

2000
THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Mr Rugendyke)

Leases (Commercial and Retail) Bill 2000

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2000
THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Mr Rugendyke)

Leases (Commercial and Retail) Bill 2000

A BILL

FOR

An Act to regulate some retail and commercial leases and licences, to establish a Tenancy Tribunal and other special procedures for resolving disputes about the leases and licences, to provide for a code of practice about the leases and licences and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

PART 1—PRELIMINARY

1 Name of Act

5 This Act is the *Leases (Commercial and Retail) Act 2000*.

2 Commencement

This Act commences on a day fixed by the Minister by notice in the Gazette.

5 *Note 1* The provisions of an Act providing for its name and commencement automatically commence on the date of notification of the Act (see *Interpretation Act 1967*, s 10B).

Note 2 A single day or time may be fixed, or different days or times may be fixed, for the commencement of different provisions (see *Interpretation Act 1967*, s 10C (1)).

10 *Note 3* If a provision has not commenced within 6 months beginning on the date of notification of the Act, it automatically commences on the first day after that period (see *Interpretation Act 1967*, s 10E (2)).

3 Dictionary

(1) The dictionary at the end of this Act defines certain words and expressions used in this Act, and includes references to certain words and expressions defined elsewhere in this Act.

(2) The dictionary is part of this Act.

(3) A definition in the dictionary of a word or expression applies to each use of the word or expression in the Act unless the contrary intention appears.

20 4 Meaning of lease

(1) In this Act:

25 *lease* means 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, but does not include—

- (a) an agreement relating to the common area of a shopping centre by reason only that it provides for a person to use a portion of that area; or
- 30 (b) a lease granted under, or to be taken to be granted under, the *Land (Planning and Environment) Act 1991*.

(2) In this section:

premises means premises, in the Territory, of the following kinds:

- 35 (a) retail premises, or premises located in a shopping centre, other than premises with a lettable area greater than 1000m² that are leased to a corporation that is not eligible to be

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incorporated as a proprietary company under the Corporations Law;

- (b) small commercial premises that are not located in a shopping centre.

PART 2—APPLICATION OF ACT

5 What disputes does this Act apply to?

(1) This Act applies to a dispute about, or arising from, a lease or the code or a right arising under this Act or the code.

5 (2) Without limiting subsection (1), this Act applies to disputes about the following:

(a) the termination of a lease, including an application for termination;

(b) a rental rate increase;

10 (c) a claim for compensation in relation to or arising from a lease, this Act or the code;

(d) a lease that is no longer in force.

(3) Without limiting subsection (1), this Act and the code applies to a dispute about a lease regardless of when the lease was entered into, renewed or extended.

15 (4) However—

(a) this Act does not apply to a lease that is no longer in force if the lease expired, or otherwise ceased to be in force, before the commencement of this subsection; and

20 (b) if the act, or latest of a series of acts, causing a dispute occurred more than 6 months before the commencement of this section, the tribunal or decision-maker has a discretion as to whether to hear the dispute or make a decision on it.

6 Jurisdiction of Magistrates Court

25 The Magistrates Court has no jurisdiction in relation to a dispute to which this Act applies.

7 Matters before Magistrates Court or Supreme Court

30 This Act does not apply to a dispute the substance of which is the subject matter of a proceeding commenced in the Magistrates Court or the Supreme Court before the commencement of this section.

PART 3—LEASE TERMS

8 Power to approve void or invalid terms

- 5 (1) The tribunal may approve a term of a lease, including a proposed lease, that is, or would otherwise be, invalid or void because of the operation of the code.
- (2) On application for approval of a term, the tribunal must consider—
- (a) whether the term was included in the lease because of fraud or undue influence; and
 - 10 (b) any criteria determined under section 86 (Determination of criteria).
- (3) A term approved is not invalid or void because of the operation of the code as long as any condition imposed on the approval by the tribunal is complied with.
- 15 (4) The tribunal may only approve a term in a proposed lease for a specified proposed lessee.

9 Minimum 5 year lease

- (1) The term of a lease must be at least 5 years.
- (2) If the term of a lease is less than 5 years, this section extends the term of the lease to 5 years.
- 20 (3) However, this section does not apply to a lease if—
- (a) the lease is entered into for a fixed term of 6 months or less; or
 - (b) the lease arises when the tenant holds over after the termination of an earlier lease with the consent of the owner and the period of holding over is not more than 6 months; or
 - 25 (c) the tenant has been in possession of the premises for 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.

PART 4—TERMINATION AND END OF LEASES

10 When may a lease end or be terminated?

(1) A lease ends or may be terminated only—

- 5 (a) if it is a fixed term lease and the tenant voluntarily vacates the premises before, on or after the nominal termination date of the lease; or
- (b) if a tenant gives the owner signed notice of the tenant's intention to terminate and vacates the premises in accordance with the notice; or
- 10 (c) if the tribunal terminates the lease; or
- (d) if the tribunal makes a termination and possession order in relation to the premises; or
- (e) if the tenant abandons the premises; or
- 15 (f) if the tenant and owner agree in writing to terminate the lease and the tenant vacates the premises in accordance with the agreement; or
- (g) if the tenant and the owner are the same person; or
- (h) if—
 - (i) a party to the lease repudiates the lease; and
 - 20 (ii) the other party accepts the repudiation; and
 - (iii) the tenant vacates the premises.

11 General duty to mitigate

(1) If—

- 25 (a) a person would, apart from this section, be entitled to compensation under this Act; and
- (b) the person could have reasonably avoided the loss, or part of the loss;

the tribunal must reduce the compensation by an amount that is just and equitable having regard to the person's share of responsibility for the loss.

- 30 (2) If the tribunal reduces compensation to a person under this section, it must decide and record the compensation that would have been recoverable if the person had not contributed to the loss.

12 Entry for eviction purposes

(1) A person may only enter premises that someone else has protected possession of to recover possession of the premises or part under a warrant issued by the registrar, an order or a warrant of the tribunal or an order of the Supreme Court.

