

1994

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

**COMMERCIAL AND TENANCY TRIBUNAL BILL 1994**

**EXPLANATORY MEMORANDUM**

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## **COMMERCIAL AND TENANCY TRIBUNAL BILL 1994**

### **Explanatory Memorandum**

#### **Summary of main features**

The Commercial and Tenancy Tribunal Bill 1994 ("the Bill") -

- enables the Minister to approve a code of practice relating to retail and commercial leases;
- establishes a Commercial and Tenancy Tribunal ("the Tribunal") with jurisdiction to hear disputes and grant relief concerning leases to which the Bill applies; and
- as a preliminary step, establishes a mediation process, for the resolution of disputes relating to such leases.

#### ***Application of Bill***

The application of the Bill is limited to leases for the following types of premises -

- retail premises, or any premises in a shopping centre, other than premises which have a lettable area greater than 1000 square metres and which are leased to a public company (that is, one which is not eligible to be incorporated as a proprietary limited company under the Corporations Law);
- small commercial premises (defined to mean premises with a lettable area of no more than 300 square metres) outside a shopping centre; and
- other premises, or a class of premises, prescribed by an approved code (it is intended that this will permit the application of the Bill to, for example, premises used for community or non-profit purposes).

#### ***Approved Code***

It is intended that a Commercial and Retail Leases Code of Practice ("the Code") prescribing a wide range of matters in relation to leases to which the Bill applies, will be approved shortly after the passage of the Bill. Approval of the Code, or any variations to the Code, is to be by disallowable instrument.

It is intended that the provisions of the Code apply only in respect of leases entered into, extended under an option, renewed or varied on or after the commencement of the operation of the substantive provisions of the Code.

***Transitional application of certain provisions of the Code to existing leases***

However, there are two exceptions to that intention. First, the provisions of the Code dealing with "key money" and "ratchet clauses" (terms defined in *clause 3* of the Bill) will apply in respect of existing leases, but only in respect of conduct which occurs on or after the substantive commencement of the Code. Second, in cases of "harsh and oppressive" conduct, the Bill will apply to existing leases, but only where the conduct occurs on or after the substantive commencement of the Code.

***Mediation process***

The Bill enables referral of a dispute about a lease to the Registrar of the Tribunal (appointed by the Minister pursuant to the Bill). The Registrar will attempt to facilitate resolution of the dispute, informally, prior to the commencement of any formal process. It is expected that most disputes will be resolved in this manner.

If informal resolution of a dispute is not possible, the Registrar may, generally, refer the matter to an approved (private) mediator, hear the dispute himself or herself or refer the dispute direct to the Tribunal. In determining which of these options is chosen it is intended that the Registrar have regard to a range of matters including the nature and complexity of the dispute, the amount of money (if any) involved, and the likelihood of resolution of the dispute through mediation.

In certain circumstances the Bill requires that a dispute must be referred direct to the Tribunal, such as where the dispute arises from an alleged breach of a previously mediated agreement or where the dispute concerned is one required by the Code to be determined by the Tribunal.

Where an attempted mediation fails the dispute is required to be referred to the Tribunal.

***Tribunal hearings and jurisdiction***

The Bill establishes the Tribunal which is to be constituted by either the President (a Magistrate appointed by the Minister), sitting alone, or the President and 2 other members - one a representative of tenant interests, the other a representative of landlord interests. The tenant and landlord representatives will be drawn from 2 pools of suitably qualified and experienced people, and will be called upon where the President of the Tribunal considers that it would be of assistance in the particular hearing to have the benefit of the experience of such members.

The Bill prescribes particular aspects of the procedures of the Tribunal. To the extent that procedures are not prescribed by the Bill or the Code, the Tribunal may determine its own procedures.

The Tribunal is given the power, subject to the Bill and the Code, to make such orders as it would be within the jurisdiction of the Magistrates Court to make pursuant to the *Magistrates Court (Civil Jurisdiction) Act 1992* and, in addition, power to make such orders as are necessary to enforce the Code and a specific power, where the Tribunal is hearing a dispute alleging harsh and oppressive conduct, to reopen the relevant lease, vary provisions of the lease, substitute alternative provisions or set aside the lease.

The Tribunal is endowed with power to enforce its orders, including orders of the President requiring a witness to provide evidence.

Appeals against decisions of the Tribunal, on a question of law, may be taken to the Supreme Court.

***Disputes not covered by the Code***

Where a dispute relates to a matter not covered by the Code, jurisdiction to hear such a dispute has been transferred from the Magistrates Court to the Tribunal. Accordingly, the Tribunal will be able to hear disputes concerning leases which have been entered into before the passage of the Bill. However, the Bill requires that such disputes be handled in accordance with the mediation process outlined above.

***Financial implications***

**The financial implications arising from the Bill will be considered when the Code is settled.**

**Details of the Bill are set out in the Attachment.**

## **PART I - PRELIMINARY**

*Part I* comprises *clauses 1 to 3* (inclusive).

### ***Clauses 1 and 2 - Short title and commencement***

*Clauses 1 and 2* are formal provisions dealing with, respectively, the short title and commencement of the Bill.

### ***Clause 3 - Interpretation***

*Clause 3* is an interpretation provision which defines a number of terms used in the Bill.

## **PART II - APPLICATION**

*Part II* comprises *clauses 4 to 10* (inclusive) dealing with the application of the Bill and the Code.

### ***Clause 4 - Interpretation***

*Clause 4* is an interpretation provision which defines "lease" for the purposes of Part II to mean a lease to which the Bill applies by virtue of *clause 5*.

### ***Clause 5 - Leases***

*Clause 5* is an application provision which limits the application of the Bill to leases for particular types of premises, and should be read subject to the transitional application provisions of *clause 8*.

