A Review of the

*Retail and Commercial Leases Act 1995 (SA)*

Conducted for the
South Australian Small Business Commissioner
by Mr Alan Moss, a retired Judge of the District Court of South Australia

Dated the 14th day of April 2016
Introduction

1. In October 2014, the Minister for Small Business the Honourable Tom Koutsantonis MP, requested me, Mr Alan Moss, a retired Judge of the District Court, to review certain pieces of legislation for which the Small Business Commissioner (SBC) is responsible. One of those pieces of legislation is the Retail and Commercial Leases Act 1995 (SA) ("the Act"). Although the Act and the Regulations made pursuant to it have now been in operation for 20 years and although the Act and Regulations have been extensively amended in their time, no formal review of the Act and assessment of the effectiveness of its provisions has ever been undertaken.

2. The Act is properly characterised as consumer protection legislation, the primary purpose of which is to protect the position of lessees of retail shop premises, paying rents below a specified threshold. The Act amended the Landlord and Tenant Act 1936 (SA) and in doing so, continued and extended protection to lessees. The Act operates to render void provisions of leases that are contrary to provisions of the Act.

3. While there are many good tenants and many good and fair landlords, there is always the potential for strain in a lease agreement and obviously, the interests of the lessor and the lessee will not always be aligned. For many small business operators the rent on their retail premises is their single biggest financial out-going and the affordability and fair operation of their lease will be critical to the success, or failure, of their business. There will also often be a significant imbalance in commercial power between the lessee and the lessor which can sometimes put the lessee at a significant disadvantage.
4. The SBC is of the view that small business is of vital importance to South Australia’s ("the State’s") economy and is a major provider of employment. The SBC is also sensitive to the fact that the property industry is also a major contributor to the State’s economy and invests large amounts of money in providing and developing retail premises. It was the intention of Parliament, back in 1995, to strike a reasonable balance between these sometimes competing interests.

5. The SBC is responsible for the administration of the Act and the Act provides a procedure for the resolution of disputes between parties to a retail shop lease. Either party, or former party, may apply to the SBC for mediation of the dispute.

6. The purpose of this review was to consult with both sides of the industry and to assess how well, or otherwise, the provisions of the Act are working and to suggest amendments which might be made to increase the Act’s effectiveness.

**The Review and the Review process**

7. The review was commenced by the SBC publishing an issues paper in December 2014, which called for submissions on topics raised in that issues paper and on any other matters relating the Act. Advertisements announcing the review were placed in The Advertiser on 20 December 2014 and 10 January 2015. The formal closing date for submissions was Friday 13 February 2015. Given the intervening Christmas holiday period, that closing date was far too optimistic and I received numerous requests for extensions of time. I decided to be very flexible about this on the basis that it was best to let everyone who wanted to voice an opinion do so and in fact, I was still receiving
submissions as late as April, 2015. I had hoped to complete the review well before the end of 2015, but a number of issues made that impossible. I have continued to receive further helpful submissions which have merited consideration and I have had a number of discussions with the SBC and his former deputy, Associate Professor Frank Zumbo. I have also had to take into account the expected effects of the Commonwealth’s unfair contracts legislation which will come into force in late 2016 (see Commonwealth Act No. 147, 2015). The Australian Competition and Consumer Commission has already indicated that commercial leasing will be one of the areas it will be focusing on under the new legislation. I hope the delay in completing the review has not caused undue inconvenience to anybody, but I think the extra time taken to complete it has been worthwhile.

8. In response to the issues paper, the SBC received 36 written submissions from the following persons, business and organisations:-

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<th>No.</th>
<th>Name of Organisation</th>
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<tr>
<td>1</td>
<td>William Close Pty Ltd</td>
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<td>2</td>
<td>City of Onkaparinga</td>
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<td>3</td>
<td>O’Brien Solicitors</td>
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<td>4</td>
<td>Michael Immarrone</td>
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<td>5</td>
<td>Sandra Brown</td>
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<td>District Council of Grant</td>
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<td>Leasing Information Services</td>
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<td>Business SA</td>
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<td>Betty Kokkinos</td>
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<td>The Lease Bureau</td>
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<td>Restaurant &amp; Catering Industry Association</td>
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<td>12</td>
<td>Australian Retailers Association</td>
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<td>14</td>
<td>Shopping Centre Council of Australia</td>
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<td>15</td>
<td>National Retailer Association</td>
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<td>South Australian Independent Retailers</td>
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<td>17</td>
<td>The Pharmacy Guild of Australia</td>
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<td>18</td>
<td>Australian Institute of Conveyancers (SA Division)</td>
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<td>19</td>
<td>Motor Trade Association of South Australia</td>
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<td>20</td>
<td>Scentre Group</td>
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A Review of the Retail and Commercial Leases Act 1995 (SA)
21 Novion Property Group
22 Jewellers Association of Australia
23 Property Council of Australia (SA Division)
24 Wallmans Lawyers
25 Deluxe Pty Ltd
26 Robert Moroni
27 Law Society of South Australia
28 Real Estate Institute of South Australia
29 EB Games
30 Diakou Nominees Pty Ltd
31 Massimo Sassi
32 Maurice Corcoran - South Australian Community Visitor Scheme
33 Pathology Australia
34 Australian Sporting Goods Association Inc.

9. I also had meetings with the SBC and the following persons:

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<tr>
<th>Date</th>
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<tr>
<td>22/01/15</td>
<td>Bill Close</td>
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<td>22/01/15</td>
<td>Angas Nardi, Ruth Newfield</td>
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<td>22/01/15</td>
<td>Michael Iammarrone</td>
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<td>10/02/15</td>
<td>Robert Harding</td>
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<td>10/02/15</td>
<td>Daniel Gannon, Sally Burridge, Michael Liebich</td>
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<tr>
<td>18/02/15</td>
<td>Brad Thorp</td>
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<td>18/03/15</td>
<td>Hester Daalder, Julie Chambers, Susan Muggleton</td>
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<td>14/05/15</td>
<td>Phillip Chapman</td>
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<td>30/06/15</td>
<td>Stephen Hodder, David Hopkins, Giles Kahl</td>
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<td>30/06/15</td>
<td>Simon Fonteyn</td>
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10. While I heard many different opinions about many aspects of the Act I found all the submissions and meetings helpful and informative and I greatly appreciate the time and effort that people put in to presenting their opinions. As I have mentioned, I was also aided by the helpful and experienced views of the SBC and Associate Professor Zumbo, however, the views I have reached and the recommendations I have made are entirely my own.
The Structure of the Act

11. As I have already noted the Act is primarily a piece of consumer protection legislation. Sections 4 and 5 make this plain. Section 4(2)(a) provides that the Act applies to leases, which do not exceed $250,000 per annum (amended by Regulation effective from 4th April, 2011, to $400,000 per annum), so the Act is essentially aimed at smaller tenancies. The Section also provides that the Act does not apply to leases for less than one month, nor does it apply where the lessee is a powerful body, or corporation, well able to look after its own interests (Section 4(2)(c)). Section 5 provides that the Act operates despite the provisions of a lease and to the extent that a provision of a lease is inconsistent with the Act, then that provision is void.

