

1 September 2022

Hon Bill Johnston MLA
Minister for Mines and Petroleum, Energy, Corrective Services, Industrial Services
Department of Mines, Industry Regulation and Safety
Level 9, 2 Havelock Street
WEST PERTH WA 6005

Email only: Minister.Johnston@dpc.wa.gov.au

Dear Minister

COMMERCIAL TENANCY LAW REVIEW CONSULTATION PAPER

I refer to consultation on *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA) Statutory Review 2022 (Consultation)*.

The Law Society of Western Australia thanks the Department of Mines, Industry and Regulation and Safety for the opportunity to provide feedback on the Consultation, and for the extension of time granted to allow us to prepare a submission on this matter.

Please see the completed Commercial Tenancy (Retail Shops) consultation workbook, annexed to this letter.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely



Rebecca Lee
President

Commercial Tenancies Comments Table

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
2.1 LEASES TO SMALL BUSINESSES PROVIDING SERVICES		
1.	<p>It is proposed that the CT Act continue to apply to any business premises situated in a retail shopping centre. Do you support this? (If not, please provide reasons for your answer).</p>	<p>Yes, subject to our response to questions 2, 4 and 6 below.</p> <p>If our positions in respect of 2, 4 and 6 are not supported then our response to this question is no.</p>
2.	<p>On the CT Act applying to retail businesses selling mostly services, do you prefer Option A or Option B? Why?</p>	<p>Option B – uniformity and consistency of the protections are of primary importance.</p> <p>It appears arbitrary that a supplier of services within a retail shopping centre receives protection, yet the same supplier would not receive protection if they operated from a premises outside the retail shopping centre.</p> <p>If the overarching goal of the act is to protect small businesses, then a distinction between a retailer of goods and a retailer of services appears artificial.</p>
3.	<p>If Option A (status quo) is pursued:</p> <p>1) Are there any additional small businesses selling services outside shopping centres that should be covered by the CT Act?</p> <p>2) Other than not having the benefit of CT Act protections, what risks are there for tenants if the CT Act does not apply to a lease to a non-retail business?</p>	<p>1) No. Exceptions should be as limited as possible.</p> <p>2) It provides an inconsistent and unfair legal playing field dependent on whether the business is in a retail shopping centre.</p>

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
4.	<p>If Option B is pursued:</p> <p>1) Are there small businesses selling services outside shopping centres where it would not be appropriate for the CT Act to apply?</p> <p>2) What costs are incurred by landlords and tenants in complying with the CT Act in relation to these leases?</p>	<p>1) No. Uniformity and consistency should be prioritised.</p> <p>2) Landlord’s significant costs include disclosure costs, legal fees (eg a REIWA commercial lease form could no longer be used), SAT application costs and fees (if applicable), leasing fees, ongoing compliance costs (including managing agent costs).</p> <p>Tenant’s costs of complying with CT Act are minimal, if any.</p>
2.2 EXCLUDED BUSINESSES OR PREMISES		
5.	<p>In addition to vending machines and ATMs, are there any additional types of businesses or premises that should be excluded from the application of the CT Act? (If yes, please provide examples and reasons for your answer).</p>	<p>Yes. Short term (less than 12 months) leases should be excluded from all aspects of the CT Act to ensure flexibility for mall licences etc which can be beneficial to both landlords and tenants.</p> <p>Telco, kiddy rides, signage, storage and parking (eg direct to boot bays) and sundry income uses.</p>
2.3 COVERAGE OF SMALL BUSINESS TENANTS		
6.	<p>It is proposed that the CT Act would continue to exclude leases held by publicly listed companies and their subsidiaries, and most leases where the lettable area is greater than 1,000 m². Do you support Option A, Option B or Option C?</p> <p>(Please provide reasons for your answer).</p>	<p>Option C. The inclusion of a monetary based threshold appears reasonable. It is reasonable to assume that the more significant the monetary consideration paid under a lease, the more sophisticated a tenant is likely to be and therefore the need for protection is less.</p> <p>The Society also supports a general “contracting out” of the act exemption when an appropriate certificate is provided by the Tenant’s accountant or solicitor.</p>

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
7.	If Option B is preferred, which small businesses with premises that have a lettable area greater area than 1,000 m2 would be appropriate for the CT Act to capture?	Option B is not preferred.
8.	If Option C is preferred, should the monetary threshold be linked to: 1) the lease's occupancy costs, or 2) the estimated payable annual rent?	The rent payable at the commencement date of the initial term. It is important that a fixed date is chosen and once the threshold determination has been made, the status of the lease cannot then change during the term or any extended term.
9.	If Option B or C is pursued, what are the costs or disadvantages for landlords if the CT Act was to apply to larger privately owned businesses?	Increased compliance and disclosure costs. The larger the business, the less likely that protection is required.
3 MINIMUM FIVE YEAR LEASE		
10.	Is there a need to change the way the CT Act applies the right to a five-year term? Please give reasons for your answer.	<p>Historically, the five-year statutory term was an important tool to protect vulnerable tenants. Tenants are now generally more sophisticated and understand the possible risks associated with short term leases.</p> <p>The sentiment expressed that the minimum five-year term has resulted in a lack of flexibility and innovation is correct, but it is not always a reluctance on the part of a landlord to grant a shorter term lease – it is often a desire on the part of the tenant to enter into a shorter term arrangement.</p> <p>The process of having a shorter term approved by the SAT has proven to be an unnecessary cost, takes additional time and the result of the application is not always predictable, as the concept of “special circumstances” is subjective.</p>

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
11.	What option do you prefer? Why?	<p>Option B – While there are good arguments to remove the right to a minimum five-year term, this will probably be a step too far at this time. We therefore support Option B.</p> <p>This option provides a relatively simple and cost-effective way of catering for terms of less than five years.</p>
12.	What costs are incurred by landlords and tenants in complying with the current provisions of the CT Act in relation to the right to a five-year term?	<p>Currently, the costs of compliance relate mostly to applications to the SAT.</p> <p>If the term is less than five years an application must be made for approval of the shorter term. As previously mentioned, these applications can be costly (the costs are not just limited to the SAT application fee – the application is often prepared by a solicitor) and don't always result in the outcome the parties are seeking due to the subjectiveness of the test to be applied by the SAT.</p> <p>Currently, even if the term is five years or more, if there are clauses in the lease that allow the landlord to terminate during the first five years of the term, they must be approved by the SAT. These applications are becoming increasingly harder to successfully make, as it is not clear what test is being applied by the SAT in approving or rejecting clauses. The need for these applications could mostly be avoided if, much like the redevelopment and relocation clauses, a prescribed damage and destruction clause is set out in the CT Act or Regulations.</p> <p>Costs and management burden of managing tenants with terms of 6 months or less i.e. ensuring tenancy actually ends or tenant is moved within 6 months (no flexibility to exceed this period or risk that a rights arises to a 5 year term).</p>
13.	What are the risks to tenants if the right to a five-year term does not continue in its current form?	In the current market and, taking into account the comparative sophistication of tenants now compared to the 1980's when the CT

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
		<p>Act was introduced, the abolition of the minimum five-year term would pose little risk to tenants.</p> <p>The risks could be addressed in the Tenant Guide and Disclosure Statement by inserting notes warning tenants that the landlord is not obliged to extend or renew the lease beyond the agreed term and encouraging tenants to consider carefully if the term of the lease offered is adequate for the it to recover the time and money invested.</p>
14.	If option B is implemented, what mechanism should be used to allow for contracting out of the right to a five year term?	Legal practitioner or accountant certificate.
4.1 ADDITIONAL DISCLOSURE TO PROSPECTIVE TENANTS		
15.	Should the CT Act require additional information to be disclosed?	No, nothing further needs to be disclosed.
16.	Could existing disclosures be made clearer? For example, by providing a standard list of outgoings?	<p>A list of what is required in the disclosed outgoings.</p> <ul style="list-style-type: none"> • Relevant year that the outgoings relate to; • Description of outgoing; • Estimated annual amount. <p>At the end of the list.</p> <ul style="list-style-type: none"> • Total estimated outgoings (exclusive of GST) for the relevant year; • An indication of which outgoings the particular tenant is not liable for (if any); • Tenant's relative proportion - % applicable to this tenant. <p>Estimated annual amount of outgoings payable by the tenant (exclusive of GST).</p>

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
17.	If yes to either of the above, please specify what additional information should be disclosed and what can be done to improve existing disclosure requirements to make them clearer. Please include reasons for your answer.	As to question 16, if the key information is required to be given it will be much clearer to a tenant as to what the likely annual outgoings payment will be and the basis upon which it is calculated. It will also provide consistency of key information to be included in outgoings budgets.
4.2 DISCLOSURE ON RENEWAL OF THE LEASE		
18.	Do you prefer Option A, Option B or Option C? Why?	<p>Option A. The CT Act already places considerable obligations on landlords. If a tenant exercises an option, it is already bound to the further term. No legal or consumer protection value in a landlord subsequently giving updated disclosure to a sitting tenant who already knows key information and is already bound. Both parties require certainty as to the valid exercise of an option to renew. Landlords also shouldn't have to initiate updated disclosure to a sitting tenant of its own motion before the option exercise period is open which may be 6-12 months before the further terms commences when budgets etc have not been set and information changes in the interim (eg tenancy mix).</p> <p>In any event, any changes will be documented in the extension of lease. For example, the rent payable by the tenant for the renewed term, variations to existing provisions or additional special conditions. Generally, the extension of lease document is reviewed (and negotiated, if applicable) by the tenant before that tenant enters into the extension of lease.</p>
19.	If Option B or C is pursued, what additional costs would landlords incur?	<p>Legal costs – The Landlord may require legal assistance to review the disclosure statement.</p> <p>Leasing agent fees – Generally, the leasing agent will prepare the disclosure statement.</p>

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
4.3 DISCLOSURE AT ASSIGNMENT OF LEASE		
20.	Do you prefer Option A or Option B? Why?	Option B. There are currently no disclosure obligations on the Landlord or Tenant to a proposed assignee. An assignee should be afforded an opportunity (even if it is only a procedural requirement) to understand particulars of the lease agreement to be assigned to assist them with making an informed decision.
21.	If Option B is pursued, what additional costs would be exiting tenants and landlords incur?	<p>Similar to question 19 above:</p> <p>Legal costs – the Landlord and/or Tenant may require legal assistance to review an updated disclosure statement, in addition to costs incurred for negotiating the terms of the proposed assignment and variations to the lease (if any). Unrepresented assignors may require the Landlord’s assistance with the disclosure statement.</p> <p>Leasing agent costs – disclosure statements are generally prepared by leasing agents. Preparation of updated statements will incur further costs.</p>
22.	If Option B is pursued, should the tenant be required to provide an additional assignor’s disclosure statement if the assignee is to continue the business?	No. An assignee should be undertaking its own due diligence on the business they intend to continue. A disclosure statement as to the lease obligations should be sufficient.
23.	Should the CT Act be amended to require that an existing tenant must provide a copy of the tenant’s guide to the assignee? Please provide reasons for your answer.	No. A tenant guide should already be included in the original grant of the lease, as required under the CT Act. A prudent proposed assignee would have obtained copies of the relevant lease documents concerning the tenancy (i.e. original lease, any extensions, variations etc.).

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
		The consequences of the failure to provide the tenant guide need to be spelt out. Currently, the assignor is released from its monetary obligations under the lease on the assignment. Such release should only occur if the tenant guide is provided to the assignee.
4.4 DISCLOSURE AND ACCESS TO MARKET RENT INFORMATION		
24.	Are the current provisions in the CT Act regarding disclosure and access to market rent information operating effectively? Please detail any issues.	Yes.
25.	If not, how could disclosure and access to rent information be improved?	<p>Mandatory registration of leases was considered by the Department of Commerce in the 2014 review as a means of achieving greater transparency and access to rent information. However, having regard to the balancing of access to useful and meaningful rent information against the costs to landlords and tenants in having to comply with any additional obligations, the proposal was not implemented.</p> <p>There appears a general reluctance amongst landlords to register leases on title. Registration of leases is an onerous, time consuming and costly process. More commonly, a tenant's interest under a lease is recorded by lodgement of a caveat by a tenant.</p> <p>The creation of a specific form of caveat relevant to retail leasehold interests or amending Landgate policy and procedures to require certain information to be included when lodging caveats pursuant to a leasehold interest (eg. commencing rent, term (including any options), date and method of annual rent reviews) would not impose any additional costs on either landlord's or tenants, whilst also providing a useful source of publicly available information that can be searched by tenants or valuers for a relatively low cost.</p>

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
26.	Have there been any changes in the retail tenancy market to justify further reform? Please provide details.	No.
5.1 TURNOVER RENT		
27.	Which of the above options do you support? Please provide reasons and any additional costs/benefits.	<p>Option A. Whether to include or exclude online sales from the calculation of turnover rent should be a matter for negotiation between the landlord and tenant.</p> <p>Consideration may be given to amending the Form 2 (Notice of Election that rent be determined by reference to turnover) to include a specific election as to whether turnover rent will include or exclude online sales.</p>
28.	Are the current provisions in the CT Act relating to turnover rent operating effectively? If not, please detail any additional issues.	Yes.
5.2 LAND TAX		
29.	Which of the above options do you support? Please provide reasons and any additional costs/benefits.	<p>Option A – no change.</p> <p>Landlords and tenants are already free to negotiate what outgoings are payable and will be recovered by the landlord. It is appropriate that statutory protection continues so that a tenant's contribution (if any) is limited to land tax calculated on a single ownership basis.</p> <p>Difficult to see why recovery of land tax should be prohibited when other statutory charges are recoverable (eg council and water rates).</p>
30.	Are there any other outgoings or expenses that you believe should not be passed onto the tenant? If so, why?	No.

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
5.3 MARKETING FUNDS		
31.	Which of the above options do you support? Please provide reasons and any additional costs/benefits.	Option A, however, if Option B is preferred, then recommend following ACT's requirements, i.e. written estimate of advertising or promotion provided at least 1 months before accounting period. No auditor's report required.
5.4 SECURITY BONDS, BANK AND PERSONAL GUARANTEES		
32.	Which option do you support and why?	Option A.
33.	<p>If you support Option B, should the CT Act be amended to include the following:</p> <ol style="list-style-type: none"> 1) the maximum amount a landlord can collect as a security bond or require as a bank guarantee? 2) when the landlord should return the security deposit or release or return a bank guarantee. 3) a provision allowing a tenant to elect which form of security they would like to use; and/or 4) a provision preventing a landlord from requesting more than one form of security (e.g. a security bond and a bank guarantee) or from refusing to accept a bank guarantee. <p>Please provide reasons and any additional suggestions or costs/benefits.</p>	<p>Option B is not supported but:</p> <ol style="list-style-type: none"> 1) no maximum should be mandated - there are a range of commercial factors that go into how the security amount is agreed between the parties e.g. landlord's works, leasing incentives, extent of make good obligations; 2) x months after tenant completes obligations could be subjective. Suggest longer period (say 6 months) from a fixed date e.g. the date the tenant vacates; 3) a tenant should not be able to unilaterally elect the form of security. The form of security must be agreed between the parties as it is a key commercial lease term. In this regard, a landlord should not be required by a tenant to hold/ manage a cash security deposit or to have to sue a personal guarantor (higher costs of recovery); 4) multiple forms of security should not be prohibited. Multiple forms may be required to make the tenant's lease proposal acceptable and allow the tenant to enter into the lease (e.g. usually a small bank guarantee amount and a director's guarantee). In relation to prohibiting a landlord from refusing a

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
		bank guarantee, again, the form of security must be agreed between the parties under the lease.
6 FIRST RIGHT OF REFUSAL		
34.	Is there justification for providing sitting tenants with a preferential right to renew their lease? Is this a widespread issue?	No. The sitting tenant may already be entitled to a minimum 5-year term. The parties are free to negotiate options and leases.
35.	Do you prefer Option A or Option B? Why?	Option A. Given the lease has expired and there are no further options of renewal, a landlord should have the freedom to deal with their property without further fetter. It is not reasonable to extend the tenant's rights beyond the period the parties contracted for and beyond the statutory minimum 5-year term.
36.	If Option B was pursued: <ol style="list-style-type: none"> 1) what exceptions should apply? (e.g. similar to those in South Australia and the Australian Capital Territory?); and/or 2) what conditions should apply? (e.g. should the offer of a renewed lease have to be on terms no less favourable than those of a proposed new lease? or, determined by independent valuer if agreement cannot be reached between the parties). 	Given Option A is preferred, it is not necessary to consider which other jurisdiction ought be followed. If any were provided, the least onerous should be applied. The section 13B process gives the tenant certainty of its position after expiry. It is not recommended to go further and give a tenant a statutory " <i>right of first refusal</i> ". There does not appear to be a clear preferred model for any preferential right.
7 EARLY TERMINATION DUE TO SEVERE FINANCIAL HARDSHIP		
37.	Which of the above options do you support? Please provide an explanation for your response and include examples and any potential costs or benefits.	Option A. The other tenancy legislation is radically different to legislation which seeks to alter relations in a commercial setting. It is unclear why WA would want to pursue this avenue given no other jurisdiction currently provides for early termination rights on the basis of severe financial hardships due to unforeseen or exceptional circumstances.

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
38.	Can you suggest any alternative options to those presented above?	Not necessary as option A supported.
39.	What criteria should be considered to establish whether: <ol style="list-style-type: none"> 1) a tenant is suffering severe financial hardship; and 2) the circumstances were unforeseeable at the time the tenant entered into the lease? 	Not necessary as option A supported.
40.	Do you think that tenants who terminate their leases early due to severe financial hardship should be relieved of all or some of their obligations? If so - which obligations should the tenant still be required to comply with? For example, should the tenant still be required to: pay compensation; pay damages to the landlord associated with early termination of a lease (often referred to as 'break lease costs') and/or make good the premises?	Not necessary as option A supported.
41.	Do you support termination on grounds of severe financial hardship applying to landlords as well as tenants?	No. Not necessary as option A supported.
8.1 MINIMUM TRADING HOURS		
42.	Do you prefer Option A or Option B? Why?	Option A - The purpose of this provision is to allow tenants the 'right to determine their own trading hours to satisfy the needs of their business, their marketing environment and their personal circumstances.
43.	If Option B is pursued – what requirements should be included in order for the lease to be able to set core trading hours? (For example, restrictions on certain days and times, or a requirement for the majority of shopping centre tenants to agree any changes to core hours)?	Not necessary as option A supported.