(2) If a person (the *offender*) enters premises in contravention of subsection (1), the tribunal must, on application, order the offender to pay appropriate compensation to the person who had protected possession.

(3) If an offender is an owner or is acting for the owner with the owner's consent, in considering how much compensation is appropriate, the tribunal must take into consideration whether the owner reasonably believed that the premises had been abandoned by the tenant.

(4) If an offender is not the owner but is acting for the owner with the owner's consent, the tribunal must make an order for compensation against the owner instead of the offender.

(5) For this section, the following possession is *protected*:

- (a) possession under a lease;
- (b) possession as a former tenant continuing to occupy the premises.

13 Preference to be given to existing tenant

(1) If an owner proposes to re-lease premises and the existing tenant wants to renew or extend the term of the lease, the owner must give preference under this section to the existing tenant over other possible tenants.

(2) The owner must—

- (a) assume the existing tenant wishes to renew or extend the term of the lease unless the tenant has notified the owner otherwise in writing during the 12 months before the lease is due to expire; and
- (b) unless notified otherwise—begin negotiations in good faith with the existing tenant for a renewal or extension of the lease at least 6 months (but not more than 12 months) before the end of the term of the lease.

(3) The owner must not offer to re-lease to a person other than the existing tenant unless it would be substantially more advantageous to the owner to do so.

(4) However, the owner is not obliged to prefer the existing tenant under this section if—

- 5 (a) 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
- (b) the existing tenant has breached the lease substantially or persistently; or
- (c) the owner—
 - 10 (i) does not propose to re-let the premises within 6 months after the end of the lease; and
 - (ii) needs vacant possession of the premises for the owner's own purposes (but not to carry on a business of the same kind as the business carried on by the tenant).

14 Application to terminate lease

15 (1) The tribunal may only make a termination order on application if satisfied that—

- (a) a ground for termination (the *termination ground*) exists under this Act, the lease or the code; and
- 20 (b) a termination notice in the approved form based on the ground has been served by the party proposing to terminate on the other party to the lease (the *other party*); and
- (c) the termination ground justifies termination; and
- (d) the party that served the order is not the party that did the thing that gave rise to the termination ground;

25 and may make any other order it considers appropriate.

(2) However, the tribunal may refuse to make a termination order even if satisfied as to the matters mentioned in subsection (1) if—

- (a) the thing that gave rise to the termination ground has been remedied; or
- 30 (b) the other party agrees to remedy the thing within a reasonable stated time and is reasonably likely to do it.

(3) The tribunal may suspend a termination order for not more than 21 days if satisfied that—

- 35 (a) the immediate execution of the order would cause significant hardship to the other person; and

- (b) that hardship would be greater than the hardship that the suspension would cause to the applicant.

15 Termination on ground of significant hardship

- (1) The tribunal may terminate a fixed term lease if satisfied that—

- 5 (a) if the lease were not terminated the applicant would suffer significant hardship; and
(b) on the balance of hardships, it is appropriate to terminate the lease.

- 10 (2) A decision to terminate under this section takes effect on a day stated by the tribunal that is at least 8 weeks after the announcement of the decision unless the tribunal is satisfied on the balance of hardships that it is appropriate for the decision to take effect on an earlier day stated by the tribunal.

- 15 (3) For this section, the tribunal is satisfied that it is appropriate to make an order on the balance of hardships if it is satisfied that the hardship likely to be suffered by the applicant if the order were not made, or not made at a certain time, would be greater than the hardship likely to be suffered by the respondent to the application if the order were made or were made at an earlier time.

20 **16 Termination on ground of damage, injury or intention to damage or injure**

- (1) On application by a party to a lease, the tribunal may terminate the lease effective immediately if satisfied that the other party to the lease (the *other party*) has intentionally or recklessly caused or permitted, or is likely to so cause or permit—

- 25 (a) serious danger to the premises or to property of the other party; or
(b) injury to the other party or a member of the other party's family.

- (2) For this section, the tribunal may be satisfied—

- 30 (a) on the balance of probabilities; or
(b) if the other party has been convicted of an offence because of the acts or omissions complained of.

17 Termination on ground of false or misleading statements

On application by a party to a lease, the tribunal may terminate the lease if satisfied that the lease was induced by a false or misleading statement by or on behalf of the other party to the lease.

5 18 Content of termination and possession orders

(1) A termination and possession order must state the following:

- (a) the day the lease is terminated;
- (b) that the tenant must vacate the premises on or before that day;
- (c) either—

- 10 (i) that if the tenant does not vacate the premises as required, the owner may ask the registrar to issue a warrant for the eviction of the tenant; or
- (ii) that if the tenant does not vacate the premises as required, the termination and possession order will have effect as if it
- 15 were a warrant for eviction.

(2) If a termination and possession order states that it will have effect as if it were a warrant for eviction, the order must comply with section 19.

19 Content of warrants for eviction

A warrant under this Part must—

- 20 (a) authorise the police to take appropriate action to evict a named person within the time stated in the warrant; and
- (b) require the police to give the person at least 2 days notice of the proposed eviction.

20 Unconditional orders

25 On request, the registrar must issue a warrant for the eviction of a person if—

- (a) the tribunal has made an unconditional termination and possession order; and
- 30 (b) the person continues to occupy the premises in contravention of the order.