12. The SBC is responsible for the Act and Section 9 gives him the following functions:

9—Commissioner's functions

The Commissioner has the following functions:

(a) investigating and researching matters affecting the interests of parties to retail shop leases; and
(b) publishing reports and information on subjects of interest to the parties to retail shop leases; and
(c) giving advice (to an appropriate extent) on the provisions of this Act and other subjects of interest to the parties to retail shop leases; and
(d) investigating suspected infringements of this Act and taking appropriate action to enforce this Act; and
(e) making reports to the Minister on questions referred to the Commissioner by the Minister and other questions of importance affecting the administration of this Act; and
(f) administering the Fund.
13. Part 3 of the Act provides safeguards for a prospective tenant, prior to the lease being entered into. A copy of the lease must be provided at negotiation stage and a comprehensive disclosure statement provided to the would-be lessee, prior to the lease being entered into, or renewed. Extra information must be provided if the shop is situated in a retail shopping centre. The disclosure statement must be in a form compliant with the regulations.

If a disclosure statement is not given, or is false or misleading, then the Magistrates Court may make orders necessary to rectify the situation, including avoiding the lease either wholly, or in part, and for the payment of compensation by the lessor.

Section 13 limits the circumstances in which a lease may require a lessee to make, or reimburse capital expenditure upon the premises.

Section 14 limits the lessee's liability for the costs of preparing the lease documentation and Section 15 essentially prohibits a lessor from seeking, or receiving a premium in connection with the granting of a lease.

Section 16 places the duty of registering a lease (if it is to be registered) upon the lessor, after stamp duty has been paid by the lessee.

Section 18 implies a condition in the lease that the premises are structurally suitable for carrying on the particular business to be run by the lessee, although this implied warranty may be excluded by the lessor giving notice in the prescribed form prior to the execution of the lease.
14. Part 4 of the Act deals with security bonds to be paid by the lessee and their ultimate repayment by the lessor. Section 19 provides that a security bond must not exceed 4 weeks rental under the lease and this is backed up by a criminal penalty. However, if after 2 years of the lease has run and the rental has increased, then the lessor may, by notice, require the lessee to increase the amount of the bond. All monies paid by way of such security must be paid to the SBC to be held in a fund. Section 20 provides that application may be made to the SBC for repayment of the bond monies at the end of the lease. Any disputes about repayment are, upon the formal notice of dispute being given to the SBC, to be referred to the Magistrates Court for determination.

15. Part 4A of the Act deals with terms of lease and renewal. Parliament obviously considered that this was an area of critical importance and set out specific objects to guide the operation of this part of the Act.

Section 20A reads:-

20A—Objects

(1) The Parliament recognises that conflicts sometimes arise between a lessor's expectation to be able to deal with leased premises subject only to the terms of the lease and a lessee's expectation of reasonable security of tenure.

(2) The objects of this Part are to achieve an appropriate balance between reasonable but conflicting expectations and to ensure as far as practicable fair dealing between lessor and lessee in relation to the renewal or extension of a retail shop lease.

16. Division 2 of Part 4A makes provision for initial terms of leases. In essence a retail shop lease must be for a minimum term of at least 5 years, including any right of renewal. Any lease which does not do this is not invalidated, but is legislatively
extended to a minimum 5 year period. There are certain exceptions for short term leases, or consensual holding over after expiration of the lease (6 months maximum in each case), or for leases that contain a certified exclusionary clause, or where the lessee has already been in possession of the premises for a least 5 years, or where the lease is a sub-lease and limited by the term of the head lease, or where otherwise excluded by regulation. While these exclusions may seem numerous they do not in fact substantially diminish the fundamental legislative proposition that a retail shop lease must be for a minimum term of 5 years.

17. Division 3 of Part 4A of the Act is dedicated to the renewal of shopping centre leases. While there are certain exclusionary provisions from compliance with this Division, namely primary short term leases, or certified exclusionary clauses, the Division operates to give preference to existing lessees of premises within a shopping centre over other possible lessees of the premises.

Section 20D(3) limits the right of preference and provides:-

20D—Preference to be accorded to existing lessee

(1) If a lessor of premises in a retail shopping centre proposes to re-let the premises, and an existing lessee wants a renewal or extension of the term, the lessor must give preference to the existing lessee over other possible lessees of the premises.

(2) The lessor is to presume that the existing lessee wants a renewal or extension of the term unless the lessee has notified the lessor in writing within 12 months before the end of the term that the lessee does not want a renewal or extension.

(3) However, the lessor is not obliged to prefer an existing lessee if—

(a) the lessor reasonably wants to change the tenancy mix in the retail shopping centre; or

(b) the existing lessee has been guilty of a substantial breach or persistent breaches of the lease; or
(c) the lessor requires vacant possession of the premises for the purposes of demolition or substantial repairs or renovation; or

(d) the lessor—

(i) does not propose to re-let the premises within a period (the relevant period) of at least 6 months from the end of the term; and

(ii) requires vacant possession of the premises for the lessor's own purposes during the relevant period (but not for the purpose of carrying on a business of the same kind as the business carried on by the lessee); or

(e) the renewal or extension of the lease would substantially disadvantage the lessor; or

(f) the lessee's right of preference is, in the circumstances of the case, excluded by regulation.