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
8.2 STANDARD TRADING HOURS		
44.	Do you prefer Option A or Option B? Why?	Option A – Option B has more disadvantages.
45.	If Option B is pursued: <ul style="list-style-type: none"> • Which hours should be prescribed as standard trading hours? (for example, 11am to 2pm on a Sunday); • Should certain conditions be met before a landlord can charge operating costs for extended trading? (For example, retail shop lease is located in a shopping centre in the Perth metropolitan area). 	Not necessary as option A supported.
9 UNCONSCIONABLE CONDUCT		
46.	Which of the above options do you support? Please provide an explanation for your response and include examples and any potential costs or benefits.	Option A – Current provisions provide adequate protection.
10.1 MATTERS EXEMPT FROM ALTERNATIVE DISPUTE RESOLUTION		
47.	Does the current list prescribed in regulation 10 of the CT Regulations require amendment? If so, what matters should be included or removed from the list? Please provide reasons for your position.	No.
48.	Do you support including matters arising under the Strata Titles Act to the list of matters that do not require a certificate from the Small Business Commissioner and therefore may proceed directly to the SAT for determination?	Yes.
10.2 STATE ADMINISTRATIVE TRIBUNAL		

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
49.	Are there any gaps or issues with the SAT's jurisdiction and powers under the CT Act? If so, please provide details and examples.	No.
11 IMPACT OF COVID-19 AND OTHER ISSUES		
50.	Are there any issues resulting from the COVID-19 pandemic that aren't dealt with by the CT Act and that you think should be covered by the CT Act? Please identify these issues and provide examples.	While further measures may be required to address the impact of COVID-19 on small businesses, the CT Act is not the appropriate legislation for doing this. It has been suggested that to make amendments to the CT Act to address the impact of a one-off crisis such as COVID- 19 could be beyond the scope and intent of the legislation.
51.	Are there any other general issues that are not identified in this paper relating to the operation or effectiveness of the CT Act? Please identify any additional issues and provide examples.	<p>The Society has identified the following additional issues that should be addressed or clarified:</p> <ol style="list-style-type: none"> 1) Operating Expenses and <i>Trimat Holdings Pty Ltd v Investment Club Pty Ltd [2020] WASCA 63</i> – This case has caused considerable concern and uncertainty in the industry in respect of the recovery and enforceability of operating expenses. <p>It would be desirable to clarify that a failure to comply with the requirements of sections 12(1a) and 12(1d) of the CT Act result only in a <u>suspension</u> of the Tenant's obligation to pay operating expenses (and the landlord's right to recover the same). Non-compliance should not:</p> <ol style="list-style-type: none"> (a) allow for the tenant to recover operating expenses already paid; (b) prevent the landlord from recovering future operating expenses; or (c) prevent a landlord from recovering operating expenses once the relevant defect is cured.

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
		<p>2) Restriction on Early Termination contained in section 13(6)(ab) – The effect of this clause on extensions of lease is that the early termination restrictions are re-enlivened if the extended term (plus options) is longer than 5 years. These restrictions do not appear to operate if the extended term (plus options) are less than 5 years. Such protections do not appear justified.</p> <p>3) Damage and Destruction clauses – Where the premises (or building in which a premises are located) are substantially damaged so that the premises or the building cannot practically operate, termination should not be restricted or require SAT approval.</p> <p>The Society either recommends a general carve out for damage and destruction clauses from the CT Act early termination clauses or a prescribed clause that does not require approval.</p> <p>4) Legislative amendment recommended to address the issue raised in <i>480 Hay Street Pty Ltd v Uber Australia Pty Ltd [2019] WASC 461</i> and clarify whether a lease can change its status and fall in and out of operation of the CT Act during the term. A lease should be able to be characterised as a retail shop lease at the point of entry into the lease. It should be clear that a lease cannot change its status and fall in and out of the CT Act during the term eg because a tenant becomes or ceases to be a publicly listed entity or a subsidiary of one. Alternatively, adopt Victorian model applied in <i>Towercom Pty Ltd v Strathfield Group Ltd [2000] VSC 370</i> where retail premises can cease to be retail premises during the term if there are disqualifying factors set out in section 3(1)(a)-(e) of the Victorian legislation.</p>

No.	QUESTIONS FOR CONSIDERATION	RESPONSE
		5) If no recommendation in (3) above is not pursued, there ought to be clarity, certainty and predictability around the application process under section 13(7)(a) re: “ <i>blanket applications</i> ” eg what are the special circumstances and can it apply to all leases to be entered into for a centre (open ended).

ADDITIONAL ITEMS FOR CONSIDERATION

ITEMS	COMMENTS
	No further items for comment.



Government of Western Australia
Department of Mines, Industry Regulation and Safety



Consultation Paper

A statutory review of the
*Commercial Tenancy (Retail Shops)
Agreements Act 1985 (WA)*

June 2022



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CONTENTS

GLOSSARY	2
1 BACKGROUND	3
1.1 COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS ACT 1985	3
1.2 PURPOSE OF THIS REVIEW	4
1.3 KEY CONSIDERATIONS.....	4
1.4 REVIEW PROCESS.....	4
1.5 HOW TO HAVE YOUR SAY	5
2 LEASES COVERED BY THE ACT	6
2.1 LEASES TO SMALL BUSINESSES PROVIDING SERVICES.....	7
2.2 EXCLUDED BUSINESSES OR PREMISES.....	11
2.3 COVERAGE OF SMALL BUSINESS TENANTS.....	12
3 MINIMUM FIVE YEAR LEASE.....	16
4 DISCLOSURE REQUIREMENTS	21
4.1 ADDITIONAL DISCLOSURE TO PROSPECTIVE TENANTS.....	21
4.2 DISCLOSURE ON RENEWAL OF THE LEASE	23
4.3 DISCLOSURE AT ASSIGNMENT OF LEASE	26
4.4 DISCLOSURE AND ACCESS TO MARKET RENT INFORMATION	31
5 LEASE COSTS	34
5.1 TURNOVER RENT	34
5.2 LAND TAX.....	36
5.3 MARKETING FUNDS.....	39
5.4 SECURITY BONDS, BANK AND PERSONAL GUARANTEES.....	41
6 FIRST RIGHT OF REFUSAL	44
7 EARLY TERMINATION DUE TO SEVERE FINANCIAL HARDSHIP	48
8 TRADING HOURS	52
8.1 MINIMUM TRADING HOURS	53
8.2 STANDARD TRADING HOURS	57
9 UNCONSCIONABLE CONDUCT.....	60
10 DISPUTE RESOLUTION.....	65
10.1 MATTERS EXEMPT FROM ALTERNATIVE DISPUTE RESOLUTION.....	66
10.2 STATE ADMINISTRATIVE TRIBUNAL	68
11 IMPACT OF COVID-19 AND OTHER ISSUES	70
APPENDIX A – SUMMARY OF CT ACT.....	72

GLOSSARY

The following is a list of terminology and abbreviations used in this paper.

2003 Review	2003 statutory review of the <i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i> (WA) conducted by a Review Committee reporting to the Hon Clive Brown MLA, Minister for State Development, Tourism and Small Business.																
2011 Amendment Act	<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011</i> (WA)																
ACL	Australian Consumer Law																
Australian jurisdictions	<table><tr><td>ACT</td><td>Australian Capital Territory</td><td>SA</td><td>South Australia</td></tr><tr><td>NSW</td><td>New South Wales</td><td>Tas</td><td>Tasmania</td></tr><tr><td>NT</td><td>Northern Territory</td><td>Vic</td><td>Victoria</td></tr><tr><td>Qld</td><td>Queensland</td><td>WA</td><td>Western Australia</td></tr></table>	ACT	Australian Capital Territory	SA	South Australia	NSW	New South Wales	Tas	Tasmania	NT	Northern Territory	Vic	Victoria	Qld	Queensland	WA	Western Australia
ACT	Australian Capital Territory	SA	South Australia														
NSW	New South Wales	Tas	Tasmania														
NT	Northern Territory	Vic	Victoria														
Qld	Queensland	WA	Western Australia														
Consumer Protection	Department of Mines, Industry Regulation and Safety – Consumer Protection Division																
COVID-19	The COVID-19 Coronavirus																
CT Act	<i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i> (WA)																
CT Regulations	Commercial Tenancy (Retail Shops) Agreements Regulations 1985 (WA)																
Paper	this Consultation Paper																
parties, the	the parties to the lease agreement, e.g. the landlord and tenant																
RTH Act	<i>Retail Trading Hours Act 1987</i> (WA)																
review, the	the review on the operation and effectiveness of the CT Act																
SBDC	Small Business Development Corporation																
Small Business Commissioner	Position established by the Western Australian Parliament through the <i>Small Business Development Corporation Act 1983</i> (WA).																
SAT	State Administrative Tribunal																
ST Act	<i>Strata Titles Act 1985</i> (WA)																
ST Amendment Act	<i>Strata Titles Amendment Act 2018</i> (WA)																
TL Act	<i>Transfer of Land Act 1893</i> (WA)																
TPA	<i>Trade Practices Act 1974</i> (Cth)																

1 BACKGROUND

1.1 COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS ACT 1985

The retail industry in Western Australia is characterised by a mix of small and large businesses participating as landlords and tenants. This mix of capability and resources can lead to an imbalance in bargaining power and sometimes, to inequitable leasing arrangements.

The *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)* (the CT Act) regulates leasing agreements (or leases) between landlords and tenants to redress some of the imbalance in power and provide for fair and transparent leasing arrangements. The legislation also contains a dispute resolution process designed to be low cost and easily accessible to parties seeking to resolve issues under their retail shop lease.

The CT Act primarily focuses on the need for transparency of information between landlords and tenants (the parties) and fairness of contract.

Some of the key CT Act provisions include:

- Disclosure requirements: landlords must provide a tenant with a disclosure statement (a document containing key information on the lease) seven days prior to entering the lease. The tenant has the right to terminate the lease or to compensation in certain circumstances if disclosure is not provided.
- A right to a minimum five year lease term for leases longer than six months.
- Prohibiting lease provisions that require a retail shop to open during certain hours.
- Regulating lease provisions on rent reviews and relocation.
- Prohibiting unconscionable and/or misleading and deceptive conduct.
- Provisions to assist parties to mediate and resolve disputes through the Small Business Commissioner and the State Administrative Tribunal (SAT) with broad powers for the SAT to make a range of orders.

Appendix A summarises the main provisions of the CT Act.

1.2 PURPOSE OF THIS REVIEW

The CT Act requires a review of the operation and effectiveness of the legislation to be carried out every five years.¹ The next review is now due. This Consultation Paper (Paper) forms part of the review process and seeks feedback on matters relevant to the operation and effectiveness of the Act.

1.3 KEY CONSIDERATIONS

Key considerations of the review are to ensure the CT Act provisions balance the need to facilitate fair leasing agreements and protections for small business with the need to ensure the legislation supports viable commercial arrangements and is flexible enough to respond to a changing retail market.

To achieve this balance, the review focuses on ensuring the CT Act is operating to:

- address imbalances in bargaining power;
- maintain viability for landlords and tenants;
- accommodate the diversity of the sector and an ever changing retail marketplace; and
- promote fair contract terms.

The review process will identify what changes may be needed to ensure the CT Act continues to operate effectively.

1.4 REVIEW PROCESS

This Paper contains a number of issues for consideration. These issues stem from:

- matters raised with Consumer Protection and the Small Business Commissioner in relation to commercial tenancies;
- a review of issues raised in the Parliament;
- consideration of recent developments in other jurisdictions;
- analysis of issues raised in the media; and
- a reflection on issues arising as a result of the coronavirus (COVID-19) pandemic.

¹ CT Act section 31.

1.5 HOW TO HAVE YOUR SAY

Make a submission to this Consultation Paper

You are invited to comment on any of the issues contained in this Consultation Paper or comment on any other matter you have identified as relevant to the review.

We recommend that you enter your comments in a workbook of questions available here. This will assist you in making a submission to the review.

You do not need to answer all the questions. Answer as many as you can based on your experience and knowledge.

You may submit your comments as follows:

By mail: Commercial Tenancy Review
Department of Mines, Industry Regulation and Safety
(Consumer Protection Division)
Locked Bag 100 East Perth WA 6892

By email: consultations@dmirs.wa.gov.au

Respond to a brief survey

In addition, you are invited to respond to a short survey, which seeks feedback on key issues in the commercial tenancy market.

Your answers and comments to both the consultation paper and the survey will help in providing a review report to Government and will assist in identifying if changes are needed to the CT Act.

Information provided may become public

After the consultation closing date, all responses received may be made publicly available on Consumer Protection's website. Please note that as your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate this in your submission. As all submissions made in response to this paper will be subject to freedom of information requests, please do not include any personal or confidential information that you do not wish to become publicly available.

Who are you?

When making your submission please let us know which sector you are from. For example, whether you are a landlord, tenant, advocate, a peak body, a government agency, or any other agency or organisation.

Closing date

The period for public consultation closes on 8 August 2022.

2 LEASES COVERED BY THE ACT

A key objective of the CT Act is to provide certain protections to small business tenants in relation to their retail shop lease. While the CT Act's primary focus is on retail businesses that sell goods, the Act also captures other businesses.

The CT Act generally applies to (or covers) leases for the occupation of premises that are:

- located in a retail shopping centre² and used for carrying on any business; or
- located outside a retail shopping centre and used for a business mostly involving the retail sale of goods (for example, high street shops), or a 'specified business' which has been prescribed in the CT Regulations (for example, a business providing beauty treatments).

There are some exceptions to the above. The CT Act will not apply to the above leases where:

- the shop has a lettable area greater than 1,000 m²;
- the lease is held by a listed corporation (or a publicly listed company) or a subsidiary of such a corporation; or
- the lease is prescribed in the CT Regulations as exempt from the CT Act.

Leases covered by the CT Act are referred to as 'retail shop leases'.

Figure 1 – What is a retail shop lease?



See **Appendix A** for a summary of key provisions of the CT Act that apply to retail shop leases.

² The CT Act section 3 defines 'retail shopping centre' as a cluster of premises where at least five of those premises are used for a retail business or a 'specified business'; and all of which have a common head lessor or comprise lots on a single strata plan or in a community titles scheme.

2.1 LEASES TO SMALL BUSINESSES PROVIDING SERVICES

As noted earlier, subject to the exceptions listed above, the CT Act covers leases to premises for a retail business that sells, or predominantly sells, goods. For example, a store predominantly selling car accessories that also provides or sells services to install the purchased accessories.

On the other hand, the CT Act does not automatically cover leases to retail businesses that predominantly sell services. For example, a store that predominantly provides car related mechanical services that also sells car parts like tyres and windscreen wipers.

There are two circumstances where the CT Act may apply to leases for businesses selling services:

- If the business is situated in a retail shopping centre; or
- If the business is a prescribed 'specified business' in the CT Regulations.

Currently, a 'specified business' includes businesses providing dry-cleaning, hairdressing, beauty therapy and treatments, shoe repair (which may include key cutting and engraving) and the sale or rental of videos tapes,³ DVDs, electronic games and other similar amusements.

Issue

The issue under consideration is whether the CT Act should be extended to apply to leases for small businesses that are predominantly selling / providing services regardless of where the premises are located.

Some landlord representatives are of the view that the CT Act should only apply to leases for premises predominantly used for retail sale of *goods*, and not services.

On the other hand, some commentators argue that the protections of retail tenancy legislation should extend to all small business tenants, not just tenants predominantly selling goods. Small businesses selling services situated outside shopping centres that are not yet covered by the CT Act include: travel agents, real estate agents, medical or cosmetic services, equipment hire or repair businesses (such as watch or bike repair services), or fitness or wellness businesses (e.g. small gymnasiums or yoga studios).

Objective

To ensure the application of the CT Act is suitable for the current and emerging market and that it captures those leases and small businesses for which it was intended to apply.

³ This regulation will be updated to remove references to video tapes.

Discussion

Many businesses providing services are also small businesses. For all small businesses, the location is essential for its ongoing viability. Therefore, it may be appropriate that all small businesses whether located in shopping centres or not be covered by the protections in the CT Act. For example, the CT Act requires that leases within shopping centres will provide that the landlord is liable to pay the tenant compensation for disruption arising because of the landlord's action or inaction.⁴ This ensures equity across small business tenants and encourages small businesses providing services to lease premises within shopping centres. Currently this protection is not available to small businesses providing services outside of a shopping centre.

Table 1 below outlines how retail tenancy legislation applies to small businesses selling services across Australian jurisdictions.

Table 1 – Application of retail tenancy legislation to non-retail business

Does legislation cover leases for small business selling services? Details		
ACT	Yes	Covers leases for businesses selling or hiring services, small commercial premises, and specified premises. ⁵
NSW	Yes	Covers leases for businesses in a retail shopping centre, and businesses prescribed in regulations. There are exceptions. ⁶
NT	Yes	Covers leases to premises used for the provision of services by retail (whether in a retail shopping centre or not), carrying on a business in a shopping centre, and a specified business. There are exceptions. ⁷
Qld	Yes	Covers leases to businesses in a retail shopping centre and certain businesses (including those selling services) listed in the Regulations. There are exceptions, notably larger non-retail premises. ⁸
SA	Yes	Covers leases over business premises at which services are supplied to the public, or to which the public is invited to negotiate for the supply of services, or premises prescribed by regulations. ⁹
Tas	Yes	Covers leases to any business in a shopping centre. There are exceptions. ¹⁰
Vic	Yes	Covers leases for premises used or mostly used for the retail sale or hire of goods or services. There are exceptions. ¹¹
WA	Yes	CT Act generally applies to any business, including those selling services located in a retail shopping centre. Act applies to businesses selling services outside shopping centre if it is a 'specified business'. There are exceptions. ¹²

⁴ CT Act section 14.

⁵ *Leases (Commercial and Retail) Act 2001* (ACT) sections 7 and 12.

⁶ *Retail Leases Act 1994* (NSW) section 3.

⁷ *Business Tenancies (Fair Dealings) Act 2003* (NT) section 5.

⁸ *Retail Leases Act 1994* (Qld) sections 5A to 5C.

⁹ *Retail and Commercial Leases Act 1995* (SA) section 3(1).

¹⁰ *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) clause 1.

¹¹ *Retail Leases Act 2003* (Vic) section 4 and 12.

¹² CT Act section 3.

Like WA, retail tenancy legislation in other jurisdictions apply to leases to small businesses (including those selling services) where the premises are situated in shopping centres. To remain consistent with other jurisdictions it is proposed that the CT Act continue to apply to most businesses located within a retail shopping centre. Some jurisdictions (ACT, NT, SA and Vic) go further and cover leases to small businesses selling services outside shopping centres. For example, the legislation in Victoria covers leases to premises located both in and outside shopping centres that sell legal or accounting services.

As many retail businesses selling services are also small businesses, they may similarly benefit from the CT Act's protections to small businesses selling goods. These protections include pre-disclosure requirements before signing the lease, rules relating to rent and operating expenses, the right to a minimum five year lease (in some circumstances) and access to dispute resolution through the Small Business Commissioner or the State Administrative Tribunal.

Options

The following options are under consideration in relation to the CT Act covering leases to small businesses selling, or predominantly selling services.

Option A - no change

Under Option A, the status quo will be retained. The CT Act will cover leases to small businesses that are selling services in a retail shopping centre, and outside where they have been specified in the CT Regulations.

Option B – CT Act to automatically cover leases to small business that are selling services

Under Option B, the CT Act would be extended to apply broadly to leases for premises for a retail business selling services (subject to the usual exceptions of the premises not being over 1,000 m² and the tenant is not owned by a publicly listed corporation or a subsidiary). Businesses identified as inappropriate for the CT Act to apply could be specifically excluded under the CT Regulations.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change (status quo)	<ul style="list-style-type: none"> • Avoids unintentional or inadvertent application of the legislation to some small businesses outside a shopping centre where it is not appropriate for the CT Act to apply. 	<ul style="list-style-type: none"> • Will not automatically cover small businesses mainly selling services outside shopping centres without legislative intervention, which may be a protracted process. • May be uncertainty in some situations regarding whether a business is 'predominantly' selling goods by retail.
Option B – CT Act to automatically cover leases to small business that are selling services	<ul style="list-style-type: none"> • Generally captures most small businesses and provides a consistent approach to retail businesses selling goods or services. • Gives small businesses located outside shopping centres more flexibility to sell a mix of both goods and services while still afforded the CT Act's protections. • Removes need to assess whether mixed businesses outside a shopping centre are predominantly selling goods or predominantly selling services and reduces confusion by applying a consistent approach to both. 	<ul style="list-style-type: none"> • May inadvertently capture some small businesses where it is not appropriate for the CT Act to apply unless they are excluded by the CT Regulations.