The effect of *subclause 5(1)* is that the Bill applies to a lease for premises in the Territory of any of the following kinds:

retail premises, or premises located in a shopping centre, other than premises with a lettable area greater than 1000 square metres that are leased by a corporation which is not eligible to be incorporated as a proprietary limited company under the Corporations Law;

- small commercial premises that are not located in a shopping centre;
- premises or a class of premises prescribed by the Code.

**Subclause 5(2)** is to the effect that the Bill applies to a lease even though the lease was entered into outside the Territory or that it purports to be governed by the law of a jurisdiction, other than the Territory.

The effect of **subclause 5(3)** is that the Bill does not apply to a lease if it is -

- a lease for premises, or premises of a class, which the Code excludes from its operation; or
- the lease is excluded by the Code from its operation, or is a lease in a class of leases so excluded.

#### **Clause 6 - Disputes**

**Clause 6** applies the Bill, subject to the transitional application provisions of **clauses 8, and 9** to the following types of disputes in relation to leases to which the Bill applies:

- (a) a dispute caused by an alleged breach of a mediated agreement;
- (b) a dispute concerning alleged harsh and oppressive conduct by a party to a lease towards another party to the lease;
- (c) a dispute concerning key money or a ratchet clause, which terms are defined in **clause 3**;
- (d) a dispute about an alleged breach of the Code (other than a breach relating to key money or a ratchet clause);
- (e) a dispute about a lease, which is a dispute which the Code requires to be resolved pursuant to the Bill; and
- (f) any other dispute about a lease.

The term "harsh and oppressive", in relation to conduct, is intended to take its judicially considered meaning. The purpose of such a provision is to enable disputes to be dealt with under the Bill and relief to be granted by the Tribunal in circumstances which would not satisfy the traditional test of unconscionability (when a weaker party in a position of special disability is taken advantage of by a

stronger party who knows about the disability) but, which nonetheless, produce a harsh and oppressive outcome.

The *Trade Practices Act 1974 (Cth)* relies upon the narrow, traditional test of unconscionability and, as a result, has been unable to provide relief in circumstances where, in dealing with parties to commercial transactions (such as landlords and tenants), it has not been possible to establish the special disability of the weaker party, even though the conduct of the stronger party may have resulted in a patently harsh and oppressive outcome for the weaker party.

To establish that conduct is harsh and oppressive does not require that "unconscionable" conduct be shown, although a harsh and oppressive outcome may be the result of unconscionable conduct. Rather, a person complaining of the effect of conduct must show that he or she has suffered some substantial detriment.

#### ***Clause 7 - Jurisdiction of Magistrates Court***

The purpose of *clause 7* is to debar a person from litigating, in the Magistrates Court, a dispute to which the Bill applies. In order to avoid parties to a dispute by-passing the processes established under the Bill including, in particular, the mediation process, it will not be possible for a party to attempt to litigate the dispute in the Magistrates Court.

#### ***Clause 8 - Transitional application of the Bill***

*Clause 8* qualifies the application of the Bill to the disputes referred to in *clause 6* by reference to the time when the lease to which the dispute relates was entered into and when the conduct giving rise to the dispute occurred, as explained below:

##### ***Breaches of a mediated agreement***

***Subclause 8(1)*** provides that the Bill applies to a dispute caused by an alleged breach of a mediated agreement whether the lease concerned was entered into, varied, renewed or extended under an option before, on or after the commencement of the substantive provisions of the Bill. An alleged breach of a mediated agreement will, of necessity, be conduct occurring after the commencement of the Bill. However, because the jurisdiction concerning disputes which do not involve an alleged breach of the Code is being transferred from the Magistrates Court to the Tribunal (*see clause 7*), a

mediation may relate to conduct which occurred before the commencement of the Bill.

*Harsh and oppressive conduct*

**Subclause 8(1)** is to the effect that the Bill applies to a dispute concerning alleged harsh and oppressive conduct by one party towards another, whether or not the lease was entered into, varied, renewed or extended under an option before, on or after the commencement of the Bill. However, the effect of **subclause 8(3)** is that the Bill applies only where the conduct at issue occurs on or after the substantive commencement date of the Code (that is, the date on which the general interpretation provisions of the Code commence).

*Key money and ratchet clauses*

- (C) **Subclause 8(1)** similarly provides that the Bill applies to a dispute in relation to "key money" or a "ratchet clause" whether or not the relevant lease is entered into, varied, renewed or extended under an option before, on or after the commencement date of the Bill. The Code contains provisions concerning the enforceability of key money or ratchet clauses and the entitlements of parties in relation to these matters. While other provisions of the Code will only apply to leases entered into, varied, renewed or extended under an option, on or after the substantive commencement date of the Code, the combined effect of **clauses 6, 8 and 9** is that the provisions of the Code relating to key money and ratchet clauses also apply in relation to leases entered into, varied, renewed or extended under an option prior to the substantive commencement date of the Code. However, the effect of **subclause 8(3)** is that the Bill applies in relation to disputes about key money or ratchet clauses only where the conduct giving rise to the dispute occurs on or after the substantive commencement date of the Code.

*Breaches of the Code*

**Subclause 8(2)** is to the effect that the Bill applies to a dispute arising from a claim that a party to a lease has breached or is breaching the Code (other than a claim relating to key money or ratchet clauses) only where the relevant lease is entered into, varied, renewed or extended under an option, on or after the substantive commencement date of the Code.

*Disputes required by Code to be resolved by Tribunal*

Similarly, a dispute about a lease which the Code requires to be resolved pursuant to the Bill, by virtue of *subclause 8(2)*, can only be pursued where the lease is entered into, varied, renewed or extended on or after the substantive commencement date of the Code.