The Act then sets up a scheme for the implemental of preferential rights (Section 20D), or denial of those rights (Section 20F). A lessor who does not negotiate is effectively forced into negotiation by the automatic extension of the lease (Section 20G). Where a lessor fails to comply with the rules under Division 3, the lessee may apply to the SBC for mediation. If the matter is not resolved then the SBC must refer the matter to the Magistrates Court upon the application of either party.

18. Division 4 of Part 4A of the Act deals with renewal of leases, other than shopping centre leases. There is little change here from the established law and practice of centuries of common law. The lessor must give the lessee at least 6 months’ notice, prior to the expiration of the lease that the lessor is prepared to renew the lease upon certain terms and conditions, or alternately does not propose to offer a renewal. If such notice is not given then the lease is automatically legislatively extended.

Section 20 is important. It re-iterates the fundamental proposition that a tenant’s rights under the Act cannot be modified by contract, however, some statutory right of tenure may be excluded by a “certified exclusionary clause”, whereby a lessee may opt for a diminution of rights under the lease, but only after a lawyer who is not acting for the lessor has explained the effect of the particular provision to the lessee and the lessee has given credible assurances that he, or she, is not acting under coercion, or under undue influence and the lawyer has endorsed a certificate on the lease to that effect.

Division 5 also prohibits the requirement to pay a premium for renewal or extension of a retail shop lease and the making of threats to dissuade a tenant from seeking renewal is a criminal offence.

20. Part 5 of the Act deals with issues of rental and out-goings. Section 21 defines a lessee’s rights in relation to rental and occupation where, at the commencement of the lease, the lessor has not completed fit-out obligations under the lease. Section 22 places restrictions on the adjustment of base rent. Essentially a lease must not provide for an increase in base-rental, except at the end of each 12 monthly period of the term of the lease. This is primarily aimed at rental increases based upon current market rental. It is not aimed at leases in which the rental is increased by regular fixed amounts, or percentages. The Act is seeking certainty for lessees and Sub-Section 22(3) prohibits leases which essentially give a landlord discretion, or unfair advantage in setting, or choosing the basis for adjustment of rental and Sections 23 and 35 provide rules and guidelines for the determination of current and market rental. Section 36 offers an opportunity for a lessee to have the current market rental determined in advance of an exercise of an option to extend, or renew, the lease.
21. Section 24 similarly sets rules and guidelines for the assessment of rental based upon the turnover of the lessee’s business. Although such rental amounts will necessarily vary, the Act seeks as much certainty as is possible for the lessee by seeking to ensure that only transactions which are the core part of the lessee’s business are included as turnover and does not include administrative transactions which are not truly part of fees or sales.

22. Sections 26 to 34 inclusive make provision for the recovery by the lessor from the lessee of outgoings incurred by the lessor in respect of the leased premises. The Act recognises that it will be fair and reasonable for the lessor to recover certain outgoings, but seeks to ensure that the outgoings are genuine and that monies recovered from the lessee are actually used for the specified purpose for which they were collected. The Act seeks to achieve this by transparency and leases are taken to include provision for estimates of outgoings to be provided to the lessee, who can demand explanations of expenditure (Section 31) and for provision by the lessor of auditor’s reports upon outgoings (Section 32).

Section 33 provides that, at the end of each accounting period, there is to be an adjustment of outgoings based on actual expenditure, reasonably incurred.

23. All of the provisions in Part 5 are legislatively deemed, or implied, to be in the lease.

24. Part 6 of the Act deals with alterations to, demolition of, or damage to the retail shop premises.
Sections 37 and 38 provide for notice to be given to the lessee of the proposed alterations and the lease is taken to provide for the lessee to be compensated where the alteration works have a significant adverse effect on the lessee’s business. Where the lease provides for the termination of the lease upon the grounds of proposed demolition of the premises then the lease cannot be terminated until the lessor provides the lessee with a credible demolition proposal and gives the lessee 6 months’ notice. If the demolition does not go ahead within a reasonable time, then the lessee may be entitled to compensation.

Section 40 provides that a lessee’s rental obligation may be reduced if the premises are damaged to the extent that their useability is diminished. If the premises are rendered wholly unusable then either party may terminate the lease without compensation.

25. Part 7 of the Act makes provision for assignment and termination of leases. Essentially a lessor may not withhold consent to assignment of a lease except in the limited circumstances set out in Section 43, which includes changes of use to which the shop is to be put, or the unsuitability of the proposed assignee. The demand for, or acceptance of, a premium to consent to an assignment of a lease is illegal and Sections 45 and 45A set out the procedure for obtaining consent to assignment of a lease and formulate the lessee’s liability following assignment of the lease. Section 46 permits provision in a lease of a lessor’s right to refuse to allow a lessee to sub-let the shop, or any part of it, or to mortgage the lessee’s rights under the lease.
26. Part 8 of the Act provides for additional requirements for retail shopping centres. It is unnecessary to canvass these provisions in detail.

They cover such matters as:-

- Confidentiality of turnover information.
- Lessee’s requirement to contribute to centre advertising and promotion.
- Re-location within the shopping centre.
- Prohibition of termination for inadequate sales.
- Trading hours.
- Casual mall licensing (as per Schedule to the Act).

27. Part 9 of the Act provides for dispute resolution. The SBC is responsible for making arrangements to facilitate the resolution of disputes in respect of retail shop leases. Either party may apply to the SBC for mediation, or a matter may be referred for mediation to the SBC, by a court. The SBC may intervene in court proceedings concerning a retail shop lease and thereby becomes a party to the proceedings. In court proceedings the Magistrates Court has jurisdiction over retail shop lease disputes up to $100,000. The Magistrates Court must refer larger disputes to the District Court if requested to do so by either party.

28. The balance of the Act deals with miscellaneous matters including the establishment of the Retail Leases Fund, managed by the SBC and into which security bonds are paid and managed.

Section 73 establishes the Retail Shop Leases Advisory Committee which keeps the administration of the Act under review and reports to the Minister.
29. This overview of the structure of the Act is not intended to be academic, or legally precise. Its purpose is to demonstrate the breadth of the Act and to highlight its consumer protectionist nature. Its methodology is to imply provisions into leases which protect and delineate the rights of lessees. Parliament clearly thought that there was a substantial imbalance of power in the Lessor/Lessee relationship and that the lease agreements in use at the time of the passing of the Act were unfair, or inadequately drafted, or both. The act basically implies numerous provisions into lease agreements which should have been there in the first place in a fair and reasonable modern transaction.