21 Conditional orders

(1) This section applies if—

- (a) the tribunal has issued a termination and possession order under which the right to termination and possession is subject to a condition precedent; and
- (b) the person in whose favour the order was made applies for the issue of a warrant and satisfies the registrar that—
- (i) the condition has been satisfied; and
- (ii) the person against whom the order was directed continues to occupy the premises.
- (2) Where this section applies the registrar must give to the person against whom the order was made a notice (an *eviction notice*) that includes—
- (a) advice that the registrar has received—
- (i) an application for the issue of a warrant for possession of the premises; and
- (ii) evidence that the condition to which the termination and possession order was subject has been satisfied; and
- (b) a statement to the effect that, if the person believes that the condition has not been satisfied, he or she may apply to the tribunal within 2 days after the date of the notice for a stay of the eviction proceedings; and
- (c) a statement that, if no application is made in accordance with paragraph (b), a warrant for the eviction of the person will issue at the end of the 2 days.
- (3) If an application for a stay of the eviction proceedings is made in accordance with paragraph (2) (b), the registrar—
- (a) must list it with the tribunal; and
- (b) may not issue a warrant for the eviction of the applicant except in accordance with a further order of the tribunal.
- (4) If no application for a stay of the eviction proceedings is made in accordance with paragraph (2) (b), the registrar must issue a warrant 2 days after the date of the eviction notice.
- (5) An application for a stay of the eviction proceedings may be made orally, in writing (including by facsimile) or by electronic means.

22 Failure to pay rent

- (1) On application by an owner, the tribunal may make a termination and possession order if—

- (a) the tenant has failed to pay rent payable under the lease; and
- (b) the owner has served notice of termination of the lease in the approved form on the tenant because of the failure to pay rent; and
- (c) the tenant has not vacated the premises in accordance with the notice.

5

(2) If—

- (a) after the application is made, the tenant has paid or has offered to pay the rent payable and is, in the opinion of the tribunal, reasonably likely to pay rent as it becomes payable; and

10

- (b) the tribunal considers it just and appropriate to do so;

the tribunal may refuse to make a termination and possession order.

(3) If—

- (a) the rent has not been paid but the tenant is, in the opinion of the tribunal, reasonably likely to repay the rent payable as well as pay rent that becomes payable; and

15

- (b) the tenant agrees to repay the rent payable, and undertakes to pay rent as it becomes payable, as required by the tribunal;

instead of making a termination and possession order the tribunal may order that if the tenant does not pay the rent payable, or rent that becomes payable, as required by the tribunal—

20

- (c) the lease ends at a stated hour on the day after the day the rent was payable and not paid; and
- (d) the owner becomes entitled to possession of the premises and to the rent payable as soon as the lease ends.

23 Purported assignment or subletting

25

(1) On application by an owner, the tribunal may make a termination and possession order if satisfied that—

- (a) the tenant purported to assign or sublet the premises in contravention of the lease or code; and

30

- (b) the purported assignment or subletting was not in accordance with a term of the lease approved by the tribunal; and

- (c) the tenant gave possession of the premises to the purported assignee or sublessee; and

35

- (d) the owner served a termination notice in the approved form on the tenant because of the purported assignment or subletting; and

(e) the premises have not been vacated.

(2) Even if the tribunal is satisfied about the matters mentioned in paragraphs (1) (a), (b) and (c), the tribunal may—

- 5 (a) if the purported assignee or sublessee vacates the premises—
refuse the application for a termination and possession order; or
- (b) make a termination and possession order contingent on the failure
of the purported assignee or sublessee to vacate the premises by a
day stated in the order that is the day by which the purported
assignee or sublessee has undertaken to vacate the premises; or
- 10 (c) make a termination and possession order but suspend the
operation of the order for a stated period of no longer than 21 days
after the day of making the order if—
 - 15 (i) the purported assignee or sublessee would suffer significant
hardship if the tribunal made a termination and possession
order that took effect within the stated period after the
making of the order; and
 - (ii) that hardship would be greater than the hardship the owner
would suffer if the tribunal made the order and it did not
come into effect within that period.

20 **24 Repudiation without vacation**

On application by an owner, the tribunal may make a termination
and possession order if—

- (a) the tenant repudiates the lease in writing; and
- (b) the owner accepts the tenant's repudiation; and
- 25 (c) the tenant does not vacate the premises on or before the day stated
for vacation in the notice of repudiation.

25 Compensation to owner

30 If a person to whom a termination and possession order is directed
does not vacate the premises in accordance with the order, the tribunal may,
on application made within 2 months after the day the person was to vacate
the premises, order the person to pay to the applicant either or both of the
following:

- 35 (a) an amount equal to the rent that would have been payable to the
applicant if the premises had been tenanted while the person was
in possession of the premises after termination of the lease;

- (b) an amount equal to the reasonable costs of the applicant in applying for a warrant for eviction and having the warrant executed.

26 Retaliatory applications

5 If—

- (a) an owner applies for a termination and possession order under this Part; and
- (b) the tenant presents evidence that—
 - 10 (i) the tenant applied to the tribunal for an order against the owner; or
 - (ii) the tenant complained to a governmental or statutory entity about the owner acting as the owner; or
 - (iii) the tribunal made an order in favour of the tenant against the owner; and
- 15 (c) the tribunal is satisfied about the existence of a circumstance mentioned in paragraph (b);

the tribunal must refuse to make the termination and possession order unless satisfied that the owner was not motivated to apply for a termination and possession order by the circumstance.

PART 5—APPLICATIONS

27 Applications for resolution of dispute

(1) A party to a lease may apply to the registrar for a resolution of a dispute.

5 (2) An application must—

- (a) be in writing in a form approved by the registrar; and
- (b) contain the particulars reasonably required by the president; and
- (c) for an application relating to a rent increase—be made at least 28 days before the rent increase is proposed to take effect unless the
- 10 tribunal has waived this requirement; and
- (d) be accompanied by any determined fee.

28 Waiver of notice requirements

The tribunal may hear an application for the review of a rental rate increase made less than 28 days before the day on which the proposed

15 increase is due to come into effect, if satisfied that—

- (a) the application is late due to special circumstances; and
- (b) to hear the application will not place the lessor in a significantly worse position than the lessor would have been had the applicant applied as prescribed.

29 Withdrawal of application

A person may withdraw his or her application for resolution of a dispute at any time by giving signed notice to the registrar or tribunal.

30 Action on receiving termination order applications

The registrar must refer an application for a termination order to the

25 tribunal.

31 Action on receiving applications other than termination order applications

(1) This section does not apply—

- (a) to an application for a termination order; or
- 30 (b) if the registrar is satisfied that the application raises no dispute.

