

AUSTRALIAN CAPITAL TERRITORY

TENANCY TRIBUNAL ACT 1994

VARIATION

Instrument NO. 5 OF 1997

EXPLANATORY STATEMENT

The *Tenancy Tribunal Act 1994* ("the Tenancy Act") provides mechanisms for the resolution of disputes arising under the Commercial and Retail Leases Code of Practice ("the Code"). The Code, approved by the Minister under the Tenancy Act sets minimum standards of conduct for parties to a lease which fall under its scope of operation.

Section 75 of the Tenancy Act provides the Minister with the power to vary the Code. Clause 1 of the Variation repeals the current clause 7 of the Code and substitutes a new clause 7. The new subclause 7(a) replicates the effect of the old clause 7 in excluding from the operation of the Code leases for a duration of less than six months, until the tenant has been in continuous occupation of the premises for six months. The new subclause 7(b) excludes certain leases specified in Schedule 4 from the Code's operation.

Clause 2 inserts a new Schedule 4 into the Code. The Schedule specifies two leases for the purposes of subclause 7(b). The parties to these leases are the owners of Westfield Shoppingtown Belconnen, **PT Ltd** and **Commonwealth Funds Management Ltd** (the lessors) and two wholly owned subsidiaries of the Coles Myer Group, **Kmart Australia Ltd** and

Coles Supermarkets Australia Pty Ltd. Clearly, these leases are between parties of equal bargaining power and are outside the original policy intention of the Code to provide protection for small business.

The language, however, of paragraph 6(b)(i) of the Code obfuscates this policy objective. The test in paragraph 6(b)(i) relies on the eligibility of a company to be incorporated as a proprietary limited company under the Corporations Law. However, the eligibility of a company to be incorporated as a proprietary company depends on its shareholding and the number of people who subscribe to its memorandum. These criteria can fluctuate and a company can fall in or out of the coverage of the Code. This test is even more uncertain in light of recent amendments to the Corporations Law by the *First Corporate Law Simplification Act 1995*.

All parties to the leases in question have indicated that the Code would unduly regulate their lease agreements, and, they have written to the Minister and the ACT Consumer Affairs Bureau stating their case. Accordingly, the Minister has taken this opportunity to specifically vary the Code to allow these leases to operate without the undue regulation of the Code. The Minister has also reserved the fundamental policy question of whether to apply the Code to the new proprietary company classifications, introduced under the *First Corporate Law Simplification Act 1995*, for consideration by the Working Party reviewing the Code.

The Working Party will consider whether the original policy intention of the Code of protecting small business can still be fulfilled by the language of paragraph 6(b)(i), particularly where the *First Corporate Law Simplification Act 1995* has divided proprietary companies into large proprietary companies and small proprietary companies.

Circulated by the authority of Gary Humphries, Minister for Consumer Affairs