*Disputes not involving a breach of the Code*

*Subclause 8(1)* provides that the Bill applies to any other dispute about a lease whether the lease was entered into, varied, renewed or extended under an option before on or after the commencement of the Bill, and also applies whether the conduct giving rise to the dispute, occurs before, on or after the date of commencement of the substantive provisions of the Bill. This will enable a person who, by the operation of *clause 7* is debarred from taking action in the Magistrates Court with respect to such a dispute (which action may arise out of conduct occurring prior to the commencement of the Code) to seek resolution of the dispute under the provisions of the Bill.

*Clause 9 - Transitional application of the Code*

*Clause 9* provides that the provisions of the Code relating to "key money" or a "ratchet clause" apply whether or not the relevant lease is entered into, varied, renewed or extended under an option before, on or after the substantive commencement date of the Code. The purpose of this clause is to ensure that these provisions of the Code apply to all leases, not only those entered into, varied, renewed or extended on or after the Code commences. However, note that *subclause 8(3)* ensures that the provisions of the Code concerning key money and ratchet clauses can only apply to conduct occurring on or after the substantive commencement of the Code.

*Clause 10 - Matters before the Magistrates Court or Supreme Court*

*Clause 10* preserves the right of a person, in relation to a dispute the substance of which is the subject matter of a proceeding commenced in the Magistrates Court or Supreme Court, to continue that action, provided the proceeding was commenced in the court prior to the commencement of *clause 10*.

### **PART III - REFERRAL OF DISPUTES TO REGISTRAR**

**Part III** comprises *clauses 11 to 15* (inclusive) and deals with the process of referring disputes to the Registrar and the action which the Registrar may take, or is required to take, where a matter is brought to his or her notice.

#### **Clause 11 - Informal mediation**

**Clause 11** enables the Registrar to facilitate the resolution of a dispute, prior to having to deal with a dispute through the formal processes set out in the Bill.

#### **Clause 12- Referral**

Where the Registrar is unable to resolve a dispute by informal means, **clause 12** enables a person to refer a dispute to the Registrar, provided the referral is in a form approved by the Registrar (which form must provide for the identification of the parties to the lease). The clause requires the Registrar to ensure that a person making such a referral is given reasonable assistance in completing the referral form.

#### **Clause 13 - Action by Registrar on referral**

**Clause 13** deals with the steps required to be taken by the Registrar on receipt of a referral.

**Subclause 13(1)** requires the Registrar to determine whether the dispute is a "relevant dispute", which is defined in **subclause 13(8)** to mean a dispute to which the Bill applies, arising out of conduct occurring or the entry into, renewal, extension under an option or variation of a lease, within 6 years of the date of referral of the dispute to the Registrar.

**Subclause 13(2)** requires that before the Registrar makes a decision concerning whether the dispute is a relevant dispute he or she must give each party identified in the referral form a notice about the referral including details of the dispute and an invitation to make a written submission (within 7 days of receipt of the notice) about whether the dispute is a relevant dispute.

**Subclause 13(3)** permits the Registrar to determine whether a relevant dispute exists in the manner he or she thinks appropriate, taking into consideration any submission made pursuant to the preceding clause.

Where the Registrar is not satisfied that there is a relevant dispute **subclause 13(4)** requires that he or she take no further action with respect to the dispute other than to give the parties a review statement about that decision. The review notice, the requirements for which are set out in **clause 72** advises the parties of their rights to appeal to the Tribunal concerning the Registrar's decision.

Where the Registrar is satisfied that a relevant dispute is frivolous or vexatious, or has not been referred in good faith, **subclause 13(5)** requires the Registrar to take no further action with respect to the dispute other than to give the person who referred the dispute a review statement about that decision. The review notice advises the parties of their rights to appeal to the Tribunal concerning the Registrar's decision.

Where the Registrar is satisfied that there is a relevant dispute, other than one which is frivolous, vexatious or not referred in good faith, **subclause 13(6)** requires that, unless the Code requires the dispute to be determined by the Tribunal or the Registrar is satisfied that there is no reasonable likelihood of the dispute being resolved by mediation, the Registrar either refer the dispute to an approved mediator or hear the dispute himself or herself.

Otherwise, the Registrar is required to refer the dispute to the Tribunal.

**Subclause 13(7)** requires that where the Registrar refers a dispute to an approved mediator the Registrar must give the mediator written notice specifying the time within which the mediator is to provide the Registrar with a mediation report.

#### **Clause 14- Referral to mediator**

**Clause 14** sets out the matters the Registrar may consider in deciding whether to refer a dispute to a mediator, rather than hear the dispute himself or herself. The Registrar is entitled to refer a dispute to a mediator having appropriate regard to the nature and complexity of the dispute, the amount of money (if any) involved in the dispute and such other matters as the Registrar considers relevant.

**Clause 15 - Initial referral to Tribunal**

**Clause 15** deals with the circumstances in which a dispute is to be referred directly to the Tribunal, without any attempted mediation.

**Subclause 15(1)** requires that the Registrar refer a dispute to the Tribunal if the Registrar is satisfied that the dispute is not reasonably likely to be resolved by mediation, or the Code requires the dispute to be determined by the Tribunal or the Registrar is otherwise satisfied that the dispute should be heard by the Tribunal.

Where a dispute relates to a mediated agreement and involves an alleged breach of the agreement **subclause 15(2)** requires that the dispute be referred to the Tribunal.

The purposes of this clause are -

- (a) to avoid unproductive attempts at mediation where the circumstances of the dispute suggest that mediation is unlikely to resolve the matter or a previously mediated agreement has not been successful;
- (b) to enable particularly complex, or potentially significant disputes to be referred to the Tribunal; and
- (c) to enable specific disputes required by the Code to be determined by the Tribunal to be referred directly to the Tribunal, by-passing the mediation process.