**Issues arising out of the review process**

30. It is fair to say that the submissions did not disclose any desire for wholesale reform or adjustment to the Act. Rather, the general tenor of the submissions was that the Act is well understood in the industry and works satisfactorily. There were of course many suggestions for amendment to the Act, but these tended to be more about refinements and improvements intended to make the Act work better and to clear up areas of opaqueness, or ambiguity.

31. The following is a list of the primary areas of concern and need for improvement:

(a) Application of the Act
   - Should the monetary threshold (currently $400,000) be maintained, or increased, or should the threshold be determined by lettable area (e.g. 1,000 sq metres)?
• Can a lease come in and out of the Act during the term of the lease as rent increases, or the regulated monetary threshold increases. Is this desirable?
• Should the monetary threshold be inclusive, or exclusive of GST?
• Should the Act only apply to genuine small business and not to large businesses which rent many little shops?
• Should government and/or local government be exempt from the Act?
• The notion of “public company” needs to be clarified.

(b) Registration or Transparency

• Should registration of leases be compulsory?
• Lessees must be able to gauge the market.
• Should leases disclose all incentives?
• Shopping centre tenants need to know when the anchor lease (e.g. Coles) expires.

(c) Beginning of Lease

• Should the draft lease document and disclosure statement be provided at commencement of negotiations?
• Should failure to provide draft lease and disclosure statements render the lease voidable? Should Section 6 of the Act remain?
• Should false or misleading disclosure statements render the lease voidable?
• Should independent condition reports (including photographs) be compulsory before the lease is entered into? If so, who should pay the costs?

• Is the implied warranty of fitness for purpose (Section 18) sufficient? Should it be retained?

• Should the Act require a prescribed pro-forma lease, as a minimum standard?

• Should land tax be fully recoverable?

• Who should bear the costs of lease preparation?

• All bank guarantees, as well as bonds should be held by the SBC.

• Bonds or guarantees should not exceed 3 months rental (inclusive or exclusive of GST).

(d) Five year minimum term and exclusionary clauses

• Should the 5 year term be abolished?

• Should the SBC be able to certify exclusion clauses. Should professionals, other than lawyers, be able to certify exclusion clauses?

• Should there be legislative provision for orderly exit from a lease when a business is failing?

(e) During Lease

• Are the provisions for damage, or demolition adequate?
- Should rights to assign, mortgage, or sub-let be included in the lease, if not, should these rights be legislatively implied?
- The SBC should have power to mediate, or determine, refusal to assign, sub-let or mortgage a lease.
- Is the liability of a lessee after assignment sufficiently clear (Section 45A)?
- "Capital expenditure" needs to be clarified.

(f) End of Lease and Right of Renewal

- Does the Act sufficiently spell out a lessee's obligations upon termination of lease?
- The term "make good" is unclear.
- Should all shops have the same rights of renewal as supermarket shops?
- Should independent condition reports (including photographs) be compulsory upon termination?
- Are the provisions for termination for non-payment of rent under the Landlord and Tenant Act 1936 fair and reasonable. Should the Act contain specific provisions for this?
- Requirements to re-paint and re-carpet should be clarified.

(g) Mediation and Dispute Resolution

- Should the SBC be able to mediate disputes of any amount, or should this be limited to a certain monetary amount?
• Should the SBC have power to resolve disputes? If so, should this be limited to a certain monetary amount?

• Should the jurisdiction of the Magistrates Court be increased?

• The SBC should have power to appoint independent valuers for the purpose of mediation, or resolution of disputes. Who should pay the costs?

(h) National Harmonisation

• Is it necessary, or desirable, and how it can be achieved?

Discussion

Threshold

32. There is a clear choice to be made as to whether the threshold for the application of the Act be based upon the amount of the rental, or upon the lettable area. I have found it impossible to come up with an either/or scheme which works. That is not to say that one might not exist, it simply means that I have not been able to envisage it. The notion of the threshold being area based on lettable area has some attractions. The primary attraction is one of certainty. Leases of premises under a certain arbitrary size (e.g. 1,000 sq. m) would be caught by the Act and that would be that. There would be no question of the lease coming into the Act and out of the Act during a lengthy leasehold term and hence no question of changing liability for the payment of land tax and all the other implied consumer protection provisions within the Act. Generally
speaking, certainty in a long term legal relationship is to be preferred. However an area based threshold may cause more problems than it solves. Many genuinely small businesses may occupy large areas. Engineering shops, prefabricators, boat yards, auto dismantlers and agri-businesses, are to name but a few that can fall into this category. Similarly different types of premises in different locations will have very differing values. A small retail premises in the heart of the city may have a much higher rent than a large premises in an outer suburb.

The purpose of the Act is to protect small business and to seek to redress the imbalance in bargaining power that often exists between lessor and lessee. In market terms the ultimate test of the resources of a lessee is the amount the lessee is prepared to pay to rent the premises. The size of the premises will be only one factor amongst many when a lessee is considering whether the rental is value for money. Ultimately rental is the determining factor for small business.

I have also considered an “either/or” threshold. That is, that the Act would apply both to leases under a certain dollar threshold amount and to leases for a lettable area less than a prescribed lettable area.

The problem with this multiple test is that it has the potential to extend the application of the Act to businesses, which are not small businesses. There are undoubtedly very profitable companies, with huge turnover, which are capable of comfortably operating in a small space. An obvious example of such businesses are some of those that operate in the world of information technology. Such operations might choose, for reasons of business or convenience, to rent premises in the CBD which although
small, command a rental many times the threshold amount. Stockbrokers, groups of medical, or other high earning professionals might also fall into this category. These businesses do not require the protection of the Act and it would seem unfair to landlords that the Act should apply in those situations.

The Act could be amended to provide that if a lease began under the Act then it should remain under the Act and conversely if a lease began outside the Act, then it should remain outside the Act. However that also has its own built in unfairness. Each time the threshold is significantly increased by regulation, there is likely to be an increasing group of lessees who are paying rental under the threshold and who will not receive the protection of the Act, while other newer lessees, paying similar rental will be protected by the Act.

