

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN
CAPITAL TERRITORY**

LEASES (COMMERCIAL AND RETAIL) BILL 2000

EXPLANATORY MEMORANDUM

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Independent

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Explanatory Memorandum

OUTLINE

The Bill provides for

- (a) the regulation of retail and commercial leases and licences;
- (b) the termination and end of leases;
- (c) the establishment and composition of the Tenancy Tribunal;
- (d) procedures for resolving disputes about leases and licences; and
- (e) a code of practice about leases and licences.

FINANCIAL IMPACT

It is anticipated that any additional demand on the Tenancy Tribunal will be absorbed within current budget allocation at this stage. Costs associated with the use of Members and Referees to enhance the case management practices of the Tenancy Tribunal will need to be assessed.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clauses 1 and 2 are formal requirements. They refer to the short title of the Bill, and commencement of the Bill, which is to be on a day fixed by the Minister by notice in the Gazette.

Clause 3 provides for a dictionary defining certain words and expressions used in the Act. The dictionary is at the end of the Act and is part of the Act.

Clause 4 defines the meaning of a lease in very broad terms. A lease is defined to mean an agreement, whether in writing or not, that provides for the occupation of premises exclusively or otherwise, whether for a fixed term, periodically or at will, and includes a sublease and a licence. The dictionary defines a licence as a right to occupy premises if the right is given other than by a lease. Premises is defined to include retail premises, or premises located in a shopping centre (other than large retail premises with a lettable area greater than 1000m² leased to a corporation not eligible to be incorporated as a proprietary company under the corporations law) and small commercial premises that are not located in a shopping centre. Retail premises, shopping centre and small commercial premises are defined in the dictionary.

PART 2 - APPLICATION OF THE ACT

Clause 5 provides that the Act applies to a dispute about or arising from, a lease or the code or a right arising under the Act or the code, regardless of when the lease was entered into, renewed or extended, including disputes about;

- (a) the termination of a lease, including an application for termination;
- (b) a rental rate increase;
- (c) a claim for compensation in relation to or arising from a lease, the Bill or the code;
- (d) a lease that is no longer in force.

Leases no longer in force before the commencement of the Act cannot be the subject of a dispute, however if the act or series of acts causing a dispute occurred more than 6 months before the commencement of the Act the Tribunal or decision maker has a discretion as to whether to hear the dispute or make a decision on it.

It is intended that that Act apply to all acts or a series of acts about or arising from a lease, the code or the requirements of the Act. By avoiding complex jurisdictional criteria access to dispute resolution processes for owners and tenants is enhanced.

Clause 6 excludes the jurisdiction of the Magistrates Court in relation to a dispute to which the Act applies.

Clause 7 provides that the Act does not apply to proceedings in the Magistrates Court or the Supreme Court instituted prior to the commencement of the Act.

PART 3- LEASE TERMS

Clause 8 enables the Tribunal to approve a term of a lease, or a proposed lease that would otherwise be invalid or void because of the operation of the code.

The Tribunal may only approve a term of a lease on the application of a party to the lease and must consider whether the term was included in the lease because of fraud or undue influence and any criteria determined by the Minister under clause 86.

A term approved is not invalid or void because of the operation of the code as long as the condition imposed on the approval of the Tribunal is complied with.

The Tribunal may only approve a term in a proposed lease for a specified lessee.

Clause 9 provides that the term of a lease must be at least 5 years unless:

- (a) the term of the lease is for a fixed term of 6 months or less;
- (b) the lease arises when the tenant holds over after the termination of an earlier lease, for a period not exceeding 6 months, with the consent of the owner;
- (c) the tenant has been in possession for a period of at least 5 years; or

(d) if the lease is a sublease - the term of the lease is as long as the term of the head lease allows.

Where the term of a lease is less than 5 years the lease the term of the lease to 5 years.

PART 4 - TERMINATION AND END OF LEASES

Clause 10 defines the manner in which a lease ends or may be terminated and provides that a lease ends or may be terminated only:

- where the tenant voluntarily vacates the premises at the expiration of a fixed term lease;
- the tenant gives the owner notice of intention to terminate and vacates the premises in accordance with the notice;
- the Tribunal terminates the lease or makes a termination and possession order in relation to the premises;
- the tenant abandons the premises;
- the tenant and the owner agree to terminate or repudiate the lease and the tenant vacates the premises; or
- the tenant and the owner are the same person.