Questions for consideration:

1. *It is proposed that the CT Act continue to apply to any business premises situated in a retail shopping centre. Do you support this? (If not, please provide reasons for your answer).*
2. *On the CT Act applying to retail businesses selling mostly services, do you prefer Option A or Option B? Why?*
3. *If Option A (status quo) is pursued –*
 - 1) *Are there any additional small businesses selling services outside shopping centres that should be covered by the CT Act?*
 - 2) *Other than not having the benefit of CT Act protections, what risks are there for tenants if the CT Act does not apply to a lease to a non-retail business?*
4. *If Option B is pursued –*
 - 1) *Are there small businesses selling services outside shopping centres where it would not be appropriate for the CT Act to apply?*
 - 2) *What costs are incurred by landlords and tenants in complying with the CT Act in relation to these leases?*

2.2 EXCLUDED BUSINESSES OR PREMISES

The CT Act allows for certain types of premises or leases to be excluded from the Act's coverage.¹³ Currently, only leases for the purpose of operating a vending machine or automatic teller machine (ATM) are explicitly excluded by the Act.¹⁴

Issue

The issue under consideration is whether certain leases or premises should be excluded from the coverage of the CT Act.

Objective

To ensure the CT Act is suitable for the current and emerging markets and does not inadvertently apply to leases or premises not intended to be covered by the Act.

Discussion

Other jurisdictions exclude certain leases or premises from the application of their retail tenancy legislation. These include:

- market stalls¹⁵ or temporary stalls at an agricultural or trade show, carnival, festival or cultural event;¹⁶
- premises used for certain community or charitable purposes, provided the rent is less than \$10,000 per annum;¹⁷
- premises in a theme or amusement park,¹⁸ bowling alley or cinema;¹⁹ and
- premises in common areas such as children's ride machines, display advertisements, public telephones, storage and parking.²⁰

Questions for consideration:

5. *In addition to vending machines and ATMs, are there any additional types of businesses or premises that should be excluded from the application of the CT Act? (If yes, please provide examples and reasons for your answer).*

¹³ See the definitions of 'retail shop' and 'retail shop lease' in CT Act section 3(1) and the general exemption provision in section 4(4).

¹⁴ CT Regulations regulation 3AB.

¹⁵ *Retail Shop Leases Act 1994* (Qld) section 5A. The Act does not apply to premises at a flea market. In NSW the Act does not apply to a stall in a market, unless the market is a permanent retail market. Victoria excludes premises in the Melbourne Markets (determination made under *Retail Leases Act 2003* (Vic) section 5(1)(c), 15 September 2005).

¹⁶ *Retail Shop Leases Act 1994* (Qld) section 5A.

¹⁷ Determination made under *Retail Leases Act 2003* (Vic) section 5(1)(c), 6 October 2014.

¹⁸ *Retail Shop Leases Act 1994* (Qld) section 5A.

¹⁹ *Retail Leases Act 1994* (NSW) section 5; *Business Tenancies (Fair Dealings) Act 2003* (NT) section 6; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) regulation 2.

²⁰ *Retail Leases Act 1994* (NSW) Schedule 1A; *Retail Shop Leases Act 1994* (Qld) section 5A.

2.3 COVERAGE OF SMALL BUSINESS TENANTS

A key focus of the CT Act is to protect small business tenants in relation to their lease. The CT Act currently provides for this by excluding leases held by a publicly listed company or its subsidiary, and where the lettable premises are over 1,000 m².

Issue

Stakeholders have raised concerns that the current criteria captures tenants that are not genuine small business tenants. Landlord representatives have indicated that a privately owned large retail business leasing numerous small premises may have those leases covered by the CT Act.

Some stakeholders have also noted that a larger area size does not always equate to market strength. Stakeholders have suggested that certain retail shops with a lettable area greater than 1,000 m², in some circumstances, should be afforded protections under the CT Act. Such shops may include furniture showrooms, gardening supply centres / plant nurseries or art galleries run by small retail businesses that should be covered but whose premises have a lettable area larger than the 1,000 m² limitation.

Objective

To ensure the definitions and other provisions in the CT Act are operating as intended to capture small business tenants and to exclude large retail businesses.

Discussion

Most other jurisdictions limit the application of retail tenancy legislation to small businesses using similar criteria to WA. Like WA, jurisdictions that exclude leases with a lettable area over 1,000 m² do not appear to have expressly provided an exception to this rule.

Some jurisdictions use monetary thresholds to limit the legislation to small business leases. Victoria has abolished the 1,000 m² limit and instead excludes leases where the estimated occupancy costs²¹ exceed \$1,000,000 per annum.²² South Australia's legislation excludes leases where the amount of rent payable under the lease exceeds \$400,000.²³ However, in both states the leases cannot be held by a publicly listed company or its subsidiary companies like WA.

Monetary thresholds would not necessarily address the issue raised by some landlords that a large private business leasing a number of small premises has the benefit of the CT Act because the thresholds are linked to the occupancy costs for a particular lease not a group of leases.

²¹ *Retail Leases Act 2003* (Vic) section 4(3) provides occupancy costs to mean rent (not being rent that is to be determined by reference to the turnover of a business), outgoings as estimated by the landlord that the tenant is liable to contribute under the lease, and other costs of the prescribed kind that the tenant is liable to pay under the lease.

²² *Retail Leases Act 2003* (Vic) section 4.

²³ *Retail and Commercial Leases Act 1995* (SA) section 4(2)(a) and 3(1a).

The use of monetary thresholds can also result in uncertainty if rents increase or decrease with market conditions. In addition, the use of monetary thresholds can lead to reluctance on the part of landlords to set rents at a lower level in order to avoid the application of the legislation.

On the other hand, the monetary threshold method may capture genuine small business leases with a lettable area greater than 1,000 m², and bring these leases under the CT Act.

Other methods to limit retail tenancy legislation to small business include excluding a specific geographical area or location, or specific leases. For example, Queensland excludes retail shops within the South Bank corporation area, where it is a long-term lease entered into or granted by the South Bank Corporation. Note that the CT Act already has a mechanism to exempt leases of a certain kind.²⁴

Options

The following options have been identified in relation to the issue of providing for the CT Act to cover genuine small business tenants.

Option A - no change

Under Option A, the status quo (and current criteria) will be retained. The CT Act will cover retail shop leases except where the lettable area is over 1,000m², or the lease is held by a publicly listed company or its subsidiary. Certain kinds of larger business can be exempt from the CT Act.

Option B – CT Act applies to certain business with lettable area greater than 1,000 m²

Under Option B, the CT Act would be amended to apply to leases for certain businesses with a lettable area greater than 1,000 m² where it is appropriate. For example, these businesses may be prescribed in the CT Regulations. Leases held by a publicly listed company or subsidiary will remain excluded.

Option C – introduce a monetary threshold

Under Option C, a similar approach to Victoria and South Australia is adopted to restrict legislation to apply to small business by setting a monetary threshold. This threshold may be linked to the lease's occupancy costs or the amount of rent payable under the lease. Tenants that are public companies will remain excluded.

The following potential advantages and disadvantages have been identified for each of the options.

²⁴ CT Act – section 3, paragraph (d) states the mechanism to exempt leases of a certain kind.

	Advantages	Disadvantages
Option A – no change (status quo)	<ul style="list-style-type: none"> Existing parameters cover most small businesses and excludes large businesses. Can exclude by regulation certain kinds of leases from the CT Act. The current parameters are well understood by the industry. 	<ul style="list-style-type: none"> May inadvertently exclude a small business from the protections of the CT Act due to the premises being greater than 1,000 m². May inadvertently continue to capture large privately owned businesses that have a number of leases over small premises.
Option B – CT application is extended to certain business with lettable area greater than 1,000 m²	<ul style="list-style-type: none"> Similar benefits as Option A, with addition that small business with lettable area greater than 1,000 m² will be afforded CT protections where appropriate. 	<ul style="list-style-type: none"> As with Option A, may inadvertently capture large privately owned businesses that have a number of leases over small premises.
Option C – adopt a monetary threshold approach similar to Victoria or South Australia	<ul style="list-style-type: none"> May capture most genuine small business leases, including those with a lettable area greater than 1,000 m². 	<ul style="list-style-type: none"> As with Options A and B would not necessarily exclude large businesses that have a number of leases over small premises if threshold is linked to occupancy costs / rent payable for each lease. May result in uncertainty on whether the CT Act applies for businesses close to the threshold if rents increase or decrease with market conditions. Landlords may become reluctant to set lower or reduce rent to avoid the application of the CT Act. Monetary threshold requires monitoring and regular review to ensure it reflects market changes. May require regular regulatory change, public agencies to monitor the market place to ensure threshold remains the appropriate amount. Would potentially extend the CT Act to large privately owned businesses that fall within the monetary thresholds.

Questions for consideration:

6. *It is proposed that the CT Act would continue to exclude leases held by publicly listed companies and their subsidiaries, and most leases where the lettable area is greater than 1,000 m². Do you support Option A, Option B or Option C? (Please provide reasons for your answer).*
7. *If Option B is preferred, which small businesses with premises that have a lettable area greater area than 1,000 m² would be appropriate for the CT Act to capture?*
8. *If Option C is preferred, should the monetary threshold be linked to:
1) the lease's occupancy costs, or
2) the estimated payable annual rent?*
9. *If Option B or C is pursued, what are the costs or disadvantages for landlords if the CT Act was to apply to more large privately owned businesses?*

3 MINIMUM FIVE YEAR LEASE

The CT Act currently provides most retail shop tenants with the right to a minimum five year lease term. Tenants with leases longer than six months have the option to renew and extend the lease term so that the total term is at least five years.²⁵ For example, a tenant with a seven months lease from 1 January 2022 may exercise the option under the Act to extend it up to 1 January 2027.

The right to a minimum five year term is often referred to as a cornerstone protection provided by the CT Act. Its purpose is to provide tenants with security of tenure. Historically, the minimum five year term has been viewed as necessary to allow tenants time to establish a viable business and recoup any establishment and fit out costs.

Issue

Some stakeholders believe the right to the statutory option of a minimum five year term has resulted in a lack of flexibility and innovation in the sector. Landlords may be reluctant to enter into leases with new tenants for more than six months because they do not want to be locked in to providing a minimum five year lease.

Objective

To examine whether policy settings underpinning the minimum five year term are appropriate for current and future retail shop marketplaces and consider whether greater flexibility is needed. If greater flexibility is required to decide whether this can be achieved while continuing to protect the interests of tenants (who are mostly small businesses).

Discussion

Section 13(1) of the CT Act provides as follows:

Subject to this section, where under a retail shop lease —

- (a) the term of the lease (in this section called the **current term**) is more than 6 months but less than 5 years; and*
- (b) the current term plus any term (in this section called the **option term**) that may be obtained by the tenant by way of an option to renew the lease totals more than 6 months but less than 5 years,*

the lease shall be taken to give the tenant an option to renew the lease for a term commencing immediately after the expiry of the current term and the option term, if any, and ending on a day specified by the tenant that is not later than 5 years after the day of commencement of the current term.

²⁵ CT Act section 13.

The effect of this provision is that once a tenant has been in possession of retail shop premises for more than six months, they have a right under the CT Act to exercise an option to renew their lease and extend their lease term for up to five years. Although section 13(1) gives the tenant the right to extend the lease to a total term of five years, the tenant is able to choose a shorter period.

The extended term will be on the same terms and conditions as the original lease. If the original lease did not cover the basis on which rent is reviewed, then this will be the market rent.²⁶

The CT Act also sets out circumstances where the right to a five year term does not apply, including where:

- a five year term would be inconsistent with a head lease (if any);²⁷
- upon application by the landlord, the SAT has approved a term allowing for the lease to be determined (or to end) earlier.²⁸ The SAT will only make an order if satisfied that special circumstances exist justifying approval; and
- upon application by the tenant, the SAT has ordered that the option to extend does not arise.²⁹ The SAT will only make an order if satisfied that the application was made of the tenant's own free will and it is appropriate in the circumstances to grant the application.³⁰

The cost of an application to the SAT is currently \$135.³¹ The SAT will consider whether the lease terms are favourable to the tenant and the tenant understands the consequences of foregoing their legal right.

The landlord and tenant may also simply agree to a lease term between 6 months and five years and not seek an order from the SAT. This means the tenant agrees not to exercise their option to extend the lease. However, the landlord must accept the risk that at the end of the agreed shorter lease term, the tenant may wish, and remains entitled to, exercise their option to extend the lease for a minimum five year term.

Retail tenancy legislation in all Australian jurisdictions except Qld and NSW provides for the minimum five year lease term. In some jurisdictions, this applies to all retail leases, in others it applies to leases longer than six months or longer than 12 months.

²⁶ CT Act section 13(5).

²⁷ CT Act section 13(6)(b).

²⁸ CT Act section 13(6)(c) and 13(7) or (7a).

²⁹ CT Act section 13(6)(d) and 13(7b).

³⁰ CT Act section 13(7b).

³¹ As at 1 July 21. The fee includes the first day of hearing. A fee of \$267 applies for an additional hearing day.

Other jurisdictions also have different mechanisms to contract out of (or give up) the right to the five year term. In Victoria, the tenant must obtain a certificate from the Small Business Commissioner, and in other jurisdictions the tenant must obtain a certificate from a legal practitioner or an accountant stating that the tenant understands the implications of waiving that right.

Table 1 – Right to a 5 year term – other Australian jurisdictions

	Minimum total term	Minimum term for application	Mechanism for contracting out
WA	5 years ³²	6 months	Application to SAT by tenant or landlord
Vic	5 years	12 months ³³	Certificate from Small Business Commissioner
SA	5 years	6 months	Certificate from solicitor
Tas	5 years	None	Certificate from solicitor
ACT	5 years	6 months ³⁴	Certificate from solicitor
NT	5 years	6 months ³⁵	Certificate from solicitor or accountant
Qld	No minimum	N/A	N/A
NSW	No minimum	N/A	N/A

Options

The following options are under consideration in relation to this issue.

Option A - no change

Under Option A the status quo would be retained - no change would be made to the CT Act and the parties to a retail shop lease would operate within the current laws.

There appears to be some confusion in the marketplace in relation to the operation of section 13, with some participants interpreting the section as requiring a tenant to agree to a five year term. This misinterprets the provisions as there are a number of ways the parties can agree to a shorter term:

- the parties can agree to a lease term that is less than six months (so that the statutory right to a five year term does not apply);
- the landlord can seek an order from the SAT stating that the right to a five year term does not apply in certain circumstances;
- the tenant can seek an order from the SAT waiving their statutory right to a five year term; or
- the parties could simply agree to a shorter term than five years and not seek an order from the SAT.

Under Option A community education and guidance could be provided to clarify the operation of the CT Act in relation to the right to a five year term.

³² May be shorter term at option of tenant.

³³ CT Act does not apply to lease of less than 12 months.

³⁴ CT Act does not apply to lease of less than 6 months.

³⁵ CT Act does not apply to lease of less than 6 months.

Option B - change mechanism for contracting out

Under Option B, the right to a five year term would be retained and the CT Act amended to provide for a different mechanism to contract out of the right. This could include a requirement for a tenant to obtain a certificate from a legal practitioner, stating that the tenant understands the implications of waiving their statutory right.

Option C – extend six months to 12 months

Under Option C, the right to a five year term in section 13 would be retained and the CT Act amended to provide that the right applies after a tenant has been in possession of the premises for 12 months, rather than the current six month period.

Option D - remove right to five year term

Under Option D, the CT Act would be amended to remove the right to a five year term.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change (status quo)	<ul style="list-style-type: none"> • Provides retail shop tenants with certainty and security of tenure after initial six months of the lease. • Redresses imbalance in bargaining power. • SAT application process provides some flexibility and oversight to ensure that tenants are aware of implications of waiving their right to a five year term. 	<ul style="list-style-type: none"> • May be considered inflexible in some circumstances. • SAT application process involves time and costs. • Risk that SAT may not make order in some instances. • Some landlords will only grant leases of less than six months as they do not want to be locked into longer leases - tenants will invest time and money in their business with no capacity to continue in the premises after the six month period and recoup their costs.
Option B - change mechanism for contracting out from SAT to legal practitioner, accountant, small business commissioner	<ul style="list-style-type: none"> • Maintains right to a five year lease. • Provides retail shop tenants with certainty and security of tenure after initial six months of the lease. • Redresses imbalance in bargaining power. • Certificate process provides greater flexibility and some oversight to ensure tenants are aware of implications of waiving their right to a five year term. • Certificate process may take less time than an application to the SAT. 	<ul style="list-style-type: none"> • Risk that some lawyers may not fully understand implications of a tenant waiving their right to a five year term. • Risk that right may be waived in circumstances where it is not appropriate. • Potential for inconsistent advice to be provided in the market. • Legal advice may cost more than SAT application process or may not be readily available.

	Advantages	Disadvantages
Option C – extend minimum lease term for when right to a five year term applies from six months to 12 months	<ul style="list-style-type: none"> • Provides landlords with greater flexibility to offer lease terms of less than 12 months. • Maintains right to a five year lease. • Provides retail shop tenants with certainty and security of tenure after initial 12 months. • Redresses imbalance in bargaining power to some extent. 	<ul style="list-style-type: none"> • Risk of reduced security of tenure for tenants as some landlords may only grant leases of less than 12 months as they do not want to be locked in to longer lease. • Tenants will invest time and money in their business with no capacity to continue in the premises after the 12 month period (this may require a greater investment than the current 6 month term). • SAT application process involves time and costs. • Risk that SAT may not make order in some instances.
Option D - remove right to five year term	<ul style="list-style-type: none"> • Provides landlord with complete flexibility in relation to the length of the lease term. 	<ul style="list-style-type: none"> • No certainty or security of tenure for tenants. • Risk that tenants invest time and money in their business with no capacity to recoup costs by continuing in the premises after the agreed initial lease term.

Questions for consideration

10. *Is there a need to change the way the CT Act applies the right to a five year term? Please give reasons for your answer.*
11. *What option do you prefer? Why?*
12. *What costs are incurred by landlords and tenants in complying with the current provisions of the CT Act in relation to the right to a five year term?*
13. *What are the risks to tenants if the right to a five year term does not continue in its current form?*
14. *If option B is implemented, what mechanism should be used to allow for contracting out of the right to a five year term?*

4 DISCLOSURE REQUIREMENTS

Landlords generally possess a significant amount of leasing information about their tenancies. This can place landlords in a stronger bargaining position than tenants during lease negotiations and throughout the term of the lease.

One tool to address this imbalance is to require landlords to disclose or provide prospective tenants with key leasing information before the tenant enters into a lease. Under the current CT Act, landlords must provide the following disclosure documents to a prospective tenant at least seven days before signing a lease:

- a disclosure statement,³⁶ which sets out important information on the retail shop and the lease. It includes a copy of the proposed lease and a document detailing the annual estimates of expenditure in relation to operating expenses; and
- the tenant guide,³⁷ which contains information to assist tenants to understand some of their legal rights and obligations under the lease and legislation.

