

1994 Instrument No. 145

This determination relates to the
Commercial and Retail Leases Code of
Practice



TENANCY TRIBUNAL ACT 1994

COMMERCIAL AND RETAIL LEASES

CODE OF PRACTICE

&

EXPLANATION OF PROVISIONS

**ISSUED BY
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ATTORNEY-GENERAL**

**DETERMINATION
NO. 145 OF 1994**

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TABLE OF CONTENTS

1. CODE OF PRACTICE.....	1-47
PART 1 - PRELIMINARY	1
1 Citation	1
2 Interpretation	1
3 When a lease is taken to be entered into.....	5
PART 2 - APPLICATION	5
4 Provisions of Code subject to lease purpose clauses of Crown lease.....	5
5 Leases to which the Code applies.....	5
6 Premises to which Code applies.....	6
7 Exempt premises and leases.....	6
8 Part 4 applies to premises in a shopping centre.....	6
9 Commencement of Code.....	6
PART 3 - REQUIREMENTS APPLICABLE TO LEASES FOR ALL CATEGORIES OF PREMISES	7
Division 1 - Conduct.....	7
10 Parties to conduct themselves in accordance with the Code.....	7
11 Code to prevail where lease conflicts with Code.....	7
12 Lease to be read as containing provisions required by the Code to be included in the lease.....	7
13 Prohibited conduct	7
Division 2 - Negotiation of leases.....	7
14 Representations not to be false or misleading	7
15 Compensation for pre-lease misrepresentations.....	8
16 Form of lease to be provided.....	8
17 Disclosure statement to be provided.....	8
18 Form of disclosure statement	8
19 Notice may be given where no disclosure statement provided or statement is deficient.....	8
20 Notification of material changes.....	9
21 Failure to notify of a material change.....	9
22 Other rights unaffected by notice of termination.....	9
23 Owner may contest termination notice.....	9
24 Manner of contesting termination notice.....	10
25 Termination where owner does not contest notice.....	10
26 Owner contests notice.....	10
27 Tribunal may make orders	10

Division 3 -Lease Costs	11
28 Tenant not required to pay undisclosed contributions.....	11
29 Each party to bear own costs.....	11
30 Agreement as to costs where no lease entered into.....	11
31 Key-money prohibited.....	11
32 Recovery of key-money.....	12
Division 4 - Terms of lease	12
33 Minimum 5 year term.....	12
34 Validity of lease for lease less than 5 years.....	12
35 Tenant may require conversion of a lease to 5 year lease.....	12
36 5 year minimum term does not apply where tenant independently advised.....	12
37 5 year minimum term does not apply to certain renewals.....	13
38 5 year minimum term does not apply where inconsistent with head lease.....	13
39 Non-application of 5 year minimum term to be drawn to attention of tenant.....	13
Division 5 - Lease Documentation	13
40 Parties to advise of acceptance of lease offer.....	13
41 Owner to provide copy of lease to tenant.....	13
Division 6 - Rent setting and Rent reviews	14
42 Interpretation.....	14
43 Invalidity of certain provisions dealing with the setting of initial rent.....	14
44 Void clauses in relation to rent reviews	15
45 Method of rent setting or reviewing where lease contravenes clauses 43 or 44.....	15
46 Frequency of rent reviews	15
47 Lease to state date on which rent review due	15
48 Turnover Rent.....	15
49 Adjustments to turnover rent.....	16
50 Frequency of adjustments to turnover rent.....	17
51 Market rent - rent reviews and options.....	17
52 Rent to continue at same rate pending valuation and then an adjustment is to be made.....	18
53 Setting rent on renewal of a lease.....	18
54 Lease extended where rent is still to be determined.....	19
55 Conflict of interest to be disclosed.....	19
56 Grounds for parties to seek new valuation	20
57 Orders which may be made by Tribunal under application under clause 56.....	20
58 Costs of valuation to be shared equally	20

59 Parties to respond to request for submission to valuer within a reasonable time.....	20
60 Valuation may be conducted notwithstanding failure of a party to make a submission to the valuer.....	21
Division 7 - Outgoings etc.....	21
61 Commencement of rent and outgoings	21
62 Recovery of Outgoings	21
63 Depreciation not recoverable.....	21
64 Capital costs not recoverable from tenant.....	22
65 Outgoings budget to be provided by owner	22
66 Owner to provide auditor's report on outgoings.....	23
67 No report required where tenants waive requirement.....	24
68 Adjustment of contributions to outgoings based on actual expenditure properly and reasonably incurred.....	24
Division 8 - Alterations and other interference	24
69 Alterations to or affecting the premises	24
70 Emergency alterations	25
71 Compensation for disturbance	25
72 Compensation to reflect any concessions.....	25
73 Enlargement of shopping centre not, of itself, grounds for compensation.....	26
74 Demolition.....	26
75 Damaged Premises	26
76 Reduction in rent where damaged premises useable.....	27
77 Owner to notify tenant of owner's intentions regarding repair to damage	27
78 Parties may terminate lease where owner advises that he or she does not intend to repair premises.....	27
79 Compensation payable where tenant relies on owner's advice and repair not completed within reasonable time.....	27
80 Parties may terminate lease by agreement.....	28
81 Employment Restriction.....	28
82 Refurbishment of Premises.....	29
Division 9 - Assignments, subleases and mortgages	29
83 Tenant may seek consent to assignment of lease or grant of sublease of premises, or mortgage of lease.....	29
84 Owner to request information necessary to determine request for assignment, sublease or mortgage	29
85 Owner may consent to or object to assignment, sublease or mortgage.....	30
86 Grounds for withholding of consent to assignment or sublease.....	30
87 Grounds for withholding of consent to a mortgage of a lease.....	31
88 Owner may recover costs.....	31
89 Substantiation of Costs.....	31

90	Tenant and guarantor released from liability	31
91	Tenant to provide prospective assignee or subtenant with copy of disclosure statement	32
92	Tenant may seek copy of disclosure statement from owner	32
93	Owner to assist with provision of disclosure statement	32
Division 10 - Termination and renewal of leases		32
94	Tenant may request owner's intention as to renewal	32
95	Owner to respond within one month of giving notice	32
96	Failure to respond extends period of lease	33
97	Lease extended where offer withdrawn	33
98	Tenant's right to terminate lease where lease period extended	33
Division 11 - Miscellaneous		33
99	Security bonds - interpretation	33
100	Maximum level of security bond	34
101	Security bond to be held on trust in interest bearing account	34
102	Security bond to be repaid within one month of termination of tenancy	34
103	Bank guarantee may not be unreasonably refused as security bond	34
104	Independent legal advice	35
105	Tenant not required to pay fees	35
106	No reliance to be placed on certificate provided where tenant compelled to use lawyer nominated by owner	35
107	Rent concessions to be disclosed for purpose of valuation	35
108	Owner not liable for breach of confidence	35
PART 4 - ADDITIONAL REQUIREMENTS FOR PREMISES IN SHOPPING CENTRES		36
Division 1 - Management information		36
109	Provision and use of turnover figures	36
110	Statistical information to be available to tenant	36
Division 2 - Advertising and promotion costs		37
111	Advertising and promotion levy	37
112	Tenant not liable to pay costs where owner fails to comply with Code	37
113	Moneys not expended to be retained for benefit of tenants	37
Division 3 - Outgoings		37
114	Non-specific outgoings contribution limited by ratio of lettable area	37

Division 4 - Relocation	38
115 Relocation due to refurbishment or redevelopment	38
116 Premises must be affected	38
117 Requirements for relocation clauses	38
Division 5 - Trading hours	39
118 No change to core trading hours without majority support of tenants	39
119 Tenants may trade outside core trading hours	39
Division 6 -Miscellaneous	40
120 Geographical restrictions	40
121 Inadequate sales	40
122 Tenants' association	40
PART 5 - DISPUTE RESOLUTION	40
123 Disputes	40
SCHEDULE 1 - SPECIFIED PREMISES	41
SCHEDULE 2 - DISCLOSURE STATEMENT	42
SCHEDULE 3 - VALUATION PRINCIPLES	46

2. EXPLANATION OF PROVISIONS 49-106

CHAPTER 1 - SCOPE AND APPLICATION OF THE CODE	51
Leases and Licences to which the Code applies	52
The difference between a lease and a licence	52
Application of the Code to Subleases	52
Leases not covered by the Code	53
Leases that run for a term of less than 6 months	53
Premises to which the Code applies	53
Retail premises	54
Commercial Premises	54
Premises in shopping centres	55
Specified Premises	56
Timing - When does the Code start applying to leases?	56
New leases entered into on or after 1 January 1995	56

Leases that are renewed, or extended under an option, on or after 1 January 1995.....	57
Variations to leases on or after 1 January 1995.....	57
Certain conduct is prohibited from 1 January 1995 regardless of when the lease was entered into.....	57
Avoiding the Code.....	58
CHAPTER 2 - CONDUCT OF THE PARTIES.....	61
Prohibited Conduct.....	62
Unconscionability.....	62
Coercion.....	63
Harsh and Oppressive.....	63
General Conduct.....	64
CHAPTER 3 - NEGOTIATION OF LEASES.....	67
Representations made before a lease is entered into.....	68
Disclosure Statements.....	68
Form of a Disclosure Statement.....	69
What happens if no disclosure statement is provided or it is missing information or it contains misleading information?.....	69
Legal advice.....	71
Acceptance of a Lease - copies of documentation.....	71
CHAPTER 4 - LEASE COSTS	73
Costs in the preparation of a lease.....	74
Key Money.....	74
Bonds.....	75
CHAPTER 5 - 5 YEAR LEASE TERMS, TERMINATION AND RENEWAL	77
Minimum 5 year leases.....	78
Background.....	78
5 year leases.....	78
Notice of Renewal or Termination.....	79
CHAPTER 6 - RENT, RENT REVIEWS AND OPTIONS.....	81
Turnover rental & profits.....	82

Multiple rent review and ratchet clauses	83
Valuations under the Code.....	84
Market rental during the term of a lease.....	86
Concessions and valuations.....	86
Valuers.....	87
Costs of Valuation.....	88
Frequency of Rent Reviews.....	88
CHAPTER 7 - OUTGOINGS.....	89
What can be claimed as outgoings?.....	90
Sinking funds, capital expenses and depreciation.....	90
Only reasonable expenses will qualify as outgoings.....	91
Audited reports and adjustments for prepaid outgoings.....	91
Apportionment of outgoings in a shopping centre	92
Advertising and Promotion.....	93
Statistical Information - Traffic Counts	93
CHAPTER 8 - ALTERATIONS, DEMOLITION, RELOCATION, DAMAGED PREMISES AND REFURBISHMENTS	95
Disturbances	96
Demolition.....	96
Damaged premises.....	97
Refurbishment.....	98
Relocation in Shopping Centres.....	99
CHAPTER 9 - ASSIGNMENT, SUBLEASE AND MORTGAGE OF A LEASE.....	101
CHAPTER 10 - TRADING HOURS FOR SHOPPING CENTRES	105
INDEX TO CLAUSE NUMBERS.....	107

PART 1 - PRELIMINARY

1 Citation

This Code may be cited as the *Commercial and Retail Leases Code of Practice*.

2 Interpretation

For the purposes of this Code;

"approved mediator" has the same meaning as in the *Tenancy Tribunal Act 1994*;

"auditor" means an auditor who is a member of either the Institute of Chartered Accountants or the Australian Society of Certified Practising Accountants;

"Code" means the *Commercial and Retail Leases Code of Practice*

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

(a) the sale or hire of goods by retail; or

(b) the provision of services by retail;

"core trading hours" means the times when retail premises in a shopping centre are required to be open for business, whether the requirement is imposed by or under a lease or by or under some other agreement, arrangement or understanding between owners and tenants, or otherwise.

"demolition" includes any substantial repair, renovation or reconstruction of a building in which premises are located, which repair, renovation or reconstruction cannot be carried out practicably without vacant possession of the premises;

"key-money" means any money paid by or on behalf of a tenant to, or at the discretion of, an owner, or any benefit that is to be conferred on, or at the discretion of, an owner, other than:

- (a) rent;
- (b) a repayable security bond or security deposit, or a guarantee by way of security;
- (c) a payment for the goodwill of a business conducted by the owner;
- (d) money payable on account of outgoings;
- (e) money payable to a person for attendances on a tenant in connection with the preparation of documents that are relevant to a lease;
- (f) any reasonable sum of money payable to an owner for goods and services provided, or to be provided, to a tenant; or
- (g) any money permitted to be paid under this Code;

"lawyer" means a solicitor, a barrister or a barrister and solicitor;

"lease" means an agreement, whether in writing or not, that provides for the occupation of premises, exclusively or otherwise, whether for a fixed term, periodically or at will, and includes a sublease or licence but does not include -

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

"material matter" means any matter within the knowledge and power of a person that is necessary for making a sound commercial decision;

"multiple rent review clause" means a provision in a lease that -

- (a) has the effect or reserving to a party a discretion as to which of 2 or more methods of calculating a change to rent is to apply; or

- (b) provides for rent to change in accordance with whichever of 2 or more methods of calculating the change would result in the higher or highest rent;

whether generally, or on a particular occasion;

"option" in relation to a lease, means a right contained in that lease to choose to extend or renew the lease on the same, or substantially the same, terms and conditions as are contained in the lease;

"outgoings" means an owner's outgoings on account of any of the following:

- (a) the reasonable expenses

- (i) of repairing or maintaining; or
 - (ii) directly related to the operation of;

the building in which the premises to which a lease relates are situated or, in the case of premises in a shopping centre, of any building in the shopping centre or any areas used in association with any such building, provided that the expenses are in respect of expenditure during the term of the lease;

- (b) rates, taxes, levies, or other statutory charges payable by the owner because the owner is the owner or occupier of any such building or the land on which it is erected, provided that the charges relate to liabilities incurred during the term of the lease; and

- (c) where the premises are located in a shopping centre, the reasonable costs of advertising or promotion of the premises or the shopping centre;

"owner" means a person who grants, or proposes to grant, a right to occupy premises under a lease, and includes any heir, executor, administrator or assign of that person;

"party" means the owner or the tenant under a lease;

"ratchet clause" in relation to a provision of a lease for determining rent variations in such a way that rent might decrease, means a

provision in that lease that has the effect of preventing, or giving a person the power to prevent, that decrease;

"Registrar" has the same meaning as in the *Tenancy Tribunal Act 1994*;

"renewal" in relation to a lease, does not include exercising an option contained in the lease;

"rent" includes a component of rent;

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

(a) the sale or hire of goods by retail; or

(b) the provision of services by retail;

"shopping centre" means a group of premises where -

(a) at least 5 of the premises are retail, small commercial or specified premises, or a mixture of those premises;

(b) the premises -

(i) all have, or would if leased have, the same owner or same head owner; or

(ii) all comprise lots within a single unit plan under the *Unit Titles Act 1970*;

(c) the premises are located -

(i) in a single building; or

(ii) in buildings that adjoin or are separated only by areas owned by the owner of the premises; and

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

"small commercial premises" means commercial premises with a lettable area of no more than 300 square metres;

"specified premises" means premises specified in Schedule 1 of this Code;

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

- (a) a subtenant;
- (b) any heir, executor, administrator or assign of a tenant; and
- (c) a prospective tenant;

"Tribunal" has the same meaning as in the *Tenancy Tribunal Act 1994*.

"valuer" means a valuer who is a corporate member of the ACT Division of the Australian Institute of Valuers and Land Economists (Valuation Stream), with expertise in determining Australian Capital Territory market value rentals, or some other suitably qualified person.