In my opinion the question is best answered by accepting that leases may come in and out of the Act as rents increase, or when the threshold is increased. I understand that Courts in Victoria have held that their similar Act can come in and out of application during the term of a lease. The problem is greatly alleviated if the threshold is regularly raised by modest amounts that reflect market increases. A duty could be given to the SBC to monitor the market place and to recommend increases to the threshold every 2 years.

*Should the monetary threshold be inclusive or exclusive of GST?*

33. There was little support in the submissions for the monetary threshold being inclusive of GST. The Act came into effect prior to GST being introduced and there would
seem to be no reason to effectively lower the rent threshold for leases to which the Act applies. This would have the effect that fewer small businesses would be covered by the Act. Nor do all landlords have an income which makes them liable to pay GST. The submissions inform me that it is the commercial practice that the threshold is considered to be exclusive of GST. It is my opinion that the Act should clear up any confusion on this topic and provide that the rental threshold is exclusive of GST.

Should the Act only apply to genuine small businesses and not to big businesses which rent a lot of small shops?

34. This is truly a conundrum.

There are certainly large nation-wide chains which rent hundreds of small shops. Very often they will be public companies in which case they are not small businesses within the meaning of the Act. Some, however, will be in private hands and their business models will vary. Often they will be franchise models and franchisees are often new to the business world and clearly need the protection of the Act. Sometimes the company structures will be broken into smaller companies operating as a group, or even quite autonomously under a group banner. Although it will be the case that some such businesses will actually have more market place power than landlords, any attempt at a formula to correct this imbalance would be enormously complex and still unlikely to catch every case. I think legislation should be a simple and straightforward as possible and ease for the parties to navigate.
I am of the opinion that the rule should be that a shop leased for an amount below the rental threshold should be considered a small business for the purpose of the Act.

*Should government and/or local government be caught by the Act?*

35. There is no doubt that the Act causes government and local government a lot of trouble and expense.

A few examples are:-

- Rental of rooms in a school, after hours by a chess club, for a monthly competition.
- Rental of specialist rooms in a hospital, where the specialist also has a right of private practice and consults with members of the public.
- Rental of pools and hydrotherapy services within the health system by a private physiotherapist, or swimming instructor.
- Lease of local government facilities for men’s sheds and other volunteer organisations. Sometimes the same premises will be used for a number of different small groups on various occasions in any month.
- The volunteer operation by sporting clubs of small shops at council owned sporting facilities.

On the face of it many of these modest and worthwhile activities are caught by the Act and the requirements upon government and local government to comply with disclosure statements and the other provisions of the Act are extremely
onerous and discourages them from providing these community friendly activities. The minimum 5 year term is also problematic in situations where government may wish to close a school, or relocate an institution, or where early termination may occur due to other legislation, (e.g. the *Crown Land Management Act 2009*).

The provisions of Section 41 of the Act restricting the lessor’s power to limit the employment of persons of the lessee’s own choosing also causes problems in areas where volunteers are required to have police checks before being permitted to work with children.

There are currently provisions under Section 77 of the Act for applications to be made to the Minister, or to the Magistrates Court, for exemption from the provisions of the Act. Both routes are cumbersome and expensive. The Act should be amended to allow by regulation a list of classes of leases and licences provided by government and local government which are excluded from the Act. Such a list should be agreed upon by the government and local government and the SBC when amendment of the Act is being considered. Care would need to be taken to exclude only those businesses which would be rendered unviable by the application of the Act. There is no reason why other small businesses renting from government, or local government, should be excluded from the Act.

The power of the Minister and the Magistrates Court should be revoked and discretion to exempt a lease, or licence, from the operation of the Act should rest with the SBC (with a possible appeal to SACAT).
The notion of public company needs to be clarified

36. Concern was raised in some submissions that the lack of a definition of public company in the Act causes confusion. Some people assume that “public company” means a company listed on the Australian Stock Exchange, whereas others take the view that “public company” has the same meaning as in the Corporations Act 2001 (Commonwealth Powers). Furthermore, the Act arguably applies to an Australian private company, which is a subsidiary of a large multi-national company, which would have far greater financial power than most Australian landlords.

It would seem sensible and in accord with consistency that the expression “public company” be defined to have the same meaning as in Section 9 of the Corporations Act 2001, which essentially provides that a public company is a company other than a proprietary company.

Compulsory registration of leases and ability to gauge the market

37. Strong views for and against compulsory registration of leases were expressed in the submissions. Those opposed to compulsory registration saw the requirement as being costly (particularly any survey requirement), unnecessary, an infringement of business confidentiality and yet more government red tape. Those in favour saw it as an essential step to give some transparency to what is, currently, an opaque market place, in which the landlords, particularly shopping centre owners, have all the market information while the prospective tenants have none. Although leases may be registered in all States, no State requires registration. I was, however, informed by
some of the submissions that registration is common in some other States, particularly in Queensland and New South Wales and the market in those States is fairer and more transparent as a result. Both sides of the argument have a point. Registration does have a cost, but it does make the market much more transparent. Markets usually operate best where there is a level of transparency and where people are able to gauge market value with a reasonable degree of accuracy. Business failures come at a considerable cost to the community in reducing trade, loss of jobs, costs of bankruptcy and loss of rent to lessors.

Many people who enter retail shop leases are new to the world of business, often using accumulated savings, or redundancy payments to commence in business. They are frankly ignorant of market rental values. While big landlords will have a very good knowledge, many smaller landlords will not have a good idea of the benchmark value of their premises and this may act to their detriment.

On balance its seems to me that there is more to be gained than lost by compulsory registration, provided the costs are kept to an absolute minimum.

In my opinion, a certified copy of a retail shop lease should be lodged for registration within 30 days of the lease being entered into. I cannot see any need for a survey. I understand that surveys will be important for leases for broad acreage, industrial sites and house properties, but the overwhelming majority of retail shop leases operate satisfactorily without a survey plan. A middle course could be that survey plans could be optional for the registration of retail shop leases. Provided the rental, the location and lettable area of the premises is disclosed, then it is up to prospective lessees and

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their agents to make use of this information to inform the market value of that particular type of premises. It would also assist prospective lessees of shops in large shopping centres to know when the lease of the anchor tenant expires.

If either party insists upon a survey being lodged upon registration, then the costs of the survey should be shared equally by the parties. Leases exempted from the Act, of the sort mentioned in paragraph 35 hereof, would also be exempt from registration.