The CT Act provides a tenant with certain rights if a landlord fails to provide the above documents within the required timeframe, or if the landlord provides incomplete, or false or misleading information. For example, in some circumstances, the tenant may be able to terminate the lease or apply to the State Administrative Tribunal to seek compensation from the landlord for any monetary loss the tenant has suffered.

4.1 ADDITIONAL DISCLOSURE TO PROSPECTIVE TENANTS

A disclosure statement contains key information about the lease. This includes: details on shop premises, the lease term, options to renew, rent and other occupancy costs, whether there are requirements for fit-out, refurbishment, alteration or works to the premises, trading hours and information regarding the retail shopping centre (if applicable).

In 2013, in response to industry feedback, the disclosure statement was updated to require landlords to specify whether the tenant had exclusivity for the permitted use of the retail premises and whether there were any restrictions on the provision of certain goods and services by the tenant.³⁸

³⁶ CT Act section 6.

³⁷ CT Act section 6A.

³⁸ CT Regulations Schedule 2 Form 1.

Issue

Some industry stakeholders have suggested that landlords should disclose additional information to prospective tenants, such as:

- the average rent for the shopping centre in which the premises are located (or rent information on request);
- further information on the current tenancy mix of the shopping centre (i.e. the types and sizes of businesses in the centre), and whether there are proposed changes to the current mix;
- the location of other tenants in the shopping centre selling similar goods; and
- additional disclosure about operating expenses (outgoings).

Objective

To address the information asymmetry that often exists by ensuring prospective tenants are provided with all relevant information required to make a fully informed decision before entering into a lease.

Discussion

Retail tenancy information requirements for disclosure statements are generally consistent across Australian jurisdictions.

Some states and territories require landlords to disclose the shopping centres estimated annual turnover and customer traffic flow (where this information is collected).³⁹ South Australia also requires disclosure about proposed changes to the current tenant mix in a shopping centre.⁴⁰

In relation to operating expenses, disclosure statements in some states and territories provide additional clarity by having a standardised list of outgoings or a checklist for landlords to complete, instead of landlords providing their own list.⁴¹ Benefits of standardising the list of outgoings include improving readability, making it easier for tenants to compare outgoings/expenses between different shopping centres, and providing a starting list for landlords to complete.

Utilities costs often represent a significant lease cost. One stakeholder has raised the issue of lack of transparency of electricity costs and rates, particularly in embedded networks where the shopping centre landlord has purchased the electricity from an electricity retailer and is on-selling to tenants.

³⁹ *Retail Leases Act 1994* (NSW) Schedule 2 clause 22 and 25; *Retail Shop Leases Regulation 2016* (Qld) regulation 2(q); *Retail Leases Regulations 2013* (Vic) Schedule 2 Item 22 and 25.

⁴⁰ *Retail and Commercial Leases Act 1995* (SA) section 12(3)(g).

⁴¹ *Leases (Commercial and Retail) Act 2001* (ACT) section 4 Approved form AF2003-4; *Retail Leases Act 1994* (NSW) Schedule 2 clause 14; *Business Tenancies (Fair Dealings) Regulations 2004* (NT) Schedule Prescribed forms clause 5.5; *Retail Leases Regulations 2013* (Vic) Schedule 2 Item 14.

In this situation it has been suggested that some landlords are applying a margin to the cost of supplying electricity or not passing on to tenants the benefit of the discounted supply rate the landlord has negotiated with the retailer. There may also be a lack of understanding about the costs incurred by shopping centre owners in providing and maintaining the embedded network, this cost may need to be incorporated in the rate charged to tenants. Some stakeholders are suggesting that greater transparency is required in relation to these costs and arrangements.

Questions for consideration:

15. *Should the CT Act require additional information to be disclosed?*
16. *Could existing disclosures be made clearer? For example, by providing a standard list of outgoings?*
17. *If yes to either of the above, please specify what additional information should be disclosed and what can be done to improve existing disclosure requirements to make them clearer. Please include reasons for your answer.*

4.2 DISCLOSURE ON RENEWAL OF THE LEASE

Currently the CT Act provides that a landlord is not required to provide a disclosure statement or tenant guide on the renewal of a retail shop lease on the exercise of an option (including the option arising from the right to a minimum five year lease term).

Issue

The issue being considered is whether a landlord should provide the tenant with any updated information that was not disclosed in the previous disclosure statement before the tenant exercises an option to renew. For example, whether the landlord is planning to undertake major works to the shopping centre during the extended lease term. Some stakeholders argue this would allow the tenant to be informed of any changes potentially impacting the lease, and assists them in deciding whether to renew the lease.

Objective

To ensure that tenants are provided with all relevant information required to make a fully informed decision before renewing or extending a lease.

Discussion

Most other jurisdictions provide that the landlord is to disclose updated information from the previous disclosure statement before lease renewal, or where the tenant exercises the option to renew or extend the lease. In some jurisdictions, the previous disclosure statement is provided in addition to the updated disclosure statement.

Table 1 summarises the disclosure requirements on lease renewal across states and territories. The updated information must be given before the lease is renewed.

In Victoria, the information must be given either 21 days before the end of the current lease term, or if the parties have made an agreement to renew the lease – up to 14 days after the agreement is made.⁴²

In 2020, South Australia removed the requirement in its legislation for a landlord to provide a disclosure statement before lease renewal following a recommendation of the 2016 Moss Review.⁴³ It was reasoned that the tenant, in giving notice to exercise their option to renew effectively creates a new lease term. Practical difficulties would arise if the landlord were required to give a disclosure statement before the start of the new lease term. In addition, the Moss Review considered that all the information required to be in the disclosure statement on renewal would already be known to the sitting tenant, and there is no need for the landlord to provide another statement.

In Queensland, the tenant may waive, or not require the landlord to provide another disclosure document at renewal, by signing and giving the landlord a waiver notice. Tenants in Queensland may also waive their right to receive the initial disclosure statement from the landlord.⁴⁴ Where a landlord fails to provide an updated disclosure statement before lease renewal or provides incomplete, false or misleading information, the consequences across jurisdictions are generally similar to not providing the original disclosure statement. For example, the tenant may in some circumstances be entitled to recover compensation for monetary costs, or terminate the renewed lease.

⁴² *Retail Leases Act 2003* (Vic) section 26(1).

⁴³ A Review of the *Retail and Commercial Leases Act 1995* (SA), "Moss Review" at paragraph [39].

⁴⁴ *Retail Shop Leases Act 1994* (Qld) section 21B and 21E.

Table 1 – Disclosure requirements on lease renewal across states and territories

	Disclosure required?	By whom?	Form of disclosure
ACT ⁴⁵	Yes, upon tenant's request	Landlord to tenant	Updated disclosure statement
NSW ⁴⁶	Yes	Landlord to tenant	Earlier disclosure statement with a written statement updating the earlier disclosure statement
NT ⁴⁷	Yes	Landlord to tenant	Updated disclosure statement
Qld ⁴⁸	Yes, may be waived by tenant	Landlord to tenant	Updated disclosure statement
SA ⁴⁹	No	N/A	N/A
Tas ⁵⁰	No	N/A	N/A
Vic ⁵¹	Yes	Landlord to tenant	Updated disclosure statement (but the layout of the statement need not be the same) ⁵²
WA ⁵³	No	N/A	N/A

Options

The following options are under consideration in relation to the above issue.

Option A - no change

Under Option A, there would be no change and the status quo would be retained. The CT Act would not require a landlord to disclose updated information before the exercise of an option to renew the lease.

Option B – landlords to provide updated disclosure unless no changes

Under Option B, the CT Act would be amended to require landlords to disclose to a tenant any changes to information from the previous disclosure statement before the exercise of an option to renew the lease. The information would be in the form of a separate statement detailing the changes to the original disclosure statement. This step would not be required if no changes had occurred since the previous disclosure statement.

Option C – landlords to provide updated disclosure or confirm no changes

Same as Option B, except if there are no changes to the information disclosed in the previous disclosure statement, the landlord would instead provide the tenant a statement confirming the information from the previous disclosure statement remains current.

⁴⁵ *Leases (Commercial and Retail) Act 2001* (ACT) section 30.

⁴⁶ *Retail Leases Act 1994* (NSW) section 11(4).

⁴⁷ *Business Tenancies (Fair Details) Act 2003* (NT) section 19(5).

⁴⁸ *Retail Shop Leases Act 1994* (Qld) section 21E.

⁴⁹ *Retail and Commercial Leases Act 1995* (SA) section 12(1a).

⁵⁰ *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) clause 28.

⁵¹ *Retail Leases Act 2003* (Vic) section 26.

⁵² Examples of Victoria's statements can be found at <https://www.vsbv.vic.gov.au/your-rights-and-responsibilities/accurate-lease-information/>

⁵³ CT Act section 6(6)(a).

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change (status quo)	<ul style="list-style-type: none"> Maintains status quo – no additional burden on landlords. 	<ul style="list-style-type: none"> Tenant is not made aware of changes that would potentially affect their decision to renew a lease. Increased risk of a dispute.
Option B – landlord to provide updated disclosure unless no changes	<ul style="list-style-type: none"> Allows tenant to be informed of changes to the lease before deciding on option to renew. Potentially limits disputes in relation to the renewal of a lease. 	<ul style="list-style-type: none"> Places additional burden on landlords to provide updated disclosure. Possible uncertainty for tenants if no confirmation that previous information remains current.
Option C – landlord to provide updated disclosure or confirm no changes	<ul style="list-style-type: none"> Same as Option B. Tenants made aware if no changes have occurred, removing uncertainty. 	<ul style="list-style-type: none"> Places additional burden on landlords to provide updated disclosure or statement of no changes.

Questions for consideration:

18. Do you prefer Option A, Option B or Option C? Why?

19. If Option B or C is pursued, what additional costs would landlords incur?

4.3 DISCLOSURE AT ASSIGNMENT OF LEASE

An assignment of a lease occurs when the tenant (the assignor) transfers their rights and obligations under the lease to someone else (the assignee). This may occur when the tenant sells their retail business and the assignee takes over the tenant's obligations under the existing lease, such as the payment of rent to the landlord.

The CT Act provides a tenant has the right to assign their retail shop lease with the landlord's consent. The landlord cannot withhold their consent without reasonable grounds. However, the prospective assignee is not entitled to a disclosure statement or the tenant's guide at the assignment of the lease.⁵⁴

⁵⁴ CT Act section 6(6)(b) and 7(6)(b).

Issue

The issue being considered is whether a prospective assignee should be given the same benefit of disclosure as a tenant at the start of a lease agreement.

Objective

To ensure that an assignee, as an oncoming tenant, is provided with all relevant information required to make a fully informed decision before taking on rights and obligations under a lease.

Discussion

All states and territories other than WA and Tasmania, require the existing tenant to provide disclosure to a prospective assignee before assigning the lease. This allows prospective assignees to consider the information before deciding whether to agree to the assignment and take on the obligations under the lease.

Table 2 below summarises the disclosure requirements on lease assignment across states and territories.

Table 2 – Disclosure requirements on lease assignment across states and territories

	Required?	By whom?	Form of disclosure	Consequences of non-disclosure
ACT ⁵⁵	Yes	Tenant to assignee	<ul style="list-style-type: none"> Landlord disclosure statement together with details of any material change that has occurred. (Tenant may request disclosure statement from landlord). 	<ul style="list-style-type: none"> Does not meet prerequisite to request landlord's consent to assign.
NSW ⁵⁶	Yes	Tenant to assignee, landlord (some circumstances)	<ul style="list-style-type: none"> Landlord disclosure statement with details of any changes that have occurred. (Tenant may request landlord to provide an updated statement. If this does not occur, tenant may complete updated disclosure statement to best of lessee's knowledge.) If the assignee is to continue the business, tenant must also provide an assignor disclosure statement to the assignee and landlord. 	<ul style="list-style-type: none"> Landlord entitled to withhold consent to assignment. Also if the assignee is continuing the business, and does not receive the updated landlord's disclosure statement, then the tenant is not afforded statutory protection from liability in respect of amounts payable under the lease.
NT ⁵⁷	Yes	Tenant to assignee, landlord (some circumstances)	<ul style="list-style-type: none"> Most recent landlord disclosure statement and details of any changes that has occurred. (Tenant may request most recent disclosure statement from landlord). Tenant may also provide an assignor disclosure statement. If assignee is to continue the business, tenant <i>must</i> provide the assignor disclosure statement to the assignee and landlord. 	<ul style="list-style-type: none"> Tenant not afforded statutory protection from liability in respect of amounts payable under the lease.

⁵⁵ *Leases (Commercial and Retail) Act 2001* (ACT) section 93.

⁵⁶ *Retail Leases Act 1994* (NSW) part 5.

⁵⁷ *Business Tenancies (Fair Details) Act 2003* (NT) section 56.

	Required?	By whom?	Form of disclosure	Consequences of non-disclosure
Qld ⁵⁸	Yes, but may be waived by assignee	Tenant to assignee Assignee to tenant and landlord (some circumstances)	<ul style="list-style-type: none"> Tenant provides a tenant's disclosure statement and a copy of the current lease to assignee. If assignee is to continue business, tenant to provide an assignor disclosure statement to the assignee. Assignee to provide disclosure statement to tenant and to the landlord. 	<ul style="list-style-type: none"> If a retail tenancy dispute exists between the parties, the person who did not receive a notice may apply to QCAT for a disclosure order.
SA ⁵⁹	Yes	Tenant to assignee, landlord (some circumstances)	<ul style="list-style-type: none"> Landlord disclosure statement together with details of any changes that the tenant is aware of or could reasonably be expected to be aware of. (Tenant may request disclosure statement from landlord, and if not provided, tenant is not required to provide above disclosure to assignee). If the assignee is to continue business, tenant to also provide an assignor disclosure statement to the assignee and the landlord. 	<ul style="list-style-type: none"> If the assignee is continuing the business, and does not receive the assignor's disclosure statement, the tenant is not afforded statutory protection from liability in respect of amounts payable under the lease.
Vic ⁶⁰	Yes	Tenant to assignee, landlord (some circumstances)	<ul style="list-style-type: none"> Landlord disclosure statement and details of any changes of which the tenant is aware, or could reasonably be expected to be aware of. (Tenant may request landlord to provide disclosure statement no older than 3 months, and if not provided – tenant not required to provide above disclosure to assignee). If the assignee is to continue business, the tenant must give an assignor disclosure statement to the assignee and landlord. 	<ul style="list-style-type: none"> Does not meet prerequisite to request landlord's consent to assign and may commit an offence. Tenant also risks not having statutory protection from liability in respect of amounts payable under the lease or performance of obligations.
Tas ⁶¹	No	N/A	N/A	N/A
WA ⁶²	No	N/A	N/A	N/A

As seen from Table 2, any required disclosure usually is in the form of the tenant providing the prospective assignee with the most recent or updated landlord's disclosure statement together with details of any changes that have occurred since any previous disclosure statement. In most jurisdictions that require disclosure, the tenant may request the landlord provide them with the most recent disclosure statement which they can then provide to the prospective assignee (ACT, NSW, NT, SA, Vic). Where the landlord does not comply with this request, the tenant would

⁵⁸ *Retail Shop Leases Act 1994* (Qld) – section 22B.

⁵⁹ *Retail and Commercial Leases Act 1995* (SA) – section 45 and 45A.

⁶⁰ *Retail Leases Act 2003* (Vic) – Part 7.

⁶¹ *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* clause 28.

⁶² CT Act section 6(6)(b).

either no longer be required to provide the disclosure statement to the assignee (SA, Vic), or the tenant may complete the disclosure statement to the best of their knowledge before providing it to the assignee (NSW).

Where the assignee is to continue the retail business, some jurisdictions (NSW, NT, Qld, SA, Vic) require the tenant to also provide an “assignor disclosure statement” to the prospective assignee and the landlord before the lease is assigned. This statement discloses whether there are any outstanding notices or encumbrances in relation to the lease or the shop itself, whether rent concessions or other benefits had been given or were available to the tenant by the landlord, and information on the shop’s trading performance.

For jurisdictions that require disclosure to the assignee, this disclosure is to occur before the tenant requests the landlord’s consent to assign the lease. In some jurisdictions, disclosure is a procedural requirement before requesting consent (ACT, Vic), or the landlord is entitled to withhold consent (NSW). Some retail tenancy legislation protects the tenants (as an assignor) and their guarantors from liability for performance of obligations or payment under the lease where the tenant has complied with a certain process (such as giving the required disclosure to assignees and landlords).

Another consequence for non-disclosure is that the tenant may not be afforded any protection from any liability in respect to the amounts payable under the lease. The protection may be set out in the relevant Act (NSW, NT, SA, Vic), or implied in law. For example, if a tenant fails to provide disclosure to a prospective assignee before an assignment is entered into, and the assignee fails to pay rent and any contribution towards operating expenses – the tenant could be liable for these costs. Other jurisdictions do not appear to require tenants to disclose the equivalent of a tenant’s guide to an assignee. However, as this is a pre-lease disclosure requirement in WA, it follows that a tenant providing a disclosure statement to an assignee should also provide the tenant’s guide.

Options

The following options are under consideration in relation to the above issue.

Option A – no change

Under Option A, the status quo would be retained. An existing tenant would not be required to provide a prospective assignee disclosure information under the CT Act.

Option B – tenant to provide disclosure to assignee

Under Option B, the CT Act would be amended to require the existing tenant to provide disclosure information to a prospective assignee before requesting the landlord consent to the assignment, or the assignment of the lease. Further, where the assignee will continue the retail business, the tenant must also provide an assignor’s disclosure statement. If an existing tenant fails to provide, or provides deficient disclosure information, then they may still be liable for the rights and obligations (such as payment of rent) under the lease.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change (status quo)	<ul style="list-style-type: none"> • Maintains status quo – no additional impost on existing tenants or landlords. 	<ul style="list-style-type: none"> • Assignee at a leasing information disadvantage in comparison to the tenant and landlord. • Assignees risk agreeing to assignments and lease obligations without opportunity to understand their obligations. • Potential for disputes to arise between parties.
Option B – tenant provides disclosure statement to assignee	<ul style="list-style-type: none"> • Promotes fair dealing and more transparency between the parties, and provides redress to the information imbalance between the assignee and the other parties. • Assignees may better understand their rights and obligations under the lease. • Reduces risk of potential future disputes between parties. 	<ul style="list-style-type: none"> • Additional impost on the tenant (and potentially the landlord through the tenant) to provide disclosure to assignee and potentially to the landlord.

Questions for consideration:

20. *Do you prefer Option A or Option B? Why?*
21. *If Option B is pursued, what additional costs would exiting tenants and landlords incur?*
22. *If Option B is pursued, should the tenant be required to provide an additional assignor's disclosure statement if the assignee is to continue the business?*
23. *Should the CT Act be amended to require that an existing tenant must provide a copy of the tenant's guide to the assignee? Please provide reasons for your answer.*

4.4 DISCLOSURE AND ACCESS TO MARKET RENT INFORMATION

The CT Act contains provisions intended to ensure rent reviews are fair and accurate. For example, the Act provides that a rent review provision in a retail shop lease is void unless the lease specifies a single basis on which the review is to be made.⁶³

There are also particular protections relating to market rent reviews including a provision that prohibits a landlord from including goodwill or improvements made to the premises by the tenant in any assessment of market rent.⁶⁴ In addition, the CT Act prohibits ratchet clauses (a provision in a lease that prohibits or limits the extent to which market rent may be increased or reduced).⁶⁵

The CT Act also requires any disagreement regarding market rent to be referred to a licensed valuer.⁶⁶ In 2011, amendments were made to these provisions to require a landlord to provide a valuer with any relevant leasing information about leases for retail shops in the same building or retail shopping centre to assist with the determination of market rent where the parties have been unable to agree on the rent payable (2011 Amendments).⁶⁷

Some commentators have argued the 2011 Amendments did not go far enough and that landlords should be required to disclose relevant leasing information to the tenant at the time of the market rent review. It has been further suggested that this information should be provided to prospective tenants to assist with their rent and lease negotiations.