3 When a lease is taken to be entered into

For the purposes of this Code, a lease is considered to have been entered into when a person enters into possession of the premises as a tenant under the lease or begins to pay rent under the lease (whichever happens first). However, if both parties execute the lease before the tenant enters into possession under the lease or begins to pay rent under the lease, the lease is considered to have been entered into as soon as both parties have executed the lease.

PART 2 - APPLICATION

4 Provisions of Code subject to lease purpose clauses of Crown lease

The provisions of the Code are subject to the provisions of any lease purpose clause in a Crown headlease.

5 Leases to which the Code applies

Subject to clauses 6, 7 and 8 this Code applies to -

- (a) a lease entered into;

- (b) a lease renewed or extended under an option; or
- (c) a variation to a lease made;

on or after the commencement of the Code.

6 Premises to which Code applies

The Code applies in respect of a lease for premises which are -

- (a) situated within the Australian Capital Territory, regardless of where the lease was entered into and notwithstanding that the lease purports to be governed by the law of a jurisdiction other than the Australian Capital Territory; and
- (b)
 - (i) retail premises, or premises located in a shopping centre, other than premises with a lettable area greater than 1000 square metres that are leased to a corporation that is not eligible to be incorporated as a proprietary limited company under the Corporations law;
 - (ii) small commercial premises that are not located in a shopping centre; or
 - (iii) specified premises.

7 Exempt premises and leases

Notwithstanding clause 6, the Code does not apply to a lease for premises for less than 6 months until the tenant has been in continuous occupation of the premises for a period of six months.

8 Part 4 applies to premises in a shopping centre

The provisions of Part 4 apply only in respect of a lease for premises situated within a shopping centre.

9 Commencement of Code

The provisions of this Code take effect on 1 January 1995.

PART 3 - REQUIREMENTS APPLICABLE TO LEASES FOR ALL CATEGORIES OF PREMISES

Division 1 - Conduct

10 Parties to conduct themselves in accordance with the Code

Parties to a lease shall, in their dealings with each other, conduct themselves in accordance with the Code.

11 Code to prevail where lease conflicts with Code

Except as otherwise provided in this Code, where there is an inconsistency between a provision of this Code and a provision of a lease or an agreement to lease the Code shall prevail.

12 Lease to be read as containing provisions required by the Code to be included in the lease

Notwithstanding that a lease may not include provisions required by the Code to be included in the lease, the lease shall be read as though those provisions were included in the lease.

13 Prohibited conduct

A party to a lease shall not engage in conduct, in its dealings with the other party to the lease, that is -

- (a) unconscionable;
- (b) coercive; or
- (c) harsh and oppressive.

Division 2 - Negotiation of leases

14 Representations not to be false or misleading

A representation made or disclosed, in the course of negotiations for a lease (including a representation made in the context of a disclosure statement), by one party to another shall not be false or misleading or omit any material matter at the time the representation is made.

15 Compensation for pre-lease misrepresentations

In addition to any other rights a party may have, a party to a lease is liable to pay another party to the lease ("the injured party") reasonable compensation for damage suffered by the injured party that is attributable to the injured party's entering into the lease as a result of a deliberate failure of the other party to act in accordance with clause 14.

16 Form of lease to be provided

A copy of the form of a proposed lease and advice to the tenant concerning the existence of the Code and its availability shall be provided by the owner to a prospective tenant as early as practicable in the negotiations for the lease.

17 Disclosure statement to be provided

The owner shall, in respect of a proposed lease, give a prospective tenant a disclosure statement for that lease -

- (a) at least 7 days before a lease is entered into or renewed; or
- (b) where the Code applies because the tenant has been in continuous occupation of the premises for 6 months - within 7 days of the commencement of the Code's application.

18 Form of disclosure statement

A disclosure statement shall be in the form of Schedule 2. Each item of the disclosure statement is required to be completed but only to the extent that it is relevant to the lease concerned. The completed disclosure statement shall be signed by or on behalf of the owner prior to presentation of the statement to the prospective tenant, and the prospective tenant shall, on receipt of the statement, sign the statement as an acknowledgment of receipt.

19 Notice may be given where no disclosure statement provided or statement is deficient

If an owner fails to provide a disclosure statement in accordance with his or her obligations under clause 17, or the disclosure statement that is provided is false or misleading in a material way

or omits a material matter, the tenant may terminate the lease by giving the owner 14 days notice in writing within 3 months after the lease is entered into. This right is in addition to any other rights the tenant may have.

20 Notification of material changes

If a disclosure statement has been provided in accordance with clause 17, and the owner becomes aware of a material change in relation to the information contained in the statement, the owner shall, where the person to whom the statement was provided has not yet -

- (a) signed a lease; or
- (b) entered into possession of the premises;

immediately notify that person of the details of the change.

21 Failure to notify of a material change

If an owner fails to comply with clause 20, or the notification provided under that clause contains information that is false or misleading in a material way or omits a material matter, the tenant may terminate the lease by giving the owner 14 days notice in writing within 3 months after the lease is entered into. This right is in addition to any other rights the tenant may have.

22 Other rights unaffected by notice of termination

The termination of a lease under clause 19 or 21 does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the lease in respect of any period before its termination.

23 Owner may contest termination notice

An owner may, within 14 days of being served with a notice of termination under clause 19 or 21, contest the termination on the grounds that-

- (a) the owner acted honestly and reasonably and ought reasonably be excused for his or her failure to comply with clause 17 or 20, as the case may be; and

- (b) the tenant is, substantially, in as good a position as the tenant would have been if there had been no failure to comply by the owner.

24 Manner of contesting termination notice

An owner may contest a notice of termination under clause 23 by referring the matter to the Registrar, as a dispute under the lease under paragraph 6(e) of the *Tenancy Tribunal Act 1994*.

25 Termination where owner does not contest notice

Where an owner fails to contest a notice of termination within 14 days of the date on which the notice was served on the owner, the notice takes effect from the expiration of that period.

26 Owner contests notice

Where an owner contests a notice of termination within 14 days of the date the notice was served on him or her-

- (a) the Registrar shall refer the dispute to the Tribunal and notify the tenant, as soon as is practicable, of such referral; and
- (b) the Tribunal shall determine whether the grounds specified in clause 23 have been made out and make an order that either-
 - (i) the termination notice is effective from the date of the Tribunal's order; or
 - (ii) the termination notice has no effect.

27 Tribunal may make orders

The Tribunal may make any additional order that it thinks fit concerning the rights and obligations of the parties under the lease, from the time at which the owner contested the notice of termination until the time at which the Tribunal makes an order in respect of that notice.

Division 3 -Lease Costs

28 Tenant not required to pay undisclosed contributions

A provision of a lease that requires a tenant to pay for or contribute towards the cost of any finishes, fixtures, fittings, equipment or services is void unless the liability to make the payment or contribution was disclosed in the disclosure statement.

29 Each party to bear own costs

Each party to a lease shall bear his or her own costs in relation to the preparation of the lease. Costs associated with the preparation of the lease, including stamp duty and registration fees shall not be passed from one party to the other.

30 Agreement as to costs where no lease entered into

Nothing in clause 29 precludes the right of an owner to request the written authority of a prospective tenant granting the owner permission to arrange for the preparation of a lease, and the owner's reliance on a provision in any such authority to the effect that if the prospective tenant withdraws, without reasonable cause, from lease negotiations the prospective tenant is responsible for the reasonable costs incurred towards the preparation of the lease.

31 Key-money prohibited

The payment or provision by a tenant of, or the request for or acceptance by an owner of, any key-money in association with -

- (a) the granting of a lease;
- (b) the extension of a lease under an option;
- (c) the renewal of a lease;
- (d) the consent to an assignment, sublease or mortgage of a lease; or
- (e) the assignment, sublease or mortgage of a lease;

is prohibited.

32 Recovery of key-money

Where key-money is paid or provided by a tenant in contravention of clause 31, the tenant is entitled to, in addition to exercising any other rights, to recover any money paid, or the value of any benefit conferred, from the owner.

Division 4 - Terms of lease

33 Minimum 5 year term

The term for which a lease is entered into, together with any further term or terms provided for by any agreement or option for the acquisition by the tenant of a further term as an extension or renewal of the lease, must not be less than 5 years. An agreement or option is not to be taken into account, for the purposes of this provision, if it was entered into or conferred after the lease was entered into.

34 Validity of lease for less than 5 years

Subject to this Division, if a tenant enters into a lease which contravenes clause 33, the validity of the lease is not affected but the term of the lease is extended, in accordance with clause 35, by such period as is necessary to ensure that the lease, together with any extension of the lease under an agreement or option, is a lease for a minimum of 5 years.

35 Tenant may require conversion of a lease to 5 year lease

A tenant referred to in clause 34, may, not later than 90 days before the expiry of the term of the lease, including any extension of the lease under an agreement or option, notify the owner in writing that the tenant is exercising the tenant's right to the extension of the lease so that the lease, together with any extension of the lease under an agreement or option, is a lease for a minimum of 5 years.

36 5 year minimum term does not apply where tenant independently advised

Clause 33 does not apply to a lease if the tenant has been advised by a lawyer, not acting for the owner, who certifies in writing that he or she has, at the request of the tenant, explained the effect of clauses 33, 34, and 35 to the tenant and that the giving of the

certificate will result in the lease being for a term of less than 5 years.

37 5 year minimum term does not apply to certain renewals

Clause 33 does not apply to a lease that results from the extension of an earlier lease under any option conferred on the tenant, so long as there was no break in the entitlement of the tenant to possession of the premises and the option was granted by that earlier lease or by an agreement entered into before or at the same time as that earlier lease was entered into.

38 5 year minimum term does not apply where inconsistent with head lease

Clause 33 does not apply to a lease to the extent that its application would be inconsistent with the terms of any head lease under which the owner holds the premises.

39 Non-application of 5 year minimum term to be drawn to attention of tenant

The fact that a lease is one to which clause 33 does not apply, by virtue of clause 38, must be drawn to the attention of a tenant by the owner.

Division 5 - Lease Documentation

40 Parties to advise of acceptance of lease offer

A party shall notify the other party to a lease of the acceptance of a lease offer as soon as practicable after the lease offer has been accepted but, in any case, within 7 days of the acceptance of the offer. Once an offer has been accepted, the owner shall, where applicable, ensure the lease is promptly lodged for assessment of stamp duty and, where applicable, expedite registration of the lease.

41 Owner to provide copy of lease to tenant

An owner shall provide a tenant with an executed copy of a written lease-

- (a) where the lease is not to be registered - within 21 days of the return of the duly stamped lease from the Office of the Commissioner for Revenue to the owner or the owner's solicitor or agent; or
- (b) where the lease is to be registered - within 21 days of the return of the duly registered lease from the Registrar General's Office to the owner or the owner's solicitor or agent.

Division 6 - Rent setting and Rent reviews

42 Interpretation

For the purpose of this Division -

"base rent" means rent, or that component of rent, which comprises a specified amount of money (whether or not there is provision for the amount to change)

"initial rent" means the rent set at the commencement of a lease

"rent review", in relation to rent, includes a change to rent payable on the exercise of an option under a lease.

"turnover" includes gross takings, gross receipts, gross income and similar concepts.

"turnover rent" means rent, or that component of rent, which is based on the tenant's turnover.

43 Invalidity of certain provisions dealing with the setting of initial rent

A provision of a lease setting the initial rent is void to the extent that it-

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

44 Void clauses in relation to rent reviews

A provision of a lease relating to a rent review which is a multiple rent review clause or a ratchet clause is void.

45 Method of rent setting or reviewing where lease contravenes clauses 43 or 44

If a lease contravenes clauses 43 or 44, the rent is to be set or reviewed by reference to market rent unless the parties agree on an alternative basis for setting or reviewing the rent, provided the agreement does not contravene clauses 43 or 44.

46 Frequency of rent reviews

Subject to clause 50, a provision in a lease that allows a change to be made to rent-

- (a) during the first 12 months of the lease; or
- (b) more frequently than once in each 12 month period after the first anniversary of the commencement of the lease;

is void.

47 Lease to state date on which rent review due

A lease shall state the date on which each review of the rent is due. If a lease does not state the date on which such review is due, no change may be made and any change purported to be made is void.

48 Turnover Rent

Where a lease provides for part or all of the rent to be calculated as a percentage of turnover, "turnover" shall not be deemed or assumed, but is required to be calculated on actual turnover excluding amounts for the following:

- (a) losses incurred in the resale or disposal of goods reasonably and properly purchased from customers as trade-ins in the usual course of business;
- (b) deposits and instalments received on account of lay-bys, hire purchase or credit sales, which are refunded to a customer;

- (c) refunds on a transaction where the proceeds of the transaction have been included as part of turnover;
- (d) services, finance or interest charges payable by the tenant to any financier in connection with provision of credit to customers other than commissions on credit or store cards;
- (e) the price of merchandise exchanged between premises of the tenant if the exchange is made solely for the convenient operation of the business of the tenant and not for the purpose of concluding a sale made at, in, from or upon the premises to which the lease relates;
- (f) the price of merchandise returns to shippers, wholesalers or manufacturers;
- (g) the proceeds of sale of the tenant's fixtures and fittings after their use in the conduct of the business at or from the premises to which the lease relates;
- (h) discounts allowed to customers in the course of business;
- (i) written off uncollected credit accounts;
- (j) the net amount paid or payable by the tenant on account of any purchase tax, receipt tax or other similar tax imposed at the point of sale or hire of goods or services;
- (k) delivery charges;
- (l) proceeds of goods sold on consignment, other than any commission retained in respect of a sale;
- (m) sales of lottery and like tickets, other than commissions.

49 Adjustments to turnover rent

A lease which includes provisions for the payment of turnover rent shall include provisions for any underpayment or overpayment of such rent, resulting from actual turnover differing from projected turnover, to be adjusted within 1 month of a request by either party for such an adjustment. The party must make the request in writing

and provide the other party with such information as that party may reasonably require to make the adjustment.

50 Frequency of adjustments to turnover rent

A party may make a request under clause 49 once in the first 12 months of the lease term and thereafter at intervals of not less than 12 months following the first request for an adjustment under the lease. This clause does not prevent the lease providing for, or the parties otherwise agreeing to, more frequent adjustments than are provided for by this clause.

51 Market rent - rent reviews and options

(1) Where

- (a) rent is to be determined for the purposes of clause 45;
- (b) rent is to be changed in accordance with market rent; or
- (c) a lease contains an option to extend the lease at market rent;

the market rent of the premises is the rent that could reasonably be expected to be paid for the premises if unoccupied and offered for rent for the use to which the premises may be put in accordance with the lease.

- (2) Where the parties cannot agree on what constitutes the market rent for the premises, either party may notify the Registrar that the party wishes to have the matter referred to mediation.
- (3) After receiving a request under subclause (2), the Registrar shall refer the matter to an approved mediator for mediation. The Registrar may specify a time period within which the mediator is to report to the Registrar on the outcome of the mediation.
- (4) If the mediation resolves the matter, the market rent for the purposes of paragraph (a) is the amount of rent agreed between the parties.
- (5) If the mediator reports to the Registrar that the parties cannot agree on the amount of rent, the rent is to be determined by valuation, in accordance with the principles in Schedule 3 to

the Code, carried out by a valuer appointed by agreement between the parties or, failing agreement, appointed by the Registrar, following consultation with the President of the ACT Division of the Australian Institute of Valuers and Land Economists.

52 Rent to continue at same rate pending valuation and then an adjustment is to be made.

- (1) If the amount of rent for premises is not determined in accordance with clause 51 before the date for a review of rent or commencement of the extension of the lease ("the review date"), the rent shall continue at the rate charged immediately prior to the review date until the procedures in clause 51 have been concluded.
- (2) When the rent is finally determined in accordance with clause 51, that shall be the rent that applies from the review date and the parties shall correct any overpayment or underpayment which may have occurred in respect of the period commencing on the review date.