Note If the registrar is satisfied that the application raises no dispute, section 34 applies.

(2) On receiving an application, the registrar must take the action he or she considers appropriate to assist in the resolution of the dispute.

(3) To assist, the registrar may do 1 or more of the following:

- (a) contact anybody to try to resolve the dispute;
- 5 (b) contact anybody to ask for information in relation to the dispute;
- (c) refer the dispute to a mediator if—
 - (i) the registrar considers the dispute is suitable for mediation and that it is reasonably likely that the dispute may be resolved by mediation; and
 - 10 (ii) the parties agree;
- (d) if the registrar considers there is a significant chance of resolving the dispute by agreement without the need for a full tribunal hearing—conduct a preliminary conference or refer the application to a referee to conduct a conference;
- 15 (e) refer the dispute to the tribunal for hearing.

(4) In considering whether there is a significant chance of resolving a dispute in paragraph (3) (d), the registrar must consider whether the parties attended mediation in relation to the dispute before making the application.

32 After failed mediation

20 (1) This section applies if—

- (a) the registrar refers a dispute to a mediator; and
- (b) the parties to the dispute do not reach agreement in relation to the dispute.

(2) The registrar must—

- 25 (a) refer the application to the tribunal unless he or she has already referred the application to the tribunal; and
- (b) if appropriate—require the parties to attend a preliminary conference.

30 (3) For subsection (2), it is appropriate to require the parties to a dispute to attend a preliminary conference if, in the opinion of the registrar, a preliminary conference is likely—

- (a) to resolve the dispute; or
- (b) to narrow the issues in dispute or help to prepare the parties for a tribunal hearing.

33 Considerations for registrar

The registrar, when considering what action to take under section 31 (Action on receiving applications other than termination order applications) or 32 (After failed mediation)—

- 5 (a) must consider whether an action is likely to prevent the tribunal deciding the dispute (if the application is not otherwise resolved) within 28 days after the day of application; and
- (b) may refer a dispute to a mediator or require the parties to attend a preliminary conference even if he or she has referred the
- 10 application to the tribunal.

34 What if an application shows no dispute?

- (1) If the registrar is satisfied that an application shows no dispute, the registrar must notify the applicant in writing and take no further action on the application unless required to do so under this Act.
- 15 (2) A notice must include a statement that the applicant may, within 14 days after the date of the notice, require the registrar to refer the application to the tribunal.

35 Referral to tribunal

- If, within 14 days after the date of the notice under subsection
- 20 34 (1), an applicant requires the registrar to refer the application to the tribunal, the registrar must refer the application as required.

PART 6—PRELIMINARY CONFERENCES

36 Nonattendance at preliminary conferences

(1) This section applies if—

- 5 (a) the registrar requires the parties to a dispute to attend a preliminary conference; and
- (b) the registrar is satisfied the parties have been given notice of the conference; and
- 10 (c) on the day and at the time and place fixed for the conference a party does not attend the conference, either personally or by a representative.

(2) The registrar may—

- (a) if neither party attends—strike out the application; or
- (b) if the applicant does not attend—strike out the application; or
- 15 (c) if the respondent does not attend—make an order in favour of the applicant.

(3) However, the registrar may adjourn a preliminary conference if satisfied that a party or his or her representative cannot, for good reason, attend the conference.

20 **(4)** If the registrar adjourns a conference, the registrar must notify the parties of the day, time and place fixed for the resumption of the conference.

37 Representation

A party to a preliminary conference may be represented at the conference by a legal practitioner or someone else.

25 38 Taking evidence

(1) The registrar or a referee may take evidence on oath or affirmation at a preliminary conference and, for that purpose—

- (a) may require a person attending the conference to take an oath or make an affirmation; and
- 30 (b) may administer an oath or affirmation to the person.

(2) The registrar or referee may refuse to take evidence unless given on oath or affirmation.

39 Agreement at preliminary conference

(1) If a dispute is resolved at a preliminary conference, the agreement (the *dispute agreement*) may be enforced as if it were an order of the tribunal if it is—

- 5 (a) put in writing and signed by or on behalf of the parties; and
 (b) filed not earlier than 3 days after it is signed.

(2) The registrar must—

- (a) assist the parties to put the agreement into writing; and
 (b) unless a party to the agreement tells the registrar that he or she
10 withdraws from the agreement before the agreement is filed—file
 the agreement not sooner than 3 days after it is signed.

40 Non-agreement at preliminary conference

 If the parties to a dispute do not reach agreement at a preliminary
conference, the registrar must, if he or she has not already done so, refer the
15 application to the tribunal.

41 Referral of questions of law

(1) A member of the tribunal may, with the agreement of the president, refer a question of law arising during a preliminary conference to the tribunal.

- 20 (2) Jurisdiction is vested in the tribunal to decide a question referred to it under this section.

42 Review of decisions of referee

 If a referee makes an order, gives a direction or does another act in
relation to proceedings, the tribunal may, on application by a party to the
25 dispute, review the order, direction or act and make an order by way of
confirmation, variation, discharge or otherwise that the tribunal considers
just.

PART 7—TRIBUNAL HEARINGS

Division 7.1—General

43 Parties

Each of the following is a party to a tribunal hearing:

- 5 (a) each party to the lease that is the subject of the hearing;
- (b) if the director intervenes—the director;
- (c) anyone the tribunal gives leave to be a party.

44 Intervention by director

- 10 (1) The director may intervene in a tribunal hearing or related proceedings if—

- (a) the director considers that it would be in the public interest; and
- (b) the Minister consents.

- 15 (2) If the director intervenes in a proceeding, it must be presumed, in the absence of evidence to the contrary, that the Minister has consented to the intervention.

45 Hearings

- (1) The tribunal must hear each dispute referred to it by the registrar.
- 20 (2) The registrar must, at least 14 days before a hearing, give written notice to each person who he or she is satisfied has a sufficient interest in the dispute of the time, date and place of the hearing.