Issue

The issue being considered is whether the current requirements relating to disclosure of rent information, including the 2011 Amendments are operating effectively or whether there have been changes in the marketplace to justify the introduction of additional measures to improve access to lease information.

Objective

To provide an appropriate level of lease information to prospective tenants, while:

- minimising the cost to landlords and tenants;
- ensuring the information is current;
- ensuring the information is useful to tenants and not likely to mislead or be easily misunderstood by tenants.

⁶³ CT Act section 11.

⁶⁴ CT Act section 11(2)(a).

⁶⁵ CT Act section 11(2)(c).

⁶⁶ CT Act section 11(3).

⁶⁷ CT Act section 11(3B) (amended by the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011*).

Discussion

The issue of access to lease information has previously been examined by the former Department of Commerce – Consumer Protection Division (Consumer Protection) through a public consultation process undertaken between 2010 and 2012.⁶⁸

The previous consultation process considered the following options:

1. implement the 2011 Amendments to require landlords to provide a valuer with lease information at the time of a market review of rent if the parties have been unable to reach agreement on the rent payable, but to make no further changes;
2. require landlords to provide certain information to a valuer (appointed by a tenant) prior to the commencement of a lease or at any other time;
3. amend the CT Act to provide for the creation of a publicly accessible, electronic lease register or database. Under this option, landlords would be required to lodge a summary of lease details (including rent) with a central body;
4. introduce a requirement that all retail shop leases be registered on the land title; and
5. require landlords of shopping centres to maintain a register of lease information for shops in the centre and provide access to the register to tenants in the centre and bona fide potential tenants.

Submissions to the consultation did not indicate majority support for a particular option. A key concern raised by a number of stakeholders was that increased access to lease information may not achieve the intended benefit of significantly improving the bargaining power of tenants (thus resulting in lower rentals or better lease terms). A number of the options also involved significant cost to landlords, tenants and government.

In particular, with regards to the option of establishing a lease register, some landlord and tenant representatives raised the following key concerns:

- confidentiality of commercially sensitive information;
- costs in establishing, maintaining and searching a database;
- difficulties and costs in keeping the register up to date;
- administrative burden on landlords in registering current lease information;

⁶⁸ Department of Commerce, *Decision Regulatory Impact Statement – Improving access to lease information in the retail tenancy market in Western Australia*, October 2014. <https://www.commerce.wa.gov.au/consumer-protection/commercial-tenancy-access-retail-tenancy-market-2014>

- difficulty in ensuring the information can be used appropriately and that users do not misinterpret information - a number of variables need to be taken into account to ensure that comparisons across locations are meaningful and not misleading; and
- difficulty in ensuring compliance given the CT Act does not have penalties.

Based on an analysis of all the feedback, Consumer Protection concluded that the Government should implement and monitor the 2011 Amendments and that the costs of introducing any further legislative reform would likely outweigh any benefits accruing from those reforms.

This review provides an opportunity to assess the effectiveness of the 2011 Amendments and to consider whether there has been any significant change in the marketplace to warrant further reform.

Questions for consideration:

24. *Are the current provisions in the CT Act regarding disclosure and access to market rent information operating effectively? Please detail any issues.*
25. *If not, how could disclosure and access to rent information be improved?*
26. *Have there been any changes in the retail tenancy market to justify further reform? Please provide details.*

5 LEASE COSTS

There are various costs imposed on a tenant as part of their lease agreement including: rent; operating expenses (or outgoings); insurance; security bond; fit-out refurbishment; and marketing costs. Some of these costs may be ongoing and increase during the lease term.

One of the objectives of the CT Act is to ensure the various costs incurred by tenants as part of their lease agreement are fair and reasonable and have been adequately disclosed to the tenant.

5.1 TURNOVER RENT

The CT Act allows for rent to be based on a percentage of the turnover of the tenant's business. The Act contains provisions to prevent potential misuse by landlords of turnover information and to ensure turnover clauses protect the interests of tenants.

For example, a clause in a lease that obliges a tenant to provide turnover figures is void unless the figures are provided for the purpose of determining rent.⁶⁹ A tenant must also agree (in the prescribed form) to pay turnover rent⁷⁰ and a number of charges/costs are specifically excluded when calculating turnover (e.g. delivery charges, customer discounts and written-off accounts).⁷¹

Issue

With an increase in online shopping in recent years and changes in consumer behaviour as a result of the COVID-19 pandemic, some landlord representatives have queried whether sales from online transactions should be included or excluded in the calculation of turnover.

Objective

To consider whether the current provisions in the CT Act about rent reviews and other lease costs are operating as intended and whether any reforms are required to respond to emerging issues in the market.

Discussion

In 2017, New South Wales amended its legislation to provide that turnover rent does not include online transactions, unless:

- the good or services are delivered or provided from the retail shop (or the retail shopping centre in which the shop is located); or

⁶⁹ CT Act section 8(1).

⁷⁰ CT Act section 7(1).

⁷¹ CT Act section 7(4).

- the online transaction takes place while the customer is at the retail shop – whether or not the goods or services being purchased are delivered from or at the retail shop.⁷²

NSW is the only jurisdiction so far to specifically address how to treat online sales in the calculation of turnover rent.

The Australian Bureau of Statistics (ABS) has recorded a steady increase in online sales since 2015. The ABS noted that online sales have become particularly popular during the COVID-19 pandemic as restrictions placed on the operation of physical stores has resulted in both businesses and consumers turning to online sales.⁷³

Given this trend, there may be an increasing need to clarify how online sales should be treated in the calculation of a retail shop’s turnover.

Options

The following options are under consideration in relation to the above issue.

Option A - no change

Under Option A, the status quo will be retained with no change. The Act would continue to protect tenants from potential misuse of turnover information and ensure turnover clauses protect interests of tenants.

Option B – amend the CT Act in line with NSW to clarify the circumstances in which online sales included/excluded from turnover rent

Under Option B, the CT Act would be amended in line with the NSW provisions to exclude revenue from online sales from the calculation of turnover rent unless there is a sufficient connection with the physical retail shop.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change (status quo)	<ul style="list-style-type: none"> • Allows flexibility for the parties to determine how to treat online sales. This may vary according to the particular circumstances of the tenant. 	<ul style="list-style-type: none"> • There may be uncertainty among parties as to how online sales should be treated. • Risk that uncertainty may lead to disputes.

⁷² RLA (NSW) section 47(2).

⁷³ [Online sales, January 2021 - Supplementary COVID-19 analysis | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/online-sales-january-2021-supplementary-covid-19-analysis)

	Advantages	Disadvantages
Option B – online sales sufficiently connected to shop be included in turnover	<ul style="list-style-type: none"> Provides greater certainty for parties and may reduce disputes. Addresses an emerging issue in the industry as online sales become more popular. 	<ul style="list-style-type: none"> Reduces flexibility for parties to agree on their own commercial arrangements in relation to online sales.

Questions for consideration:

27. Which of the above options do you support?
Please provide reasons and any additional costs/benefits.
28. Are the current provisions in the CT Act relating to turnover rent operating effectively? If not, please detail any additional issues.

5.2 LAND TAX

Currently, a tenant may be required to pay land tax in relation to land on which the retail shop is situated as part of their outgoings or operating expenses.

Issue

Tenant stakeholders have consistently argued that land tax is an ownership expense of the landlord and should not be classified as an operating expense of a building/retail shopping centre. The payment of land tax by tenants particularly when there is a sudden increase in the amount payable can place an unanticipated financial burden on tenants.

Some landlord groups argue that if landlords are required to absorb the cost of land tax it would most likely be passed onto tenants as increased rent meaning the same costs are borne by the tenant, but the process is less transparent.⁷⁴

Some landlords acknowledge that in a soft market, higher land tax costs increase outgoings figures, thereby inflating gross rents (rent + outgoings) and making it more difficult to attract tenants.

In a soft market, if gross rent is too high to attract tenants, but most outgoing costs are fixed (e.g. GST, land tax etc.) then the only way to reduce gross rent may be to reduce the rent component and thereby putting negative pressure on rent prices.

⁷⁴ 2003 Review, 123.

To avoid any negative pressure on rent, some landlords may prefer that tenants are not required to pay land tax as part of their outgoings. That way, landlords have the discretion to decide whether to pass on land tax to tenants via rent or, in a soft market, to absorb the cost themselves in order to avoid reducing rent.

Objective

To consider issues in relation to the payment of land tax by commercial tenants and whether amendments are required in the CT Act in relation to operating costs and rent calculations.

Discussion

Several jurisdictions including Victoria, Queensland and South Australia legislate to prohibit land tax from being recovered from a tenant and New South Wales limits a tenant's liability to contribute to land tax.⁷⁵ It is not possible to determine with any degree of confidence whether in other jurisdictions the prohibitions on recovery of land tax have been passed on to tenants in the form of higher rent, as a wide variety of market forces can affect rent levels.

Table 1 – Treatment of land tax

	Is land tax payable /partly payable by tenant? Requirements	
ACT⁷⁶	Yes	Landlord can recover rates, taxes, levies or other statutory charges (including land tax)
NSW⁷⁷	Yes	Liability is not to exceed amount of the liability if land tax calculated on certain basis (eg land is only land owned by the landlord)
NT	No	No land tax payable in NT
Qld⁷⁸	No	A requirement in lease for tenant to pay land tax or reimburse landlord for land tax is void
SA⁷⁹	No	Land tax cannot be recovered from a tenant
Tas⁸⁰	N/A	No provision
Vic⁸¹	No	Landlord cannot recover land tax from tenant
WA⁸²	Yes	Landlord can recover relevant proportion of notional land tax from tenant

This issue has been included in this discussion paper as the treatment of land tax in Western Australia is inconsistent with most of the other jurisdictions and because a number of tenant stakeholders have requested the payment of this cost be reviewed.

⁷⁵ *Retail Leases Act 1994* (NSW) section 26.

⁷⁶ *Leases (Commercial and Retail) Act 2001* (ACT) section 70(1)(b).

⁷⁷ *Retail Leases Act 1994* (NSW) section 26.

⁷⁸ *Retail Shop Leases Act 1994* (Qld) section 7(3).

⁷⁹ *Retail and Commercial Leases Act 1995* (SA) section 30.

⁸⁰ *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) clause 28.

⁸¹ *Retail Leases Act 2003* (Vic) section 50.

⁸² CT Act section 12(3).

Options

The following options are under consideration in relation to the above issue.

Option A – no change Under Option A, the status quo will be retained and the landlord may recover relevant proportion of notional⁸³ land tax from tenant.

Option B – prohibit landlords from passing on land tax to tenants Under Option B, the CT Act would be amended to prohibit landlords from passing on land tax to tenants.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change (status quo)	<ul style="list-style-type: none"> Will not create a risk that rent will be increased to absorb transfer of land tax expense from tenant to landlord. 	<ul style="list-style-type: none"> Potential downward pressure on rents in a soft market could be a cost for landlords particularly if lower rents also results in a reduction in the value of the property. Small business landlords may not be able to absorb sudden increase in land taxes. Tenants continue to pay for an outgoing cost that tenants in other jurisdictions are not required to pay.
Option B –amend the CT Act to prohibit landlords from passing on land tax to tenants	<ul style="list-style-type: none"> Reduces lease costs for tenants – avoids unexpected hikes in outgoings which may be difficult for small business to absorb. May make certain premises more financially attractive to tenants increasing occupancy rates for landlords. 	<ul style="list-style-type: none"> Additional cost for landlords who may pass it on to tenants as increased rent.

Questions for consideration:

29. Which of the above options do you support?

Please provide reasons and any additional costs/benefits.

30. Are there any other outgoings or expenses that you believe should not be passed onto the tenant? If so, why?

⁸³ Tax calculated on the basis that the land on which the tax is assessed is the only land owned by that landlord for land tax purposes.

5.3 MARKETING FUNDS

Some retail shop leases may contain a clause requiring a tenant to contribute to a fund for marketing or promotion of the retail shopping centre. If this is the case, the CT Act includes the following requirements:

- the purpose of the fund must be specified in the retail shop lease;⁸⁴
- funds are to be deposited into an appropriately designated interest-bearing account;⁸⁵
- funds and interest can only be applied for the specified purpose, tax or imposts and audit costs;⁸⁶ and
- the landlord is to keep accurate records and accounts, have the accounts audited and provide tenants with a copy of the audit report.⁸⁷

Issue

The application of marketing funds contributed by tenants has been reported as a common area of dispute between landlords and tenants in Western Australia.

While the CT Act does require the landlord to specify the purpose of any marketing fund in the lease agreement, there is no obligation on the landlord to provide any specific details on the marketing plan.

Objective

To consider whether the current provisions in the CT Act about the contribution by tenants to marketing funds is fair and whether reforms are required in relation to the obligation of landlords to provide marketing plan details.

Discussion

As outlined in Table 2 below, most other Australian jurisdictions require a landlord to provide the tenant with a marketing plan or budget detailing the advertising and promotion expenditure for the upcoming accounting period.

⁸⁴ CT Act section 12B(2).

⁸⁵ CT Act section 12B(3)(a).

⁸⁶ CT Act section 12B(3)(b).

⁸⁷ CT Act section 12B(3)(c).

Table 2 – Marketing and advertising requirements

	Marketing plan/estimate required? Requirements	
ACT⁸⁸	Yes	Written estimate of advertising or promotion costs provided at least 1 month before accounting period.
NSW⁸⁹	Yes	Landlord must provide marketing plan 1 month before accounting period and auditor's report on expenditure within 3 months of end of accounting period.
NT⁹⁰	Yes	Landlord must provide marketing plan at least 1 month before accounting period and auditor's report on expenditure within 3 months of end of accounting period.
Qld⁹¹	Yes	Landlord must provide a marketing plan at least 1 month before start of each accounting period and auditor's report on expenditure within 3 months of end of accounting period.
SA⁹²	Yes	Landlord must provide marketing plan at least 2 months before start of accounting period and; <ul style="list-style-type: none"> - if the payment relates to an opening promotion, at least 2 months before the promotion make details available to tenant; and - within 3 months of accounting period provide auditor's report on expenditure.
Tas⁹³	Yes	Landlord must provide annual marketing plan and budget. If the tenant requests, landlord must also provide an unaudited expenditure statement within 1 month of the end of every 6 months in an accounting year. Landlord must provide auditor's report within 3 months of end of every accounting year.
Vic⁹⁴	Yes	Landlord must provide estimate of expenditure on promotion and advertising at least 1 month before start of accounting period and within 3 months after end of accounting period provide auditor's report confirming expenditure.

Options

The following options are under consideration in relation to the above issue.

Option A – no change

Under Option A, the status quo will be retained. There is no obligation on the landlord to provide specific details on the marketing plan.

Option B – landlords to provide a marketing plan to tenant before each accounting period

Under Option B, the CT Act would be amended to require landlords to provide a marketing plan to the tenant before each accounting period and an auditor's report confirming expenditure.

⁸⁸ *Leases (Commercial and Retail) Act 2001* (ACT) sections 132 -133.

⁸⁹ *Retail Leases Act 1994* (NSW) section 53.

⁹⁰ *Business Tenancies (Fair Details) Act 2003* (NT) sections 69-72.

⁹¹ *Retail Shop Leases Act 1994* (Qld) sections 22B – 22C.

⁹² *Retail and Commercial Leases Act 1995* (SA) sections 53-56 12.

⁹³ *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) clause 34.

⁹⁴ *Retail Leases Act 2003* (Vic) section 72.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change (status quo)	<ul style="list-style-type: none"> Maintains the status quo - no additional impost on landlords. 	<ul style="list-style-type: none"> Tenants may not be (fully) aware of marketing plans. Potential impact on a tenant's budget. Increased risk of disputes between tenants and landlords.
Option B—landlords to provide a marketing plan before each accounting period	<ul style="list-style-type: none"> Provides greater transparency for tenants. Improves landlord accountability regarding the application of a tenant's contribution to marketing costs. Will enable better budgeting by tenants. May reduce risk of disputes. 	<ul style="list-style-type: none"> Additional costs for landlords. Landlords may pass additional costs on to tenants as increased rent.

Questions for consideration:

31. Which of the above options do you support? Please provide reasons and any additional costs/benefits.

5.4 SECURITY BONDS, BANK AND PERSONAL GUARANTEES

Some landlords of retail premises will require a form of security from a tenant in order to protect themselves if a tenant defaults or breaches their obligations under a lease. The security instrument can take various forms including security bonds and personal and bank guarantees. Bank guarantees can be preferable in some instances as they may not require the same outlay of funds upfront.

The CT Act does not specifically regulate security instruments. There is currently no regulation of the payment or holding of security instruments and no time limits for the return of security instruments to tenants. Therefore, the landlord has discretion as to the type of security required and when the security is to be returned.

Issue

The requirement for a tenant to provide security bonds or bank guarantees when entering into a lease can require significant funds. They are also often the subject of dispute. Western Australia and Queensland are the only jurisdictions in Australia to not specifically address payment and holding of security instruments.

Objective

To consider issues in relation to the payment, holding and return of security instruments and whether amendment to the CT Act is required.

Discussion

Most other jurisdictions regulate the payment, holding and return of security instruments. New South Wales, South Australia and Victoria include a timeframe for landlords to return security instruments to the tenant. Most jurisdictions also prohibit landlords from unreasonably refusing to accept a bank guarantee instead of a bond and most jurisdictions regulate the holding of security instruments, including a requirement to deposit the security into an interest bearing or other regulated account. South Australia, the ACT and Tasmania also limit the amount a landlord can request as a security deposit.

Below is a summary of the different requirements across jurisdictions.

Table 1 – Regulation of security instruments

	Are security instruments regulated? Requirements	
ACT⁹⁵	Yes	<ul style="list-style-type: none">• security bond not more than 3 months' rent;• landlord must not unreasonably refuse bank guarantee instead of security bond; and• bond to be repaid or returned within 30 days after end of the lease or tenant vacating (whichever is later).
NSW⁹⁶	Yes	<ul style="list-style-type: none">• government scheme administers security bonds; and• landlord must return bank guarantee within 2 months after the tenant completes obligations.
NT⁹⁷	Yes	<ul style="list-style-type: none">• landlord cannot unreasonably refuse to accept a bank guarantee as a security.
Qld	No	n/a
SA⁹⁸	Yes	<ul style="list-style-type: none">• landlord must not require:<ul style="list-style-type: none">- more than 1 security instrument;- security of more than 3 months' rent;• security bond must be paid to small business commissioner w/n 28 days of receipt; and• landlord who receives bank guarantee must return to tenant w/n 2 months after tenant completes obligations.
Tas⁹⁹	Yes	<ul style="list-style-type: none">• security bond not more than 3 months' rent; and• landlord must not unreasonably refuse to accept bank guarantee instead of security deposit.
Vic¹⁰⁰	Yes	<ul style="list-style-type: none">• landlord must not unreasonably refuse to accept bank guarantee instead of security deposit; and• landlord who receives bank guarantee must return to tenant within 2 months after tenant completes obligations.

