Government of **Western Australia**
Department of **Mines, Industry Regulation and Safety**

Report and recommendations

A statutory review of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA)

April 2024

Contents

Glossary

The following is a list of terminology and abbreviations used in this paper.

2003 Review	2003 statutory review of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) conducted by a Review Committee reporting to the Hon Clive Brown MLA, Minister for State Development, Tourism and Small Business.
2011 Amendment Act	*Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011* (WA).
2013 CT Regulation Amendments	Amendments to the CT Regulations commencing in 2013 and introduced by the *Commercial Tenancy (Retail Shops) Agreements Amendment Regulations (No. 2) 2012* (WA).
Australian jurisdictions	ACT Australian Capital Territory; NSW New South Wales; NT Northern Territory; Qld Queensland; SA South Australia; Tas Tasmania; Vic Victoria; WA Western Australia
Consumer Protection	Department of Mines, Industry Regulation and Safety – Consumer Protection Division.
consultation paper, the	The Consultation Paper for the statutory review of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) released in June 2022.
COVID-19	The COVID-19 Coronavirus.
CT Act	*Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA).
CT Regulations	*Commercial Tenancy (Retail Shops) Agreements Regulations 1985* (WA).
DS	The Disclosure Statement prescribed at Form 1 of Schedule 2 to the CT Regulations.
parties, the	The parties to the lease agreement, e.g. the landlord and tenant.
RTH Act	*Retail Trading Hours Act 1987* (WA).
SBDC	Small Business Development Corporation.
Small Business Commissioner or SBC	Position established by the Western Australian Parliament through the *Small Business Development Corporation Act 1983* (WA).
SBC certificate	A certificate issued by the SBC in accordance with section 25C of the CT Act.

SAT	State Administrative Tribunal.
ST Act	*Strata Titles Act 1985* (WA).
ST Amendment Act	*Strata Titles Amendment Act 2018* (WA).
TG	The Tenant Guide prescribed at Form 4 of Schedule 2 to the CT Regulations.
TL Act	*Transfer of Land Act 1893* (WA).
TPA	*Trade Practices Act 1974* (Cth).

Introduction

The *Commercial Tenancy (Retail Shops) Agreements Act 1985* (CT Act or Act) regulates the rights and obligations of parties to a retail shop lease in order to promote fair and transparent lease agreements. The legislation also provides parties with an accessible dispute resolution process designed to preserve the leasing relationship and minimise the cost of disputes.

The retail industry in Western Australia is characterised by a range of businesses including small business tenants and small business "mum and dad" landlords, as well as larger more sophisticated tenants and landlords. This mix of capability and resources can lead to an imbalance in bargaining power and inequitable leasing arrangements. The power imbalance typically exists when the landlord possesses leasing information and resources that places them in a stronger position to negotiate favourable lease terms. An imbalance can also occur when the landlord is a small business and the tenant is a larger entity or part of a national or global brand.

The CT Act was introduced principally to address the power imbalance between small business tenants and larger landlords by focussing on the need for transparency of information and fair lease terms. Key provisions of the CT Act that were introduced to achieve these outcomes include:

- Disclosure requirements – landlords must provide a tenant with a disclosure statement and tenant guide outlining key lease information seven days before entering into the lease.
- A right to a minimum five-year lease term for leases longer than six months – to give the tenant the security to establish their business.
- Prohibiting lease provisions that require a retail shop to open during certain hours.
- Regulating rent reviews and payment of other lease costs.
- Restrictions on lease provisions relating to relocation, refurbishment and refitting.
- Prohibiting unconscionable conduct and misleading and deceptive conduct.

The retail industry has continually evolved since the introduction of the CT Act. New business models and types have emerged alongside changes in consumer preferences and behaviour.

The retail sector has also been significantly impacted by the COVID-19 pandemic and the lockdown and travel restrictions imposed by various State Governments. Retailers have been required to respond to changing consumer behaviour, disrupted and unpredictable supply chains, staff shortages and now inflationary and cost-of-living pressures. Some businesses do not have the economic resilience to adjust to these challenges despite a return to growth in retail sales in Western Australia. Many forecasters believe that the full impact of COVID-19 on the retail sector and contractual arrangements is still unfolding.

While it is not the role or intention of the CT Act to address matters such as rising living costs or supply shortages, these issues have heightened the need for the CT Act to operate effectively in a range of economic conditions. This statutory review provides an opportunity for the Government to ensure the objectives and outcomes of the CT Act are still effective and adaptable in a changing retail environment.