46 Unconscionable conduct etc

- (1) Without limiting the matters the tribunal may consider before making an order, the tribunal may have regard to any of the following matters:
 - 25 (a) the relative strengths of the bargaining positions of the owner and the tenant;
 - (b) whether, as a result of conduct engaged in by the owner, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the owner;
 - 30

- (c) whether the tenant was able to understand any document 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 owner or a person acting on behalf of the owner in relation to the lease;
- (e) the circumstances under which the tenant could have acquired a lease on identical terms over similar premises from a person other than the owner;
- (f) the extent to which the owner's conduct towards the tenant was consistent with the owner's conduct in similar lease transactions between the owner and other like tenants;
- (g) the requirements of the code;
- (h) the extent to which the owner unreasonably failed to disclose to the tenant—
- (i) any intended conduct of the owner that might affect the interests of the tenant; and
 - (ii) any risks to the tenant arising from the owner's intended conduct (being risks that the owner should have foreseen would not be apparent to the tenant);
- (i) the extent to which the owner and the tenant acted in good faith.
- (2) An owner must not be taken, for this section, to have engaged in harsh, oppressive or unconscionable conduct only because the owner referred a dispute to the tribunal.
- (3) In the application of subsection (1)—
- (a) the tribunal must not have regard to circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) the tribunal may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.

Division 7.2—Procedure

47 Procedure generally

If no procedure is prescribed by this Act or the regulations in relation to a particular matter in a hearing, the tribunal may determine its own procedure.

48 Public hearings

(1) A tribunal hearing must be in public.

(2) However, the tribunal may—

- 5 (a) direct that a hearing or part of a hearing is to be closed and give directions as to the persons who may be present; or
- (b) give directions prohibiting or restricting the publication of evidence given before the tribunal, whether in public or in a closed hearing; or
- 10 (c) give directions prohibiting or restricting the disclosure to any of the parties of evidence given before the tribunal.

(3) In considering whether to make an order under subsection (2), the tribunal must have regard to the following matters:

- (a) the principle that the tribunal hearings should be held in public;
- 15 (b) the principle that all evidence given before the tribunal should be made public;
- (c) the confidentiality of any evidence to be given before the tribunal;
- (d) any other relevant consideration raised in argument by a party.

49 Inquiries

20 The tribunal may make the inquiries it considers appropriate for a hearing.

50 Record of proceedings

The tribunal must keep a record of its proceedings.

51 Appearances

The following people may appear at a tribunal hearing:

- 25 (a) a party to the hearing;
- (b) a person to whom the tribunal has granted leave to appear.

52 Representation

A person who may appear at a hearing may be represented at the hearing by a lawyer or, with the leave of the tribunal, by someone else.

53 Witnesses

(1) For a tribunal hearing, the tribunal may summon a person to appear as a witness before it—

- (a) to give evidence; or
- 5 (b) to give evidence and produce a named document or thing in the possession, custody or control of the person; or
- (c) to produce a named document or thing in the possession, custody or control of the person.

10 (2) The president may give a party leave to inspect a document produced under a summons.

(3) A person is taken to have complied with a summons under paragraph (1) (c) if the person gives the documents to the registrar before the date stated in the summons.

(4) A summons must be—

- 15 (a) in writing; and
- (b) served on the person named in the summons.

(5) A person served with a summons under subsection (1) must not, without reasonable excuse, fail to comply with the summons.

20 Maximum penalty (subsection (5)): 50 penalty units, imprisonment for 6 months or both.

54 Appearance by audiovisual or audio links

(1) This section applies if, in relation to a hearing or a part of a hearing (the *relevant hearing*), the tribunal has given a direction under subsection 18 (1) or 30 (1) of the *Evidence (Miscellaneous Provisions) Act 1991*.

25 (2) A person who, in a relevant hearing—

- (a) is required or entitled to appear personally, whether as a party or as a witness; or
- (b) is entitled to appear for another person;

30 may appear in that hearing and participate or give evidence, as the case requires, in accordance with the direction.

(3) A person who appears in a relevant hearing under this section is taken to be before the tribunal.

55 Taking evidence

The tribunal may take evidence on oath or affirmation and, for that purpose, the president—

- 5 (a) may require a person attending before the tribunal to take an oath or make an affirmation; and
- (b) may administer an oath or affirmation to such a person.

56 President's powers

(1) For a tribunal hearing, the president may require a person appearing before the tribunal—

- 10 (a) to answer a question relevant to the hearing; or
- (b) to produce a document or other record relevant to the hearing.

(2) A person required to give evidence under subsection (1) must not, without reasonable excuse, fail to give such evidence.

15 Maximum penalty (subsection (2)): 50 penalty units, imprisonment for 6 months or both.

57 Self-incrimination

A person is not excused from giving evidence before a tribunal hearing on the ground that the evidence would tend to incriminate the person.

20 **58 Admissibility of evidence in subsequent criminal proceedings**

The following evidence is not admissible against a person in criminal proceedings other than prosecutions for an offence against section 88 (Obstruction of registrar and tribunal):

- (a) evidence given before the tribunal;
- 25 (b) evidence of information or a thing obtained directly or indirectly as a consequence of evidence given before the tribunal.

59 Amendments

At any stage of a hearing, the tribunal may—

- 30 (a) on application by a party or on its own initiative, order that a document in the hearing be amended; or
- (b) with the consent of the parties, give leave to a party to amend a document of the party in the hearing.

60 Determination of questions

(1) A question of law arising before the tribunal must be decided in accordance with the opinion of the president.

5 (2) Subject to subsection (1), where there is a division of opinion among the tribunal members in relation to a question, the question must be decided by the opinion of the majority.

61 Adjournment

On application by a party, or on its own initiative, the tribunal may adjourn a hearing.

10 **62 Costs**

The parties to a hearing must bear their own costs unless the tribunal orders otherwise.

Division 7.3—Relief

63 Interim orders

15 (1) This section applies if, at any time after an application for resolution of a dispute is made, a person who has a direct interest in the dispute applies to the tribunal for an interim order.