53 Setting rent on renewal of a lease

- (1) Where an owner proposes to renew a lease and-
 - (a) an owner makes an offer to the tenant in response to a notice under clause 94; or
 - (b) an owner otherwise makes a renewal offer to the tenant prior to the expiration of the period of 3 months after the end of the existing lease;

the amount of rent (to be charged initially under the new lease) contained in that offer must not exceed the market rent for the premises being the rent that could reasonably be expected for the premises if unoccupied and offered for rent for the use to which the premises may be put in accordance with the renewed lease.

- (2) If the parties cannot agree that the amount of rent proposed by the owner in his or her offer is reasonable, either party may notify the Registrar that the party wishes to have the matter referred to mediation.

- (3) After receiving a request under subclause (2), the Registrar shall refer the matter to an approved mediator for mediation. The Registrar may specify a period within which the mediator is to report to the Registrar on the outcome of the mediation.
- (4) If the mediation resolves the matter, the initial rent under the new lease for the purposes of subclause (1) is the amount of rent agreed between the parties.
- (5) If the mediator reports to the Registrar that the parties cannot agree on the amount of rent, the Registrar shall appoint a valuer, following consultation with the President of the ACT Division of the Australian Institute of Valuers and Land Economists, to determine the market rent for those premises. The valuer is required to make the valuation in accordance with the principles in Schedule 3 to the Code and within any time limit specified by the Registrar.
- (6) The Registrar shall notify both parties of the amount of rent determined by the valuer in accordance with subclause (5). Each party has 14 days after being notified of the valuation to negotiate the amount of rent payable under the new lease having regard to the rent determined by the valuer. If the parties cannot agree on the amount within that period, the rent determined by the valuer shall be the initial rent applicable under the new lease for the purposes of subclause (1).
- (7) For the purposes of this Division, a lease shall be taken to be renewed if the new lease is between the same parties to the lease that is expiring, relates to the same premises and where the premises are to be put to the same or similar use.

54 Lease extended where rent is still to be determined

Where a lease is due to end before the rent is determined under clause 53, the lease is deemed to continue until 14 days after the rent is so determined.

55 Conflict of interest to be disclosed

A valuer appointed either by agreement between the parties or by the Registrar must disclose, to the person or persons by whom the

valuer was appointed, any direct or indirect interest of the valuer in the outcome of the valuation.

56 Grounds for parties to seek new valuation

Where a party to a lease has reasonable grounds to believe that -

- (a) a valuer has failed to comply with clause 55; or
- (b) a valuer has failed to conduct a valuation in accordance with the provisions of this Division or the valuation principles in Schedule 3 to the Code,

the party may apply to the Tribunal for an order for the conduct of a new valuation.

57 Orders which may be made by Tribunal under application under clause 56

In respect of an application under clause 56, the Tribunal may make an order -

- (a) that any existing valuation shall apply; or
- (b) that a new valuation shall be conducted, whether or not by the valuer who conducted any existing valuation;

and may also make such order as to costs as the Tribunal thinks fit.

58 Costs of valuation to be shared equally

The parties to the lease shall share equally the costs of a valuation carried out under clause 51 or 53.

59 Parties to respond to request for submission to valuer within one month

Where a valuation is being determined by a valuer in accordance with this Code, the parties shall comply with a request from the valuer for a submission concerning the valuation within one month of the request being made.

60 Valuation may be conducted notwithstanding failure of a party to make a submission to the valuer

A valuer may proceed with the conduct and completion of a valuation for the purposes of the Code, notwithstanding the failure of a party to comply with clause 59.

Division 7 - Outgoings etc.

61 Commencement of rent and outgoings

Payment of rent and outgoings is not to commence prior to the date of handing over possession of the premises, and may only commence provided that any finishes required to be provided by the owner, in accordance with the lease, have been substantially provided.

62 Recovery of Outgoings

A tenant under a lease is not liable to pay any amount to an owner in respect of outgoings except -

- (a) in accordance with provisions of the lease which specify -
 - (i) the outgoings that are to be regarded as recoverable;
 - (ii) how the amount of those outgoings will be determined and how they will be apportioned to the tenant; and
 - (iii) how those outgoings or any part of them may be recovered by the owner from the tenant; and
- (b) where the nature of the outgoings have been specified in the disclosure statement provided to the tenant in accordance with the requirements of this Code.

63 Depreciation not recoverable

Costs in respect of depreciation of premises are not recoverable by an owner from a tenant and any provision in a lease that requires the tenant to pay any amount in respect of depreciation is void.

64 Capital costs not recoverable from tenant

A provision in a lease that requires a tenant to pay any amount in respect of the capital costs-

(a) of the building in which the premises to which the lease relates is located; or

(b) in the case of a premises in a shopping centre of any building in the shopping centre or any areas used in association with any such building;

is void.

65 Outgoings budget to be provided by owner

A lease which provides for payment by a tenant in respect of outgoings must include provisions to the following effect:

- (a) the owner must give the tenant a written estimate of the outgoings to which the tenant is required to contribute under the lease itemising those outgoings under the item descriptions used in the list of outgoings in the disclosure statement;
- (b) the estimate of outgoings must be given to the tenant in respect of each accounting period of the owner during the term of the lease and must be given before the lease is entered into and thereafter during the term of the lease at least 1 month before the commencement of the accounting period concerned;
- (c) the owner must make a written expenditure statement available for examination by the tenant detailing all expenditure by the owner on account of outgoings to which the tenant contributes, itemising those outgoings under the item descriptions used in the list of outgoings in the disclosure statement;
- (d) the expenditure statement must be made available at least once in each of the owner's accounting periods during the term of the lease and must be made available within 1 month after the end of the period to which it relates.

66 Owner to provide auditor's report on outgoings

A lease which provides for payment by a tenant in respect of outgoings must include provisions to the following effect:

- (a) the owner must give the tenant a written report that complies with this clause and details all expenditure by the owner in each accounting period of the owner during the term of the lease on account of outgoings to which the tenant contributes;
- (b) each report is to be given to the tenant within 3 months after the end of the accounting period to which it relates;
- (c) the report is to be prepared by an auditor and is to be prepared in accordance with customary accounting standards;
- (d) the report is to include a statement by the person who prepared the report as to whether or not the amounts paid by the tenant in respect of outgoings were properly payable by the tenant and as to whether or not the total amount of outgoings in respect of which the tenant contributed (that is, the estimated total expenditure by the owner on outgoings) exceeded the total amount actually expended by the owner in respect of those outgoings during the period concerned;
- (e) the report may be a composite report (that is, it may relate to more than one tenant) so long as each tenant to which it relates is able to determine from the report whether or not the amounts paid by the tenant in respect of outgoings were properly payable by the tenant;
- (f) The report need not comply with paragraphs (c) and (d) if the report only relates to outgoings of the following type -
 - (i) land tax;
 - (ii) water, sewerage and drainage rates and charges;
 - (iii) other rates and statutory charges; and
 - (iv) insurance;

so long as the report is accompanied by copies of receipts in respect of all expenditure by the owner referred to in paragraph (a).

67 No report required where tenants waive requirement

Where the tenants of a majority of premises in a shopping centre agree to waive the requirement for the preparation of an auditor's report, the owner is not required to provide an auditor's report in respect of any of the tenants in the shopping centre.

68 Adjustment of contributions to outgoings based on actual expenditure properly and reasonably incurred

Where a lease includes a provision requiring a tenant to contribute to outgoings, the lease must include provisions to the following effect:

- (a) within 3 months after the end of each period in respect of which the tenant contributes to outgoings under the lease, there is to be an adjustment between the owner and the tenant to take account of any underpayment or overpayment by the tenant in respect of those outgoings;
- (b) the adjustment is to be calculated on the basis of the difference between the total amount of outgoings in respect of which the tenant contributed, that is, the estimated total expenditure by the owner on outgoings during the period concerned, and the total amount actually expended by the owner in respect of those outgoings during that period, but taking into account only expenditure properly and reasonably incurred by the owner in payment of those outgoings.

Division 8 - Alterations and other interference

69 Alterations to or affecting the premises

Subject to clause 70, an owner shall advise a tenant likely to be affected by alterations to, or refurbishment of, a shopping centre or building in which the tenant's premises are located. Such notice shall be in writing, shall include details of the proposed alterations or refurbishment and the measures, if any, that will be taken by the owner to minimise the effect of the alterations or refurbishment on the premises of the tenant and shall be given to the tenant at least 2 months prior to the commencement of such alterations or refurbishment.

70 Emergency alterations

In cases of emergency, the owner shall give reasonable notice of any proposed alteration or refurbishment.

71 Compensation for disturbance

An owner who-

- (a) other than as a reasonable response to an emergency or in compliance with statutory requirements or a lawful direction of a Government agency or authority -
 - (i) inhibits, in any substantial manner, access of a tenant to the premises leased by the tenant; or
 - (ii) takes any action that would inhibit or alter, to a substantial extent, the flow of customers to such premises;
- (b) fails to rectify, as soon as practicable, any breakdown of plant or equipment under the owner's care and maintenance;
- (c) in relation to premises which are situated in a shopping centre, neglects to adequately clean, maintain or repair the shopping centre including common areas; or
- (d) otherwise by his or her conduct, whether by act or omission and without reasonable cause, adversely affects the trade of a tenant,

is liable to pay the tenant reasonable compensation for any loss or damage (other than nominal loss or damage) suffered by the tenant as a consequence.

72 Compensation to reflect any concessions

In determining the amount of reasonable compensation for the purposes of clause 71 regard must be had to any concessions given to the tenant, including reduced rent, which were based on the likelihood of, or actual, disturbance of the tenant's trade.

73 Enlargement of shopping centre not, of itself, grounds for compensation

A tenant in premises located in a shopping centre is not entitled to compensation under clause 71, by reason only of the fact that -

- (a) the shopping centre is enlarged; or
- (b) there is a change in the tenants who hold leases in the shopping centre.

74 Demolition

A lease which provides for termination of the lease on the grounds of proposed demolition of the building of which the premises to which the lease relates forms part, must include provisions to the following effect:

- (a) the lease cannot be terminated on that ground unless and until the owner has provided the tenant with details of the proposed demolition sufficient to indicate a genuine proposal to demolish that building within a reasonable time after the lease is to be terminated;
- (b) the lease cannot be terminated by the owner on that ground without at least 6 months written notice of termination;
- (c) if the lease is for a term of 12 months or less, the period of 6 months in paragraph (b) is shortened to 3 months;
- (d) where a lease is terminated prior to the expiry of the current term of the lease, whether or not the owner proceeds with the demolition of the building, the owner shall pay the tenant reasonable compensation in respect of any loss suffered by the tenant arising from the termination of the lease;
- (e) in determining the amount of reasonable compensation regard must be had to any concessions given to the tenant, including reduced rent, which were based on the existence in the lease of the demolition clause.

75 Damaged Premises

A tenant is not required to pay rent and outgoings in respect of premises which are unusable or inaccessible due to damage, unless-

- (a) the tenant is responsible for the damage;
- (b) the tenant contributed to the damage other than in a nominal way; or
- (c) the tenant, by an act or omission, causes the termination of the owner's insurance policy which relates to the damaged premises.

76 Reduction in rent where damaged premises useable

Where premises are still useable under the lease but their useability is diminished due to damage, the tenant's liability for rent and any amount in respect of outgoings attributable to any period during which useability is diminished is reduced in proportion to the reduction in useability caused by the damage, unless clause 75 applies.

77 Owner to notify tenant of owner's intentions regarding repair to damage

Where the premises or a building in which premises of a tenant are located is damaged, the owner shall advise the tenant, in writing, if the owner considers the damage to the premises such that repair is impracticable or undesirable, and, therefore, proposes not to repair the premises. Such notice must be provided no later than the expiry of 2 months from the date of the damage occurring to the premises.

78 Parties may terminate lease where owner advises that he or she does not intend to repair premises

Where the owner advises the tenant under clause 77 that the owner does not intend to repair the premises, either the owner or the tenant may terminate the lease by giving no less than 7 days notice to the other party in which case no compensation is payable in respect of that termination.

79 Compensation payable where tenant relies on owner's advice and repair not completed within reasonable time

Where -

- (a) a tenant acts in reliance on the owner's advice that he or she intends to repair the premises; or
- (b) an owner fails to comply with clause 77,

and the tenant suffers damage or loss, other than nominal damage or loss, as a result of the owner's failure -

- (c) to comply with clause 77;
- (d) where the owner advised that the premises would be repaired within a period of time - to repair the premises within the time nominated; or
- (e) where the owner advised that the premises would be repaired but no time was specified by the owner - to repair the premises within a reasonable time;

the tenant is entitled to compensation, in respect of that loss or damage.

80 Parties may terminate lease by agreement

Nothing in clauses 77, 78 or 79 prevents the parties to a lease from terminating the lease by agreement if the premises or building in which the premises are situated is damaged or destroyed.

81 Employment Restriction

A lease must not contain a provision which limits or has the effect of limiting the tenant's right to employ persons of the tenant's choosing, except that a lease may contain one or more of the following provisions:

- (a) a provision specifying minimum standards of competence and behaviour for persons employed in the premises or other persons (such as contractors) working in the premises;
- (b) a provision prohibiting work from being carried out on specified items of the owner's property;
- (c) a provision requiring the tenant to comply with the requirements of any industrial award, industrial agreement or enterprise agreement (such as a construction site agreement) affecting any shopping centre in which the premises are situated.

82 Refurbishment of Premises

An owner shall not require a tenant to refurbish or refit the premises unless the lease specifies the nature, extent and timing of the refurbishment or refitting.

Division 9 - Assignments, subleases and mortgages

83 Tenant may seek consent to assignment of lease or grant of sublease of premises, or mortgage of lease

A tenant may, subject to clauses 91 and 92, by request in writing, seek the agreement of an owner to any of the following:

- (a) the assignment of the lease;
- (b) the grant by the tenant of a sublease for the premises to which the lease relate;
- (c) the mortgage of the lease.

84 Owner to request information necessary to determine request for assignment, sublease or mortgage

If an owner requires information to make a decision in relation to a request under clause 83, the owner shall advise the tenant of any information required within 14 days of the request under clause 83. For the purposes of this clause an owner may not require information from a tenant other than:

- (a) where the request is for consent to an assignment or sublease -
 - (i) information concerning the financial standing of the prospective assignee or subtenant, including details of any finance for which the prospective assignee or subtenant has approval;
 - (ii) information concerning the business skills of the prospective assignee or subtenant;
 - (iii) information concerning the financial standing of any prospective guarantor for the prospective assignee or subtenant;
 - (iv) a current tenant's certificate of occupancy for the premises;

- (v) information as to the proposed use of the premises by the prospective assignee or subtenant; and
 - (vi) references for the prospective assignee or subtenant; and
- (b) where the request is for consent to the mortgage of the lease-
- (i) information concerning the identity and financial standing of the proposed mortgagee; and
 - (ii) details of the loan or other obligation to be secured by the mortgage including, where applicable, the amount of the loan, the purpose to which it is proposed the loan moneys be applied, the term of the loan and the repayment schedule for any loan and the powers which may be exercised by the mortgagee under the mortgage.

85 Owner may consent to or object to assignment, sublease or mortgage

An owner shall give written notice of his or her consent or refusal of consent to an assignment, sublease or mortgage, within 21 days of receipt of any information required to be given under clause 84. If no information is requested under clause 84, then the owner shall give written notice of his or her consent within 21 days after the expiry of the 14 day period referred to in clause 84. If the owner fails to give written notice of his or her consent in accordance with this section, the owner shall be deemed to have given consent to the proposed assignment, sublease or mortgage. The Tribunal may order an owner to produce the Crown Lease at the Office of the Registrar of Titles to enable the endorsement of an assignment or sublease.