Clause 11 imposes an obligation upon all parties to mitigate any losses which they may incur. The Tribunal must reduce compensation to a person by an amount that is just and equitable having regard to that persons share of responsibility for any loss and record the amount otherwise recoverable if the person had not contributed to the loss.

Clause 12 provides that a person may only enter premises to recover possession if they have a warrant issued by the Registrar of the Tribunal, an order or a warrant of the Tribunal or an order of the Supreme Court. Any person (or the owner if the person is acting for the owner with the owners consent) who contravenes this requirement is liable to pay compensation to the person who had protected possession. Protected possession is defined as possession under a lease or possession as a former tenant continuing to occupy the premises.

Clause 13 requires an owner to give preference to an existing tenant over other possible tenants if the existing tenants wants to renew or extend the term of the lease. The owner must assume the existing tenant wishes to renew or extend the term of the lease unless otherwise advised by the tenant during the 12 months prior to the expiration of the lease. The owner must also begin negotiations in good faith with the existing tenant for renewal or extension of the lease between 6 and 12 months before the end of the term of the lease.

The owner may offer to re - lease to a person other than the tenant if it would be substantially more advantageous to the owner to do so. The owner is not obliged to prefer the existing tenant if:

- the lease is for premises in a shopping centre and the owner reasonably wishes to change the tenancy mix within the whole precinct of the existing shopping centre; or
- the tenant has substantially or persistently breached the terms of the lease; or
- the owner does not propose to re-let the premises within 6 months after the end of the lease and requires the premises for the owners own purposes other than to carry on a business of the same type as the business carried on by the tenant.

Clause 14 provides for the termination of a lease by application to the Tribunal where:

- a reason for termination is provided for in the Act, the lease or the code; and
- notice has been served on the other party; and
- the reason justifies termination; and
- the party giving the notice is not the party that did the thing that gave rise to the reason for termination.

The tribunal may refuse to make a termination order if the reason for termination has been remedied or the party in default agrees to remedy the default within a reasonable stated time and is reasonably likely to do so. The Tribunal may suspend a termination order for not more than 21 days if satisfied that the immediate execution of the order would cause significant hardship greater than the hardship the suspension would cause to the applicant.

Clause 15 enables the Tribunal to terminate a fixed term lease on the grounds of significant hardship.

Clause 16 enables the Tribunal to terminate a lease if satisfied that the other party intentionally or recklessly causes or permits or is likely to cause or permit serious damage to the premises or the property of the other party or injure the other party or a member of the other party's family.

Clause 17 enables the Tribunal to terminate a lease on the grounds of false or misleading statements.

Clause 18 specifies the contents of a termination and possession order.

Clause 19 specifies the contents of a warrant for eviction.

Clause 20 provides for the issue of a warrant for eviction where the Tribunal has made an unconditional termination order and the other party continues in occupation of the premises in contravention of the order.

Clause 21 provides for the issue of a warrant of eviction where the Tribunal has made a termination and possession order which is subject to conditions.

Clause 22 enables the Tribunal to make a termination and possession order if the tenant has failed to pay rent.

Clause 23 enables the Tribunal to make a termination and possession order if the tenant purports to assign or sublet the premises contrary to the terms of the lease or the code.

Clause 24 enables the Tribunal to make a termination and possession order if the tenant repudiates the lease and fails to vacate the premises.

Clause 25 enables the Tribunal to order the person against whom a termination and possession was made to pay compensation to the owner for lost rent and costs incurred. Application for compensation must be made within 2 months after the day the person was to vacate the premises.

Clause 26 prohibits retaliatory applications by the owner to terminate a lease.

PART 5 - APPLICATIONS

Clauses 27, 28 and 29 deal with the manner and form of applications to the Tribunal.

Clause 30 requires the Registrar to refer an application for a termination order to the Tribunal.

Clause 31 requires the Registrar to take such action as he or she considers appropriate to assist in the resolution of a dispute (other than in relation to an application for a termination order or where the application raises no dispute).