**PART IV - MEDIATION BEFORE AN APPROVED MEDIATOR**

**Part IV** comprises **clauses 16 to 22** (inclusive) and deals with the mediation process where a dispute is referred to an approved mediator.

**Clause 16 - Parties**

**Clause 16** provides that the parties to a mediation before an approved mediator are each party to the lease that is the subject of the hearing and any other person who satisfies the Registrar that he or she has a sufficient interest in the dispute.

**Clause 17- Approved mediators**

**Clause 17** enables the Minister to, by instrument, approve persons to be mediators for the purposes of the Bill.

**Clause 18 - List of approved mediators**

**Clause 18** requires that the Registrar maintain a list of approved mediators which is to be available for inspection by the public at all reasonable times.

**Clause 19 - Procedure**

**Clause 19** sets out the procedure to be followed by an approved mediator to whom the Registrar refers a dispute.

It requires the mediator to, as soon as practicable:

- give written notice to the parties to the mediation inviting them to confer with the mediator;
- endeavour to make arrangements with the parties regarding a time and place for a conference; and
- if the parties attend - conduct the conference.

**Clause 20 - Admissibility of evidence in subsequent proceedings**

**Clause 20** has the effect of restricting the use of any evidence in a mediation to the circumstances set out in *clauses 47 and 81*.

**Clause 21 - Mediation reports**

**Clause 21** sets out the matters required to be included in a mediation report and the obligation of the mediator to provide the report, within the time specified in the referral notice, to the Registrar and the parties.

It should be noted, however, that a mediation report will consist of nothing more than a report which specifies:

- whether mediation occurred and, if not, why not;
- whether mediation resolved the dispute, and

the terms of any mediated agreement.

***Clause 22 - Referral to Tribunal***

***Clause 22*** requires that where the Registrar receives a mediation report to the effect that a dispute remains unresolved the Registrar must refer the dispute to the Tribunal.

***PART V - HEARINGS BEFORE THE REGISTRAR***

***Part V*** comprises ***clauses 23 to 32*** (inclusive) and deals with the process of a hearing where a dispute is heard by the Registrar.

***Clause 23 - Parties***

***Clause 23*** establishes who are parties to a hearing before the Registrar. They are each party to the lease that is the subject of the hearing and any other person notified by the Registrar under ***clause 25***.

***Clause 24 - Representation***

***Clause 24*** enables a party to a hearing to be represented by a legal practitioner or agent, but only with the consent of the Registrar.

***Clause 25 - Notice of hearing***

***Clause 25*** sets out the requirements for a notice of hearing where the Registrar decides to hear a dispute himself or herself.

***Subclause 25(1)*** requires that a notice be served on any person who the Registrar is satisfied has a sufficient interest in the dispute and ***subclause 25(2)*** specifies that the notice must specify the location, date and time for the hearing and it must be served a reasonable time before the date of the hearing.

***Clause 26 - Closed hearing***

***Clause 26*** provides that hearings before the Registrar are to be closed.

**Clause 27 - Summons to appear**

**Clause 27** gives the Registrar the power to summons a party or the representative of a party to appear as a witness. **Subclause 27(2)** requires that the summons be in writing and served on the person named in the summons.

A penalty of \$5000 or 6 months imprisonment, or both, is provided for failure of a person to appear pursuant to a summons.

**Clause 28 - Formal record**

**Clause 28** restricts the record which may be kept of evidence given at a hearing to a record containing only:

- the referral form from the Registrar;
- a statement by the Registrar setting out the nature of the dispute;
- any relevant mediated agreement; and
- a statement of the grounds for any referral of the dispute to the Tribunal.

**Subclause 28(3)** requires that the formal record of the hearing be made available for inspection at all reasonable times, free of charge, by any party to the hearing or any representative of a party and that the formal record is admissible in evidence before the Tribunal or a court.

**Clause 29 - Admissibility of evidence in subsequent proceedings**

**Clause 29** restricts the admissibility of evidence given in a hearing before the Registrar to admission at a further hearing before the Registrar or in accordance with **clause 47** or in a prosecution under **clause 80** or **81**.

**Clause 30 - Resolution by agreement**

**Clause 30** sets out the process to be followed by the Registrar, where the parties reach a mediated agreement, and what constitutes a breach of an agreement.

**Subclause 30(1)** requires that the Registrar arrange for the agreement to be put in writing and signed by on behalf of the parties and that the agreement be filed with the record of the hearing.

**Subclause 30(2)** provides that a party is taken to breach an agreement if the agreement is signed in accordance with **subclause 30(1)** and the party has not complied with the agreement within the time specified in the agreement, or if no such time is specified, within 2 months from the time of filing of the agreement.

**Clause 31 - Referral to Tribunal**

**Clause 31** requires that the Registrar refer a dispute to the Tribunal if:

- the parties fail to reach a mediated agreement and the Registrar is satisfied that there is no reasonable likelihood of such an agreement being reached;
- a party who has been notified of the hearing under **clause 25** fails to attend the hearing;
- a party breaches a mediated agreement which has been duly filed;
- 90 days after the dispute is referred to the Registrar a mediated agreement has not yet been filed or the dispute has not been referred to the Tribunal on the basis that no agreement has been, or is reasonably likely to be, reached; or
- the Registrar is otherwise satisfied that the dispute should be heard by the Tribunal.

**Clause 32 - Costs**

**Clause 32** establishes that the parties to a hearing shall bear their own costs unless the Registrar otherwise orders.

**PART VI - TRIBUNAL HEARINGS**

**Part VI** comprises **clauses 33 to 56** (inclusive), separated into 4 divisions, dealing with the procedures which apply where a dispute is referred to the Tribunal, relief which may be granted by the Tribunal and enforcement of the Tribunal's orders.