86 Grounds for withholding of consent to assignment or sublease

An owner may withhold consent to the assignment of a lease or granting of a sublease for premises only where the owner has reasonable grounds to believe that-

- (a) the prospective assignee or subtenant intends to change the use of the premises as permitted under the lease;

- (b) the prospective assignee or subtenant (taking into account information concerning any proposed guarantor for that person) does not have the financial standing to conduct the business;
- (c) the tenant cannot produce a current tenant's certificate of occupancy for the premises; or
- (d) the prospective assignee or subtenant possesses skills which are less than those of the existing tenant for the purposes of the conducting the business.

87 Grounds for withholding of consent to a mortgage of a lease

An owner may withhold consent to the mortgage of a lease only where the owner has reasonable grounds to believe that the tenant is not of sound financial standing or does not have the capacity to service a proposed loan, or otherwise meet his or her obligations under the mortgage.

88 Owner may recover costs

An owner is entitled to recover from the tenant the reasonable costs of any legal or other expenses incurred in connection with determining whether to consent to an assignment, sublease or mortgage, provided that the owner seeks recovery of such costs, in writing, within 6 months of the giving, or refusing, of consent to the assignment, sublease or mortgage, as the case may be.

89 Substantiation of Costs

A tenant may, in writing, require an owner to provide substantiation of costs sought to be recovered by the owner under clause 88 and the owner may not recover those costs until such substantiation is provided to the tenant.

90 Tenant and guarantor released from liability

A tenant and a tenant's guarantor are released from further obligations under the lease upon the assignment of the lease in accordance with this Code.

91 Tenant to provide prospective assignee or subtenant with copy of disclosure statement

Before requesting the consent of the owner to agree to an assignment or the granting of a sublease, the tenant shall provide to the prospective assignee or subtenant, as the case may be, a copy of any disclosure statement given to the tenant in respect of the lease, together with details of any material changes that have occurred in respect of the information contained in that disclosure statement since it was given to the tenant, being changes of which the tenant is aware or could reasonably be expected to be aware. A tenant shall not, without reasonable excuse, fail to comply with this clause.

92 Tenant may seek copy of disclosure statement from owner

Where a tenant does not have in his or her possession, or have access to, a copy of the disclosure statement, the tenant may request the owner to provide a copy of the disclosure statement in relation to the lease, for the purpose of providing a copy to a proposed assignee or subtenant.

93 Owner to assist with provision of disclosure statement

Where a tenant requests a copy of a disclosure statement under clause 92, the owner shall not, without reasonable excuse, fail to comply with the request, within 14 days of receiving the request.

Division 10 -Termination and renewal of leases

94 Tenant may request owner's intention as to renewal

A tenant is entitled, by written notice, within 12 months prior to the expiry of a lease, to request from the owner a statement of intention as to renewal of the lease by the owner.

95 Owner to respond within one month of giving notice

Where an owner receives a notice under clause 94, the owner must, within one month from the date on which the notice was served on the owner, give written notification to the tenant, either -

- (a) offering the tenant a renewal of the lease on terms and conditions (including the amount of rent to be charged initially under the new lease) specified in the notification; or
- (b) informing the tenant that the owner does not propose to offer the tenant a renewal of the lease.

96 Failure to respond extends period of lease

If an owner fails to respond to a notice under clause 94 within one month from the date on which the notice was served on the owner, the period of the lease is deemed to be extended by the period commencing from the expiry of one month from the date on which the notice under clause 94 was served on the owner until the date on which the owner responds to that notice.

97 Lease extended where offer withdrawn

Where an offer is made to the tenant in response to a notice under clause 94 and the owner withdraws the offer at any time (whether or not the processes of clause 53 are invoked), the existing lease is extended by the period commencing from the date on which the offer was made until the date on which the owner withdrew the offer. An extension under this clause is in addition to any extension that may arise by virtue of the operation of clauses 54 and 96.

98 Tenant's right to terminate lease where lease period extended

Where a lease is extended by virtue of the operation of clause 96 or 97, the tenant may, at any time after the date when the lease would have expired, but for the extension of the lease, terminate the lease by giving one month's notice, in writing to the owner.

Division 11 - Miscellaneous

99 Security bonds - interpretation

A reference to a security bond is a reference to a sum of money paid (or guaranteed) by or on behalf of a tenant or prospective tenant, to an owner, under an agreement that the money will be repaid by the owner on or after the termination of the tenancy without any deduction, other than a deduction of an amount equal to the sum of the amounts (if any) -

- (a) owed by the tenant by way of unpaid rent in respect of the premises and goods leased with the premises and unpaid outgoings; and
- (b) necessarily expended in repairing or restoring the premises, or replacing, repairing or restoring goods leased with the premises, as a result of loss, damage or deterioration, other than fair wear and tear, occurring during the term of the tenancy and attributable to the act or default of the tenant or of any other person on the premises, or using the goods, with the consent of the tenant.

100 Maximum level of security bond

A security bond shall not be greater than an amount equal to 3 months rent.

101 Security bond to be held on trust in interest bearing account

Subject to the provisions of the *Agents Act 1968*-

- (a) a security bond shall be held by the owner in an account bearing interest; and
- (b) neither the bond nor any interest on the bond which accrues to the tenant shall be appropriated by the owner except in satisfaction of amounts referred to in paragraphs 99 (a) and (b).

102 Security bond to be repaid within one month of termination of tenancy

Subject to the provisions of the *Agents Act 1968*, a security bond and any interest which has accrued in respect of the bond, or that part of the bond and interest which has not been appropriated by the owner in accordance with the Code, shall be refunded to the tenant within one month of the termination of the tenancy.

103 Bank guarantee may not be unreasonably refused as security bond

An owner may not unreasonably refuse to accept a bank guarantee in satisfaction of any requirement to provide a security bond.

104 Independent legal advice

A tenant must not be compelled to use the services of a lawyer nominated by the owner.

105 Tenant not required to pay fees

Where a tenant is compelled, in contravention of clause 104, to use the services of a lawyer nominated by the owner -

- (a) the tenant is not required to pay any fees for the lawyer's services and the owner is liable to pay to the tenant the amount of any fees paid by the tenant or tenant to such a lawyer for such services; and
- (b) the owner is liable to pay any unpaid fees for the lawyer's services which the tenant, by virtue of paragraph (a), is not liable to pay.

106 No reliance to be placed on certificate provided where tenant compelled to use lawyer nominated by owner

If a tenant is compelled to use the services of a lawyer in contravention of clause 104 for the purpose of the provision of a certificate referred to in clause 36, any certificate so provided is invalid.

107 Rent concessions to be disclosed for purpose of valuation

An owner shall provide to a valuer, in confidence, for the purpose of a valuation required to be carried out under this Code, details of any rent concessions the owner has given to other tenants.

108 Owner not liable for breach of confidence

An owner, in complying with the requirements of clause 107, is not taken to have committed any breach of confidence or contract.

PART 4 - ADDITIONAL REQUIREMENTS FOR PREMISES IN SHOPPING CENTRES

Division 1 - Management information

109 Provision and use of turnover figures

An owner may only require that monthly turnover figures be supplied by the tenant to the owner where the lease provides that rent is to be determined by reference to turnover. The owner shall not divulge or communicate to any person any such information provided by the tenant other than:

- (a) with the consent of the tenant;
- (b) in a document giving aggregate turnover information about a shopping centre in a manner that does not disclose information relating to the turnover of an individual tenant's business;
- (c) to a court or tribunal or for the purposes of any mediation, hearing or valuation for the purposes of this Code or the lease;
- (d) in compliance with a requirement made by or under this Code or an Act;
- (e) to the owner's professional advisers (such as legal or financial advisers), or to the proper officer of any financial institution for the purpose of enabling the owner to obtain financial accommodation; or
- (f) in good faith, to a prospective purchaser of the shopping centre or part thereof.

110 Statistical information to be available to tenant

If a lease requires the tenant to pay any amount in respect of outgoings on account of expenditure incurred in obtaining statistical information (such as "traffic counts"), the lease must include a provision to the effect that the owner must make any information so obtained by the owner available to the tenant.

Division 2 - Advertising and promotion costs

111 Advertising and promotion levy

If a lease requires the tenant to pay any amount to the owner in respect of advertising and promotion costs, before any such amount may be levied by an owner he or she must -

- (a) at least 1 month before the start of each accounting period of the owner, make available to the tenant a marketing plan that gives details of the owner's proposed expenditure on advertising and promotion during that accounting period, and indicate the amount (if any) of moneys previously levied for advertising or promotional purposes, but not expended; or
- (b) if such a payment relates to an opening promotion, at least 1 month before that opening promotion, make available to the tenant details of the proposed expenditure on that promotion.

112 Tenant not liable to pay costs where owner fails to comply with Code

Where an owner fails to comply, other than in a minor or trivial way, with the requirements of clause 111 a tenant is not liable to pay any amount in respect of advertising and promotion costs and may recover any amount already paid in respect of the costs for which no expenditure plan has been provided.

113 Moneys not expended to be retained for benefit of tenants

Any moneys paid by a tenant, under an advertising and promotion levy, which is not expended within the owner's accounting year shall be retained by the owner in a marketing fund for the benefit of tenants to be applied towards future expenditure on advertising or promotion of the shopping centre.

Division 3 - Outgoings

114 Non-specific outgoings contribution limited by ratio of lettable area

- (1) A tenant under a lease in a shopping centre is not liable to contribute towards a non-specific outgoing of the owner (that is, an outgoing not specifically referable to any particular

premises in the shopping centre) unless the tenant's premises is one of the premises to which the outgoing is referable, and is not liable to contribute an amount in excess of an amount calculated by multiplying the total amount of that outgoing by the ratio of the lettable area of the tenant's premises to the total of the lettable areas of all the premises in the shopping centre to which the outgoing is referable.

- (2) In this clause, an outgoing is "referable" to premises if the premises is one of the premises that enjoys or shares the benefit resulting from the outgoing.

Division 4 - Relocation

115 Relocation due to refurbishment or redevelopment

If a lease contains a provision that enables the business of the tenant to be relocated within the shopping centre, the provision may be invoked only after presentation to a tenant of a plan for refurbishment, redevelopment or extension of the shopping centre to be carried out within a reasonable time after the relocation of the tenant.

116 Premises must be affected

A relocation provision in a lease may not be invoked unless a proposed refurbishment, redevelopment or extension of a shopping centre in which a tenant's premises are located, cannot practicably be carried out without vacant possession of the tenant's premises.

117 Requirements for relocation clauses

A provision in a lease allowing relocation of a tenant must -

- (a) require the owner to give the tenant at least 3 months written notice of the date of relocation and include an offer to provide alternative comparable premises, on terms and conditions no less favourable than those applying in relation to the leased premises;
- (b) state the right of the tenant, within one month after the relocation notice is given, to give written notice to the owner of the termination of the lease, with such termination to take

effect three months after the relocation notice was given, unless the parties agree to termination at some other time;

- (c) require the grant of a new lease for alternative comparable premises, for a period equivalent to the unexpired term of the existing lease on terms and conditions no less favourable than those applying in respect of the premises from which the tenant is relocated;
- (d) provide for the owner to pay the tenant's reasonable costs of relocation and pay reasonable compensation to the tenant for any other loss or damage incurred by the tenant as a result of the relocation; and
- (e) provide that for the purpose of determining what is reasonable compensation regard must be had to any concessions given to the tenant, including reduced rent, which are based on the existence in the lease of the relocation provision.

Division 5 - Trading hours

118 No change to core trading hours without majority support of tenants

An owner is not entitled to change the core trading hours of a tenant without the approval in writing of the tenants of a majority of premises in the shopping centre (whether or not the premises are premises to which this Code otherwise applies). The initial fixing of trading hours in a new shopping centre is not a change to core trading hours and is not affected by this clause.

119 Tenants may trade outside core trading hours

A tenant may trade outside the core trading hours determined by the owner, with the owner's agreement and provided the tenant meets the costs associated with opening and operating the shopping centre for the additional hours (including the costs relating to advertising and promotion). Any such cost met by the tenant must be proportionate, having regard to the costs related to opening and operating of the shopping centre, incurred by other tenants, who are trading outside the core trading hours simultaneously with that tenant.

Division 6 -Miscellaneous

120 Geographical restrictions

A lease must not contain a provision which has the effect of preventing or restricting the tenant from carrying on business outside the shopping centre in which the tenant's premises are located, either during the term of or after the expiry of the lease. This clause does not operate to prevent a lease or other agreement from containing a provision that prevents the use of the name of the shopping centre in connection with a business carried on outside the shopping centre.

121 Inadequate sales

A provision in a lease that allows an owner to terminate the lease on the ground that the tenant or the business of the tenant has failed to achieve adequate or specified sales or turnover performance is void.

122 Tenants' association

A tenant may not be prevented from, or compelled to, join a tenants' association or other similar body.

PART 5 - DISPUTE RESOLUTION

123 Disputes

Except as otherwise provide in this Code any unresolved dispute between parties to a lease, arising under or in connection with the lease or the use or occupation of premises to which the lease relates may only be resolved in accordance with the process of mediation and referral of disputes to the Tenancy Tribunal set out in the *Tenancy Tribunal Act 1994*.

SCHEDULE 1

SPECIFIED PREMISES

The following premises are specified premises for the purposes of the Code:

1. Premises leased to a corporation incorporated under the *Associations Incorporation Act 1991* or an organisation eligible to be so incorporated.
2. Premises leased to an unincorporated charitable organisation.
3. Any premises leased as-
 - (i) a child care centre;
 - (ii) a sport centre;
 - (iii) an art gallery; or
 - (iv) a gardening supply centre

SCHEDULE 2

DISCLOSURE STATEMENT

(Commercial - in - confidence)

ADVICE TO TENANTS (& SUBTENANTS)

Before signing agreements to lease or leases you should ensure you fully understand the documents. If you have any doubt you should seek independent legal advice. A disclosure statement must be given to you at least 7 days before you enter into a lease. The owner is required to tell you where you may obtain a copy of the Code of Practice for Retail and Commercial Leases and provide you with a copy of the form of the proposed lease as early as practicable in the negotiations. Make sure you have these documents before you sign anything.

NOTE: Where there is insufficient space on this form, please attach additional sheets

TENANCY DETAILS

Address of Premises/Shop No	Lettable Area (sq.m)
Permitted Use of Premises	
Lease Period / /19 to / /19	Option Periods (if any)
Finishes to be provided by the owner.	
Hours of access to premises outside trading hours	
Date on which premises will be available for occupation by the tenant.	
Owner's requirements as to quality and standard of fittings in premises	

State what finishes, fixtures, fittings equipment, and services will be provided by the owner and who will be responsible to maintain, insure, repair or replace them.

State what finishes, fixtures, fittings, equipment and services will be provided by the tenant and who will be responsible to maintain, insure, repair or replace them.