There may need to be some amendment of the allied legislation (e.g. the Landlord and Tenant Act 1936 and the Real Property Act 1886) to enable compulsory registration to be effective without a survey.

If compulsory registration of leases is not favoured, it may still be desirable to encourage voluntary registration by revoking, or amending, any requirement to lodge a survey as a pre-condition to registration.

**Should all incentives be required to be disclosed in the lease document?**

38. Once again submissions were strongly opposed on this issue. It would obviously benefit prospective lessees in shopping centres if these facts were known and would decrease the power of landlords in negotiation. It is essentially a matter of subjective judgement. In my opinion it is a step too far. I think it is reasonable that landlords should be able to attract, or retain, particular tenants, without those incentives becoming public knowledge.
As soon as incentives become public then they lose the character of incentives and become the expected norm, greatly reducing the shopping centre owner’s ability to profitably manage the centre.

It is not the government’s role to manage the way in which lease negotiations are conducted. The government’s role should be limited to establishing a reasonably fair playing field upon which the market can operate and operate confidentially if it chooses to do so. Of course, if the incentive was simply reduced rental, then that would be disclosed if compulsory registration of leases was adopted.

*Should a draft lease document be provided with the disclosure statement at the commencement of negotiations?*

39. In spite of the misleading heading, Section 11 does not require the lessor to provide a copy of the lease at the stage of initial inquiry by a prospective lessee. The lessor must have a copy of the draft lease (without commercial terms) available for inspection by any person making an initial inquiry. It is only when negotiations begin in earnest that a copy of the lease must be “made available” to the prospective lessee.

I also do not consider it appropriate that the disclosure statement be provided at the start of negotiations. It will often be the case that the negotiations will determine many of the things in the disclosure statement. I also do not see why the disclosure statement should be acknowledged in writing by the prospective lessee. The duty should be upon the lessor to serve the statement upon the lessee and ensure that there is sufficient proof of that service. Written acknowledgement may be one of the ways
that proof is provided, but it is a matter for the lessor. I do not think that the non-signing of the disclosure statement by the lessor should mean that the statement is deemed not to have been provided. It is the signature of the lessee upon the statement that is important. I do not consider that it is necessary to provide a penalty for failure to provide a disclosure statement, nor do I think that such failure should render a lease automatically voidable. Section 12(5) already provides powerful relief for a tenant if a disclosure statement is not provided, or is misleading. I also do not think there should be a disclosure statement before renewal of a lease. A lessee has the right to have the rent determined in advance by Section 36. The notice by the lessee of intention to exercise the right of renewal of itself creates a new term. At present the landlord must therefore give a disclosure statement well before the expiration of the term of the lease and prior to the lessee giving notice of intention to exercise the right of renewal, or risk being in breach of Section 12(1). All the things required to be in the disclosure statement will already be known to the lessee as a result of the original tenancy. There would seem to be no need for a disclosure statement to be provided prior to the renewal of a lease.

I think that Section 12 should be amended to make it plain that:-

• The disclosure statement must be provided to the lessee before any binding agreement can be made.

• The disclosure statement should be signed by the lessor, or agent of the lessor and served upon the lessee.

• The disclosure statement should be signed by the lessee, or his or her agent.
There need not be a disclosure statement required before exercising a right of renewal.

Should independent condition reports (including photographs) be mandatory at the beginning and end of a lease? Is the implied warranty of fitness for purpose (Section 18) adequate?

40. A number of submissions suggested that conditions, reports and photographs of the premises at the beginning and end of the lease should be mandatory. That there should be some evidence of the condition of the premises is potentially of benefit to both parties. Independent reports are, however, likely to be quite expensive and in the large majority of cases unnecessary. There is nothing preventing a party obtaining such reports, but I do not think that the Act should require it. It simply adds an extra layer of expense upon what is always going to be quite an expensive procedure. Photographs are another matter. In the digital age they are cheap and easy and do not require a professional photographer. Again, however, I do not think that the Act should require either party to take, or provide, photographs. I would have thought that it is an obvious step for prudent parties to adopt and I do not think that it is a matter that needs to be legislated.

Warranty of Fitness for Purpose (Section 18)

41. It is suggested in the issues paper that if a lessee has been given the prescribed notice regarding the warranty of fitness for purpose then the lessor is not obliged to repair and maintain the premises.
True it is that the Act is otherwise silent on maintenance and repair, but most leases will, or ought to, impose an obligation upon the lessor to maintain and repair the fundamental structure of the premises. A lessee would be unwise to sign a lease that did not have such an obligation, unless the lessee had clearly considered the implications of that. It is not the case that a notice under Section 18 can render void such a condition in a lease. Notice under Section 18 merely excludes the specific statutory warranty. Receipt of such a notice should cause a prospective lessee to carefully consider the advisability of entering into the lease. I note that the SBC has a lot of enquiries in this area. It is obviously an area about which prospective tenants require education.

*Should the Act provide a pro-forma lease and who should bear the cost of lease preparation? Should the cost of lease preparation be capped?*

42. There is no doubt that lease preparation is expensive and the attraction of a pro-forma lease is obvious. I understand that the Law Society and other real estate industry bodies do have pro-forma leases available, however, a truly comprehensive pro-forma lease would be difficult, if not impossible, to prepare. Although most leases will have similar clauses there will inevitably be some peculiarities in every leasehold transaction and leases are really best prepared by lawyers, or conveyancers. In any event I do not think that it is the role of government to become involved in business transactions in this way. As well as that, having worked in government for most of my working life, I do not think government would do a very good job. A pro-forma lease designed by government would be as thick as a telephone directory. This is something best left to the private world. Section 14 provides that, except for government fees and
charges, the costs of preparing the lease should be shared equally between the parties and this seems abundantly fair. (Sections 14 and 16 should be amended as stamp duty is no longer payable on leases). I do not think that it is practical to cap lease preparation costs. Some leases will be short and simple, others long and complicated and in the end, it is up to the parties to decide upon the level of service and expertise required for the preparation of their lease.

The disclosure statement already warns that independent legal advice should be sought before entering into a lease.