(2) If the tribunal is satisfied that, if an interim order were not made, the person applying for the order would suffer detriment, the tribunal may
20 make an appropriate interim order to safeguard the position of the person.

(3) An interim order remains in force until—

(a) the tribunal orders otherwise; or

(b) the tribunal makes an order under section 64 at the conclusion of a hearing;

25 whichever is earlier.

(4) The tribunal may, on application by a person who has a direct interest in the relevant dispute, while an interim order is in force—

(a) vary the order; or

(b) rescind the order.

30 (5) An application for an interim order must be in accordance with the form approved by the registrar.

(6) If a person against whom an interim order is made is not present at the making of the order, the registrar must serve a copy of the order on the person as soon as practicable after the order is made.

64 Power to grant relief

- 5 (1) The tribunal may exercise any power to grant relief in relation to a dispute heard before it that would be exercisable by the Magistrates Court under the *Magistrates Court (Civil Jurisdiction) Act 1982* if that court had jurisdiction to hear the dispute unless this Act or the code expressly states otherwise.
- 10 (2) In addition to any other order the tribunal may make, the tribunal may do any or all of the following:
- (a) reopen a lease and take whatever action it considers appropriate in the circumstances, including—
 - 15 (i) varying the lease, whether by inserting new terms or otherwise; and
 - (ii) setting the lease aside, in part or in whole;
 - (b) make any order required to enforce the code;
 - (c) restrain a person from breaching a lease or the code;
 - (d) require performance of the terms of a lease or the code;
 - 20 (e) require the payment of compensation for loss caused by or resulting from a contravention of a term of a lease or the code;
 - (f) restore a lease to a person and grant the person possession of the premises—
 - 25 (i) from which the person was evicted in contravention of this Act or the code; or
 - (ii) that are vacated because of the misleading behaviour of the owner, including giving a notice that purports to be a notice to vacate under this Act but is invalid;
 - (g) require payment of all or part of the rent payable under the lease to the tribunal until the tribunal orders otherwise;
 - 30 (h) direct payment to be made out of amounts paid into the tribunal;
 - (i) terminate a lease and grant vacant possession of the premises to the owner.
- 35 (3) In addition, the tribunal may make any other order it considers appropriate.

(4) However the tribunal may not make an order under this section which would be inconsistent with the code.

(5) The tribunal is not limited in any amount it may order to be paid.

65 Notice of orders

5 (1) Unless a party to a hearing is present at the making of an order, the tribunal must give the party written notice setting out the terms of an interim order made under section 63 (Interim orders) or order made at the conclusion of a hearing under section 64 within 3 working days after making the order.

10 (2) If a copy of an order has been served on a person under subsection 63 (6), the tribunal is not required to give the person written notice of the order under this section.

(3) Failure to comply with this section in relation to an order does not affect the validity of the order.

15 **Division 7.4—Enforcement**

66 Failure to comply

A party to a hearing must not, without reasonable excuse, fail to comply with an order of the tribunal or of the president.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

20 **67 Powers of enforcement**

The tribunal has the same powers to enforce its decisions as the Magistrates Court has when exercising its jurisdiction under the *Magistrates Court (Civil Jurisdiction) Act 1982*.

PART 8—APPEALS TO THE SUPREME COURT

68 Appeal from decisions of the tribunal

(1) A party to a tribunal hearing may appeal to the Supreme Court on a question of law from a decision of the tribunal in the hearing.

5 (2) An application for an appeal may be made no later than 28 days after—

(a) the day the order is made; or

(b) if notice has been given under section 65 (Notice of orders)—the day the notice is given.

10 (3) However, the court may grant further time to make an application on, before or after time expires under subsection (2).

(4) The Supreme Court must hear and determine the appeal and may make any of the following orders:

(a) an order affirming or setting aside the decision of the tribunal;

15 (b) an order remitting the case to be heard and decided again, either with or without the hearing of further evidence, by the tribunal in accordance with the directions of the court;

(c) any other order the court considers appropriate.

PART 9—TENANCY TRIBUNAL

69 Establishment

The Tenancy Tribunal is established by this section.

70 Constitution

5 (1) The tribunal consists of—

- (a) the president; or
- (b) the president and 2 members appointed by the president under subsection 71 (3); or
- 10 (c) a referee, if the president considers it desirable for a particular dispute (subject to section 76 (Tribunal hearings by referees)).

(2) The president is responsible for ensuring the orderly and prompt discharge of the business of the tribunal and accordingly may, subject to appropriate consultation with the referees, allocate a referee in relation to a particular dispute.

15 71 Membership

(1) The president must be a magistrate appointed by the Minister in writing.

(2) The president holds office for the period (not longer than 5 years) stated in the instrument of appointment but is eligible for reappointment.

20 (3) If the president considers it desirable, having regard to the nature and complexity of a particular dispute, the president may appoint 2 further members in writing for the hearing, of whom—

- (a) the first must be a member of a group selected under subsection (4); and
- 25 (b) the second must be a member of a group selected under subsection (5).

(4) The Minister must, in writing, select people who, in his or her opinion, are qualified by reason of experience and expertise to represent the interests of tenants to form a group for paragraph (3) (a).

30 (5) The Minister must, in writing, select people who, in his or her opinion, are qualified by reason of experience and expertise to represent the interests of owners to form a group for paragraph (3) (b).

72 Powers of tribunal

The tribunal has power to do all things necessary or convenient to be done for or in connection with the performance of its functions unless expressly stated otherwise in this Act.

5 **73 Expenses**

The Territory must reimburse a member referred to in subsection 71 (3) (Membership) for expenses reasonably incurred in the performance of the member's functions.

74 Registrar and deputy registrar

- 10 (1) The registrar of the Magistrates Court is the registrar of the tribunal.
- (2) Each deputy registrar of the Magistrates Court is a deputy registrar of the tribunal.
- (3) Subject to any direction of the registrar, a deputy registrar of the tribunal may exercise the powers of the registrar of the tribunal.
- 15 (4) The registrar may, in writing, delegate to a public servant all or any of his or her powers under this Act.