Rent:

Method for calculating rent:

1. Commencement Date
2. Formula
3. Rent reviews - frequency
- nature

ESTIMATED OUTGOINGS TO BE PAID BY THE TENANT

DETAILS OF OUTGOINGS	Estimate \$p.a.	DETAILS OF OUTGOINGS	Estimate \$p.a.
Air Conditioning/ Ventilation		Audit Fees	
Building Intelligence & Emergency Systems		Cleaning	
Car Parking		Child Minding	
Electricity		Energy Management Systems	
Fire Protection		Gardening	
Gas & Oil		Insurance	
Land tax		Lifts and escalators	
Management Costs		General rates	
Pest Control		Provision for Maintenance	
Public Address/Music		Repairs and Maintenance	
Security		Sewerage Disposal & Sullage	
Signs		Telephones (Public)	
Uniforms		Water & Sewerage rates	

Formula for apportionment of outgoings if tenant not liable for total amount
Additional outgoings to be borne by tenant (to be specified)

SHOPPING CENTRE DETAILS (IF APPLICABLE)

Name of Shopping Centre		
Address of Shopping Centre	Suburb/Town	Postcode
Number of Premises in Shopping Centre	Total Lettable Area (sq.m)	
Parking Facilities at Shopping Centre Number of bays for customers _____ Number of bays for tenants _____ _____		
Facilities and services provided by the owner.		
Changes or developments planned by the owner and timing of any changes or developments for: Shopping Centre: Surrounding Roads:		
Core trading hours (the times when the premises in the shopping centre are required to be open for business)		
Tenant mix - Attach floor plan showing, in the case of a new shopping centre, the proposed tenancy mix for the centre, including the location of common areas and kiosks within the centre, and in the case of an existing shopping centre the existing and any proposed tenancy mix, and the location of common areas and kiosks within the precinct.		
Tenants Association No <input type="checkbox"/> Yes <input type="checkbox"/> Attach details of constitution, voting rights and conditions, including contributions		
Contribution to shopping centre advertising and promotion No <input type="checkbox"/> Yes <input type="checkbox"/> Tenant's estimated contribution, if any: \$ per annum		

DETAILS AS TO AGREEMENTS OR REPRESENTATIONS

Give details of any other agreements between owner and tenant, or representations made by owner or tenant (including undertakings given in relation to exclusivity or limitations on competing uses agreed between the parties).

DECLARATION BY OWNER

I acknowledge that all details and statements in this Disclosure Statement are true and correct.

Name of owner:

Address of owner:

Signature:

Date:

DECLARATION BY TENANT

I acknowledge receipt of this Disclosure Statement.

Name of tenant:

Address of tenant:

Signature:

Date:

SCHEDULE 3

VALUATION PRINCIPLES FOR MARKET RENTAL VALUATION

1. In relation to the valuation of premises no consideration should be had for:
 - (a) any special interest or concern of the owner or tenant;
 - (b) the tenant's goodwill (if any);
 - (c) the tenant's fixtures and fittings; and
 - (d) any advantage or detriment due to the existence of the current lease agreement.
2. Subject to Principle 3, in relation to the valuation of premises consideration must be had for:
 - (a) total gross costs of occupancy, ie., rent plus outgoings (excluding promotional levies or advertising commitments required by the lease);
 - (b) market evidence relating to comparable premises, including the level of any incentives or inducements to lease being offered in the marketplace for comparable premises;
 - (c) the estimated gross occupancy costs which would be agreed, as at the date of the valuation, between a willing owner and a willing tenant in an arms length transaction, after proper marketing of the premises, in which transaction the parties act knowledgeably, prudently and without compulsion;
 - (d) covenants and restrictions on the use of the premises or any covenants pertaining to adjacent premises that run with the premises;
 - (e) court precedents relating to valuation practice;
 - (f) the proposed arrangements for rent review;
 - (g) the building services and improvements being offered by the owner (excluding any services or improvements that are capable of being removed or withdrawn by an outgoing tenant or third party);
 - (h) the condition of the premises, as they are to be provided by the owner;
 - (i) particulars required to be disclosed in a "disclosure statement" which affect or potentially affect the value of premises, including particulars as to a tenant's obligations, costs or responsibilities;
 - (j) the terms and conditions of the proposed lease, not

inconsistent with the Code; and
(k) any other relevant market evidence.

Valuation to be a "speaking valuation"

3. A valuation shall be a "speaking valuation", that is, the valuer must give detailed reasons for his or her determination and must specify the matters to which he or she had regard for the purposes of making his or her determination.

Valuation to include statement concerning disclosure of concession

4. A valuation shall include a statement concerning whether any rental concessions relevant to the determination of the valuation of premises, the subject of the valuation, was disclosed to the valuer, for the purposes of the valuation.

EXPLANATION OF PROVISIONS

2. *Explanation of Provisions*

CHAPTER 1

SCOPE AND APPLICATION OF THE CODE

Leases and Licences to which the Code applies

The difference between a lease and a licence

1. Both a lease and a licence are agreements to occupy premises. The major legal difference between these two types of agreement is that under a lease, a tenant has a right to 'exclusive possession' whereas under a licence there is no such right. If the Code only applied to leases, parties would be able to avoid the Code by entering into licence agreements. Lease is defined in the Code to include leases and licences, whether or not those agreements are in writing. [see clause 2 - definition of lease]

2. Even though the Code will apply to both leases and licences, some provisions of the Code will be incapable of applying to a licence and some provisions will need to be interpreted differently to take account of the differences between a lease and a licence. The High Court has considered this question before. In the case of *Clarke v Tyler* (1949) 78 CLR 646 at 650; 23 ALJ 284 per Latham CJ the High Court had to examine how the Agricultural Holdings Act 1949 of New South Wales would apply to licences. That Act regulated leases and licences of agricultural land. In that legislation, lease was defined to include a licence, but the provisions of the legislation were framed to apply mainly to a lease rather than a licence. The High Court held that when reading the legislation, it is necessary to take account of the fact that a licence is different to a lease. If the legislation can be read in a way to apply to a licence then the Court will do so. In the case, even though the legislation referred to a 'notice to quit' a lease, the Court interpreted that provision as including a notice to determine the use and occupation of land under a licence.

Application of the Code to Subleases

3. The Code applies to a sublease as if it were a lease. [clause 2 - definition of 'lease'] In such circumstances, the tenant who grants the sublease becomes an owner, in respect of the sublease, and the subtenant becomes a tenant, in respect of the sublease. In a similar fashion, where a tenant assigns the lease to another person, that other person becomes the tenant, after

the date of assignment. If the owner sells the premises, the new owner becomes the owner, under the Code, after the sale.
[clause 2 - definitions of 'owner' and 'tenant']

Leases not covered by the Code

4. The Code will not apply to a Crown headlease. In addition, the Code will not apply to any agreement to occupy a part of the common area of a shopping centre if the agreement does not specify the particular area that is to be occupied. In other words, an agreement to use an undefined portion of the common area is not intended to be covered by the Code. [see clause 2 - definition of lease]. The Code will only apply to certain types of premises and generally it will not apply to leases of less than 6 months. Most provisions of the Code will not apply to leases entered into prior to 1 January 1995.

Leases that run for a term of less than 6 months

5. The Code recognises that there may be circumstances in which it may suit both a property owner and a tenant to enter into a short term lease without the formalities and requirements of the Code.
6. The Code will generally not apply to a lease having a term of less than 6 months. [see clause 7]
7. However, a lease that runs periodically from week to week or month to month will be covered by the Code from the date that the tenant has been in continuous occupation of the premises for 6 months. A lease that has a fixed term of less than 6 months that is renewed for a further period of less than 6 months will be covered by the Code as soon as the tenant has been in continuous occupation of the premises for 6 months. And a tenancy at will will be covered by the Code as soon as the tenant has been in continuous occupation of the premises for 6 months. [see clause 7]

Premises to which the Code applies

Retail premises

8. Retail premises are premises that are mostly used (or intended to be mostly used) for running a business selling or hiring goods or providing services by retail. [clause 2 - definition of 'retail premises']
9. To determine whether or not the Code applies to particular retail premises, use the following guide:
 - **THE CODE APPLIES** to retail premises, if they are:
 - 1000 square metres or under in area;
 - over 1000 square metres if the tenant is not a company;
 - over 1000 square metres if the tenant is a company, provided that the company is eligible to be incorporated as a proprietary limited company; or
 - 'specified premises' - see paragraphs 15 - 16 below

[clause 6]

Commercial Premises

10. Commercial premises are any premises that are predominantly used (or intended to be predominantly used) for running a business but which do not qualify as retail premises. [clause 2 - definition of 'commercial premises']
11. The Code does not apply to all commercial premises. To determine whether or not the Code applies to particular commercial premises, use the following guide:

- **THE CODE APPLIES** to commercial premises if they are:
 - small commercial premises - that is, no more than 300 square metres in area;
 - 1000 square metres or under in area and located in a shopping centre;
 - over 1000 square metres if the tenant is not a company and the premises are located in a shopping centre;
 - over 1000 square metres if the tenant is a company which is eligible to be incorporated as a proprietary limited company and the premises are located in a shopping centre; or
 - 'specified premises' - see paragraphs 15 - 16 below

[clause 6 and clause 2 -definition of small commercial premises]

Premises in shopping centres

12. The Code defines a shopping centre as a group of premises which must meet certain characteristics.

[see clause 2 - definition of 'shopping centre']

13. To qualify as a shopping centre, all of the characteristics in the definition in clause 2 must be satisfied. Therefore, where a building contains a mix of premises such as retail shops on a ground floor and commercial offices on upper levels of the building, only the premises that are promoted or regarded as a shopping centre or court, or arcade, are taken to be part of the shopping centre. This would generally exclude the commercial offices on upper levels or entertainment annexures.

14. To determine whether or not the Code applies to particular premises in a shopping centre, use the following guide:

- **THE CODE WILL APPLY** to any premises in a shopping centre, regardless of whether the premises are retail premises,

2. Explanation of Provisions

commercial premises or some other type of premises, if they are:

- . 1000 square metres or under in area;
- . over 1000 square metres if the tenant is not a company;
- . over 1000 square metres if the tenant is a company, provided that the company is eligible to be incorporated as a proprietary limited company; or
- . 'specified premises' - see paragraphs 15 - 16 below

[clause 6]

Specified Premises

15. 'Specified premises' are premises that may not fall within the definition of retail premises or commercial premises, but which are, nonetheless, considered to require the protection of the Code. Specified premises are those premises listed in Schedule 1 to the Code. [clause 2 - definition of 'specified premises']

Timing - When does the Code start applying to leases?

Summary: The Code will apply to leases entered into, renewed or extended under an option on or after 1 January 1995. The Code will also apply to any particular clause in a lease that is varied on or after 1 January 1995. In addition, certain provisions of the Code will apply to all leases, regardless of when they were entered into, but only in respect of conduct occurring on or after 1 January 1995.

New leases entered into on or after 1 January 1995

17. A lease can be 'entered into' in a number of ways. Obviously, a lease can be entered into if both the tenant and the property owner sign a written lease. However, sometimes a tenant will want to move into premises before a lease is finalised and can be signed by both parties. If a prospective tenant moves into premises, or begins to pay rent for premises, before there is a

fully signed lease, the lease is taken to be entered into from the date the tenant moves into the premises or begins to pay rent, whichever happens first. [clause 3 - definition of 'entered into']. Owners and tenants should note that a tenant is not required to pay any rent prior to the date of handing over possession of the premises (the date of handing over possession can occur before the tenant actually moves into the premises) and rent is not required to be paid until the finishes, required to be provided by the owner have been substantially provided. [clause 61]

18. Where a lease is entered into on or after 1 January 1995, the Code will apply to that lease. [clause 5 and clause 9]

Leases that are renewed, or extended under an option, on or after 1 January 1995

19. Where a lease is renewed, or extended under an option, on or after 1 January 1995, the Code will apply to all the provisions of the renewed lease or the lease entered into under the option. [clause 5 and clause 9]

Variations to leases on or after 1 January 1995

20. Where a tenant and an owner agree to add or change a provision of a lease on or after 1 January 1995, the Code will apply to that new provision (not the whole lease) to the extent that the Code is capable of applying to that new provision in isolation. [clause 5 and clause 9]

Certain conduct is prohibited from 1 January 1995 regardless of when the lease was entered to.

21. On or after the 1 January 1995, the following conduct will be prohibited in respect of all leases whether or not they were entered into before or after that date:
- A party to a lease will not be permitted to engage in conduct that is unconscionable, coercive or harsh and oppressive. *see further Chapter 2*
 - An owner will not be permitted to seek, and a tenant (including an assignee tenant or subtenant) will not have to pay, any key money when a lease is granted, extended under an option, renewed, assigned, sublet or mortgaged, or where the tenant

seeks the owner's consent to the assignment, sublease or mortgage of a lease.

Certain conduct is prohibited in leases entered into after 1 January 1994

- Multiple rent review clauses, in leases entered into after 1 January 1994, will be void from 1 January 1995. Such clauses will have to be renegotiated by the parties after that date and if the parties cannot agree on a new method for reviewing the rent, all future rent reviews under the lease will be at market value. Rent reviews which take place before 1 January 1995 will not be affected.
- Ratchet clauses in leases entered into after 1 January 1994, will be void from the 1 January 1995. However, there is no retrospective operation of the Code so adjustments made under a ratchet clause before the 1 January 1995 will not be affected.

[see generally sections 6, 8 and 9 of Tenancy Tribunal Act 1994]

<h2>Avoiding the Code</h2>


22. Even if a lease is:

- signed outside the ACT; or
- has a provision stating that the lease is to be governed by the laws of some place other than the ACT; or
- has a provision stating that the Code does not apply to the lease,

it will still be subject to the Code if the lease is for premises situated in the ACT and the premises meet the requirements explained in this chapter. [clause 6(1)]

2. *Explanation of Provisions*

23. Where there is any inconsistency between a lease and the Code, the provisions of the Code prevail over the lease. [clause 11] In addition, where the Code requires a lease to contain certain provisions, the lease will be read to include those provisions even if the lease fails to include them. [clause 12]
24. However, the Code is subject to the provisions of any lease purpose clause of a Crown headlease and the Code does not apply to a Crown headlease. [clause 2 - definition of lease, and clause 4]



2. *Explanation of Provisions*

CHAPTER 2

CONDUCT OF THE PARTIES

Prohibited Conduct

Summary: The Code prohibits conduct between an owner and a tenant that is:

- unconscionable;
- coercive; or
- harsh and oppressive.

[see clause 13]

Unconscionability

25. The leading Australian decision on the concept of unconscionability was given by the High Court in the case of *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. In that case, two elderly Italian immigrants, with a limited grasp of English, were enticed into a loan without receiving any independent advice. The Court held that the couple were under a special disability. Their age and limited English skills, made them particularly vulnerable to exploitation. The lender had taken unfair advantage of their position and the loan was therefore invalid. The test developed by the High Court involves identifying a special disability that seriously affects the ability of the weaker party to protect its own interests. Having identified such a disability it is necessary to prove that the stronger party has taken unfair advantage of that vulnerability.
26. Conduct will not usually be unconscionable merely because it is harsh in its effect on the party. In a commercial setting, where both parties are business people, the parties are more likely to be capable of looking after their own interests than someone not involved in business. Competitive bargaining is a part of the commercial environment and this would be taken into account in determining whether particular conduct is unconscionable.

Coercion

27. Acting under 'coercion', in a legal sense, is something more than acting under pressure to do something you may prefer not to do. A reluctant debtor who pays under the stress of legal proceedings is not coerced within the legal meaning of the word. 'Coercion involves something in the nature of the negation of choice...': *Hodges v Webb* [1920] 2 Ch 70 per Petersen J.
28. In *Ellis v Barker* (1871) 40 LJ Ch 603 Lord Romilly MR held that 'Coercion takes an infinite number of forms, but it may properly be thus defined: - the moment that the person who influences the other does so by the threat of taking away from that other something he then possesses, or of preventing him from obtaining an advantage he would otherwise have obtained, then it becomes coercion and it ceases to be persuasion or consideration.'
29. At common law, duress has been held to be a form of coercion which vitiates a contract: *Pao On v Lau Yiu Long* [1980] AC 614. Behaviour which the Courts have held to result in a person acting under duress has included demands for payment in excess of what has been agreed in a contract, under threat of breach of the contract.
30. It is expected that if an owner threatened not to renew a lease unless the tenant took some action that was not warranted or part of an existing agreement and the tenant takes that action because of fear of the threat, then the conduct would be coercive.