**Should land tax be fully recoverable?**

43. The submissions disclosed that landlords think land tax should be fully recoverable, while tenants think it should not be. A hardly surprising result. The situation is quite clear and does not need changing. Parliament has made a policy decision that a lease covered by the Act cannot require a lessee to pay, or reimburse, land tax. (Section 30). If a lease is not covered by the Act then land tax may be recoverable, depending upon the terms of the lease.

If it were thought that the shifting liability to pay land tax as a lease comes in and out of the Act was undesirable, then Parliament could extend its policy decision to cover all leases so that land tax could not be recoverable under any lease and the Lessor would retain the right, which currently exists, to take land tax into account when determining the rental. The current provisions are seen as acceptable because they can be justified as being “friendly” to small business. That justification cannot be called in
aid of leases in general and would almost certainly be seen as an unwarranted governmental intrusion into the market place.

Security

44. Many submissions state that the 1 month’s rental contemplated by Section 19 is inadequate. I found force in the argument that the 1 month rental bond results in landlords acting too quickly to terminate the lease of a slow paying tenant. Most submissions favoured a security of 3 months’ rental, inclusive of GST when the lease provides that the tenant must pay GST. I think that is a more realistic security. Most complaints from tenants were about landlords being slow to return bank guarantees, thereby prejudicing their chances of financing any new venture.

I cannot see any reason why bank guarantees should be treated any differently from bonds and I am of the opinion that all bank guarantees for security of a lease under the Act should be held by the SBC. This will obviously have some resource implications for the Office of the Small Business Commissioner.

Five year minimum term and exclusionary clauses

45. Although some submissions considered that the minimum 5 year term was too long, one of the primary purposes of the Act is to provide security of tenure for the lessee. I consider that, as a baseline, the minimum 5 year term is the right length, given that that security of tenure may be excluded by a certified exclusionary clause, if the lessee seeks a shorter term.
One submission pointed to an ambiguity arising from the provisions of Section 20B(3)(b), which states that the 5 year minimum term does not apply if a tenant holds over for less than 6 months with the consent of the landlord. This would tend to imply that a new 5 year term will apply if the tenant holds over for longer than 6 months, whether the parties desire that, or not. There is no good reason why holding over should imply a new 5 year term. The subsection should be amended by deleting the words “with the consent of the lessor and the period of holding over does not exceed 6 months”. This will ensure that holding over does not imply a new term and will allow either party to terminate the hold over.

There were a lot of submissions about who should be able to certify exclusionary clauses under Section 20K. Most of these submissions were concerned about the cost to the prospective tenant of obtaining independent legal advice in accordance with Section 20K(3) and suggested that other professionals within the real estate industry should be able to give that advice, as should the SBC.

I am wary of extending the range of persons who can give this advice. Lawyers are the only group that will universally have the expertise, resources and necessary insurance to give this advice. I would however agree that the SBC should be able to give this advice for a modest fee. The SBC could arrange a scheme for providing this advice remotely for prospective tenants in regional areas.
Should there be legislative provision for an orderly exit from the lease when the business is failing?

46. It is an unfortunate fact of commercial life that many new businesses fail. I understand that more than 25% of new businesses fail within the first 3 years, well inside the minimum 5 year term. It is often the case that once a tenant falls behind in the rent that the landlord will move swiftly to terminate the lease, which will often exacerbate the tenant’s losses. Stock may have to be sold at rock bottom prices and staff may have to be paid compensation in lieu of notice of dismissal and other legal and insolvency costs will accrue.

I suggest that the Act provide a legislative path for an orderly exit from the lease where a tenant’s business is failing. The Act could be amended to allow a tenant to give 3 months notice of the fact that their business is failing and that they need to exit the lease. Precautions would need to be in place to ensure that an unscrupulous lessee did not use the process to exit the lease because a better lease opportunity had arisen elsewhere. The notice would need to be accompanied by a statement from an accountant certifying that the business has no reasonable prospect of becoming a viable, profitable business. Receipt of the notice would entitle the lessor to access the 3 months rental held by the SBC and give the lessor 3 months in which to find a replacement tenant.
Are the provisions for demolition and damage adequate?

47. The Act as it stands does not require a lessor to pay a lessee’s relocation or fit out costs in the event of a demolition clause in a lease being activated. Section 39 does however provide safeguards for a lessee, including a lengthy notice period and a provision preventing a lessor from pretending that the premises will be demolished as a ruse for getting rid of an undesired tenant. I think, however, that the disclosure statement should be expanded to draw attention to any provision in the lease relating to demolition.

The provisions relating to damage (Section 40) seem to me to be quite adequate. Problems may arise where the parties cannot agree about the extent and effect of the damage. Such a dispute should be referrable to the SBC for mediation, or determination.

Repairs and maintenance and capital expenditure

48. It is the case that the Act does not imply any liability on either party for repairs and maintenance, except that Section 38 requires a lessor to rectify any breakdown of plant and equipment under the lessor’s care and maintenance and in the case of a shopping centre must clean, maintain and repair the centre. Section 29 governs the operation of sinking funds, otherwise matters of repair and maintenance are a matter for the lease agreement. I do not think that there is any problem with this situation. These are purely business matters to be decided between the parties. A concern is raised in the issues paper that the Act does not require a minimum standard for the
condition of premises offered to let and that premises are often leased on an “as is” basis. I understand that this is often the case, but no one is forcing the tenant to rent sub-standard premises. The tenant would presumably take that into account when deciding what the rental should be.

The submissions also complained that lessors chose to try to repair worn out plant (a tax deduction) rather than replace it, (a capital expenditure, not deductible), with the result that the plant, usually air-conditioning, operates below par. It was suggested that the Act should define “capital expenditure”. All this may be true but does not derogate from the lessor’s duties under the lease, or under Section 38. The problem is that these matters are difficult and expensive to resolve in court. I have already noted that the SBC receives many enquiries in this area and should have the power to mediate, or determine such disputes. “Capital expenditure” is an accountancy and taxation concept and I do not think it is profitable for a State Act to trespass in this area.

*Should the Act imply rights to assign, sub-let, or mortgage the lease?*

49. Part 7 of the Act attempts to deal comprehensively with these issues. These provisions are “consumer friendly” and assist the lessee in assigning the lease. Problems may arise when the landlord does not consider the assignee to be suitable under Section 43(1). In my opinion such a dispute should be able to be mediated, or determined, by the SBC.
In enacting Section 46, Parliament clearly thought that the lessor’s fundamental rights of ownership should be preserved and give the lessor the absolute discretion to refuse consent to sublet or part possession of the premises, or to mortgage the lessee’s interest in the lease. I can see no reason to change that situation.