**Clause 33 - Parties**

**Clause 33** establishes which persons are parties to a Tribunal hearing. The parties to a hearing are each party to the lease that is the subject of the hearing, any person notified by the Registrar under **clause 35**, and the Director, if the Director intervenes under **clause 34**.

**Clause 34 - Intervention by Director**

**Clause 34** enables the Director to intervene in a Tribunal hearing or related proceedings if the Director considers that that would be in the public interest and the Minister consents to the intervention. **Subclause 34(2)** is to the effect that where the Director intervenes in any proceedings, the Director is presumed to have the consent of the Minister, in the absence of evidence to the contrary.

**Clause 35- Hearings**

**Clause 35** requires that the Tribunal hear each dispute referred to it by the Registrar and that the Registrar give at least 14 days written notice of a hearing to each person who he or she is satisfied has a sufficient interest in the dispute.

**Clause 36 - Renewed hearings**

**Clause 36** enables a party in whose favour an order has been made by the Tribunal, where the order is breached, to apply to the Tribunal for the renewal of the hearing of the dispute.

**Subclauses 36(2)** and **(3)** are to the effect that an application must be made in writing, to the Registrar, and that on receipt of the application the Tribunal may renew its hearing into the dispute.

**Subclause 36(4)** provides that **Part III** of the Bill applies to a renewed hearing in the same way as it applies to an original hearing of the dispute.

**Clause 37 - Procedure generally**

**Clause 37** is to the effect that where no procedure is prescribed by the Bill or the regulations, in relation to a particular matter, the Tribunal may determine its own procedure.

**Clause 38 - Public hearings**

**Clause 38** sets out particular procedures to be followed in hearings before the Tribunal.

**Subclause 38(1)** requires that Tribunal hearings be in public.

**Subclause 38(2)** enables the Tribunal to:

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

**Subclause 38(3)** requires that the Tribunal, in considering whether to make an order, must have regard to the following matters:

- the principle that Tribunal hearings should be held in public;
- the principle that all evidence given before the Tribunal should be made public;
- the confidentiality of any evidence to be given before the Tribunal; and
- any other relevant consideration raised in argument by any party.

**Clause 39 - Inquiries**

**Clause 39** enables the Tribunal to make such inquiries as it considers appropriate for the purposes of a hearing.

**Clause 40 - Record of proceedings**

**Clause 40** requires the Tribunal to keep a record of proceedings.

**Clause 41 - Appearances**

**Clause 41** permits a party to a hearing and a person to whom the Tribunal has granted leave to appear at a Tribunal hearing.

**Clause 42 - Representation**

**Clause 42** provides that a party to a hearing may be represented at the hearing by a legal representative or agent.

**Clause 43 - Witnesses**

**Clause 43** sets out the authority of the Tribunal to require witnesses to attend before the Tribunal and to provide certain documents or other things to the Tribunal.

**Subclause 43(1)** authorises the Tribunal, for the purposes of a Tribunal hearing, to require, by summons, a person to appear as a witness before it -

- . to give evidence;
- . to give evidence and produce any document or thing specified in the summons, which thing is in the possession, custody or control of the person; or
- . to produce any document or thing, specified in the summons, in the possession, custody or control of the person.

**Subclause 43(2)** enables the President to give a party leave to inspect a document produced under a summons.

**Subclause 43(3)** enables a person to comply with a requirement under a summons to produce any document or thing specified in the summons by delivering the document or thing to the Registrar before the date specified in the summons.

**Subclause 43(4)** requires a summons to be in writing and served on the person named in the summons.

**Subclause 43(5)** requires a person on whom a summons is served to comply with the summons.

A penalty of \$5000 or 6 months imprisonment, or both, is provided for failure to comply with a summons under **clause 43**.

***Clause 44 - Taking evidence***

**Clause 44** enables the Tribunal to take evidence on oath or affirmation and for that purpose enables the President to require a person attending before the Tribunal to give evidence on oath or affirmation and to administer an oath or affirmation to such a person.

***Clause 45 - President's powers***

**Clause 45** provides the President with powers to require a person before a hearing of the Tribunal to answer a question relevant to the hearing or to produce a document or other record relevant to the hearing. A penalty of \$5000 or 6 months imprisonment or both is provided for failure to comply with *clause 45*.

***Clause 46 - Self-incrimination***

**Clause 46** is to the effect that a person is not excused from giving evidence before a Tribunal hearing on the ground that such evidence would tend to incriminate the person. While this provision denies the person required to give evidence the protection against self-incrimination which would be generally applied in court proceedings, it should be noted that any evidence given by a person before the Tribunal may only be used in subsequent criminal proceedings in the limited circumstances set out in *clause 48*.

***Clause 47 - Admissibility of evidence given during mediation***

**Clause 47** enables evidence obtained at a hearing of a dispute by the Registrar or during mediation to be admitted only in very limited circumstances. Such evidence may be admitted only if the parties agree or where the evidence in question is evidence of a mediated agreement and the agreement has been included in a mediation report or filed and a party to the agreement alleges, in good faith, that the agreement was induced or affected by fraud, other than the fraud of that party.

***Clause 48 - Admissibility of evidence in subsequent criminal proceedings***

**Clause 48** restricts the use which may be made, in subsequent criminal proceedings, of evidence obtained as a result of the President exercising his or her power to require evidence to be given or evidence of any information or thing obtained directly or indirectly as a consequence of evidence before the Tribunal. Such

evidence may only be used in prosecutions for an offence against *clauses 80* and *81* dealing with obstruction of the Registrar and Tribunal and false or misleading information.

***Clause 49 - Amendments***

*Clause 49* enables the Tribunal, either on the application of a party or of the Tribunal's own motion, to order that any document in a hearing be amended or, with the consent of the parties, give leave to a party to amend any document of that party.

