

1994

**AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY**

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

**SUPPLEMENTARY EXPLANATORY MEMORANDUM**

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ATTORNEY-GENERAL**

## ***General Comments***

This Explanatory Memorandum provides an explanation for proposed Government amendments to the *Commercial and Tenancy Tribunal Bill 1994* ('the Bill') and a consequential amendment to the *Magistrates Court (Civil Jurisdiction) Act 1982*.

### ***Key money - definition***

Amendments are proposed to the definition of "key-money" in response to consultation with owner and tenant groups. Under these amendment, the definition of "key money" will exclude -

- (a) a payment by the tenant to the landlord for the goodwill of a business, formerly conducted by the landlord; (**Amendment no. 2**)
- (b) payment or provision of a security deposit or guarantee by way of security; (**Amendment no. 3**)
- (c) payment to a person, other than a lawyer or licensed agent, for attendances on the tenant, in connection with the preparation of documents that are relevant to the lease - the definition presently excludes payments to a lawyer or licensed agent only; (**Amendment no. 4**) and
- (d) a benefit conferred on the landlord which is permitted to be paid under the Code - the definition presently only refers to a payment made in accordance with the Code. (**Amendment no. 6**)

To ensure that a party can bring a dispute regarding payment of key money or disagreement over proposed lease terms that will breach the Code before a lease is signed, an amendment is necessary to clause 6 to include disputes in relation to negotiations for the entering into of a lease in addition to disputes in relation to a lease. (**Amendment no. 19**)

### ***Use of the term "landlord"***

Consistent with the Government's policy on non-sexist language in ACT legislation and to overcome any "feudal" overtones, these amendments will replace the term "landlord" with the term "owner". The term "tenant" will be retained. This is preferred over "lessor" and "lessee", particularly in view of the fact that the definition of "lease" encompasses a licence.

The amendments will omit "landlord" wherever it occurs and provide a definition of "owner" that corresponds to the current definition of "landlord". (**Amendment nos. 1, 5, 7, 11, 12, 15 & 34**)

### ***Lease - definition***

In order to avoid the circumvention of the Code and the Bill, it is intended that the term "lease" encompass a "licence". A "lease" and a "licence" are similar agreements, but a lease gives the tenant exclusive possession. The definition of the term "lease" is modified by these amendments to give effect to the intention that a lease include a licence (**Amendment nos. 8 & 9**)

### ***Ratchet clauses and Multiple rent review clauses - definitions***

Advice from the Institute of Valuers and Land Economists (IVLE) has been provided that the type of clause which has been defined in the Bill as a "ratchet clause" is properly described as a "multiple rent review clause" while a ratchet clause is a clause that prevents rent from decreasing when an adjustment of rent is due. It was always intended that both types of clauses should be prohibited once the Code comes into force. The Amendments will insert definitions of these terms in accordance with the advice of IVLE and add multiple rent review clauses to those things that are prohibited (**Amendment nos. 10, 13, 17 & 18**).

### ***Registrar***

Following implementation of a separate ACT Public Service, clause 65 should be amended to the effect that the Registrar is a public servant occupying or performing the duties of an office in the relevant Department. This will necessitate a change to the definition of "Registrar". To ensure that there is consistency between the organisational structure of this and other Tribunals within the administrative control of the Magistrates Court, it is proposed that there be a power to appoint Deputy Registrars rather than a power to appoint an acting Registrar. (**Amendment nos. 14, 35, 36 & 37**)

### ***Shopping Centre***

As the areas between shops within a shopping centre may not always be common areas, it is desirable to remove the word "common" from the definition of shopping centre in subparagraph (c)(ii). (**Amendment no. 16**)

### ***Taking action after lease has finished***

Advice has been received that under current clause 6 a party may not be able to refer a dispute to the Registrar after a lease has ceased to be in force. This is clearly not the intention as there may be instances immediately after the lease has terminated where parties will want to refer a dispute to the Registrar. To remove any doubt over this issue, an amendment is proposed to the effect that a dispute may be referred to the Registrar for up to three months after a lease has ceased to be in force. **(Amendment no. 20)**

### ***Variations***

Where a provision of a lease is varied after the Code comes into force, the Code should apply, insofar as it is relevant and capable of applying, in respect of that variation, but not in respect of the other unvaried provisions of the lease. As a response to concerns that the provisions of the Bill may not give effect to this intention an amendment is proposed to clause 8 of the Bill. This amendment is designed to ensure that if a lease, already in existence at the date the Code takes effect, is varied by the parties, the Bill will apply to the varied provisions but not to the lease as a whole. **(Amendment no. 21)**

### ***Direct Interest***

Following representations from landlord groups it is proposed that clause 16 of the Bill be amended to the effect that the Registrar must be satisfied that a person has a "direct" rather than a "sufficient" interest in a dispute, before the person may be made a party to the mediation. **(Amendment no. 22)**

A similar amendment is proposed to subclause 25(1), in relation to parties to a hearing before the Registrar. **(Amendment no. 24)**

### ***Admission of evidence given in mediation or hearing before Registrar***

Concerns have been raised by the Conflict Resolution Service (CRS) about the provisions of the Bill relating to confidentiality of things said and acts done during a mediation or a hearing before the Registrar. The Bill (clauses 20 and 29) allows for evidence of such matters to be given in subsequent proceedings, either where the parties agree or where a party has alleged fraud in the making of a mediated

agreement. Evidence of proceedings at a mediation can be given in criminal proceedings for an offence under clause 81 (knowingly providing false and misleading information) and evidence of proceedings at a Registrar's hearing can be given in criminal proceedings for an offence under clauses 80 and 81. The CRS is concerned that the possibility of parties and mediators being drawn into subsequent proceedings and the prospect of the mediation not being kept confidential will impede the mediation process.

The amendments will have the effect that only where there is an allegation of fraud or duress in the making of a mediation agreement should such evidence be able to be adduced. This will have the effect of removing the need for clause 81 and the reference to clause 81 in clause 48. (Amendment nos 23, 27, 28, 29, 29A, 31 & 33)

#### *Informal record of hearing before Registrar*

Subclause 28(4) is not necessary. The Registrar may make notes as an aid to memory without the inclusion of such a provision. The amendments will omit this subclause. (Amendment nos. 25 and 26)

#### *Power of Tribunal to award costs*

Consistent with the power of the Registrar to exercise a discretion regarding the awarding of costs of the parties, an amendment is proposed to the Bill to the effect that parties, before the Tribunal, shall bear their own costs, unless the Tribunal orders otherwise. (Amendment no. 32)

#### *Legal representation of persons given leave to appear*

It is proposed that the right to legal representation, which is accorded to parties in a hearing before the Tribunal, should be extended to persons given leave to appear before the Tribunal, pursuant to clause 41. (Amendment no. 30)

#### *Review of decisions*

The provisions of clause 79 are intended to be consistent with those in other legislation dealing with payments of fees and charges to courts. To achieve consistency it is necessary to amend the provisions to the effect that the Registrar is only required to give notice or review rights in respect of an *adverse* decision, rather than any decision. (Amendment no. 38, 39 & 40)