The payment and return to tenants of security instruments is a common area of dispute between parties and raises the question of whether the Act should be amended to regulate security instruments.

⁹⁵ *Leases (Commercial and Retail) Act 2001* (ACT) sections 39-45.

⁹⁶ *Retail Leases Act 1994* (NSW) Part 2A.

⁹⁷ *Business Tenancies (Fair Details) Act 2003* (NT) section 63.

⁹⁸ *Retail and Commercial Leases Act 1995* (SA) section 20AA.

⁹⁹ *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) clause 30.

¹⁰⁰ *Retail Leases Act 2003* (Vic) section 24.

Options

The following options are under consideration in relation to the above issue.

Option A – no change

Under Option A, the status quo will be retained.

Option B – regulate the payment and release of securities

Under Option B, the CT Act would be amended to regulate the provision and release of security instruments.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option B – no change (status quo)	<ul style="list-style-type: none"> No additional costs for landlords. 	<ul style="list-style-type: none"> Uncertainty for tenants in relation to release of security instruments. Potential for increased start-up costs for tenants. Potential area of misuse and dispute.
Option A – regulate the payment and release of security instruments	<ul style="list-style-type: none"> Certainty for tenants and landlords in relation to release of security instruments. May reduce start-up costs for tenants if cap on maximum security amount. Reduces risk of disputes. 	<ul style="list-style-type: none"> Increased costs for landlords if cap on maximum security amount is insufficient. Risk of increased costs being passed on to tenants.

Questions for consideration:

32. Which option do you support and why?

33. If you support Option B, should the CT Act be amended to include the following:

- 1) the maximum amount a landlord can collect as a security bond or require as a bank guarantee?
- 2) when the landlord should return the security deposit or release or return a bank guarantee;
- 3) a provision allowing a tenant to elect which form of security they would like to use; and/or
- 4) a provision preventing a landlord from requesting more than one form of security (e.g. a security bond and a bank guarantee) or from refusing to accept a bank guarantee.

Please provide reasons and any additional suggestions or costs/benefits.

6 FIRST RIGHT OF REFUSAL

A key concern at the end of the lease term (and after any options to renew the lease have been used) is whether a further lease term will be granted. The CT Act currently requires a landlord, at the tenant's request, to indicate whether they will offer a lease renewal.¹⁰¹ However, other than the statutory option for the tenant to renew their lease for up to five years in section 13 of the CT Act, the landlord is not obligated to offer the existing tenant a lease renewal or a further lease term.

Issue

Some tenant representatives have suggested that if a landlord intends to re-let their premises at the end of the current lease, the sitting tenant should be given the option of extending/renewing their lease before the landlord offers to lease the premises to anyone else (sometimes called a first right of refusal or preferential right of renewal).

Tenant representatives have also suggested that the offer to extend the lease should be on terms and conditions no less favourable than any new lease to a prospective tenant. This would remove the risk of some landlords taking advantage of a tenant's potential vulnerability at lease end to significantly increase rent or impose other onerous terms and conditions.

Objective

To examine whether the current policy settings in relation to lease renewal or extension are appropriate and provide a balance between the expectations of retail shop tenants and landlords.

Discussion

There is sometimes conflict between a landlord's expectation to be able to freely deal with the retail shop premises, subject only to the terms of the lease, and a tenant's expectations of security of tenure. Most tenants incur significant costs fitting out their retail shop premises and establishing their business. In some cases, a tenant may not have had sufficient time during the course of their lease to offset those costs and derive a profit, particularly if the business required a costly fit-out or other significant establishment costs.

Other tenants may have already established a successful business that is dependent on the location of the premises. For example, a coffee shop that has a local customer base. Tenants in these circumstances may be particularly vulnerable at the end of their lease as the future of their business and livelihood may depend on their lease being renewed. Some landlords could use the success of an existing tenant's business as leverage to attract another tenant at a higher rent or on other terms more favourable to the landlord.

¹⁰¹ CT Act section 13B.

A landlord could benefit from the hard work and financial investment a tenant has put into establishing their business and customer base, while the tenant risks losing their investment and future earnings.

Retail tenancy legislation in South Australia¹⁰² and the Australian Capital Territory¹⁰³ provides preferential rights for existing tenants within shopping centres. If a landlord proposes to re-let the premises and the existing tenant wishes to renew or extend the current lease, the landlord must give preference to the existing tenant over other potential tenants.

In South Australia, the landlord must presume the existing tenant wants to renew their lease unless the tenant notifies the landlord otherwise 12 months before the end of the lease. The landlord is required to begin negotiations with the existing tenant at least six months before the end of the lease.¹⁰⁴ In addition, before agreeing to enter into a lease with another person, the landlord must make an offer to the existing tenant on terms no less favourable than those of the proposed lease.

This preferential right does not apply in certain circumstances, including:

- where the landlord reasonably wants to change the mix of tenants in the shopping centre;
- the tenant has seriously or persistently breached the lease;
- the landlord requires vacant possession of the premises; or
- where the landlord would be substantially disadvantaged by the renewal or extension of the lease.

The legislation in the Australian Capital Territory also provides the tenant with the opportunity to 'opt out' of having the preferential right if there is acknowledgement that they have received legal advice and have not been acting under undue influence in agreeing to the exclusion.¹⁰⁵

Some commentators have criticised the South Australian provisions on the basis that they allow the landlord to obtain alternate offers from other retailers who may be able to afford a higher rent than the sitting tenant. These commentators suggest that the legislation should require the sitting tenant and landlord to agree on the terms and conditions of the renewed lease and if an agreement cannot be reached, the rent should be set by an independent valuer.¹⁰⁶ Other jurisdictions do not provide for preferential rights at the end of the lease for premises located in a shopping centre, and none currently provide preferential rights for existing tenants for premises located outside a shopping centre.

¹⁰² *Retail and Commercial Lease Act 1995* (SA) sections 20C-20G.

¹⁰³ *Leases (Commercial and Retail) Act 2001* (ACT) sections 108-112.

¹⁰⁴ *Retail and Commercial Lease Act 1995* (SA) section 20E.

¹⁰⁵ www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Retails_leasing/Report/d01

¹⁰⁶ www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Retails_leasing/Report/d01

The preferential rights issue was examined in the 2003 CT Act Review.¹⁰⁷ The Review Committee noted that landlord groups at the time argued that the issue was not widespread, that most tenants already have the right to a minimum five year lease term, and that some research suggested that most renewals proceeded with minimal issue.

The Committee acknowledged that it was desirable for a sitting tenant to have recourse if they had been wrongfully denied a further term under a lease, or granted a further term only after agreeing to onerous conditions. The Committee was of the view however that, given that the issues did not appear to be widespread, they would be adequately addressed by the inclusion of new unconscionable conduct provisions.¹⁰⁸

Unconscionable conduct provisions were introduced into the CT Act in 2006.¹⁰⁹ These are largely consistent with the statutory prohibition on unconscionable conduct in the Australian Consumer Law. If a landlord has engaged in conduct that is so harsh, oppressive or unreasonable that it goes against good conscience, the State Administrative Tribunal may make an order for payment of compensation or another appropriate order.

However, a landlord is not taken to have engaged in unconscionable conduct only because the landlord failed to renew/enter into a new lease.¹¹⁰ Additional evidence of unconscionable conduct, would be required to establish grounds for action under this section, so it would only provide protection to a tenant in the most extreme circumstances (see Part 8 on consideration of the CT Act's unconscionable conduct provisions).

Options

The following options are under consideration in relation to the above issue.

Option A - no change

Under Option A, the status quo will be retained. Tenants would not have a preferential right to a new lease. If the landlord has engaged in unconscionable conduct (that is more than just not renewing/not entering into a new lease), tenants may apply to the State Administrative Tribunal for orders that may include monetary payment.

Option B – CT Act to provide a preferential right for existing tenant

Under Option B, the CT Act would be amended to provide for the existing tenant to have a preferential right to a new lease/extend the current lease for the same premises located in the retail shopping centre. Conditions and exceptions may apply.

¹⁰⁷ Review of Commercial Tenancy (Retail Shops) Agreements Act, Report to Minister for State Development; Tourism and Business, February 2003, 127 – 135.

¹⁰⁸ Review of Commercial Tenancy (Retail Shops) Agreements Act, Report to Minister for State Development; Tourism and Business, February 2003, Recommendation 51, 127.

¹⁰⁹ See Part IIA, Division 1 (inserted by the *Retail Shops and Fair Trading Legislation Amendment Act 2006 (WA)*).

¹¹⁰ CT Act section 15E(b).

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change (status quo)	<ul style="list-style-type: none"> Shopping centre owners have flexibility to change tenancy mix, redevelop the premises or make decisions relating to the property (noting most tenants already have security of tenure for a minimum 5 year term). 	<ul style="list-style-type: none"> Imbalance in parties negotiating power at time of lease renewal/extension. Tenants may take on onerous or unfavourable lease conditions in order to retain premises. Existing unconscionable conduct provisions may not be effective in protecting tenants, as they must demonstrate more than just a failure to renew/extend the lease in order to prove unconscionability.
Option B – CT Act to provide a preferential right for existing tenant with conditions and exceptions	<ul style="list-style-type: none"> Reduces imbalance of negotiating power between parties at time of lease renewal/extension. Encourages existing tenants to continue to invest into the business. Exceptions will apply in circumstances where it is appropriate to not provide a preferential right. 	<ul style="list-style-type: none"> Removes some flexibility for shopping centre owners to make decisions relating to the premises. Could create marketing and contractual issues for the landlord in that before the landlord could accept an offer from a third party to lease the premises, the landlord would have to allow the sitting tenant time to decide whether to exercise its preferential rights. Having to put the third party 'on hold' may result in them walking away.

Questions for consideration:

34. *Is there justification for providing sitting tenants with a preferential right to renew their lease? Is this a widespread issue?*

35. *Do you prefer Option A or Option B? Why?*

36. *If Option B was pursued:*

- 1) *what exceptions should apply?(e.g. similar to those in South Australia and the Australian Capital Territory?); and/or*
- 2) *what conditions should apply? (e.g. should the offer of a renewed lease have to be on terms no less favourable than those of a proposed new lease? or, determined by independent valuer if agreement cannot be reached between the parties).*

7 EARLY TERMINATION DUE TO SEVERE FINANCIAL HARDSHIP

The CT Act does not currently provide for the early termination of a lease by a tenant on the grounds of severe financial hardship. Tenants are therefore reliant on the agreement of the landlord to terminate the lease early, the specific terms of the lease or common law principles.¹¹¹

For tenants facing severe financial hardship, there can be serious legal consequences if they breach their agreement by failing to pay rent. The landlord has the right to terminate the lease, take possession of the premises and/or pursue defaulting tenants for damages and compensation.

For a tenant who has provided their personal assets as security against their lease obligations or given a personal guarantee, any default could result in the loss of their family home. Insurance may not cover this type of loss.

Issue

Some tenant stakeholders have raised concerns about whether the CT Act is sufficiently flexible to respond to crises resulting in severe financial hardship for tenants. The disruption to business caused by COVID-19 has highlighted this issue.

Objective

To consider whether the CT Act is (or should be) sufficiently flexible to respond to unforeseen circumstances that result in the tenant experiencing severe financial hardship and unable to fulfil their lease obligations.

Discussion

Tenant stakeholders have raised concerns about the power imbalance typical between tenants and landlords and the lack of willingness on the part of some landlords to negotiate with tenants facing severe difficulties.¹¹²

Tenant stakeholders have suggested that the CT Act should be amended to provide relief to tenants experiencing severe financial hardship, by introducing the right to seek early termination of a retail shop lease.¹¹³

Also under consideration is whether the CT Act should be amended to provide tenants with the right to seek adjustments to the lease agreement in situations where they are likely to suffer severe financial hardship due to unforeseen or extraordinary circumstances.

¹¹¹ There may be scope to assign the lease or if the agreement allows sub-leasing the premises, but these options are unlikely to be practical for tenants facing severe financial hardship.

¹¹² It is understood that there is a disincentive for some landlords to negotiate rent reductions as this may result in their property being devalued and may impact rent projections.

¹¹³ Tenants experiencing hardship are not able to rely on common law for relief as it does not provide for the concept of hardship. Refer: Pen Guo: 'Good Faith in Long-Term Relational Supply Contracts in the Context of Hardship from A Comparative Perspective'. Springer, Singapore 2021, 41-64.

In some cases, this could be considered an alternative to early termination of a lease and may provide scope for the tenant to recover sufficiently to meet their obligations under the lease.¹¹⁴

Some landlords have commented that they also face significant challenges when tenants are unable to meet their obligations under the lease. Providing relief such as a reduction in rent to tenants facing financial hardship is not always feasible, particularly when the landlord is also a small business. Larger landlords, can also be under significant pressure from shareholders and financiers not to reduce rent as doing so can reduce the value of their asset and return on investment which can have significant financing and re-sale implications.

There is a general reluctance by government to introduce legislation that has the effect of interfering in commercial agreements, particularly when the legislation allows for an agreement to be set aside or terminated. Therefore, introducing early termination rights or the right to seek a lease variation requires careful consideration of a number of matters including the risks and benefits to all parties.

Other jurisdictions in Australia do not currently provide early termination rights for commercial tenants on the basis of severe financial hardship due to unforeseen or exceptional circumstances.

However, other tenancy legislation in Western Australia does include hardship provisions. Both the residential tenancy legislation and the residential parks legislation provide for orders to be made by the court or SAT for termination of the tenancy agreement on the grounds of undue hardship of either the landlord or tenant.¹¹⁵ Orders may also be made in regard to payment of compensation to the other party.

A similar approach is reflected in the Commercial Tenancies (COVID-19 Response (Early Termination)) Bill 2020 (WA) (Early Termination Bill), which was introduced in the Legislative Assembly on 16 April 2020, but did not progress.¹¹⁶ The purpose of the Early Termination Bill was to give tenants, in severe financial distress caused by COVID-19, a mechanism for terminating their lease.

Under the Early Termination Bill, tenants would not be liable for the usual compensation or damages associated with early termination of a lease (often referred to as 'break lease costs').

¹¹⁴To apply to small to medium commercial tenancies, including retail tenancies, small businesses and incorporated associations.

¹¹⁵ *Residential Tenancies Act 1987* (WA) section 74 and **Error! Use the Home tab to apply Name Of Act/Reg to the text that you want to appear here.**2006 (WA) section 73.

¹¹⁶ The Second Reading Speech noted that the Early Termination Bill would only proceed if there was evidence of widespread abuse by landlords of their obligation for good faith negotiations for rent relief for commercial tenants as provided for in the *Commercial Tenancies (COVID-19 Response) Act 2020*. Refer Hansard, WA Legislative Assembly, 16 April 2020, 2299a.

Options

The following options are under consideration in relation to this issue.

Option A - no change

Under Option A, no change to current arrangements.

Option B – CT Act to include hardship provisions allowing for early termination

Under Option B, the CT Act would be amended to include hardship provisions allowing for the early termination of the lease in specific circumstances of severe financial hardship.

Option C – CT Act to include hardship provisions allowing for temporary adjustments and/or early termination

Under Option C, the CT Act would be amended to include hardship provisions allowing for either:

- adjustments to be made to the lease to provide relief in specific circumstances of severe financial hardship; or
- early termination of the lease in specific circumstances of severe financial hardship.

Under Options B and C, a tenant would have the ability to make an application to the SAT for an early termination order. However, before making an application to the SAT, the parties would first need to seek to resolve the matter with the assistance of the Small Business Commissioner in accordance with the current dispute resolution provisions of the CT Act.

The circumstances in which early termination rights could be exercised would need to be limited by including specific criteria for establishing whether the tenant is suffering severe financial hardship and whether the circumstances were unforeseeable by the tenant.

The exercise of any right to terminate would require the oversight of the SAT. Under Options B and C, the SAT would play a key role in considering whether this criteria has been satisfied and in determining:

- whether the tenant is suffering severe financial hardship;
- whether the tenancy should be terminated;
- whether the tenant should be relieved of obligations under the lease including the payment of compensation and damages or whether the tenant should be required to comply with some of their outstanding obligations under the lease (e.g. make good the premises); and
- whether alternative concessions such as adjustments to the agreement are more appropriate than terminating the lease, for example, the waiver or deferral of rent.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A No change	<ul style="list-style-type: none"> Delivers contractual certainty for landlords. 	<ul style="list-style-type: none"> Tenants are not provided with adequate protections in the event of unforeseen and extraordinary circumstances causing severe financial hardship.
Option B: CT Act to include hardship provisions allowing for early termination	<ul style="list-style-type: none"> Delivers greater protections for tenants suffering severe financial hardship. Encourages tenants and landlords to negotiate in good faith to provide relief. Ensures legislation is sufficiently flexible to respond to future crises. 	<ul style="list-style-type: none"> Landlords may suffer financial impacts. Raises concerns about reduced contractual certainty.
Option C: CT Act to include hardship provisions allowing for temporary adjustments and/or early termination	<ul style="list-style-type: none"> Delivers greater protections for tenants suffering severe financial hardship. Encourages tenants and landlords to negotiate in good faith to provide relief. 	<ul style="list-style-type: none"> Landlords may suffer financial impacts. Raises concerns about reduced contractual certainty.

Questions:

37. Which of the above options do you support? Please provide an explanation for your response and include examples and any potential costs or benefits.

38. Can you suggest any alternative options to those presented above?

39. What criteria should be considered to establish whether:

- 1) a tenant is suffering severe financial hardship; and
- 2) the circumstances were unforeseeable at the time the tenant entered into the lease?

40. Do you think that tenants who terminate their leases early due to severe financial hardship should be relieved of all or some of their obligations? If so – which obligations should the tenant still be required to comply with?

For example, should the tenant still be required to: pay compensation; pay damages to the landlord associated with early termination of a lease (often referred to as ‘break lease costs’) and/or make good the premises?

41. Do you support termination on grounds of severe financial hardship applying to landlords as well as tenants?

8 TRADING HOURS

Trading hours refers to the times and hours a shop or business is open for trading.

In Western Australia, trading hours are regulated by the *Retail Trading Hours Act 1987 (WA)* (RTH Act) which sets out times retailers in Western Australia can open for business. Permitted trading hours vary depending on the size of the business, the types of goods sold and the location of the shop. Extended trading hours can also apply at different times during the year (e.g. Christmas). Retailers are not required to open for the retail trading hours relevant to their class of shop, but may trade if they wish to do so.

Retail trading hours refers to the hours a shop is permitted to open and are prescribed under the RTH Act. The permitted opening hours vary according to the type of business, its location and size.

For general retail shops in the Perth metropolitan area the retail trading hours are as follows:

- 8am to 9pm on Monday to Friday.
- 8am to 5pm on Saturday.
- 11am to 5pm on Sunday.
- 11am to 5pm on public holidays.¹¹⁷
- Closed on ANZAC Day, Christmas Day and Good Friday.¹¹⁸

All shops are regarded as general retail shops unless they fall under one of the other categories including: small retail shops, special retail shops, filling - service stations or motor vehicle shops. Small retail shops can trade 24 hours a day, every day of the year. Special retail shops are considered necessary for emergency, convenience or recreation goods. Shops in this category can trade between 6.00am to 11:30pm every day of the year. Outside the metropolitan area trading hours vary, with deregulated trading hours in some locations (set in consultation with local government).