***Clause 50 - Determination of questions***

*Clause 50* establishes that the determinative powers of the Tribunal on questions of law are to be decided in accordance with the opinion of the President. Where there is a division of opinion among Tribunal members, other than in relation to a question of law, the question must be decided according to the opinion of the majority.

***Clause 51 - Adjournment***

*Clause 51* enables the Tribunal to adjourn proceedings, either on application by a party or of the Tribunal's own motion.

***Clause 52 - Interim orders***

*Clause 52* deals with the circumstances in which an interim order for relief may be granted and the status of such an order.

*Subclause 52(1)* enables the granting, before a hearing by the Tribunal, of an interim order to a party to the hearing who applies for such an order in circumstances where the Tribunal is satisfied that if the order were not made before the commencement of the hearing the party making the application would suffer detriment. The Tribunal may make such interim order as it considers appropriate to safeguard the position of that party.

*Subclause 52(2)* is to the effect that an interim order remains in force until the expiration of 14 days after the order is made, until the Tribunal otherwise

orders or until the Tribunal makes an order at the conclusion of the hearing, whichever of these is the earlier.

**Subclause 52(3)** enables the Tribunal, on application by a party, while an interim order is in force to vary or rescind the order or extend it for a further 14 days.

**Subclause 52(4)** requires that an application for an interim order be in a form approved by the Registrar.

**Subclause 52(5)** requires that where a person against whom an interim order is made is not present at the making of the order the Registrar must cause a copy of the order to be served on the person as soon as practicable after the order is made.

**Clause 53 - Power to grant relief**

**Clause 53** sets out the Tribunal's general powers to grant relief.

**Subclause 53(1)** endows the Tribunal, subject to the Bill and the Code, with the jurisdiction to exercise any power to grant relief in relation to a dispute that would be exercisable by the Magistrates Court under the *Magistrates Court (Civil Jurisdiction) Act 1982*, if that Court had jurisdiction to hear the dispute.

**Subclause 53(2)** extends the jurisdiction of the Tribunal to grant relief, to the effect that, subject to the Code -

- . the Tribunal may make an order for the payment of an amount exceeding \$50,000;
- . the Tribunal may, in relation to a dispute alleging harsh or oppressive conduct by a party to a lease, reopen the lease and take action including varying the lease, whether or not by inserting new terms in the lease, or setting the lease aside; and
- . the Tribunal may make any order required to enforce the Code.

The significance of the qualifying words "subject to the Code" is that it is intended that where the Code indicates the nature of the remedy which is to apply where the Code is breached, any relief which the Tribunal may grant should be consistent with

the remedy indicated in the Code. Relief granted by the Tribunal is not intended exceed that indicated in the Code.

Where a dispute relates to a lease to which the Code applies and is a dispute in respect of matters on which the Code is silent as to the appropriate remedy the Tribunal may provide such relief as is necessary to enforce the Code.

***Clause 54 - Notice of orders***

***Clause 54*** requires written notice of the terms of any orders made by the Tribunal to be given to each party to the hearing, within 14 days of the making of an order at the conclusion of a hearing.

***Clause 55 - Failure to comply***

***Clause 55*** provides a penalty for the failure of a person to comply with an order of the Tribunal or the President. The penalty is \$5000 or 6 months imprisonment or both.

***Clause 56 - Powers of enforcement***

***Clause 56*** gives the Tribunal the same power to enforce its decisions as the Magistrates Court has to enforce its decisions under the *Magistrates Court (Civil Jurisdiction) Act 1982*.

**PART VII - APPEALS TO THE SUPREME COURT**

***Part VII*** consists of ***clause 57*** dealing with the right of appeal from decisions of the Tribunal to the Supreme Court.

***Clause 57 - Appeal from decision of the Tribunal***

***Clause 57*** establishes the right of a person to appeal to the Supreme Court against a decision of the Tribunal on a question of law.

***Subclause 57(2)*** requires that such an appeal be instituted within 28 days after the day on which a notice of the Tribunal's order is given to the person who is appealing, or within such further time as the Supreme Court may allow.

*Subclause 57(3)* enables the Supreme Court to hear and determine the appeal and to make an order affirming or setting aside the decision of the Tribunal, an order remitting the case to be heard and decided again by the Tribunal or such other orders as the Court considers appropriate.

#### **PART VIII- COMMERCIAL AND TENANCY TRIBUNAL**

*Part VIII* comprises *clauses 58 to 70* (inclusive) and deals with the establishment, membership and powers of the Tribunal and the appointment of the Registrar.

##### ***Clause 58 - Establishment***

*Clause 58* establishes the Commercial and Tenancy Tribunal.

##### ***Clause 59 - Constitution***

*Clause 59* provides for the Tribunal to be constituted of a President or a President and 2 persons appointed by the President in accordance with the Bill.

##### ***Clause 60 - Membership***

*Clause 60* establishes the requirements for membership of the Tribunal.

*Subclause 60(1)* requires that the President be a Magistrate appointed by the Minister, by instrument.

*Subclause 60(2)* provides for the President's term of office to be specified in the instrument of appointment but, in any event, to be for a maximum period of 5 years. However, the President is eligible for reappointment.

*Subclause 60(3)* enables the appointment by the President, where having regard to the nature and complexity of a particular dispute, he or she considers it desirable, of 2 further members to the Tribunal. One person is to be drawn from a pool of persons selected by the Minister on the basis of the persons' capacities to represent the interests of tenants. The other person is to be drawn from a pool of persons selected by the Minister on the basis of those persons' capacities to represent the interests of landlords.

