provides for the repossession of business premises and freedom of association. Removal of this part would mean that a more complex and costly process would result for both tenants and landlords. The issue appears to one of whether part 13 should be amended so that it works better for the NT. For this to occur there is a need for those aspects of Part 13 that are causing problems. Any amendments need to take account of what happens to goods apparently abandoned when premises are repossessed.

11. Should Part 13 be removed from the Act or reformed ?

7. Certificates

The operation of section 26 has been criticized on the basis that often the tenants are very "sophisticated" with no real need for this kind of protection. That is, that the certificate system is simply red tape that delays processes. The alternative proposal

is that the tenant provides some kind of statutory declaration under which they acknowledge being aware of the deal that they are entering into.

12. Is there a need to exclude Government tenancies from the operation of the Act?

8. Application of the Act – Government Tenancies

Due to the breadth of the definition of 'retail shop', the Act applies to the Territory as a tenant in certain limited circumstances. For example, the Power and Water shop in the Mitchell Centre. Despite there being very few Government tenancies, it has been suggested that the Act should be amended to exclude such tenancies from its operation. The reasoning being that the Government is not at risk of being subjected to a misuse of market power.

13. Is there a need to exclude Government tenancies from the operation of the Act?

Conclusion

The questions raised in this issues paper are intended to broadly focus discussion and comment from key stakeholders and the general public about the operation of the Act and possible areas for reform.

However, the questions and issues raised are not exhaustive, and comment on any other issues of relevance is invited.

Responses to this issues paper may demonstrate a need for further general or targeted consultation before proposals for reform are developed.