Standard trading hours prescribed under the CT Act are different to retail trading hours and are used only for the purpose of determining the tenant's contribution to the landlord's operating expenses.

¹¹⁷ The *Retail Trading Hours Act 1987 (WA)* provides that general retail shops are to be closed on public holidays, however an ongoing variation order has been in place since 2012 allowing shops to open from 11am to 5pm. Further variation orders are generally made to extend hours to 8am to 6pm for most public holidays.

¹¹⁸ *Retail Trading Hours Act 1987 (WA)* section 12E (3A) .

The standard trading hours are currently prescribed as:

- 8am to 6pm on Monday, Tuesday, Wednesday and Friday.
- 8am to 9pm on Thursday.
- 8am to 5pm on Saturday.¹¹⁹

While the standard hours were previously more closely aligned with the permitted retail trading hours for general retail shops in the metropolitan area, changes to retail trading hours legislation over the years, have permitted a greater number of retailers to open for trade outside the standard trading hours.

Core trading hours refer to the hours that a shopping centre is open. In WA, a landlord cannot include terms in a retail shop lease *requiring* a tenant to open the retail shop for any specified times, including for the core trading hours.¹²⁰ Western Australia is the only jurisdiction with this prohibition.

A tenant may choose which hours to open up shop, subject to any restrictions imposed by RTH Act.¹²¹

Trading hours may be a factor in determining a tenant's contribution to the landlord's operating expenses.

The lease may provide the tenant is to contribute to shopping centre costs (operating expenses) incurred during 'standard trading hours', whether or not the shop was open for trade during those hours. However, the CT Act provides a tenant cannot be required to contribute to operating expenses incurred as a result of some shops being open outside the standing trading hours unless the retail shop in question was actually open.¹²²

8.1 MINIMUM TRADING HOURS

Section 12C of the CT Act provides that a term or condition in a lease requiring a tenant to open their retail shop for specific hours or times is void. For example, if a shop is located in a retail shopping centre with weekday trading hours until 9pm, the lease cannot require a shop to open until 9pm. The purpose of this provision is to allow tenants the 'right to determine their own trading hours to satisfy the needs of their business, their marketing environment and their personal circumstances'.¹²³

If a landlord refuses to renew the lease and the tenant believes the refusal is due to the tenant not opening the shop at specific times, the tenant may apply to the SAT for compensation for loss suffered as a result of the non-renewal.¹²⁴

¹¹⁹ CT Regulations regulation 5A.

¹²⁰ CT Act section 12C.

¹²¹ The *Retail Trading Hours Act 1987 (WA)* sets out the hours that retailers may open (which vary depending on the type of business). If the shop is in a retail shopping centre, the centre's opening and closing times may be different to the trading hours set by law with a permit. This information should be set out in the landlord's disclosure statement at the start of the tenancy.

¹²² CT Act section 12(1)(c).

¹²³ Commercial Tenancy (Retail Shops) Agreements Amendment Bill 1997 Second Reading Speech 27 November 1997.

¹²⁴ CT Act section 12C(2).

Issue

Whether the CT Act should be amended to allow a retail shop lease to require a tenant to trade for the core trading hours of the shopping centre or other specified hours.

Objective

To consider whether the CT Act's current settings in relation to trading hours remain appropriate for the current and future retail shops marketplace.

Discussion

Most jurisdictions allow for trading hours to be specified in a lease and include requirements on how the hours can be specified or set, and how changes to the hours can be made. A comparison of retail trading legislation on core trading hours across jurisdictions is set out in Table 1 below.

Table 1 – Jurisdictional comparison of core trading hours provisions

	Can the lease require the shop to open at specific times?	Details
ACT ¹²⁵	Yes (shopping centre)	Landlord cannot change core trading hours unless the majority of the retail shopping centre tenants who hold a retail premises lease agree in writing.
NSW ¹²⁶	Yes (shopping centre)	Lease is taken to include term that landlord cannot change core trading hours of which the shop forms part except with written approval of the majority of tenants. Tenant approval is not required if it is initial fixing of trading hours in new shopping centre.
NT ¹²⁷	Yes for core trading hours. No, if trading at that time would be unlawful.	Lease is taken to include term that landlord cannot change core trading hours of which the shop forms part except with written approval of the majority of tenants. Tenant approval is not required if it is initial fixing of trading hours in new shopping centre.
Qld ¹²⁸	Yes for core trading hours. No for hours outside of core trading hours. Exception is if parties agree.	Term of the lease cannot require tenant to trade <i>outside</i> of core trading hours (allowable trading hours that have been established by a resolution of tenants). An exception is if the parties agree in writing.
SA ¹²⁹	Yes, subject to certain requirements. Cannot require shop to trade on Sundays.	Lease may only regulate trading hours if – <ul style="list-style-type: none">• the shop is within an 'enclosed shopping complex';• the lease does not reduce the trading hours to less than 50 hours per week; and• the core trading hours –<ul style="list-style-type: none">○ do not exceed 54 hours a week and does not include Sunday, and○ have been approved by the shopping centre tenants in a secret ballot by a majority of at least 75per cent of votes cast.

¹²⁵ *Leases (Commercial and Retail) Act 2001* (ACT) section 139.

¹²⁶ *Retail Shop Leases Act 1994* (NSW) section 61.

¹²⁷ *Business Tenancies (Fair Dealings) Act 2003* (NT) section 75.

¹²⁸ *Retail Shop Leases Act 1994* (Qld) section 53.

¹²⁹ *Retail and Commercial Leases Act 1995* (SA) section 61.

	Can the lease require the shop to open at specific times?	Details
Tas ¹³⁰	Yes (shopping centres)	Core trading hours may be negotiated with individual tenants. The landlord may set new trading hours for the shopping centre with the approval of tenants.
Vic ¹³¹	Yes (shopping centres) – core trading hours agreed by tenants.	Landlord cannot change the core trading hours unless the majority of the retail shopping centre tenants who hold a retail premises lease agree in writing.
WA ¹³²	No	Term of the lease cannot require tenant to trade at specific times.

In some of the other jurisdictions, the laws about retail trading hours also impact on the core trading hours that may be included in a lease. For example in Victoria, a retail shop lease may set core trading hours, however, a term of the lease requiring the premises to be open after certain times on a Saturday or at any time on a Sunday or public holiday is void.¹³³

Some jurisdictions provide for the landlord to set core trading hours at the commencement of a new shopping centre, with future changes requiring either approval of the majority of tenants who hold a retail premises lease, or are affected by the proposal (ACT, Vic, SA) or the majority of all tenants in the centre (NSW, NT).

South Australia allows the lease to set core trading hours subject to certain requirements being met. The lease must be within an enclosed shopping complex and the lease cannot reduce the trading hours for which the shop is permitted to be open for trade to less than 50 hours per week. The core trading hours must not exceed 54 hours per week, and cannot include any time on Sunday, and must have been approved in a secret ballot conducted in accordance with the regulations by a majority of at least 75 per cent of the votes cast.

Options

The following options are under consideration in relation to the above issue.

Option A - no change

Under Option A, the status quo will be retained. Provisions in a retail shop lease that require the shop to open at certain hours or times is void.

Option B - lease may set core trading hours if certain requirements are met

Under Option B, the lease for premises in a retail shopping centre may set core trading hours if certain requirements are met. These requirements may include hours which cannot be set for Sunday, changes to core hours requires written approval by majority of tenants who have a retail shop lease, and the core hours do not exceed a certain number of hours per week.

¹³⁰ Fair Trading (Code of Practice for Retail Tenants) Regulations 1998 (Tas) clause 38.

¹³¹ Retail Leases Act 2003 (Vic) section 66.

¹³² CT Act section 12C.

¹³³ Shop Trading Hours Reform Act 1996 (Vic) section 7.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change	<ul style="list-style-type: none"> Tenants have discretion and flexibility as to when to open shop. 	<ul style="list-style-type: none"> Risk of various shops remaining closed on certain times or days which may lead to a reduced shopping experience for customers and potentially reduced foot-traffic and less trade.
Option B – lease may set core trading hours if certain requirements are met	<ul style="list-style-type: none"> Improved shopping experience for customers where all retail shops are open, which in turn may result in increased foot-traffic and more trade. 	<ul style="list-style-type: none"> Minimum trading hours may make it more difficult for new small retailers to enter the market. May not be feasible for certain retail shops to trade for all of the core trading hours and would increase their operating costs. If changes require approval from majority of tenants with a retail shop lease, issues with equity on which tenants are entitled to vote (e.g. shorter term lease tenants will have the same vote as long-term tenants). The tenant mix of shopping centres could differ from one centre to another, with voting to change core trading hours likely to cause inconsistencies and unfairness between centres.

Questions for consideration:

42. Do you prefer Option A or Option B? Why?

43. If Option B is pursued – what requirements should be included in order for the lease to be able to set core trading hours? (For example, restrictions on certain days and times, or a requirement for the majority of shopping centre tenants to agree any changes to core hours)?

8.2 STANDARD TRADING HOURS

The CT Act provides for ‘standard trading hours’ that are used only for the purposes of determining the tenant’s contribution to the landlord’s operating expenses.

Tenants cannot be required to contribute to the landlord’s operating expenses related to non-standard hours unless they choose to open. However, tenants may still be required to contribute to operating expenses incurred during standard trading hours even if they choose not to open during those standard trading hours.

For example, if a shop opens from 9am until 5pm it may still be charged for operating expenses for the additional standard trading hours each day. Table 2 below provides a summary of what a tenant may be required to pay in accordance with their lease.

Table 2 – Operating expenses vs shop opening hours

Shop opening hours	What will the tenant have to pay?		
	Rent	Operating expenses for standard trading hours	Operating expenses for extended hours, e.g. Sunday trading
Open standard hours	Yes	Yes	No
Open during extended hours	Yes	Yes	Yes
Open less than standard hours	Yes	Yes	No
Not open during extended hours	Yes	Yes	No

The standard trading hours were prescribed in the CT Regulations in 1999 and have not changed since that date.¹³⁴ By contrast, many retail businesses in WA can trade outside of the standard trading hours. Under the RTH Act there are no trading hour restrictions for small retail shops¹³⁵ and special retail shops are permitted to open from 6am to 11:30pm every day. On 1 November 2020, Western Australia’s retail trading hours legislation was amended to enable general retail shops the option to open until 9pm on weeknights.

Since 26 August 2012, all retail shops in the Perth metropolitan area have been permitted to open for trade on Sundays between the hours of 11am to 5pm. The Minister for Commerce at the time, the Hon Simon O’Brien MLC said that despite the extended trading hours, the CT Act would still protect retail tenants from being forced to open on Sunday and ensure retailers could only be charged operating expenses for the days they choose to open.¹³⁶

Nowadays, Sunday trading has become normalised with most metropolitan shopping centres generally opening on Sunday.

¹³⁴ CT Regulations regulation 5A.

¹³⁵ *Retail Trading Hours Act 1987* (WA) section 10(3). A ‘small retail shop’ is generally regarded as a shop with no more than 6 owners, and employs no more than 25 employees at a time, and own no more than 4 retail shops.

¹³⁶ <https://www.mediastatements.wa.gov.au/Pages/Barnett/2012/07/Sunday-trading-to-start-on-August-26.aspx>

Issue

Whether the CT Regulations should be amended to extend the current standard trading hours to more closely align with retail trading hours permitted under the RTH Act.

Objective

To examine whether the CT Act's current settings in relation to trading hours should be more closely aligned with retail trading hours permitted under the RTH Act.

Discussion

Some landlord representatives have called for amendment to the standard trading hours to reflect the extended trading hours, or to be more consistent with retail trading hours legislation. Landlords argue that there are significant administrative costs involved in calculating the allocation of operating expenses for non-standard trading hours. Western Australia is the only jurisdiction with the mechanism providing for 'standard trading hours' to be used for purposes of determining tenant's contribution to the landlord's operating costs under the lease. The provisions are intended to make sure that tenants are not financially disadvantaged if they choose not to open for extended hours, in particular on Sundays.

Options

The following options are under consideration in relation to the above issues.

Option A – no change

Under Option A, the status quo will be retained and standard trading hours will not change.

Option B – standard trading hours to be extended (possibly to include Sunday trading hours)

Under Option B, the standard trading hours would be amended to reflect extended trading hours, such as certain hours on Sunday. Certain conditions may apply, for example the landlord can only charge Sunday operating costs if the retail shop lease premises is located in a Perth metropolitan shopping centre.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change	<ul style="list-style-type: none"> Tenants do not absorb additional costs for extended hours if the shop is not open. 	<ul style="list-style-type: none"> Significant landlord administrative costs involved in calculating allocation of operating expenses for non-standard trading hours. Potential area of uncertainty and dispute between landlords and tenants.
Option B – standard trading hours to be extended (possibly to include Sunday hours)	<ul style="list-style-type: none"> May be administratively easier for landlords to distribute operating expenses. 	<ul style="list-style-type: none"> Increased operating costs for tenants for shops that do not trade during extended hours. May pressure tenants to trade even though not viable either financially or for personal reasons.

Questions for consideration:

44. Do you prefer Option A or Option B? Why?

45. If Option B is pursued –

- Which hours should be prescribed as standard trading hours? (for example, 11am to 2pm on a Sunday);
- Should certain conditions be met before a landlord can charge operating costs for extended trading? (For example, retail shop lease is located in a shopping centre in the Perth metropolitan area).

9 UNCONSCIONABLE CONDUCT

Sections 15C and 15D of the CT Act prohibit landlords and tenants from engaging in unconscionable conduct in relation to a retail shop lease and set out a non-exhaustive list of matters the SAT may consider in determining whether a party has acted unconscionably. These matters include the relative strengths of the bargaining positions of the landlord and tenant.¹³⁷ A landlord or tenant, or former landlord or tenant who suffers loss or is likely to suffer loss as a result of unconscionable conduct can apply to the SAT for an order for compensation.¹³⁸

Issue

The issue is whether the current provisions in the CT Act are operating to prohibit landlords and tenants from engaging in unconscionable conduct. The issue is considered through discussion on the following themes:

- the intent of unconscionable conduct provisions;
- data on unconscionable conduct applications; and
- alternate concepts of fairness.

Objective

To ensure the unconscionable conduct provisions within the CT Act are operating as intended to protect parties from behaviour that is unconscionable or whether additional provisions are required to prevent certain unfair conduct.

Discussion

The intent of unconscionable conduct provisions

The unconscionable conduct provisions in the CT Act were based on Section 51AC of the *Trade Practices Act 1974* (Cth) (TPA) in 2006. Section 51AC was incorporated into the TPA in response to concerns of the Reid Committee regarding unfair market conduct in commercial transactions with small businesses.¹³⁹

The Reid Committee recommended that Section 51AA of the TPA be replaced with a new ‘unfair conduct’ provision and a list of factors the Courts could consider in determining whether a party had acted unfairly.¹⁴⁰ However, the Commonwealth Government decided to retain unconscionability to enable courts to rely on the bank of case law on the meaning and scope of unconscionable conduct.

The unconscionable conduct provisions from the TPA were subsequently included, in a slightly modified form, when the TPA was replaced by the *Competition and Consumer Act 2010* (Cth) which enacted the Australian Consumer Law (ACL).

¹³⁷ CT Act subsection 15C(2)(a), subsection 15D(2)(a).

¹³⁸ CT Act section 15F(1).

¹³⁹ Australia, House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance Towards Fair Trading in Australia*, May 1997.

¹⁴⁰ Australia, House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance Towards Fair Trading in Australia*, May 1997 [6.7-6.22].

Several stakeholders and academics have argued that statutory unconscionability provisions, such as those included in the CT Act and the Australian Consumer Law (ACL) have not achieved the intent of extending the common law doctrine of unconscionability to remedy more broadly unfair trading practices. They argue there is a gap in the regulation of these practices.

This is largely due to the fact that courts have traditionally interpreted unconscionable behaviour narrowly to only arise in the most extreme circumstances where conduct is so far outside of the normal concepts of acceptable commercial behaviour as to be offensive to good conscience, and where a party also takes advantage or exploits a vulnerability, disability or disadvantage of the other party.

Establishing that a party has a special disadvantage can be difficult in commercial transactions. Unconscionable conduct also continues to be interpreted inconsistently by Australian courts and is generally a concept that is not well understood by businesses or consumers. On 19 March 2021, the Full Court of the Federal Court delivered a decision that appears to slightly broaden (at least for now) the meaning of statutory unconscionable conduct under the ACL. The Federal Court decided that statutory unconscionability does not require the offender to take advantage or exploit a vulnerability, disability or disadvantage of the victim.¹⁴¹ However, the reasoning in this case may be tested in the High Court in the future.¹⁴²

Data on unconscionable conduct applications

In the context of the CT Act, between 1 January 2006 and 16 April 2021 there have been 59 applications to the SAT under section 15F(1) for unconscionable conduct. Of these, the majority (i.e. 34 applications) were either dismissed or withdrawn. In relation to four of the applications, the respondent was required to pay the applicant compensation (so it can be reasonably assumed in these cases, the respondent was found to have acted unconscionably).

Although some matters withdrawn may have had a successful negotiated outcome, the available data nonetheless indicates that a relatively small number of applications have been made in relation to alleged unconscionable conduct since the provisions were introduced 15 years ago and an even smaller number have resulted in a finding of unconscionable behaviour.

¹⁴¹ Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [2021] FCAFC 40.

¹⁴² This case did not address the issue of whether there is a difference between the standard of moral wrongdoing required to establish unconscionable conduct under the ACL, as opposed to that required under the common law. In addition, the CT Act provisions do not include an equivalent to section 22(4) of the ACL, specifically providing that it is the intention of Parliament that the statutory provision is not limited by the unwritten law relating to unconscionable conduct. This might lead to a difference in interpretation in the future.

Alternate concepts of fairness

Several stakeholders have suggested that the unconscionable conduct provisions in the CT Act should be broadened or replaced with more commonly used concepts such as fair trading, fair play or good faith. In a recent High Court case, Justice Edelman noted that the continued use of the term ‘unconscionable’ could be limiting the potential of the statutory prohibition and that any lowering of the bar may only be possible if ‘unconscionable’ is replaced with ‘unjust’ or ‘unfair’.¹⁴³ The need for a more general unfair practices prohibition under the ACL has been the subject of numerous inquiries over several decades.

The Ministers’ responsible for consumer affairs are currently considering the issue and have requested the preparation of a Consultation Regulatory Impact Statement (CRIS) outlining the issues and options for reform. The CRIS is expected to be released in 2022 and one of the options being considered is the inclusion of a new general prohibition on unfair trading practices.

Numerous business practices (e.g. failure to disclose or hiding material information) that cause significant detriment to a party may be unfair, but are not currently prohibited by the unconscionable conduct provisions in the ACL. This is because unconscionable conduct requires a higher level of misconduct and for the conduct to be more than just unfair.

A consequence of the uncertainty and confusion regarding unconscionable conduct in the ACL is that the current prohibition:

- does not meet the objective of the ACL to prevent unfair trading practices (as set out in the *Competition and Consumer Act 2010* (Cth) (CAA));
- fails to establish a norm of conduct that businesses will deal fairly; and
- makes it difficult for businesses to assess whether their business practices are within the limits of the law or not.¹⁴⁴

It is likely that the same problems apply to the operation of the unconscionable conduct provisions in the CT Act especially as some tenant stakeholders have described certain practices in the retail sector in Western Australia that are potentially unfair but which at present, have not been considered by the SAT under the unconscionable conduct provisions.