**Subclauses 60(4) and (5)** require that persons be selected, to the groups to represent the interests of tenants and landlords, respectively, by instrument and that they be chosen by reason of the Minister's opinion that they are persons who are by reason of experience and expertise qualified to represent the interests of tenants or landlords, as the case requires.

**Clause 61 - Acting President**

**Clause 61** enables the appointment by the Minister of a Magistrate to be the Acting President.

**Subclause 61(2)** requires that the Acting President act as President when there is a vacancy in the office of President, whether or not an appointment has previously been made to the office, or during any period or all periods when the President is unable to perform the functions of the office.

**Subclause 61(3)** prohibits a person from acting continuously as President for more than 12 months. The purpose of this provision is to require a permanent appointment of a President to be made, rather than rely on an acting appointment indefinitely.

**Subclause 61(4)** preserves the validity of any act of a person purporting to act as Acting President, where the person acted in good faith, notwithstanding that the person's appointment was ineffective or had ceased to have effect or that the occasion for the appointment of the person had not arisen.

**Clause 62- Powers of Tribunal**

**Clause 62** empowers the Tribunal, subject to the Bill, to do all things necessary or convenient to be done for or in connection with the performance of its functions.

**Clause 63 - Annual report**

**Clause 63** requires the provision to the Minister of an annual report relating to the activities of the Tribunal in each financial year.

**Subclause 63(2)** is to the effect that an annual report is a periodic report for the purposes of section 30A of the *Interpretation Act 1967*.

This means that the report will be required to be provided to the Minister as soon as practicable after the end of the particular period to which the report relates and, in any event, within 6 months after the end of that period, and the Minister will be required to cause a copy of the report to be laid before the Legislative Assembly within 15 sitting days after the day on which he or she receives the report.

***Clause 64 - Expenses***

***Clause 64*** requires the Territory to reimburse a member of the Tribunal (selected to represent tenants' or landlords' interests) for expenses reasonably incurred in the performance of the member's functions.

***Clause 65 - Registrar***

***Clause 65*** enables the Minister to appoint a person who is a public servant to be Registrar of the Tribunal and ***subclause 65(2)*** sets out the functions of the Registrar -

those conferred by this Bill, the Code or any other law of the Territory; and to provide public information and education concerning the rights and obligations of persons in relation to leases.

***Clause 66 - Delegation***

***Clause 66*** enables the Registrar to delegate, by instrument, any or all of his or her powers under the Bill.

***Clause 67 - Acting Registrar***

***Clause 67*** enables the appointment by the Minister of a public servant to act as Registrar.

***Subclause 67(1)*** requires that the Acting Registrar act as Registrar when there is a vacancy in the office of Registrar, whether or not an appointment has previously been made to the office or during any period or all periods when the Registrar is unable to perform the functions of the office.

***Subclause 67(2)*** prohibits a person from acting continuously as Registrar for more than 12 months. The purpose of this provision is to require a permanent

appointment of a Registrar to be made, rather than rely on an acting appointment indefinitely.

*Subclause 67(3)* preserves the validity of any act of a person purporting to act as Acting Registrar, where the person acted in good faith, notwithstanding that the person's appointment was ineffective or had ceased to have effect or that the occasion for the appointment of the person had not arisen.

*Clause 68 - Protection of members etc.*

*Clause 68* prevents an action, suit or proceeding against a person who is or has been, a member of the Tribunal or its staff, the Acting President of the Tribunal, the Registrar, a person acting under the authority of the Tribunal or participating in proceedings, in relation to any act or omission done in good faith in the performance or purported performance of a function under the Bill.

*Clause 69 - Resignation*

*Clause 69* enables a member of the Tribunal, the Acting President or the Registrar to resign, in writing, given to the Minister.

*Clause 70 - Termination of appointment*

*Clause 70* enables the Minister to remove from office the President, Acting President or Registrar, by reason of misbehaviour or physical or mental incapacity.

*Subclause 70(2)* provides that where the President, Acting President or Registrar

- becomes bankrupt or takes the benefit of a bankruptcy law, compounds with creditors or makes an assignment of his or her remuneration for the benefit of creditors;
- is convicted in Australia for an offence punishable by imprisonment for one year or longer;
- is unreasonably absent from proceedings of the Tribunal; or
- ceases to have the qualifications by virtue of which the person was appointed,

the Minister must remove that person from office.

### **PART IX - APPEALS TO TRIBUNAL**

**Part IX** consists of *clauses 71* and *72* relating to appeals to the Tribunal from certain decisions of the Registrar.

#### **Clause 71 - Appeals**

**Clause 71** enables an appeal to the Tribunal in respect of certain decisions of the Registrar. A person who refers a dispute to the Registrar may appeal against a decision of the Registrar, pursuant to *subclause 13(4)* or *(5)*, to take no further action with respect to the dispute.

#### **Clause 72 - Review statements**

**Clause 72** sets out the requirements for a review statement about a decision. A statement must be in writing and contain -

- a statement of the decision;
- a statement advising the person to whom it is addressed of his or her right to apply to the Tribunal for a review of the decision; and
- a statement advising the person that he or she may seek a statement of the Registrar's reasons for the decision.

**Subclause 72(2)** requires that the review statement be provided to the person within 28 days of the making of the decision.

**Subclause 72(3)** is to the effect that a failure to provide a review statement or otherwise comply with *clause 72* does not affect the validity of the decision.

### **PART X - CODE OF PRACTICE**

**Part X** comprises *clauses 73* to *75* (inclusive) dealing with the approval of a Code of Practice.

#### **Clause 73 - Approval**

**Clause 73** enables the Minister, by instrument, to approve a code of practice, relating to leases, or a variation of such an approved code.