75 Appointment of referees

- (1) The Minister may appoint people as referees of the tribunal.
- (2) The Minister may only appoint a person as referee if satisfied that
20 the person is qualified to be a referee because of the person's experience and expertise.
- (3) An appointment must be in writing signed by the Minister.
- (4) An appointment may be revoked by written notice signed by the Minister and given to the referee.

25 **76 Tribunal hearings by referees**

A tribunal constituted by a referee is not authorised to order the payment of an amount of money (other than unpaid rent) which cannot be worked out by reference to a receipt or statement of account.

77 Protection of members etc

- 30 No action, suit or proceeding lies against a person who is or has been—

- (a) a member of the tribunal; or
- (b) a member of the staff of the tribunal; or
- (c) the registrar; or
- (d) acting under the direction or authority of the tribunal; or
- 5 (e) a participant in a proceeding;

in relation to an act done or omitted to be done in good faith in the exercise or purported exercise of a function under this Act.

78 Termination of appointment

- 10 (1) The Minister may remove the president, registrar or referee from office by reason of misbehaviour or physical or mental incapacity.

(2) The Minister must remove a person mentioned in subsection (1) from office if the person—

- 15 (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of the person's remuneration for their benefit; or
- (b) is convicted in Australia of an offence punishable by imprisonment for 1 year or longer; or
- (c) is unreasonably absent from proceedings of the tribunal; or
- 20 (d) ceases to have the qualifications by virtue of which he or she was appointed.

PART 10—CODE OF PRACTICE

79 Approval of code

(1) The Minister may, in writing, approve—

- (a) a code of practice relating to leases; or
- 5 (b) a variation of an approved code of practice.

(2) The code may prescribe matters including the following:

- (a) the time from which its provisions, or any of them, are to take effect;
- (b) grounds on which specified provisions in a lease are to be invalid
- 10 or void.

(3) However, a provision in a lease that would be void or invalid because of a ground prescribed under paragraph (2) (b), is not void or invalid if it is approved by the tribunal under section 8 (Power to approve void or invalid terms).

80 Disallowance

15 A code or variation approved under section 79 is a disallowable instrument.

81 Publication

20 (1) The director must cause to be published in a newspaper published and circulating in the Territory, on or before the date of effect of an approval under section 79 (Approval of code), notice of the approval—

- (a) stating the date the approval takes effect; and
- (b) stating a place or places at which copies of the code of practice to which the approval relates may be purchased; and
- 25 (c) containing a statement to the effect that a copy of the code of practice may be inspected by members of the public at the office of the director during office hours; and
- (d) containing a statement to the effect that the approval is subject to
- 30 disallowance by the Legislative Assembly under the *Subordinate Laws Act 1989*.

(2) The director must ensure that—

- (a) a copy of the code of practice to which an approval under section 79 relates is made available for public inspection at the office of the director during office hours; and
- 5 (b) copies of the code of practice are made available for purchase at each place stated for the purpose in the relevant notice under subsection (1).

(3) In this section:

code of practice includes any document (or part of a document) the provisions of which are applied by the code.

PART 11—FEES AND CHARGES

82 Determination

(1) The Minister may, in writing, determine fees and charges for any of the following purposes:

- 5 (a) referral of disputes to the registrar;
- (b) proceedings in the tribunal and matters incidental to such proceedings, including the service of the process of the tribunal;
- (c) facilities and services provided by the registrar or the tribunal;
- (d) the general purposes of this Act and the code.

10 (2) A determination may provide for any of the following matters:

- (a) the exemption of persons from liability to pay fees or charges, in whole or in part;
- (b) exemptions from liability for the payment of fees or charges, in whole or in part, in particular circumstances;
- 15 (c) the remission or refund of fees or charges by the registrar, in whole or in part, in particular circumstances;
- (d) the deferral of liability by the registrar for the payment of fees or charges, in whole or in part, in particular circumstances.

(3) A determination is a disallowable instrument.

20 83 Payment

(1) A fee or charge determined under subsection 82 (1) is payable, in advance, in accordance with the determination, subject to this section.

25 (2) A fee or charge determined under subsection 82 (1) is payable on notification from the registrar if it is calculated by reference to expenses actually incurred in performing the function, or in providing the facility or service, for which the fee or charge is payable.

30 (3) If a fee or charge determined under subsection 82 (1) and payable in advance is not paid when due, there is no obligation on the registrar or the tribunal to exercise the function, or provide the facility or service, for which the fee or charge is payable.

84 Remission, refund, deferral, waiver, exemption

(1) A fee or charge determined under subsection 82 (1) (Determination) may be remitted or refunded, or liability for its payment deferred, in accordance with the determination.

5 (2) A fee or charge determined under subsection 82 (1) is not payable—

(a) if the person otherwise liable to pay the fee or charge is—

(i) exempt from paying the fee or charge under subsection 93 (1) of the *Legal Aid Act 1977*; or

10 (ii) legally assisted under a scheme or service provided or approved by the Attorney-General; or

(b) if the registrar waives payment of the fee or charge in whole or in part because he or she considers that it would impose hardship on the person liable to pay the fee or charge—to the extent of the waiver.

15 **85 Review of decisions**

(1) The following decisions of the registrar (*reviewable decisions*) are reviewable under this section:

(a) a decision mentioned in subsection 84 (1) in relation to the refusal to remit or refund a fee or charge (in whole or in part);

20 (b) a decision mentioned in subsection 84 (1) in relation to the refusal to defer liability for the payment of a fee or charge (in whole or in part);

(c) a decision under paragraph 84 (2) (b) in relation to the refusal to waive payment of a fee or charge (in whole or in part).

25 (2) After making a reviewable decision, the registrar must give a written notice of the decision to the eligible person including a statement to the effect that—

(a) the person may apply to the registrar for a statement of reasons for the decision; and

30 (b) the person may apply to the tribunal for review of the decision within the review period.