For example, a number of stakeholders have criticised the practice of some landlords requiring short-term tenants to move premises within a shopping centre before six months, so that the right to a statutory option for a five year term does not arise. It also appears that in some instances tenants have been required to move out of the premises for a day (and then back in) to break their ‘continuous possession’.

¹⁴³ Australian Securities and Investments Commission v Kobelt [2019] HCA 18.

¹⁴⁴ Unfair Trading Options Paper (NSW Department of Customer Service on behalf of Consumer Affairs Australia and New Zealand) pg.12.

Both practices involve costs and inconvenience to tenants and seek to avoid the application of section 13 of the CT Act and the protections those provisions provide tenants.

While in most circumstances this practice is may be considered 'unfair', it is likely to be more difficult to establish that it is unconscionable given the narrow interpretation given to the unconscionable conduct provisions.

Most other Australian jurisdictions include unconscionable conduct provisions in their retail leasing legislation. Broader concepts of 'fair dealing' and 'good faith' have not been adopted in other jurisdictions although legislation in South Australia provides that the statutory right to a five year lease term is intended to achieve 'fair dealing' between the parties.¹⁴⁵

Both the United States and the European Union have a general prohibition against unfair practices and these prohibitions have been used to respond to new and emerging issues in the market.

In addition to unconscionable conduct provisions, the ACL includes a prohibition on the use of unfair contract terms. The original provisions applied only to consumers, but in November 2016, the ACL provisions were extended to protect small businesses from unfair terms in standard form contracts. These provide some additional protection, but only cover the terms of the contract itself and only apply to a standard form contract. The protections do not capture conduct in the negotiation of a retail lease.

Options

The following options are under consideration in relation to the above issue.

Option A - no change

Under Option A, the current unconscionable conduct provisions would be retained. The interpretation of unconscionable conduct by the courts and the SAT will continue to evolve.

Option B – CT Act to include a fairness requirement

Under Option B the CT Act would be amended to introduce a prohibition on unfair practices. This is designed to apply a lower threshold of misconduct to provide greater protection against unfair practices in the retail sector.

Option C – amend the unconscionable conduct provisions

Under Option C, the CT Act would be amended to provide for a wider range of conduct to be defined as unconscionable or broaden the list of factors the SAT can consider in assessing whether conduct is unconscionable. Another enhancement could be to make the protections prospective so that they extend to conduct that is 'likely to be unconscionable'.

¹⁴⁵ *Retail and Commercial Leases Act 1995 (SA)* section 20.

The following potential advantages and disadvantages have been identified for each of the options.

	Advantages	Disadvantages
Option A – no change (status quo)	<ul style="list-style-type: none"> The SAT can rely on the case-law on unconscionable conduct in determining applications. Greater consistency with other jurisdictions. Allows time to monitor any reforms arising from the current review of the ACL provisions. 	<ul style="list-style-type: none"> If it is too difficult for parties to establish unconscionable conduct, parties do not have a remedy for conduct that is unfair but not unconscionable. Allows unfair trading practices to continue. The concept is not commonly understood by business so there is no guidance on what behaviour is lawful.
Option B – CT Act to include fairness requirement	<ul style="list-style-type: none"> Greater protection for landlords and tenants against unfair trading practices. May promote higher standard of behaviour across the industry. May provide greater flexibility to respond to new business practices as the sector evolves. 	<ul style="list-style-type: none"> There may be uncertainty as to how to define ‘unfair’ - little precedent in the retail leasing context. There are likely to be additional compliance costs associated with monitoring and identifying potential breaches of the requirements.
Option C – amend unconscionable conduct provisions to broaden matters SAT can consider and ensure the provisions operate prospectively to capture conduct that is likely to be unconscionable.	<ul style="list-style-type: none"> Avoids the uncertainty of having a new concept of fairness. Encourages the development of a broader interpretation of unconscionable conduct. 	<ul style="list-style-type: none"> May not alter courts/SAT’s understanding of ‘unconscionable’ and may not address unfair trading practices Making protections prospective adds a further element of uncertainty.

Whichever option is preferred, developments in respect of the equivalent provisions in the ACL will need to be monitored, and consideration given to the impact of any inconsistency in the future.

Questions for consideration:

46. Which of the above options do you support? Please provide an explanation for your response and include examples and any potential costs or benefits.

10 DISPUTE RESOLUTION

The SAT has broad powers to consider and make decisions in relation to a 'question arising under a lease'.¹⁴⁶ The Small Business Commissioner has a role under the CT Act to assist the parties to resolve a matter and provide alternative dispute resolution services.¹⁴⁷

The current dispute resolution process under the CT Act requires that, except in certain prescribed circumstances,¹⁴⁸ before an application can be made to the SAT, the parties should attempt to resolve the matter via the Small Business Commissioner processes. In order to make an application to the SAT the Small Business Commissioner must have issued a certificate in respect of the matter.¹⁴⁹

The Small Business Commissioner can only issue the certificate to a person if the Commissioner is satisfied:

- the matter is unlikely to be resolved with the assistance of alternative dispute resolution; or
- it would not be reasonable in the circumstances to commence an alternative dispute resolution proceeding in respect of the matter; or
- alternative dispute resolution has failed to resolve the matter.¹⁵⁰

From 2019 to December 2021, the Small Business Commissioner has issued a total of 64 certificates under the CT Act, with an average of 16 certificates being issued per year.

Data obtained from the SAT indicates that in 2021, a total of 1326 applications were made to the SAT under the CT Act. Of these, the majority (1309 applications) were applications to waive the statutory option to a five year term under section 13(7) and applications by landlords under section 14A(3) to include a relocation clause in a lease. There were only 17 applications made to the SAT under the other sections of the CT Act.

Applications under sections 13(7) and 14A(3) are determined on the documents without a hearing and therefore attract a smaller fee (\$137 in 2021). These applications are also dealt with expeditiously with the average time taken to finalise these matters being five days. The application fees for other sections of the CT Act attract a higher fee (\$614 in 2021) plus an additional hearing fee if required. The time taken to finalise applications under other sections of the CT Act is also considerably longer, with matters being finalised in an average of 128 days in 2021.

¹⁴⁶ CT Act section.16; see section 3(2) for definition of question arising under a retail shop lease'.

¹⁴⁷ CT Act section.25A.

¹⁴⁸ CT Act section. 25D(2).

¹⁴⁹ CT Act section. 25D(1).

¹⁵⁰ CT Act section. 25C(1).

It should be noted that a dispute resolution mechanism was also established under the *Commercial Tenancies (COVID-19) Response Act 2020 (WA)* (CTCR Act), for dealing with disputes that arose under that legislation during the ‘emergency period’ (which ended on 28 March 2021). The dispute resolution process under the CTCR Act is separate to the process under the CT Act and this review does not consider the dispute resolution mechanisms established under the CTCR Act.

10.1 MATTERS EXEMPT FROM ALTERNATIVE DISPUTE RESOLUTION

Some matters prescribed in the CT Regulations do not require a certificate from the Small Business Commissioner and therefore may proceed directly to the SAT for determination. These matters are:

Section of Act	Description of matters that may proceed directly to the SAT
11(3C)(b)	Application for an order that a landlord comply with a request for relevant information to assist in determining the rent payable as a result of market rent review, made under section 11(3B) of the Act.
12(1)(b)	Application for approval for proportion of operating expenses of a landlord payable by a tenant under a retail shop lease to be greater than the relevant proportion.
12(1e)	Application for approval for contribution towards the operating expenses of a landlord payable by a tenant under a retail shop lease to exceed the amount calculated under section 12(1e)(b) of the Act.
12A(3)(e)(ii)	Submission of a scheme of repayment for SAT approval under section 12A(4) of the Act in relation to the sinking fund for repairs/maintenance if retail shopping centre is destroyed, demolished or ceases to operate.
12B(3)(e)(ii)	Submission of a scheme of repayment for SAT approval under section 12B(4) of the Act in relation to the marketing fund if retail shopping centre is destroyed, demolished or ceases to operate.
13(3)(a)	Application for approval for variation of the period during which an option to renew a lease is exercisable.
13(7)	Application to approve of the inclusion in a retail shop lease of a provision under which a landlord may determine the lease at a time that is before the day set out in section 13(6)(aa) or (ab) of the Act, as is relevant.
13(7b)	Application for an order that an option of renewal in relation to the entitlement to a 5 year lease term does not arise under section 13(1) of the Act.
13A(3)	Application to determine that there are bona fide commercial reasons for an inconsistency referred to in section 13A(1)(a) of the Act.
14A(3)	Application for the approval of the inclusion in a retail shop lease of a provision about the relocation of a tenant’s business to be in a form other than a form prescribed for the purposes of section 14A of the Act.

Section of Act	Description of matters that may proceed directly to the SAT
15F(6)	Application for an interim order pending final determination of an unconscionable conduct application under section 15F(1) of the Act.
16D(6)	Application for an interim order pending final determination of a misleading or deceptive conduct application under section 16D(1) of the Act.
16(1)	Referral of a question between the parties to a lease which a party believes to be a question arising under the lease, but only if urgent relief in the form of an order for a party to the lease to do, or refrain from doing, something is sought in conjunction with the referral.
27(3)(b)	Application for a matter before the Tribunal to be transferred to a court.

Issue

The issue for consideration is whether the CT Act should be amended to include or remove matters of dispute that may proceed directly to the SAT without prior alternative dispute resolution.

Objective

To ensure the dispute resolution mechanisms within the CT Act are efficient, effective and user friendly.

Discussion

Recent amendments to the *Strata Titles Act 1985 (WA)* (ST Act) may result in parties to a retail shop lease now having a reason to appear before the SAT under that legislation. For example, where it is proposed to terminate a strata title scheme, a strata company must give any occupiers of lots or common property (which includes small business tenants) a copy of the full termination proposal.¹⁵¹ Further, if the proposal to terminate the scheme requires a decision of the SAT to proceed, any person who is required to be served this notice is entitled to appear before and be heard by or make written submissions to the SAT.¹⁵²

Because such an application would be made under the ST Act rather than the CT Act, it is arguable that a landlord or a tenant could apply directly to the SAT without first obtaining a certificate from the Small Business Commissioner.

For the sake of certainty, it is proposed to amend the CT Regulations to prescribe matters arising under the ST Act as matters not requiring a certificate from the Small Business Commissioner.

¹⁵¹ *Strata Titles Act 1985 (WA)* section 178(4).

¹⁵² *Strata Titles Act 1985 (WA)* section 183(7).

Questions for consideration:

47. Does the current list prescribed in regulation 10 of the CT Regulations require amendment? If so, what matters should be included or removed from the list? Please provide reasons for your position.

48. Do you support including matters arising under the Strata Titles Act to the list of matters that do not require a certificate from the Small Business Commissioner and therefore may proceed directly to the SAT for determination?

10.2 STATE ADMINISTRATIVE TRIBUNAL

Following amendments to the CT Act in 2013, the SAT now has broad jurisdiction to consider and determine any 'question arising under the lease'.

Section 3(3) of the CT Act provides that a 'question arising under a lease' includes a question arising in relation to the following:

- whether or not a lease existed or exists;
- whether or not a lease is or was a retail shop lease;
- any communication, including by way of a disclosure statement prior to entering into the lease;
- a retail shop lease under a provision of the CT Act;
- operating expenses including the proportionate allocation of those expenses; and
- any other matter in dispute between the parties in connection with the retail shop lease, whether or not the matter is dealt with by the provisions of the retail shop lease.

The SAT also has extensive powers to make orders to resolve disputes, including the power to:

- order a party to pay money to a person;
- order a party to do, or refrain from doing anything within a specified timeframe,
- dismiss any matter before it;
- order the parties to enter into an agreement varying a retail shop lease if the SAT determines the tenant was misled by the landlord as to the meaning or effect of a term or condition of the lease;
- terminate a retail shop lease; or

- allow any equitable claim or defence or give equitable relief (e.g. an injunction or specific performance).

It should be noted that the SAT process including the timeframe for proceedings and application fees etc. is outlined in the *State Administrative Tribunal Act 2004 (WA)* and is not subject to the review of the CT Act.

Issue

The issue for consideration is whether the SAT powers are appropriate and working as intended?

Objective

To ensure the SAT powers are appropriate and working as intended.

Discussion

This review provides an opportunity to seek feedback from stakeholders on how the dispute resolution system under the CT Act is operating and to identify if there are any outstanding issues with the jurisdiction and powers of the SAT.

For example, one tenant advocate has suggested the SAT should have jurisdiction to hear matters involving a retail shop lease that include other land related legislation such as the *Property Law Act 1969 (WA)* or the *Transfer of Land Act 1893 (WA)*.

Questions for consideration:

49. Are there any gaps or issues with the SAT's jurisdiction and powers under the CT Act? If so, please provide details and examples.

11 IMPACT OF COVID-19 AND OTHER ISSUES

COVID-19 has and will continue to have a significant impact on the retail tenancy market and retail leases in Western Australia.

The pandemic has exacerbated some of the risks and challenges that landlords and tenants already experience in relation to, information transparency, lease duration, termination rights, dispute resolution and lease costs. These issues have been discussed in the various chapters in this paper.

However, COVID-19 may have created new issues and challenges for the retail sector as lease agreements and consumer behaviour continue to evolve in response to the pandemic.

It is acknowledged that there may also be other issues not identified in this paper and not relating to COVID-19 that may have arisen since the last review of the CT Act.

Issue

The focus of this chapter is to invite stakeholders to identify any new issues arising as a result of COVID-19 that may require consideration as part of this statutory review of the CT Act or any additional issues relating to the operation of the CT Act that have not been included in this paper.

Objective

To ensure the CT Act is operating effectively and as intended.

Discussion

Covid-19 related issues

The impacts of COVID-19 continue to be felt by many businesses, particularly in locations such as the Perth central business district. These impacts are likely to be ongoing as a result of changes in lease arrangements and community behaviour, including greater access to working from home arrangements.

Some businesses have experienced a high level of loss in turnover, often exacerbated by lockdowns or restrictions on capacity (for example, hospitality venues), whereas other businesses are experiencing an ongoing consistent decline in trade with a lower level of loss in turnover.

While many landlords provided rent relief to eligible tenants under the former *Commercial Tenancies (COVID-19 Response) Act 2020 (WA)*, this relief is no longer available and many tenants are now also paying deferred rent.

The financial strain these small businesses are experiencing is having a detrimental impact on many tenants and landlords.

Some tenant stakeholders are suggesting that further assistance is required to enable small businesses to continue to trade and meet their lease obligations. In particular, it is suggested that the following issues need to be addressed:

- How to protect tenants from accruing crippling debt or losing their homes as a result of circumstances beyond their control (see discussion in Chapter 7).
- How to minimise the financial losses caused by COVID-19 – are cost sharing arrangements appropriate?
- How to achieve fair rental prices in a post COVID-19 market – it is suggested that many leases entered into prior to 2020 with rents set at pre-Covid-19 levels, no longer represent the market rent for the premises.

Other stakeholders have cautioned that while further measures may be required to address the impact of COVID-19 on small businesses, the CT Act is not the appropriate legislation for doing this. It has been suggested that to make amendments to the CT Act to address the impact of a one-off crisis such as COVID-19 could be beyond the scope and intent of the legislation.

Other issues

In addition to COVID-19 matters, there may be other issues relating to the operation of the CT Act, changes in the market place or developments in other jurisdictions or legislation that have arisen since the last statutory review of the CT Act.

As with all the issues discussed in this paper, any additional issues that are identified as part of this review process will be subject to a cost-benefit analysis and to further consultation if required.

Questions for consideration:

*50. Are there any issues resulting from the COVID-19 pandemic that aren't dealt with by the CT Act and that you think should be covered by the CT Act?
Please identify these issues and provide examples.*

*51. Are there any other general issues that are not identified in this paper relating to the operation or effectiveness of the CT Act?
Please identify any additional issues and provide examples.*

APPENDIX A – SUMMARY OF CT ACT

The following is a summary of the main provisions of the CT Act.

Section	Provision
6	Disclosure statement to be provided to the tenant at least 7 days before entering into lease.
6A	Tenant guide to be incorporated in lease (and provided with disclosure statement).
7	Rent based on turnover: <ul style="list-style-type: none"> • tenant to elect that rent to be determined by reference to turnover (in the prescribed form), includes mechanism for provision to become void if objected to by the tenant; • outlines requirements about turnover rent provision in lease; and • sets out the matters that are excluded from calculation of turnover.
8	A term or condition in a lease requiring that the tenant provides turnover figures is void unless the rent is determined by reference to turnover.
9	A term or condition in a lease for payment of key money or goodwill is void.
10	Tenant to have a right to assign lease. Landlord can only withhold consent on reasonable grounds.
11	Rent reviews: <ul style="list-style-type: none"> • Rent review provision must only specify one method of review for each review date. • Market review – outlines what can be taken into account, timing and provides that a lease term that prevents a decrease in rent is void. • A term or condition precluding a tenant from voluntarily disclosing the amount of rent paid under the lease is void. • Sets out mechanisms for resolving disputes about rent reviews. • Provides that the landlord must provide a valuer with certain lease information for the purpose of carrying out a review of rent.
12	Operating expenses: <ul style="list-style-type: none"> • Lease must specify: <ul style="list-style-type: none"> - the items of operating expenses; - how amount determined and apportioned; and - how and when payable. • Operating expenses are generally limited to relevant proportion (based on the lettable area of the premises) and expenses that are referable to premises. • Outlines limits on operating expenses payable outside of standard trading hours – a tenant will only be required to contribute to those expenses of the shop when it is open. • Includes requirements for the landlord to provide an operating expenses statement and audit report. • Provides that land tax is limited to single ownership basis. • No capital expenses or management fees can be passed on to tenants.
12A	Sinking fund for repairs and maintenance – sets out specific accounting and auditing requirements.
12B	Marketing fund – sets out specific accounting and auditing requirements.
12C	Opening hours – a term or condition in a lease requiring the tenant to open for specified hours or times is void.

Section	Provision
12D	A term or condition in a lease preventing tenants from forming a tenants' association is void.
13	The right to a five year term – if a tenant has been in possession of the premises for six months, a statutory option to renew the lease for a period up to five years applies.
13B	If there is no option to renew the lease at the end of the current term, the tenant may request a statement of intention from the landlord. If the landlord fails to respond, the lease term can be extended in some circumstances.
13C	Requires the landlord to notify the tenant of the expiry date for options to renew.
14	For leases in a shopping centre, the lease is deemed to provide for compensation to tenants for disruption arising as a result of the landlord's action or inaction.
14A	A relocation clause must be in certain form (either the prescribed clause, a clause approved by SAT or if five years of the lease term have already expired, the clause must contain certain requirements).
14B	Landlord's legal costs for preparation of lease not payable by tenant.
14C	Refurbishment and refitting provisions void unless includes sufficient detail.
15	Provision in lease excluding Act is void.
15C	Landlord not to engage in unconscionable conduct.
15D	Tenant not to engage in unconscionable conduct.
16C	Parties not to engage in misleading or deceptive conduct.
16	Parties to a lease may refer a question to the SAT.
25A-D	Provisions relating to resolution of disputes by the Small Business Commissioner – provides for an alternative dispute resolution and mediation process.

Government of Western Australia

Department of Mines, Industry Regulation and Safety

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