**Subclause 73(2)** indicates some of the matters which an approved code may prescribe. They are -

- the time from which any or all of the provisions of the code are to take effect;
- premises, or a class of premises for the purposes of *paragraph 5(1)(c)*;
- premises or a class of premises and leases or a class of leases, which are exempt from the operation of the Code;
- disputes which are to be referred to the Tribunal for resolution; and
- grounds on which specified provisions in a lease become void or invalid.

#### **Clause 74 - Disallowance**

**Clause 74** makes a code or a variation of a code approved under *clause 73* a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*. Consequently, the instrument will be of no effect if it fails to satisfy the notification and tabling requirements of section 10 of the *Subordinate Laws Act 1989* and it will be subject to scrutiny and disallowance by the Legislative Assembly.

#### **Clause 75 - Publication**

**Clause 75** requires the publication of particular information about an approval in a Territory newspaper.

**Subclause 75(1)** requires that the Director of Consumer Affairs cause the publication of a notice, on or before the date of effect of an approval, containing the following details -

- the date on which the approval takes effect;
- the place or places where copies of the code to which the approval relates may be purchased;
- a statement that the code may be inspected by the public at the office of the Director of Consumer Affairs, during office hours; and
- a statement that the approval is subject to disallowance by the Legislative Assembly under the *Subordinate Laws Act 1989*.

**Subclause 75(2)** requires the Director of Consumer Affairs to ensure that a copy of a code of practice to which an approval relates is made available at his or her office for public inspection during office hours and that copies of the code are

available for purchase at the place or places indicated in the notice required pursuant to *subclause 75(1)*.

#### **PART XI- FEES AND CHARGES**

*Part XI* comprises *clauses 76 to 79* (inclusive) and enables the determination of fees for the purposes of the Bill and sets out procedures relating to payment, remission, refund, deferral and waiver of fees, exemptions from fees and review rights in relation to fees.

##### **Clause 76 - Determination**

*Clause 76* permits the Minister, by notice in writing published in the *Gazette*, to determine fees and charges for the purposes of -

- referral of disputes to the Registrar;
- Tribunal proceedings and incidental matters;
- facilities and services provided by the Registrar or the Tribunal;
- the general purposes of the Bill and the Code.

*Subclause 76(2)* enables such a determination to provide for partial or whole exemptions, remissions or refunds of fees or deferral of liability to pay fees, which may be limited by reference to particular circumstances.

*Subclause 76(3)* makes a determination of fees a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*. Consequently, it will be of no effect if it fails to satisfy the notification and tabling requirements of section 10 of the *Subordinate Laws Act 1989* and it will be subject to scrutiny and disallowance by the Legislative Assembly.

##### **Clause 77 - Payment**

*Clause 77* requires that a fee or charge determined in accordance with *clause 76* be paid in advance, subject to *clause 77*.

*Subclause 77(2)* makes such a fee or charge payable, on notification from the Registrar, if it is calculated by reference to expenses actually incurred in performing the function or providing the facility or service in respect of which the fee is payable.

**Subclause 77(3)** is to the effect that where a fee or charge is payable in advance and is not paid when due, there is no obligation on the Registrar or Tribunal to perform the function, or provide the facility or service, in respect of which the fee is payable.

**Clause 78 - Remission, refund, deferral, waiver, exemption**

**Subclause 78(1)** permits a fee or charge to be remitted or refunded or liability for its payment to be deferred, in accordance with determination of the fee.

**Subclause 78(2)** exempts a person from paying a fee if the person to whom the fee applies is exempt under subsection 93(1) of the *Legal Aid Act 1977* or the person is legally assisted under a scheme or service provided or approved by the Attorney-General. **Subclause 78(2)** also enables the Registrar to waive payment of a fee or charge, in part or in whole, where the imposition of the fee would, in the opinion of the Registrar, impose hardship on the person to whom it applies.

**Clause 79 - Review of decisions**

**Clause 79** makes decisions of the Registrar in relation to remission or refund, deferral or waiver of a fee, or part of a fee, reviewable.

**Subclause 79(2)** requires that where the Registrar makes a reviewable decision he or she must give written notice of the decision to the person who claims to be entitled to the relevant remission, refund, deferral or waiver ("the eligible person"). The notice must advise the person that he or she may apply to the Registrar for a statement of reasons for the decision and of his or her right to apply to the Tribunal for a review of the decision within the review period.

**Subclause 79(3)** requires the Registrar to provide to an eligible person who makes written application, within 28 days of the person's receipt of the notice under **subclause 79(2)**, a statement of reasons for the decision.

**Subclause 79(4)** enables the Tribunal to review a decision, on written application of an eligible person, and **subclause 79(5)** enables the Tribunal to make such order as it considers appropriate, on review of a decision.

*Subclause 79(6)* is to the effect that there is no fee payable in relation to an application for a review under *clause 79*.

*Subclause 79(7)* sets out what is meant by "eligible person" and "review period".

#### **PART XII - MISCELLANEOUS**

*Part XII* comprises *clauses 80* to *82* (inclusive) dealing with the offence of obstructing the Registrar or the Tribunal, the offence of providing false or misleading information and a power to make regulations.

##### ***Clause 80 - Obstruction of Registrar and Tribunal***

*Clause 80* makes it an offence for a person to, without reasonable excuse, obstruct, hinder or resist the Registrar or the Tribunal in the exercise of a function under the Bill, and provides a penalty of \$5000 or 6 months imprisonment, or both, for contravention of this offence.

##### ***Clause 81 - False or misleading information***

*Clause 81* makes it an offence for a person to provide information, or make a statement in a mediation conference or a hearing under the Bill, knowing that the information or statement is false or misleading and provides a penalty of \$5000 or 6 months imprisonment, or both, for contravention of this offence.

##### ***Clause 82 - Regulations***

*Clause 82* empowers the Executive to make regulations for the purposes of the Bill.