(3) On written application by the eligible person within 28 days after the person's receipt of a notice under subsection (2), the registrar must give the person a written statement of reasons for the relevant decision.

(4) On written application by the eligible person within the review period, the tribunal may review a reviewable decision.

(5) On a review under subsection (4), the tribunal may make such order as it considers appropriate.

5 (6) No fee or charge is payable in relation to an application for review under subsection (4).

(7) In this section:

10 **eligible person**, in relation to a reviewable decision, means the person who claims to be entitled to the relevant remission, refund, deferral or waiver.

review period, for a reviewable decision, means—

- 15 (a) 28 days after receipt by the eligible person of notice of the decision under subsection (2); or
- (b) if the eligible person applies under subsection (3) for a statement of reasons for the decision—28 days after the person receives the statement of reasons.

PART 12—MISCELLANEOUS

86 Determination of criteria

(1) The Minister may, in writing, determine criteria to be considered by the tribunal for section 8 (Power to approve void or invalid terms).

5 (2) A determination is a disallowable instrument.

87 Approval of forms

The Minister may approve forms for this Act.

88 Obstruction of registrar and tribunal

10 A person must not, without reasonable excuse, obstruct, hinder or resist the registrar or tribunal in the exercise of a function under this Act.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

89 Regulation-making power

The Executive may make regulations for this Act.

PART 13—TRANSITIONAL PROVISIONS

90 Repeal

The *Tenancy Tribunal Act 1994* is repealed.

91 Code

- 5 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.
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DICTIONARY

(See s 3)

approved form, for a provision of this Act, means a form approved under section 87 for the provision.

5 **code** means the code of practice approved under section 79, as in force from time to time.

commercial premises means premises used, or intended to be used, wholly or predominantly for carrying on a business other than a business involving—

- 10 (a) the sale or hire of goods by retail; or
(b) the provision of services by retail.

conduct, in relation to a lease, means any act or omission including making a request or demand of a person in relation to the lease, or taking other action to enforce the terms of the lease.

15 **director** means the director of fair trading under the *Fair Trading (Consumer Affairs) Act 1973*.

dispute—see section 5.

evidence, for a hearing or mediation, includes a document tendered, or a statement or admission made, by a party or by a witness in the course of that hearing or mediation.

20 **hearing** means—

- (a) a hearing by the tribunal under section 45; or
(b) the hearing of an application for an interim order under section 63.

25 **key money** means any money paid by or on behalf of a tenant to, or at the discretion of, an owner, or any benefit conferred on, or at the discretion of, an owner, other than—

- 30 (a) rent; or
(b) a payment for the goodwill of a business sold or to be sold by the owner to a tenant; or
(c) a repayable security bond or security deposit, or a guarantee by way of security; or
(d) money payable on account of outgoings; or

DICTIONARY—continued

- (e) money payable to a person for attendances on a tenant in connection with the preparation of documents that are relevant to a lease; or
- 5 (f) any reasonable sum of money payable to an owner for goods and services provided, or to be provided, to a tenant; or
- (g) any money permitted to be paid under the code.

lease—see section 4.

10 *licence* means a right to occupy premises if the right is given other than by a lease.

mediator means a mediator registered under the *Mediation Act 1997*, section 5.

member of the tribunal means—

- 15 (a) the president; or
- (b) when constituting the tribunal—a referee; or
- (c) a person appointed under subsection 71 (3) who constitutes the tribunal with the president.

multiple rent review clause means a provision in a lease that—

- 20 (a) has the effect of reserving to a party a discretion as to which of 2 or more methods of calculating a change to rent is to apply; or
- (b) provides for rent to change in accordance with whichever of 2 or more methods of calculating the change would result in the higher or highest rent;

25 whether generally or on a particular occasion.

nominal termination date, for a lease, means the date on which the lease is expressed to expire.

owner—

- 30 (a) means a person that grants, or proposes to grant, a right to occupy premises under a lease; and
- (b) includes a person that receives the right to act as owner by assignment from the owner or by operation of law.

DICTIONARY—continued

party means—

- (a) in relation to negotiations for a lease—the tenant and owner; and
- (b) in relation to a lease—the tenant and owner; and
- 5 (c) in relation to a dispute—the tenant, the owner and anyone joined as a party by the tribunal; and
- (d) includes anyone acting on behalf of the tenant or owner with his or her written authority.

preliminary conference means a conference under Part 6.

10 **president** means the president of the tribunal.

ratchet clause, in relation to a provision in a lease for determining rent variations in such a way that rent might decrease, means a provision in that lease that has the effect of preventing, or giving a person the power to prevent, that decrease.

15 **referee** means a referee appointed under section 75.

registrar means the registrar of the tribunal.

retail premises means premises that are used, or are intended to be used, wholly or predominantly for carrying on a business involving—

- 20 (a) the sale or hire of goods by retail; or
- (b) the provision of services by retail.

shopping centre means a group of premises where—

- (a) the premises—
 - 25 (i) all have, or would have if leased, the same owner or same head owner; or
 - (ii) all comprise units in a single unit plan under the *Unit Titles Act 1970*; and
- (b) the premises are located—
 - (i) in a single building; or
 - 30 (ii) in buildings that adjoin, or are separated only by areas owned by the owner of the premises; and

DICTIONARY—continued

- (c) the group of premises is promoted as, or generally regarded as constituting, a shopping centre, shopping mall, shopping court or shopping arcade.

5 **small commercial premises** means commercial premises with a lettable area of no more than 300m².

tenant means a person who has the right to occupy premises under a lease, and includes—

- 10 (a) a subtenant; and
(b) a person deriving title under a tenant; and
(c) a prospective tenant.

terminates, in relation to the tribunal, includes makes a termination and possession order.

15 **termination and possession order** means an order of the tribunal terminating a lease and giving vacant possession of the premises to the owner.

termination order includes a termination and possession order.

tribunal means the Tenancy Tribunal established by section 69.

Endnote

Penalty units

Section 33AA of the *Interpretation Act 1967* deals with the meaning of offence penalties that are expressed in penalty units.