Background and consultation process

Background to the review

The CT Act requires a statutory review of its operation and effectiveness every five years from the commencement of the Act. Consumer Protection is responsible for the administration of the Act and has undertaken the review on behalf of the WA Government.

The most recent significant amendments to the CT Act, made in January 2013, gave effect to recommendations arising from a statutory review of the Act. Key amendments were introduced to require greater disclosure, strengthen tenants' rights regarding redevelopment and relocation, provide greater certainty regarding options to renew and improve access to rental information in the event of a dispute.

The purpose of this review is to consider and report on whether the CT Act continues to meet its objectives, whether the objectives are still appropriate and if the content or administration of the CT Act can be improved.

The review has considered experiences of industry participants, issues raised in the Parliament and the media, recent legislative developments in other States and Territories, developments in judicial interpretation and, most relevantly, the feedback received from the consultation paper released in June 2022.

The views, opinions and experiences of the sector about the issues raised in the consultation paper have been invaluable in informing this review process and the recommendations in this report.

To meet the requirements of the Act this report will be tabled in the WA Parliament.

Consultation

Why we consulted

Consultation was undertaken to obtain a wide range of views from landlords and tenants and other industry participants and representatives. The aim was to obtain firsthand insights from those operating within the current legislative framework and to provide the sector with the opportunity to offer suggestions on what areas of the law could be improved.

How we consulted

In June 2022, Consumer Protection released a consultation paper seeking feedback on a range of issues that might assist understanding how the laws are working and whether they can be improved.

Stakeholders were invited to share their thoughts with Consumer Protection either via written submission to the consultation paper or completing an online survey or both.

The consultation paper and survey were widely publicised through the media, social media and also through direct contact by Consumer Protection.

Consumer Protection received 42 written submissions and 214 individual responses to the survey. The majority of respondents were landlords, tenants or their representative organisations. Feedback was also provided by other groups including law firms, the SBDC, the SAT and the Law Society.

As part of the review, Consumer Protection also met with a number of key stakeholders and interest groups representing a broad cross-section of the retail industry.

Feedback was also received from relevant government agencies in Western Australia and other jurisdictions including, the Australian Competition and Consumer Commission (ACCC), Energy Policy WA, the Commonwealth Department of Treasury and the Small Business Commissions in NSW and South Australia.

Key consultation issues

The consultation sought stakeholders' views on the operation of several existing provisions in the CT Act relating to:

- the coverage of the CT Act – including current definitions of 'retail shop', 'retail shopping centre', 'retail business' and 'retail shop lease';
- the right to a minimum five-year lease;
- disclosure requirements;
- regulation of certain leases costs;
- regulation of lease requirements in relation to trading hours;
- the unconscionable conduct provisions; and
- the dispute resolution provisions.

The consultation also sought stakeholders' views on proposals to introduce new provisions relating to:

- a first right of refusal for sitting tenants; and
- early termination rights due to severe financial hardship.

Stakeholders were invited to provide additional comments on any other matter relating to the efficacy of the Act or any matter arising from the impact of the COVID-19 pandemic.

Consumer Protection has also sought additional feedback from certain stakeholders to clarify matters arising from their specific responses.

Key findings – general trends

Stakeholder feedback to the consultation paper indicates that overall the Act is working well to provide a contemporary framework for the regulation of retail lease agreements and an effective mechanism for dispute resolution.

The responses indicate that landlords and tenants and their representative organisations hold opposing views on a number of key issues.

Tenants and their representatives expressed broad support for options that strengthen protections for tenants and provide access to additional lease information. For example,

the majority of tenants support greater disclosure of rent information and operating costs as well as greater regulation of security instruments and the rights of tenants at the end of the lease term.

The majority of landlords and their representatives indicate support for options that reduce regulatory intervention and generally opposed options that transfer risk to them or that could increase administration or compliance costs. For example, the majority of landlords did not support the options to:

- extend the CT Act's coverage;
- require greater disclosure; or
- prohibit landlords from charging tenants land tax.

Analysis process

The information provided through the consultation process was analysed to identify:

- if the CT Act is operating as intended to meet policy objectives and assess whether original objectives remain appropriate;
- if there is any uncertainty or ambiguity regarding the obligations and requirements under the CT Act that require clarification;
- if there is evidence of market or regulatory failure warranting Government intervention; and
- options for reform (both regulatory and non-regulatory).