Harsh and Oppressive

31. Conduct will not be harsh and oppressive where that conduct is merely unreasonable or unfair. It is intended that this ground of relief will be focused on the outcome of conduct rather than the bargaining process. That is, the focus should be on the effect of the conduct on the party concerned, having regard to the circumstances of the particular case. Conduct will be harsh and

2. Explanation of Provisions

oppressive in those circumstances where the effect of the conduct is so unduly severe that it would be unjust to allow the conduct to stand. It is expected that the Tribunal will be properly placed to balance principles such as the desire to uphold agreements freely entered into with the desire to prevent exploitation and the adverse effects of unjust conduct.

32. Factors relevant to this issue include:

- . the fact that the parties are involved in commercial dealings as business people
- . whether any terms of the lease have actually been breached
- . whether the conditions in the lease are unduly difficult to comply with
- . whether the parties are companies or people
- . the state of the parties physical and mental capacity

33. Concepts related to "harsh and oppressive conduct" have been considered by Courts in cases such as:

A & M Thompson Pty Ltd v Total Australia Ltd [1980] 2 NSWLR 1;

Beneficial Finance Corporation Ltd v Karavas (1991) 23NSWLR 256; and

West v AGC (Advances) Ltd (1986) 5 NSWLR 610

General Conduct

34. A tenant in a shopping centre cannot be compelled to join a tenants' association or a similar body and must not be prevented from joining such a body. **[clause 122]** A lease must not seek to prevent a tenant from carrying on business outside the shopping centre either during the term of the lease or after the lease expires, but a lease may provide that the tenant is not to use the

name of the shopping centre in connection with any such business. [clause 120]

35. As an overriding, general rule, the parties to a lease are required to conduct themselves, at all times, in accordance with the provisions of the Code. [clause 10]

2. *Explanation of Provisions*

CHAPTER 3

NEGOTIATION OF LEASES

Representations made before a lease is entered into

36. The Code requires each party, during the negotiations to a lease, to provide information regarding the proposed lease to the other party. This information must not be false or misleading or omit any material information. The Code requires each party to make the other party aware of any information that they know about, or which they should know about, that is necessary for the other party to make a sound commercial decision. [clause 14 and clause 2 - definition of 'material matter'] The Code applies to a prospective tenant. [clause 2 - definition of 'tenant']
37. If one party deliberately fails to act in accordance with these duties and the other party is enticed to enter into the lease because the correct information was not given, then the guilty party must pay the other party compensation for damage suffered as a result of that breach. [clause 15]
38. As soon as practicable during negotiations, an owner is required to provide a tenant with a copy of the form of a proposed lease. The owner is also required to advise the tenant of the existence of the Code and the fact that it can be purchased from ACT Government Shopfronts. [clause 16]

Disclosure Statements

Summary: At least 7 days before a tenant enters into a lease, the owner is required to provide the tenant with a Disclosure Statement. The Disclosure Statement must contain information that is truthful and accurate, as far as the owner is aware or should be aware, at the date the Disclosure Statement is given to the tenant. If it is deficient, the tenant may have a right to claim compensation or terminate the lease.

Form of a Disclosure Statement

39. A disclosure statement is required to be in the same form as the disclosure statement set out in Schedule 2 to the Code. Each item of the disclosure statement is required to be completed, but only to the extent that it is relevant to the lease concerned. In other words, if the premises are not in a shopping centre, then information that is only required to be provided for a shopping centre does not have to be included. [clause 18]
40. A disclosure statement does not constitute an offer of lease. The acceptance of the statement by the tenant does not give rise to a lease. It is simply meant to be a source of information for the tenant about the premises. However, if the owner and tenant do enter into a lease at a later date, then the disclosure statement may be an important source of rights for the tenant.
41. The disclosure statement must be given to the tenant at least 7 days before a lease is entered into. A lease can be 'entered into' in a number of ways. Obviously, a lease can be entered into if both the tenant and the property owner sign a written lease. However, sometimes a tenant will want to move into premises before a lease is finalised and can be signed by both parties. If a prospective tenant moves into premises, or begins to pay rent for premises, before there is a fully signed lease, the lease is taken to be entered into from the date the tenant moves into the premises or begins to pay rent, whichever happens first. [clause 17 and clause 3] A tenant is not required to pay any rent prior to the date of handing over possession of the premises (the tenant may not actually move in on the date of handing over possession) and rent is not required to be paid until the finishes, required to be provided by the owner have been substantially provided. [clause 61]

What happens if no disclosure statement is provided or it is missing information or it contains misleading information?

42. If a property owner fails to provide a disclosure statement in accordance with his or her obligations, or the disclosure statement that is provided is false or misleading in a material way, either because it contains wrong information or it is missing information, the tenant may be able to terminate the

lease. [clause 19] Even if the tenant cannot terminate the lease, he or she may be able to claim compensation. An owner must provide information that is not false or misleading in a material way. The information provided must not omit a material matter. Where the owner deliberately breaches this requirement compensation is payable. [clause 14 and clause 15]

43. If, between the time the disclosure statement is given and the tenant either signs the lease or enters into occupation of the premises, the owner becomes aware of a material change in the information provided, the owner must immediately notify the tenant of the changes. [clause 20]
44. Where the owner breaches his or her obligations explained in the above two paragraphs, the tenant may give a minimum of 14 days notice of termination of the lease to the owner at any time within the first 3 months after the lease was entered into. [clause 19 and clause 21] If the tenant does not wish to terminate the lease, or the 3 month period has expired, the tenant may still have a claim for compensation under clause 15.
45. Where the tenant seeks to terminate the lease, the owner may challenge the notice of termination on the grounds that the owner acted honestly and reasonably and the tenant is substantially in the same position as if there had been no breach. [clause 23] If an owner wishes to contest a notice of termination, the owner must bring an application in the Tenancy Tribunal within 14 days of receiving the notice. The Tribunal will determine whether the notice of termination is valid or not. There is no mediation process to go through. The dispute goes directly to the Tribunal. [clause 24 and s 15 Tenancy Tribunal Act 1994]
46. If the notice of termination is not contested then the lease is taken to be terminated as from the date in the notice of termination. [clause 25] If the notice of termination is unsuccessfully challenged, the lease is taken to be terminated from the date the Tribunal so determines. [clause 26] Any rights that have accrued up to the date of the termination are not affected by the termination. In other words, the tenant is liable to pay rent and outgoings (and comply with other obligations under the lease) up until the date of termination, and the owner is required to comply with obligations under the lease up until the date of termination. [clause 22] The Tribunal has power to

make orders in relation to the rights and obligations of each party under the lease between the date the notice of termination is given and the date of the Tribunal's order. **[clause 27]**

Legal advice

47. Each party must pay their own legal costs in the preparation of a lease. **[clause 29]**
48. The Code provides that a tenant must not be compelled to use the services of a lawyer nominated by the owner. **[clause 104]** 'Lawyer' means a Barrister, Solicitor or Barrister and Solicitor. **[clause 2 - definition of 'lawyer']**. If a tenant is compelled to use a lawyer nominated by the owner, the tenant is not required to pay any fees for the services of that lawyer. The owner is liable to pay those fees. If the tenant has paid the lawyer, that payment may be recovered from the owner. **[clause 105]**
49. Under the Code a tenant and an owner may only agree to a lease for a term of less than 5 years in certain circumstances. One of those circumstances is if a lawyer explains to the tenant the effect of this waiver of the right to a 5 year lease. The lawyer must certify in writing that he or she has explained the effect of this waiver to the tenant. **[clause 36]** If the tenant has been compelled to use the services of a lawyer nominated by the owner, any certificate in writing from that lawyer is invalid and will not satisfy the requirements of clause 36. **[clause 106]**

Acceptance of a Lease - copies of documentation

50. A written lease is binding once it has been signed by both parties. Under the Code there is an obligation upon the party signing a lease last to advise the other party, as soon as is practicable, that the lease has been signed and is therefore binding. The party

who signs the lease last must notify the other party within 7 days. [clause 40]

51. When both parties have signed the lease, the owner is under an obligation to lodge the document for stamping (and registration, if applicable) promptly. [clause 40]
52. If the lease is not to be registered, the owner must supply the tenant with a copy of the duly stamped lease within 21 days of return from the Office of the Commissioner for Revenue. [clause 41(a)]
53. If the lease is to be registered, the owner must supply the tenant with a copy of the duly stamped and registered lease within 21 days of return of the lease from the Registrar-General's Office. [clause 41(b)]

CHAPTER 4

LEASE COSTS

Costs in the preparation of a lease

54. A provision in a lease that requires the tenant to pay for any finishes, fixtures, fittings, equipment or services has no effect unless the disclosure statement given to the tenant showed that such a payment would be required. [clause 28]
55. Each party is responsible for their own costs in relation to the preparation of a lease and one party cannot pass their costs on to another party. This means that stamp duty, which is an obligation on the owner, cannot be claimed from the tenant and registration charges are to be borne by the party that requires the lease to be registered - usually this would be the tenant. [clause 29]
56. Each party is liable for their own legal costs in connection with the preparation of a lease. [clause 29] However, the owner may ask a tenant to sign a document allowing the owner to arrange for the preparation of a lease. If the owner incurs costs in preparing a lease and the tenant then withdraws from negotiations, without reasonable cause, the tenant will be liable for all of the owner's reasonable costs of lease preparation. [clause 30]
57. The tenant cannot be forced to use lawyers nominated by the owner. [clause 104]

Key Money

58. The payment and collection of key money is prohibited. [clause 31] This prohibition will apply in respect of all leases and negotiations to enter leases from 1 January 1995. [s. 6-8 *Tenancy Tribunal Act 1994*]
59. Key-money is money (or some other benefit) that an owner may require a tenant to pay or give, either to the owner or someone else, simply for allowing the tenant to enter into, renew, extend, sublet, mortgage or assign a lease. [clause 31 and clause 2 -

definition of 'key-money'] It arguably represents the forced payment to an owner of the value of the tenant's goodwill.

60. Under the Code, key-money is defined to include any money or benefits provided by the tenant other than rent; a payment for goodwill on the sale of the owner's business; a bond; outgoings; money payable to a person in connection with the preparation of a lease; a reasonable amount for goods and services provided by the owner; and any other money permitted to be paid under the Code. A franchise fee would not be key-money. [clause 2 - definition of 'key-money']
61. Where key-money is provided by a tenant, the tenant may recover the amount of the money paid or the benefit conferred by making an application to the Tribunal. [clause 32]

Bonds

62. An owner may require a tenant to pay a security bond at the start of a lease, to cover any amount owed by the tenant for unpaid rent, outgoings or loss and damage caused by the tenant to the premises. [clause 99] In such circumstances, the owner must accept a bank guarantee instead of a bond if the tenant is willing to give a bank guarantee. [clause 103] The maximum amount that the owner can claim as a bond is the equivalent of 3 months rent. [clause 100] The bond is required to be held in accordance with the *Agents Act 1968* in an account interest bearing. [clause 101] A bond must be repayable, otherwise it is likely to constitute key-money. The bond, and interest accrued on the bond, must be returned to the tenant within 1 month of the end of the lease minus any amount which the owner may keep in respect of unpaid rent and outgoings or costs incurred for the restoration of the premises. [clause 102]

2. *Explanation of Provisions*

CHAPTER 5

5 YEAR LEASE TERMS TERMINATION AND RENEWAL

Minimum 5 year leases

Background

63. During consultation on the preparation of this Code, it appeared from discussions with interested groups and individuals that a minimum period of 5 years is necessary to ensure that business investments can be recouped within the period of a lease.
64. Some tenants considered that a 5 year lease alone was not sufficient. Many tenants wanted to be assured of automatic renewals and where a renewal was not granted, for compensation to be payable.
65. Owners, in contrast, pointed out that there are fundamental and important reasons why renewals should not be automatic.
66. The Code does not provide automatic renewal of commercial and retail leases at this stage. Instead, the Code provides for all leases to be for a minimum period of 5 years (inclusive of options). In addition, tenants (and owners) will have a right to a maximum of 11 months notice as to whether the lease will be renewed and if it is renewed, the initial rent cannot be set at a higher rate than the market rent for those premises. On the other hand, if the owner believes that the premises in question can be put to a better use, the owner may choose not to renew the lease.
67. The clauses in the Code have been designed to balance the concerns of tenants and owners in relation to the important issue of tenure. It leaves the power to renew a lease to an owner and it gives the tenant a guaranteed and reasonable period of time in which to recoup costs, plan ahead for the benefit of the business and be assured that there is a maximum ceiling on rent if the lease is renewed.

5 year leases

68. As a general rule, all leases are required to be for a period of at least 5 years including option periods. [clause 33] This means that a lease can be for 5 years or for, say, 3 years with an option for another 2 years. If the lease does not provide for a total

term, including options, of 5 years, it will still be valid, but the tenant has a right to extend the tenancy so that the total period of the lease is 5 years. [clause 34 and clause 35] In such circumstances, the tenant must advise the owner that he or she is extending the lease at least 90 days before the lease would have expired. [clause 35]

69. A lease of less than 5 years is possible where both the tenant and the owner do not want to enter into a 5 year lease - for example, where the owner discloses during negotiations that the premises are to be demolished in less than 5 years, or where the tenant only intends to run the business for, say, 2 years. However, it will only be possible to have a lease for less than 5 years in these circumstances where a lawyer, not acting for the owner, explains to the tenant the effect of this waiver of the right to a 5 year lease. The lawyer must certify in writing that he or she has explained the effect of this to the tenant. [clause 36] A lease of less than 5 years can also be given under the Code where a headlease has less than 5 years to run. [clause 38]
70. A lease of less than 5 years may also result after the exercise of an option, provided the original lease term, including option periods, added up to 5 years. In other words, if a lease is for 3 years with an option to extend for a further 2 years, the 2 year lease resulting from the exercise of the option will not breach the Code. [clause 37] The owner has a duty to advise the tenant that a lease cannot be given for 5 years because of inconsistency with the applicable head lease. [clause 39]

Notice of Renewal or Termination

71. Under the Code a tenant may write to the owner at any time in the final 12 months of a lease, asking whether the lease is going to be renewed. The owner then has 1 month to consider whether or not the lease will be renewed. [clause 94 and clause 95] If the owner proposes to renew the lease, the offer must include the terms and conditions for the new lease, including the rent to be charged in the first year of the new lease. If the tenant believes

that the rent offered is above the market rent for those premises, there is a special procedure for resolving the matter. [clause 53]

72. If the owner does not answer the written request within one month, the lease is extended on the current terms and conditions for the length of time, after that month, it takes the owner to give a response. For instance, if, 12 months before the current lease ends, the tenant makes a written request to the owner, the owner has 1 month to say whether the lease will be renewed or not. That is, the tenant will have at least 11 months notice as to whether or not the lease will be renewed. If the owner does not respond until 3 months before the end of the lease, the current lease will be extended by 8 months, on the current terms and conditions, so that the tenant will have 11 months notice of the owner's decision. If the owner does not respond until 6 months before the end of the lease, the current lease is extended by 5 months. The amount of notice that a tenant is entitled to will always be in the hands of the tenant. If the tenant makes a request under clause 94 12 months before the expiry of the lease, the tenant will have a long period of notice, regardless of when the owner actually says that the lease will or will not be renewed. However, if the tenant waits until 2 months before the lease is set to expire, then the tenant will have only a short period of notice. If the tenant does not want the lease to be extended, he or she may terminate the lease at any time after the current lease would ordinarily have expired by giving one month notice in writing. [clause 96 and clause 98]
73. An owner may withdraw an offer at any time before it is accepted. If the owner makes an offer for the renewal of a lease but later withdraws that offer, the lease is taken to be extended by a period from the date the offer was made until the date the offer was withdrawn. For example, if an offer is made to the tenant 8 months before the end of the lease, but the offer is withdrawn 3 months before the end of the lease, then the lease will be extended by 5 months. In other words the tenant would have 8 months notice of the fact that the lease will not be renewed. This means that if the offer is withdrawn, the tenant will be in no worse a position (in terms of notice that the lease will not be renewed) than if the owner had originally decided not to make an offer. [clause 97]