Termination and “making good”

50. The Act does not set out how a lease can be terminated. This is covered by Part 1 of the Landlord and Tenant Act 1936. The act of termination is swift and brutal, but it is also cheap and efficient. The landlord serves notice of the breach upon the tenant and if the breach is not rectified, the landlord enters the premises and changes the locks. Distress for rent, which involves seizing the tenants’ property as security for unpaid rent is another matter and as the issues paper points out, can be complex and costly. The Landlord and Tenant Act 1936 should be amended to make it clear that such actions should be in the jurisdiction of the Magistrates Court. (These days such actions would probably fall into the small claims jurisdiction). These provisions apply to all leases including retail shop leases. I have already suggested a schedule for orderly exit for a failing business and I do not think that any further mitigation of the existing law for retail shop premises is necessary.

The notion of making good at the end of a lease term is that the lessee will return the premises to the lessor in substantially the same condition as they were at the start of the lease, subject to fair wear and tear. I have already commented upon the wisdom of taking photographs at the beginning and end of the lease. The notion “making good” is well understood in the industry and I do not think that the Act should define a term
on which there is a large body of law already in existence. Apparently a practice has
arisen of requiring a tenant to repaint and re-carpet the premises at the end of the
lease. Consideration could be given to amending the Act prohibiting a requirement to
repaint unless the premises were newly painted at the start of the lease and prohibiting
a requirement to replace carpet to a better condition than that which existed at the start
of the lease, but I am of the opinion that such terms and conditions are best left to
negotiation between the parties before the lease is entered into.

*Mediation and dispute resolution*

51. It will already have become apparent to readers that I envisage a larger role under the
Act for the SBC, including resolution of disputes. The SBC already has powers of
mediation under Part 9 of the Act. I propose that the SBC have the power to sit as a
tribunal and to resolve disputes under the Act up to $100,000. The SBC should have
all the powers that the Magistrate’s Court currently has under Section 68 and have the
power to appoint independent valuers. I would recommend removing the jurisdiction
of the Magistrates court to hear these matters, but also recommend that the
Magistrates Court’s jurisdiction in this area be increased to cover disputes between
$100,000 and $400,000. The civil list in the Magistrate’s Court is already long and the
civil list in the District Court is much longer still. The SBC is a specialist in the Act
and I believe that it is important that small business people have a cheap and efficient
procedure under the Act to resolve lease disputes, so that they can get on with running
their businesses. An alternative could be that the SBC could continue in his mediation
role and that all disputes up to $100,000 could be referred to SACAT for hearing and
determination, if necessary.
National harmonisation

52. There were many calls in the submissions for uniform legislation throughout the States and Territories. This call is heard in many areas of law and administration in Australia, but unfortunately little progress seems to be made. Given that most large shopping centres are operated by national operators and the business chains which rent the shops are often national, it would be most desirable to have uniform retail shop lease legislation. I shall recommend to the government that it should support uniform national legislation, but this will not happen in the short term. (However, see para 53 below.)

New Commonwealth Laws

53. The Commonwealth Parliament has recently passed new unfair contract laws, which will have national application and undoubtedly have a significant effect on retail shop leases. This legislation will catch some retail shop leases entered into after 12 November 2016. The Act catches leases where one of the parties is a small business (employing less than 20 people) and the value of the lease is no more than $300,000 per annum or $1 million if the lease is for more than twelve months. Essentially a lease will be unfair if it enables one party, but not the other, to have and exercise rights and benefits under the lease. If a court finds that a term in a lease is “unfair”, then that term will be void. It would appear likely that shopping centre leases will come under the spotlight.
Penalties

54. The penalties for offences or misbehaviour under the current Act are clearly out dated, and in serious need of being increased.

Recommendations

55. I make the following recommendations:-

(a) The threshold for the application of the Act should continue to be determined by the amount of the rental and not by lettable area. The SBC should monitor the marketplace and make recommendations for the alteration of the threshold amount (if necessary) every 2 years.

(b) The rental threshold amount should be exclusive of GST.

(c) A shop leased for an amount under the rental threshold should be considered a small business, even if it is part of a larger franchise, brand or group.

(d) Certain classes of small business which rent premises from State Government or Local Government should be excluded from the Act by regulation. The power of the Minister and the Magistrates Court to exempt leases and licences from the Act should be revoked and instead should lie with the SBC (with a possible appeal to SACAT).

(e) The term “public company” should have the same meaning as it has in the Corporations Act 2001 (Cth).
(f) The Act should provide for the mandatory registration of leases, however, the requirement to provide a survey to effect registration should not apply to leases under the Act.

(g) Shopping centre incentives should remain confidential.

(h) Section 12 of the Act should be amended in the terms set out in paragraph 39 of this review.

(i) Independent condition reports (including photographs) at the beginning and end of a lease should not be made mandatory.

(j) The Act should not provide a pro-forma lease, nor should the cost of lease preparation be capped. References to “stamping” and “stamp duty” in sections 14 and 16 of the Act should be deleted.

(k) There should be no change to land tax provisions.

(l) Security should be by way of three months’ rental.

(m) All bank guarantees provided as security by lessees should be held by the SBC.

(n) Section 20B(3)(b) of the Act should be amended in the terms set out in paragraph 45 of this review.

(o) The SBC should have the power to certify exclusionary clauses under section 20K of the Act.

(p) The Act should be amended to provide a legislative pathway for an orderly exit from a lease by a failing business.

(q) The Landlord and Tenant Act 1936 should be amended to place the jurisdiction over actions for distress for rent in the Magistrates Court.

(r) The role of the SBC should be expanded to include the right to mediate and, if necessary, determine disputes under the Act up to $100,000, with a
possible appeal to SACAT. The jurisdiction of the Magistrate’s Court to
deal with matters under $100,000 should be revoked. In the alternative, the
jurisdiction to determine such disputes should lie with SATAC.

(s) No amendment to the Act should be undertaken until the effect of the
Commonwealth unfair contracts legislation is clearly understood.

(i) Penalties under the Act should be increased.

Signed by:

Mr Alan Moss

Dated: 14/12/2016