The Registrar may:

- contact anybody to try to resolve the dispute or seek information in relation to the dispute;
- refer the dispute to a mediator;
- conduct a preliminary conference or refer the application to a referee; or
- refer the dispute to the Tribunal for hearing.

Clause 32 deals with the obligations imposed upon the Registrar after mediation of a dispute has failed.

Clause 33 requires the Registrar when considering what action to take under clause 31 or clause 32 must consider the desirability of the Tribunal deciding the dispute within 28 days and the relevance of mediation or a preliminary conference.

Clauses 34 and 35 enable the Registrar to notify the applicant and take no further action on an application if the application shows no dispute. An applicant may within 14 days of receiving notice require the Registrar to refer the matter to the Tribunal.

PART 6 - PRELIMINARY CONFERENCES

Clause 36 deals with non attendance at preliminary conferences.

Clause 37 enables a party to be represented at a preliminary conference by a legal practitioner or someone else.

Clause 38 enables a Registrar to take evidence on oath at a preliminary conference.

Clause 39 deals with agreements reached at preliminary conferences.

Clause 40 requires the Registrar to refer a dispute to the Tribunal if agreement has not been reached at a preliminary conference.

Clause 41 enables a question of law arising during a preliminary conference to be referred to the Tribunal with the agreement of the President.

Clause 42 provides for the review of decisions of a referee.

PART 7 - TRIBUNAL HEARINGS

Clauses 43, 44 and 45 define the parties to proceedings the capacity of the Director of Fair Trading to intervene in proceedings and the obligation of the Tribunal to hear each dispute referred to it.

Clause 46 requires the Tribunal before making an order to have regard to:

- the relative strengths of the bargaining position of the parties;
- the conduct of the owner;
- whether the tenant understood any document relating to the lease;
- whether undue influence or pressure or unfair tactics were used against a tenant;
- the circumstances under which a tenant could have acquired a lease on identical terms over similar premises from someone other than the owner;
- the requirements of the code;
- the failure of the owner to unreasonably fail to disclose any conduct affecting the interests of the tenant and any risks to the tenant arising from the intended conduct of the owner; and
- the extent to which the owner acted in good faith.

Clause 47 enables the Tribunal to determine its own procedure if no procedure is otherwise prescribed by the Act or Regulations.

Clause 48 requires hearings of the Tribunal to be in Public and prescribes the circumstances by which a hearing or part of a hearing may be closed to the public.

Clause 49 enables the Tribunal to make such inquiries as it considers appropriate.

Clause 50 requires the Tribunal to keep a record of proceedings.

Clause 51 enables a party to the hearing or such other person as the Tribunal has granted leave to appear at a Tribunal hearing.

Clause 52 enables a person to be represented at a hearing by a legal practitioner or with the leave of the Tribunal some other person.

Clause 53 deals with the capacity to summon witnesses and the issue of summons to produce documents.

Clause 54 facilitates an appearance before the Tribunal by audiovisual or audio links.

Clauses 55 and 56 deal with the capacity of the Tribunal to receive evidence on oath or affirmation, to require a person to take an oath or make an affirmation, to require a person to answer a question or produce a document or other record relevant to the hearing.

Clauses 57 and 58 prevents a person from refusing to give evidence on the ground that such evidence would tend to incriminate the person and prevents evidence given to the Tribunal or any evidence of any information or thing obtained directly or indirectly as a consequence of evidence given before the Tribunal being admitted against a person for an offence against clause 88.

Clause 59 enables the Tribunal to amend any document.

Clause 60 requires questions of law to be determined by the President and where there is a division of opinion in relation to a question (other than a question of law) the question must be decided according to the opinion of the majority.

Clause 61 enables the Tribunal on the application of a party or of its own motion to adjourn a hearing.

Clause 62 requires each party to bear their own costs unless the Tribunal orders otherwise.

Clause 63 enables the Tribunal to make interim orders.

Clause 64 defines the power of the Tribunal to grant relief and enables the Tribunal to exercise any power to grant relief to a dispute before it that would be exercisable by the Magistrates Court under the Magistrates Court (Civil Jurisdiction) Act 1982 unless the Act or the code expressly states otherwise. This provision enables the Tribunal to apply the principles of equity and grant equitable relief.