CHAPTER 6

RENT, RENT REVIEWS AND OPTIONS

Turnover rental & profits

74. Turnover rent is rent, or a component of the rent, that is based on the tenant's turnover or gross income. [clause 42] Turnover may not be assumed in a lease. That is, if a lease states that rent is to be based on turnover, it must not state that rent will be calculated on the basis of a minimum turnover. The Code provides that if rent is to be calculated having regard to turnover, then it is required to be calculated on actual turnover. [clause 48] The items that are taken into account in determining turnover are set out in clause 48 of the Code.
75. Because turnover rent is required to be calculated on the basis of actual turnover, not a deemed amount, if turnover rent is paid in advance before turnover calculations have been made, any underpayment or overpayment that is discovered must be adjusted. Such adjustments must be made when one of the parties requests it and it must be done within 1 month of that request. [clause 49] An adjustment may only be requested once in any twelve month period. [clause 50]
76. Where premises are located in a shopping centre and the rent for those premises is to be determined having regard to turnover, the owner may require the tenant to provide monthly turnover figures. Except in limited circumstances, the owner is not permitted to divulge this information to anyone. Those exceptions are:
- where the tenant consents,
 - where aggregate turnover for the shopping centre is provided in a manner that does not disclose an individual tenant's turnover,
 - where turnover figures are provided to a Court or Tribunal, or for a mediation, hearing or valuation under Code,
 - where providing turnover is required by law,

- where turnover figures are provided to the owner's own professional advisers or to a financial institution for the purpose of obtaining financial accommodation,
- where the figures are provided in good faith to a prospective purchaser of the shopping centre

[[clause 109](#)]

77. A lease for premises in a shopping centre that purports to allow the owner to terminate the lease on the grounds that the tenant or the tenant's business has failed to achieve enough sales or turnover is void - the lease cannot be terminated on this ground. [[clause 121](#)]

Multiple rent review and ratchet clauses

78. A multiple rent review clause is a provision that either gives the owner a choice of methods for reviewing the rent or provides 2 or more methods for reviewing the rent, whichever results in the highest rent to be paid. [[clause 2](#) - definition of 'multiple rent review clause'] If a lease entered into on or after 1 January 1994 contains a multiple rent review clause, that provision of the lease is void and of no effect from 1 January 1995. [[clause 44](#) and s. *Tenancy Tribunal Act 1994*] The parties may renegotiate the basis for reviewing the rent, but if no agreement can be reached, then rent reviews will be set at market rent. [[clause 45](#)]
79. A ratchet clause is a clause that prevents the rent from ever decreasing or gives the owner a power to prevent rent from ever decreasing. So, for instance, if rent reviews in a lease are to be calculated in accordance with the consumer price index, a ratchet clause would be a clause that stated if the consumer price index falls, the rent will not decrease but stay at the same level. [[clause 2](#) - definition of 'ratchet clause'] If a lease contains a ratchet clause, that provision of the lease is void and of no effect from 1 January 1995 regardless of when the lease was entered into. [[clause 44](#) and ss 6 & 8 *Tenancy Tribunal Act 1994*] The parties may renegotiate the basis for reviewing the rent,

but if no agreement can be reached, then reviews will be set at market value. **[clause 45]**

80. When the rent in the first year of a lease is to be calculated on the basis of two or more methods, whichever produces the highest result, or the lease gives the owner a choice of 2 or more methods for calculating the rent in the first year, that provision is void. **[clause 43]** A lease may provide for rent to be calculated partly on the basis of turnover and partly a fixed amount. This will not be invalid provided it does not give a choice of two different ways of calculating rent. So, for instance, rent may be set at \$1000 per month plus 5% of turnover. However, it may not be set at \$1000 or 10% of turnover, whichever is the higher. Where such a rental clause is void the parties may renegotiate the basis for calculating rent, but if they cannot agree, then the rent is set at market value for those premises. **[clause 45]**

Valuations under the Code

Market rental on renewal

81. When an offer is made to renew a lease, the Code provides that the rent in that offer must be no greater than the market rent for those premises. The rent is to be negotiated between the parties, with the aid of mediation if necessary, but if agreement cannot be reached then the amount of rent offered is to be set by a valuer. This protects the tenant in rent negotiations at a time when the tenant is at a very vulnerable stage. **[clause 53]**
82. Where the tenant believes that the amount of rent offered is greater than the market rent for those premises and the tenant cannot resolve this matter with the owner in the first instance, the next step in the resolution of that disagreement is that either party may notify the Registrar that they wish to have the matter referred to mediation. The Registrar may specify a time limit within which the mediator is to provide the Registrar with a mediation report, so that the process is not unnecessarily delayed. **[clause 53]**

83. If, after mediation, the matter remains unresolved, the Registrar is required to appoint a valuer, following consultation with the President of the ACT Division of the Australian Institute of Valuers and Land Economists, to determine the market rent for those premises. The valuer must carry out the valuation in accordance with the principles in Schedule 3 to the Code. After the valuation is received, the parties have a further 14 days in which to negotiate a rent. If they cannot negotiate a rent figure then the rent to be offered is the rent determined by the valuer. For example, suppose premises have been let as a fruit shop and the lease is about to come to an end. It is the owner's choice as to whether or not the lease should be renewed. Let us say that the owner wants to renew the lease and offers to renew the lease for the continued use of the premises as a fruit shop. The parties cannot agree on the rent to apply under the renewed lease and so a valuer has been appointed to assess the rent. In these circumstances, the valuer must assess the market rent for those premises as if they were offered for renting as a fruit shop. The rent that the valuer assesses for those premises becomes the amount of rent offered under the proposed renewal. [clause 53]
84. The owner may withdraw the offer at any time before acceptance and the tenant may accept an offer at any time before it is withdrawn, regardless of what stage negotiations have reached. Effectively, either party may walk away from the negotiations if they are not happy with the amount of rent discussed in mediation or set by the valuer. However, if the owner withdraws an offer, the tenant will be entitled to a period of notice before the current lease will end. [clause 97] *see also Chapter 5.*
85. For the purposes of clause 53 if there is a gap of up to three months between leaving the premises and renewing the lease, the provisions of the Code relating to renewals will still apply to that lease as if there had been no gap and the lease was being renewed. [clause 53(a)(ii)]
86. While the procedures set out in clause 53 are in progress, a lease cannot terminate until at least 14 days after the procedures in that clause have been concluded. If the procedures in clause 53 come to a conclusion because the owner withdraws the offer, then the tenant will be entitled to a period of notice before the lease expires in accordance with clause 97.

Market rental during the term of a lease

87. Where parties have entered into a lease for the first time, or where they have already entered into a lease and are required to conduct reviews of rent or the exercise of an option at market value, the market rent is required to be assessed having regard to any restrictions on the use of those premises set out in the lease. So, for example, let's say there is a lease for a shoe shop and under that lease, annual rent reviews are required to be made at market rent. The lease contains a clause stating that the only permitted use under that lease is the running of a shoe shop. In these circumstances the market rent for the purposes of the rent review is the rent that could be obtained for those premises if they were offered for rent to the general market as a shoe shop. If the parties cannot agree on what the market rent for the premises would be, then the matter is to be referred to mediation. If a mediated agreement cannot be reached, then the rent is required to be assessed by a valuer. The valuer is required to be appointed by both parties or, if the parties cannot agree on a valuer, then the Registrar will appoint a valuer in consultation with the President of the ACT Division of the Australian Institute of Valuers and Land Economists. [clause 51]
88. Until the rent can be determined, the rent continues to be payable at the same amount, even though the date for the rent review may have passed or the lease resulting from the option has begun. As soon as the rent has been determined, the parties are required to make an adjustment to correct any underpayment or overpayment of rent. [clause 52]

Concessions and valuations

89. Some leases don't state the true rent that is being charged to a tenant. Various concessions may be offered to a tenant to take up premises because of a poor market or even for anti-competitive purposes in relation to other tenancies. Such concessions should not be kept secret from valuers, as they may interfere with the determination of the true market value of other premises. If a valuer is required to value shop X, it will be necessary to examine what rent is being charged in similar premises (say shop Y). If on the face of the lease for shop Y it appears that the rent being paid is \$200 / m² the valuer may

make a valuation for shop X using this information. If, taking into account rental concessions, the true rent being paid for shop Y is \$175 / m², the valuation for shop X may be set artificially high. Under the Code, where a valuer is required to determine the market value of premises, an owner is required to provide the valuer, in confidence, with details of any concessions that the owner has given to other tenants. [\[clause 107\]](#) The owner is not taken to breach confidence or contract merely by complying with this clause. [\[clause 108\]](#)

Valuers

90. Under the Code, a valuer is either a member of the ACT Division of the Australian Institute of Valuers and Land Economists (Valuation Stream) with expertise in valuing ACT market rentals or some other suitably qualified person. Where there is a dispute as to whether someone is in fact suitably qualified, the dispute may be referred to the Tribunal. [\[clause 2 - definition of 'valuer'\]](#)
91. The impartiality of valuers appears to be of concern to some commercial and retail tenants. In particular, some valuers either manage or own commercial or retail properties. In such cases there may be a benefit to those valuers in valuing commercial and retail properties in a similar category to their own premises at above market values. The Code requires valuers to disqualify themselves if they have a direct or indirect interest in the result of a valuation. This is aimed at ensuring an impartial result. [\[clause 55\]](#) If either party believes that a valuer has failed to disclose such an interest, that party may apply to the Tribunal for a new valuation. The Tribunal may order that the valuation should stand, or that a new valuation be undertaken. [\[clause 56\]](#)
92. Valuers are required to conduct valuations in accordance with certain valuation principles that are set out in [Schedule 3](#) of the Code. [\[clause 54\]](#) If either party believes that a valuer has failed to follow those principles, that party may apply to the Tribunal for a new valuation. The Tribunal may order that the valuation should stand, that the valuer should conduct a new valuation or that a different valuer should undertake a valuation. The Tribunal is empowered to order costs against a party seeking a new valuation. [\[clause 56\]](#)
93. If a valuer requires information from a party to a valuation, that party is required to comply with the request within 2 months.

[clause 59] If the party does not comply with the request, the valuer may proceed with the valuation. [clause 60]

Costs of Valuation

94. A cost of a valuation made under the Code is to be paid by the owner and the tenant in equal shares. [clause 58]. However, the tribunal may make a different order as to costs where a party challenges a valuation and a new valuation is ordered.

<h2>Frequency of Rent Reviews</h2>

95. Changes to the amount of rent to be paid under a lease are not permitted in the first year of a lease and are only permitted once in each subsequent year of the lease. A provision in a lease that breaches this rule is void and of no effect. [clause 46] This does not prevent the rent, already worked out for a given year, being paid in steps, because the actual rent for the year is not being adjusted. That is, if the rent for a year is set at \$12 000, that rent may be paid at \$ 500 per month for 4 months, \$1000 for the next 4 months and \$1500 for the final 4 months, provided that the amount of \$12000 is fixed and certain.
96. The lease must state the date on which a review is due. If it does not state the date for a review any purported change to rent is void. [clause 47]

CHAPTER 7

OUTGOINGS

Outgoings

What can be claimed as outgoings?

97. An owner may only claim outgoings if the nature of the outgoings has been disclosed in the disclosure statement provided to the tenant before entering into the lease. **[clause 62(b)]** An estimate of the outgoings for the first year of the lease must be given in the disclosure statement. At least 1 month before the beginning of each accounting period during the term of the lease, the owner must give an estimate of the outgoings for that accounting period. **[clause 65]** At the end of each accounting period, the owner has one month in which to produce an expenditure statement for the tenant itemising and giving details of any outgoings that are to be recovered, **[clause 65]** and three months in which to produce for the tenant an audited report on expenditure. **[clause 66]** Outgoings may only be recovered if they represent the reasonable expenses of the owner for repairs, maintenance and direct operating costs of the premises. The owner may also recover government rates, taxes levies and other statutory charges relating to the building. Expenses may only be recovered as outgoings if they relate to expenditure during the term of the lease. **[clause 2 - definition of 'outgoings']** The lease must specify what outgoings are recoverable, how the amount of those outgoings is to be determined, how they will be apportioned to the tenant and how they may be recovered by the owner from the tenant. If the lease does not include these requirements, the tenant is not liable to pay any outgoings. **[clause 62(a)]** Certain aspects about outgoings are explained in more detail below.

Sinking funds, capital expenses and depreciation

98. Sinking Funds are mainly a feature of shopping centre leases. It is claimed that contributions to sinking funds are used to pay outgoings of a capital nature or to pay for expenses that may be incurred after the tenant has left the premises. Outgoings of a capital nature, depreciation of the building and contributions to sinking funds are more directly concerned with the ownership of the premises and the ongoing investment of the owner in the premises rather than with the tenant's business. Under the Code, tenants will not be required to pay for depreciation of the

premises, outgoings of a capital nature or to pay for expenses that are not incurred during the term of the lease. In other words, sinking funds, recovery for depreciation and the recovery of capital costs will be prohibited. [clause 2 - definition of 'outgoings', clause 63 and clause 64]. The one exception in relation to sinking funds is advertising and promotion costs. [clause 113] This is explained below under the heading Advertising and promotion.

Only reasonable expenses will qualify as outgoings

99. Under the Code, an owner will only be permitted to recover the reasonable expenses incurred in the operation, repair or maintenance of the building. [clause 2 - definition of 'outgoings'] Excessive management fees are an issue of concern to many tenants who complain that amounts are arbitrary, may be paid to an inexperienced relative or friend or used to collect additional rent that could not be negotiated in relation to the lease. The Tribunal will have the power to determine whether such management fees or other outgoings are reasonable.

Audited reports and adjustments for prepaid outgoings

100. An owner is required to provide audited reports for expenditure on account of outgoings within 3 months of the end of each accounting period. [clause 66] The costs of providing an audited report can be claimed by the owner as an outgoing, provided it is included as a recoverable outgoing in the disclosure statement and the lease. In a shopping centre, a majority of tenants can waive this requirement, if for instance they do not wish to pay for an audited report to be prepared. [clause 67]
101. The report must be prepared by a member of the Institute of Chartered Accountants or a Certified Practising Account. [clause 2 - definition of 'auditor'] The accountant preparing the report must include a statement as to whether or not the amounts paid by the tenant were properly payable by the tenant and whether the estimated amount of outgoings given by the owner exceeds the total amount actually expended. However, if the only outgoings are rates, taxes, other government charges and insurance, the accountant is not required to include such a statement. The report may relate to more than one tenant so long as each tenant is able to determine the actual amount payable by that tenant. [clause 66]

102. Where outgoings are collected in advance of actually being incurred, the owner and tenant are required to make an adjustment to the amount paid by the tenant taking account of any underpayment or overpayment that there may have been. This adjustment is required to be made within 3 months of the end of the accounting period. [clause 68]

Apportionment of outgoings in a shopping centre

103. In a shopping centre, certain outgoings may not be specific to any particular tenant. That is, charges may be incurred for a group of premises within the shopping centre, but not specifically calculated for each particular shop. In these circumstances, each tenant is only liable to pay an amount for that outgoing having regard to the area of their premises. Only those premises 'to which the outgoing is referable' are included in the calculations. [clause 114]

Example

There are 51 premises in a shopping centre. Shop A has an area of 1000 square metres. One of the 51 premises in the centre is a cinema that has its own airconditioning system. The remaining 50 premises are serviced by airconditioning run by the centre management. Those 50 premises have a combined area of 50 000 square metres. The cost of airconditioning for the year for those 50 premises is \$5000. How much does Shop A pay for airconditioning?