In assessing options for reform, consideration was given to the extent to which the option would result in:

- an increase in protection for small retail tenants by clarifying their rights and responsibilities and by reducing information asymmetry and power imbalances;
- an increase in protection for smaller landlords by ensuring their rights and responsibilities are clear and easily understood;
- a reduction in the likelihood of disputes and associated costs;
- increased costs to tenants in administration and compliance;
- increased costs to landlords in administration and compliance; and
- other potential economic impacts such as shifting economic risk to landlords, reducing flexibility and innovation and impacting investment certainty in the sector.

The review's findings provide an evidence base that has been used to inform the recommendations in this report.

Summary of recommendations

Consumer Protection makes the following recommendations arising from this review of the CT Act.

Leases covered by the Act

Recommendation 1

The CT Act to continue to apply to a lease for premises located in a retail shopping centre and used for the carrying on of any business – including any service-based business (status quo).

Recommendation 2

2.1 The CT Act to continue to apply to a lease for premises located outside a retail shopping centre used for a business mostly involving the retail sale of goods or a 'specified business' that is listed in the regulations (status quo).

2.2 Amend the CT Regulations to prescribe additional service-based businesses located outside shopping centres as a 'specified business' covered by the CT Act.

Recommendation 3

Retain the current provisions in the CT Act that exclude retail shop leases with a lettable area greater than 1,000sqm or leases held by a publicly listed company or its subsidiary.

Recommendation 4

Expand the application of the CT Act to specified small businesses with a lettable area greater than 1,000sqm, by prescribing additional small businesses in the CT Regulations.

Recommendation 5

Amend the CT Regulations to prescribe additional types of businesses or premises that should be excluded from the coverage of the CT Act, including premises that, if not leased, would be within a common area of a retail shopping centre and are used for an information, entertainment, community or leisure facility; telecommunication equipment; an advertisement display; storage; and parking.

Recommendation 6

Amend the CT Act to clarify that a lease may fall in, or out, of the operation of the CT Act.

Minimum five-year term

Recommendation 7

7.1 Retain the statutory right to a five-year term in section 13(1) of the CT Act.

7.2 Amend the Tenant Guide in the CT Regulations and develop education materials to provide information on the circumstances in which parties can enter into shorter term leases under existing provisions of the CT Act.

7.3 Amend the CT Act to clarify that the statutory right in s 13(1) does not apply if the tenant is granted a new lease for retail premises in which the tenant has been in continuous and seamless occupation for five years or more.

Recommendation 8

8.1 Retain the current requirement in section 13(7b) for tenants to apply to the SAT to waive the statutory option.

8.2 Amend the CT Act to clarify the circumstances in which termination of a retail shop lease before the expiry of the statutory option may be justified. Consider aligning with other jurisdictions by replacing sections 13(7) and (7a) with specific provisions to regulate specific circumstances such as: the proposed 'demolition' of a building (where demolition includes repair, renovation and reconstruction of a building) and damage and destruction.

8.3 Amend the CT Act to clarify the operation of sections 14A and 13(7) where a landlord is seeking SAT approval of a redevelopment clause that allows for early termination of a lease.

Disclosure requirements

Recommendation 9

9.1 Amend the disclosure statement in the CT Regulations to require additional disclosure in relation to the following:

- *the number and location of current or proposed tenants with the same or substantially similar type of business (e.g. selling similar goods and services);*
- *if available, a recent foot traffic count at the retail shopping centre;*
- *the annual sales of the shopping centre and annual estimated turnover for each category of retail shop (if collected) – (e.g. food, non-food and services);*
- *if applicable, details of specific fit-out requirements;*
- *if any of the suppliers of goods or services to the shopping centre are related to the landlord and if so, details of the supplier and the service/good they supply; and*
- *if any of the planned alterations works will result in an additional cost to the tenancy (e.g. the introduction of paid parking for tenants or customers).*

9.2 Amend the disclosure statement to include a standard list of operating costs.

Recommendation 10

Amend the CT Act to require a landlord to comply with a tenant's reasonable request for further information (including invoices) relevant to an operating cost payable by the tenant.

Recommendation 11

Amend the CT Act to enable a sub-lessor (franchisor) to request an updated disclosure statement from the head-lessor and to clarify the operation of the sub-lessor's (franchisor's) obligation to provide the prospective sub-lessee with a disclosure statement The franchisor to pay the landlord's reasonable expenses in preparing the updated disclosure statement.