In addition to any other order the Tribunal may make the Tribunal may do all or any of the following:

- reopen a lease and take whatever action it considers appropriate in the circumstances including varying the lease or setting it aside in whole or in part;
- make an order enforcing the code;
- restrain a person from breaching a lease or the code;
- require performance of the terms of the lease or the code;
- require the payment of compensation for loss arising from the breach of a lease or the code;
- restore a lease and grant a person possession of the premises;
- require payment of rent; direct payment out of monies paid to the Tribunal;
- terminate a lease and grant vacant possession of the premises to the owner;
- make such other order as it considers appropriate (not inconsistent with the code).

Clause 65 requires notice of an order to be given to a party who was not present when the order was made within 3 days.

Clause 66 provides that a failure to comply with an order is an offence.

Clause 67 provides that an order of the Tribunal may be enforced as if it were an order of the Magistrates Court under the Magistrates Court (Civil Jurisdiction) Act 1982.

PART 8 - APPEALS TO THE SUPREME COURT

Clause 68 enables a party to a Tribunal hearing to appeal to the Supreme Court on a question of law from a decision of the Tribunal in that hearing within 28 days of that decision. The Supreme may grant further time for the making of an appeal and must hear and determine an appeal and affirm or set aside the decision of the tribunal, remit the matter back to the Tribunal or make such other order as it considers appropriate.

PART 9 - TENANCY TRIBUNAL

Clauses 69 establishes and Tenancy Tribunal.

Clauses 70 and 71 provide that the Tribunal is constituted by either:

- (a) the President who must be a Magistrate; or
- (b) if the President considers it desirable having regard to the nature and complexity of a particular dispute - the President and two Members, one Member representing the interests of owners and one Member representing the interests of tenants; or
- (c) if the President considers it desirable for a particular dispute - a Referee.

Clause 72 confers upon the Tribunal the power to do all things necessary for or in connection with the performance of its functions.

Clause 73 provides for the reimbursement of expenses incurred by a Member (defined in the dictionary as including the President and Referees) reasonably incurred in the performance of its functions.

Clause 74 deals with the appointment of the Registrar and Deputy Registrars of the Tribunal.

Clauses 75 and 76 deal with the appointment of Referees and the hearing of matters by a Referee.

Clause 77 defines the protection afforded to Members of the Tribunal (defined in the dictionary as including the President and Referees) in relation to an act done or omitted to be done in good faith in the exercise or purported exercise of a function under the Act.

Clause 78 deals with the circumstances by the appointment of a member may be terminated by the Minister.

PART 10 - CODE OF PRACTICE

Clause 79 enables the Minister, by instrument, to approve a code of practice relating to leases or any variation of an approved code of practice. The code may prescribe matters including the time from which its provisions, or any of them, are to take effect and the grounds on which specified provisions in a lease are to be invalid or void (unless approved by the Tribunal under clause 8).

Clause 80 provides that a code or a variation of an approved code is a disallowable instrument.

Clause 81 provides that the Director of Fair Trading must cause notice of an approval under clause 79 to be published in a newspaper circulating in the Territory.

PART 11 - FEES AND CHARGES

Clauses 82, 83, 84 and 85 deal with the determination of fees and charges by the Minister, the payment of fees and charges, the remission, refund, deferral, waiver and exemption of fees and charges payable and the review of decisions in relation to the refusal to remit or refund a fee or charge, to defer liability for the payment of a fee or charge or to waive payment of a fee or charge.

PART 12 - MISCELLANEOUS

Clause 86 enables the Minister to determine criteria to be considered by the Tribunal in determining whether to approve void or invalid terms of a lease pursuant to clause 8.

Clause 87 enables the Minister to approve forms.

Clause 88 provides that a person commits an offence if they obstruct, hinder or resist the Registrar or Tribunal in the exercise of a function under the Act.

Clause 89 enables the Executive to make Regulations for the Act.

PART 13 - TRANSITIONAL PROVISIONS

Clause 90 deals with the repeal of the Tenancy Tribunal Act 1994.

Clause 91 provides that the code in force under the Tenancy Tribunal Act 1994 immediately before the commencement of this Act is taken to be the code under this Act.