The cost of airconditioning would be apportioned in the following way:

- The cinema has its own system and is therefore not included in the calculations. Only those premises 'to which the outgoing is referable' are included in the calculations. [clause 114]
- Shop A is only liable for its proportion of the total costs having regard to floor area. Therefore, Shop A must pay an amount in accordance with the following formula:

$$\text{amount of outgoing} \times \frac{\text{Area of Shop A}}{\text{Total area of premises using the airconditioning}}$$

That means Shop A pays:

$$\begin{array}{rcccl} \$5\,000 & \times & \frac{1\,000}{50\,000} & = & \$100 \end{array}$$

Advertising and promotion

105. There are some special rules for recovery of outgoings for advertising and promotion. Advertising and promotion costs may only be recovered if they are reasonable and the advertising or promotion relates to the premises or the shopping centre in which the premises are located. [clause 2 - definition of 'outgoing'] It is envisaged that advertisements for a particular chain of shopping centres would be recoverable from tenants, provided the advertisement in question promoted shopping at those shopping centres.
105. In shopping centres, before an owner may require a tenant to pay outgoings on account of advertising and promotion, the owner is required to provide the tenants with a marketing plan giving details of proposed expenditure and moneys previously levied but not yet spent (if any). Where the amount to be recovered as an outgoing relates to an opening promotion, the owner must make available to the tenant details of the proposed expenditure on that promotion at least 1 month before it takes place. [clause 111] If the owner fails to comply with the requirements set out in clause 111, other than in a minor or trivial way, the tenant is not required to pay any amount for the advertising or promotion and may recover any amount paid in advance. [clause 112] Any money that is not spent in the owner's accounting period, is required to be kept in a special sinking fund and applied towards future spending on advertising and promotion. This represents the only exception to the general rule that outgoings must be in respect of expenditure during the term of the lease. [clause 113 and clause 2 - definition of 'outgoings'].

Statistical Information - Traffic Counts

106. Where a lease for premises in a shopping centre requires a tenant to contribute outgoings towards obtaining statistical information - such as traffic counts - the information that is received must be made available to the tenant. [clause 110]

2. *Explanation of Provisions*

CHAPTER 8

ALTERATIONS, DEMOLITION, RELOCATION, DAMAGED PREMISES AND REFURBISHMENTS

Disturbances

107. Reasonable compensation is payable by an owner to a tenant for disturbances to the tenant's business caused by the owner. Compensation is not payable for nominal loss or damage. **[clause 71]** The amount of compensation payable is likely to be reduced where the tenant has been given a concession, such as reduced rent, because of the likelihood that there would be a disturbance to the tenant. **[clause 72]** The mere fact that a shopping centre is enlarged or that there is a change in tenancy mix, will not of itself give rise to a claim for compensation under **clause 71**. **[clause 73]** The grounds for compensation are that the owner has:

- inhibited, in a substantial manner, access to the premises, (Compensation is not payable where the owner is responding to an emergency or is taking action in accordance with a statutory requirement or lawful direction from a government agency)
- failed to rectify, as soon as practicable, any breakdown of plant or equipment under the care and maintenance of the owner,
- neglected to clean maintain or repair a shopping centre, or
- in some other way, adversely affected the trade of the tenant without reasonable cause.

[clause 71]

Demolition

108. 'Demolition' is defined to include any substantial repair, renovation or reconstruction of a building where the work to be done cannot be carried out without vacant possession of premises. **[clause 2 - definition of 'demolition']**

109. A lease cannot be terminated on the grounds of a proposed demolition unless, and until, the owner has provided the tenant with details of the proposal which are sufficient to indicate that there is a genuine proposal to demolish the building within a reasonable time after the lease is terminated. [clause 74(a)]
110. Six months written notice must be given of the termination, [clause 74(b)] unless the lease is for a term of 12 months or less and then the period of notice is shortened to 3 months. [clause 74(c)]
111. Reasonable compensation is payable for any loss suffered by the tenant as a result of the early termination of the lease. [clause 74(d)] However, in calculating the compensation payable, regard must be had to any concessions given to the tenant, such as reduced rent, because of the existence in the lease of a demolition clause. [clause 74(e)]

Damaged premises

112. A tenant is not required to pay rent or outgoings for damaged premises that are unusable or inaccessible unless the tenant is responsible for the damage or contributed to it in more than a minor way. The tenant will be required to pay rent and outgoings if the tenant does anything to cause the termination of the owner's insurance policy in relation to the damaged premises. [clause 75]
113. If the damaged premises are still useable, the liability for rent and outgoings is diminished in proportion to the extent that the useability of the premises is diminished. [clause 76]
114. If the owner considers that it is impracticable or undesirable to repair the damage, the owner must provide the tenant with notice of this fact no later than 2 months from the date the damage occurred. [clause 77] After a notice is given, either the owner or the tenant may terminate the lease on 7 days notice. No compensation is payable as a result of such a termination.

Tenants should seek insurance to cover any losses in these circumstances. **[clause 78]**

115. Where the owner intends to repair, or fails to give a notice of an intention not to repair, the tenant may claim compensation for any loss or damage suffered as a result of the owner's failure to repair the premises or give the requisite notice. The tenant may not claim compensation for nominal loss or damage. **[clause 79]** Nothing in the Code prevents the parties from terminating the lease by agreement. **[clause 80]**

Refurbishment

116. Where an owner is aware that a tenant is likely to be affected by proposed alterations or refurbishment of the building or shopping centre the owner is required to notify the tenant in writing of the details of the alterations or refurbishment. The owner must also state what action will be taken by the owner to minimise any problems caused as a result of the alterations or refurbishment. This notification must be given at least 2 months prior to commencement of the work unless the alterations or refurbishment is brought about by an emergency - such as water damage to carpets through flooding. **[clause 69 and clause 70]**
117. An owner cannot require a tenant to refurbish or refit premises unless the lease indicates the nature, extent and timing of the refurbishment or refitting. **[clause 82]**. This clause is intended to provide the tenant with sufficient detail to give a clear understanding of the tenant's obligations without further requirements being stipulated at a later date by the owner. The lease should therefore not contain a general statement that a refurbishment may be required at a time of, and in accordance with, the owner's choice.
118. When carrying out a refurbishment, refitting or other work, the tenant has a right to employ anyone of their choice to do the work. However, a lease may specify minimum standards of competence and behaviour for workers. It may also prohibit work from being carried out on specified items belonging to the

owner. Where the premises are located in a shopping centre, the lease may provide that the tenant must comply with an industrial award or enterprise agreement affecting the shopping centre. [clause 81]

Relocation in Shopping Centres

119. A tenant in a shopping centre may only be relocated where there is to be a refurbishment, redevelopment or extension of the shopping centre to be carried out within a reasonable time after the relocation of the tenant. [clause 115] The relocation clause may not be used unless the refurbishment, redevelopment or extension cannot practicably be carried out without vacant possession of the tenant's premises. [clause 116]
120. The owner is required to give the tenant at least 3 months written notice of the date of relocation. A tenant has a right to terminate the lease within 1 month of receiving the notice. The termination takes effect 3 months after the notice of relocation was given unless the parties agree otherwise. [clause 117]
121. A notice of relocation must include an offer to provide alternative premises which are no less favourable to the tenant. This is intended to ensure that the tenant is given alternative premises of a similar size, frontage, accessibility and similar amount of consumer traffic. If alternative premises of a comparable standard are not provided to the tenant, then this will influence the amount of compensation to be paid by the owner for the relocation. The owner must pay the reasonable costs of relocation and reasonable compensation for the tenant's loss or damage caused by the relocation. In determining compensation, regard must be had to any concessions that were given to the tenant on the basis that the lease contained a relocation clause. [clause 117]

2. *Explanation of Provisions*

CHAPTER 9

ASSIGNMENTS, SUBLEASES AND MORTGAGES

Assignment, sublease and mortgage of a lease

122. The ability to assign (that is, sell a business as a going concern), sublease or mortgage a lease, is an important part of the management of a business by a tenant. At the same time, it needs to be recognised that the owner only leased the premises to that particular tenant after being satisfied that he or she would have the necessary skills to run the business in question. The owner needs to be assured that any person to whom the lease is assigned or sublet, will be as good a tenant as the original tenant. Where a lease is mortgaged, the owner needs to know that the tenant can service the loan and will not have a mortgagee entering into possession of the lease at a later date. It is therefore necessary to strike a balance between the needs of both the owner and the tenant. The Code does this by providing that an owner may withhold consent to the assignment, sublease or mortgage of a lease provided it is not unreasonably withheld.
123. Under the Code a tenant may write to the owner seeking consent to the assignment, sublease or mortgage of the tenant's lease. **[clause 83]** The owner then has 14 days to request any information necessary for making a decision in relation to the tenant's request. **[clause 84]** Only certain information can be requested and this is set out in **clause 84**. The owner has 21 days after receiving any material to be provided by the tenant to either allow or refuse the assignment, sublease or mortgage. **[clause 85]**.
124. An owner may only refuse an application for assignment or sublease where the owner has reasonable grounds for believing that:
- the new tenant intends to change the use of the premises
 - the new tenant does not have the financial standing to conduct the business
 - the tenant cannot produce a current certificate of occupancy for the premises
 - the new tenant doesn't have equivalent skills to the existing tenant in relation to running that kind of business
- [clause 86]**
125. An owner may refuse an application for a mortgage of the lease if there are reasonable grounds to believe that the tenant is not

of sound financial standing or does not have the capacity to service the loan or meet obligations under the mortgage. [clause 87]

126. The reasonable costs incurred by the owner in determining whether or not to grant an assignment, sublease or mortgage of the lease may be sought from the tenant within 6 months of either allowing or refusing the assignment, sublease or mortgage. [clause 88] The tenant may require the owner to provide substantiation of the costs and is not liable to pay those costs until any requested substantiation is provided. [clause 89]
127. The tenant is required to provide a new tenant with the disclosure statement for the lease. [clause 91] If the tenant does not have a copy of the disclosure statement, the tenant may request a copy from the owner who must then provide a copy within 14 days, unless the owner has a reasonable excuse for failing to do so. [clause 92 and clause 93]
128. Once a lease has been assigned, with the permission of the owner (who may request financial information among other things before granting an assignment) there seems to be no persuasive arguments as to why the original tenant should be liable under the lease. The lease may still have years to run. The original tenant has no continuing control over decisions made in relation to the lease. Under the Code, a tenant who assigns a lease, and any guarantors of that tenant, are, from the date of assignment, released from further obligations under the lease. [clause 90]

2. *Explanation of Provisions*

CHAPTER 10

TRADING HOURS

Trading hours for shopping centres

129. The Code provides that, in a shopping centre, there are to 'core trading hours'. Core trading hours are the times when retail premises in the shopping centre are required to be open for business. If hours for trading are set out in the lease - then they will ordinarily be the 'core trading hours' unless they are modified by some other agreement, arrangement or understanding between owners and tenants. Obviously, the lease must comply with any applicable laws concerning trading hours. **[clause 118]**
130. Core trading hours can only be changed with the approval in writing of the tenants in a majority of premises. That is, all premises, no matter how big or small represent one vote each. **[clause 118]**
131. In a new shopping centre, the owner can set the core trading hours by agreement in leases. **[clause 118]**
132. A tenant can trade outside core trading hours if the owner agrees. In such cases, the tenant is liable for the additional costs associated with opening and operating the centre. Where more than one tenant opens outside of core hours, the tenants are required to share the costs of opening and operating the centre proportionately. **[clause 119]**

Index to Explanation of Clauses

Clause No.	Page No.
clause 2 - definition of 'auditor'.....	91
clause 2 - definition of 'commercial premises'.....	54
clause 2 - definition of 'demolition'.....	96
clause 2 - definition of 'key-money'.....	75
clause 2 - definition of 'lawyer'.....	71
clause 2 - definition of 'lease'.....	52, 53
clause 2 - definition of 'material matter'.....	68
clause 2 - definition of 'multiple rent review clause'.....	83
clause 2 - definition of 'outgoing'.....	93
clause 2 - definition of 'outgoings'.....	90, 91, 93
clause 2 - definition of 'owner'.....	53
clause 2 - definition of 'ratchet clause'.....	83
clause 2 - definition of 'retail premises'.....	54
clause 2 - definition of 'shopping centre'.....	55
clause 2 - definition of 'small commercial premises'.....	55
clause 2 - definition of 'specified premises'.....	56
clause 2 - definition of 'tenant'.....	53, 68
clause 2 - definition of 'valuer'.....	87
clause 3.....	57, 69
clause 4.....	59
clause 5.....	57
clause 6.....	54, 55, 56, 58
clause 7.....	53
clause 9.....	57
clause 10.....	65
clause 11.....	59
clause 12.....	59
clause 13.....	62
clause 14.....	68, 70
clause 15.....	68, 70
clause 16.....	68
clause 17.....	69
clause 18.....	69
clause 19.....	70
clause 20.....	70
clause 21.....	70
clause 22.....	70
clause 23.....	70
clause 24.....	70
clause 25.....	70
clause 26.....	70
clause 27.....	71
clause 28.....	74
clause 29.....	71, 74
clause 30.....	74
clause 31.....	74

Index to Clauses

clause 32	75
clause 33	78
clause 34	79
clause 35	79
clause 36	71, 79
clause 37	79
clause 38	79
clause 39	79
clause 40	72
clause 41	72
clause 42	82
clause 43	84
clause 44	83
clause 45	83, 84
clause 46	88
clause 47	88
clause 48	82
clause 49	82
clause 50	82
clause 51	86
clause 52	86
clause 53	80, 84, 85
clause 54	87
clause 55	87
clause 56	87
clause 58	88
clause 59	88
clause 60	88
clause 61	57, 69
clause 62	90
clause 63	91
clause 64	91
clause 65	90
clause 66	90, 91
clause 67	91
clause 68	92
clause 69	98
clause 70	98
clause 71	96
clause 72	96
clause 73	96
clause 74	97
clause 75	97
clause 76	97
clause 77	97
clause 78	98
clause 79	98
clause 80	98
clause 81	99
clause 82	98

Index to Clauses

clause 83.....	102
clause 84.....	102
clause 85.....	102
clause 86.....	102
clause 87.....	103
clause 88.....	103
clause 89.....	103
clause 90.....	103
clause 91.....	103
clause 92.....	103
clause 93.....	103
clause 94.....	79, 80
clause 95.....	79
clause 96.....	80
clause 97.....	80, 85
clause 98.....	80
clause 99.....	75
clause 100.....	75
clause 101.....	75
clause 102.....	75
clause 103.....	75
clause 104.....	71, 74
clause 105.....	71
clause 106.....	71
clause 107.....	87
clause 108.....	87
clause 109.....	83
clause 110.....	93
clause 111.....	93
clause 112.....	93
clause 113.....	91, 93
clause 114.....	92
clause 115.....	99
clause 116.....	99
clause 117.....	99
clause 118.....	106
clause 119.....	106
clause 120.....	65
clause 121.....	83
clause 122.....	64
Schedule 1.....	56
Schedule 2.....	69
Schedule 3.....	85, 87