Recommendation 12

Amend the CT Act to require the landlord to provide the tenant with an original or certified copy of the lease agreement within 30 days of signing the agreement.

Recommendation 13
Amend the CT Act to require the landlord to provide a tenant with a notice of intention (in relation to renewal of the lease) between three and six months before the lease ends.

Recommendation 14
Amend the CT Act to:

- *Require a landlord to provide a renewing tenant with an updated disclosure statement, or if there are no changes to the information in the original disclosure statement, a statement confirming the previous disclosure statement remains current.*
- *Include a right to compensation or termination of a renewed lease if the landlord fails to provide disclosure (based on current section 6(1)).*
- *Provide that termination is not permitted if a landlord has acted honestly and reasonably and the tenant is in substantially the same position as if disclosure had been provided (based on current section 6(3)).*

Recommendation 15
Amend the CT Act to allow the tenant to waive the requirement for disclosure on renewal of the lease by signing and giving the landlord a waiver notice.

Recommendation 16
Amend the CT Act to require a tenant to provide a prospective assignee with a copy of the original disclosure statement, tenant guide and lease and a statement of any changes the tenant is aware of or could reasonably be expected to be aware of.

Recommendation 17
Amend the CT Act to:

- *Require landlords to provide valuers appointed by a prospective tenant or tenant with relevant rental information at the commencement of the lease or at other times during the lease term for the purpose of assisting a prospective tenant or tenant in considering or negotiating the terms of their lease;*
- *Expand the reference to 'rent' in section 11(2a) of the CT Act to include information directly relevant to the value of the rent (e.g. side agreements such as rent abatement agreements or lease incentives that may impact or distort the rent value); and*
- *Allow a tenant to request an early market rent review before deciding whether to exercise an option to renew.*

Lease costs

Recommendation 18
The CT Act should not be amended at this stage to regulate the circumstances in which online sales are included in the calculation of turnover for the purpose of determining rent based on turnover.

Recommendation 19

19.1 The CT Act not be amended to prohibit landlords from passing on land tax to tenants as a recoverable operating expense.

19.2 The disclosure material be updated to inform tenants of their right to negotiate lease costs including any contribution to land tax.

Recommendation 20

Amend the CT Act to require landlords to provide a marketing plan to the tenant before each accounting period and an auditor's report confirming expenditure.

Recommendation 21

Amend the CT Act to require the landlord to:

- *Return/release the tenant's security instrument within 30 days of the tenant discharging their obligations under the lease.*
- *Notify the tenant in writing (within a prescribed time after the end of the lease) of any obligations the tenant has not discharged.*
- *Pay compensation to the tenant for any loss or damage if the landlord fails to return the security instrument within the 30 days.*
- *Place any monies paid to the landlord as security for the tenant's obligations into an interest-bearing account.*

Recommendation 22

The CT Act not be amended to impose a maximum amount a landlord can collect as a security bond or require as a bank guarantee.

Recommendation 23

The CT Act not be amended to restrict the form or number of security instruments a landlord may require to secure the tenant's obligations under the lease.

Recommendation 24

The disclosure material (e.g. tenant guide) be updated to encourage tenants to seek advice on the amount and type of security instrument they provide to the landlord so they are better informed of their potential liability under the lease.

Recommendation 25

Amend the CT Act to provide for the following:

- *If a tenant is liable to pay for fit-out works carried out by or on behalf of the landlord, the maximum amount (or formula) payable for those works is to be agreed between the parties and the tenant is not liable to pay more than the agreed amount (in line with section 13* Retail Leases Act 1994 *(NSW)).*
- *A tenant is not required to use a contractor selected by the landlord, provided the contractor engaged by the tenant is suitably experienced and qualified and approved by the landlord (approval to be provided within specified timeframe and not to be unreasonably withheld) (in line with section 30* Retail Leases Act 2003 *(Vic)).*

- *A landlord can require a tenant to use a particular contractor in certain limited circumstances when the fit-out works impact the landlord's building or relate to compliance (e.g. safety) obligations of the landlord (in line with section 30* Retail Leases Act 2003 *(Vic)*).

Recommendation 26

Amend the CT Act to specify that the definition of 'operating expenses' in s 12(3) only enables a landlord to recover the total actual costs to them of an operating expense but no more.

Recommendation 27

The CT Act should not be amended at this stage to regulate electricity charges to the tenant's premises where the landlord on-sells the tenant electricity through their retail shop lease.

First right of refusal

Recommendation 28

The CT Act should not be amended at this stage to introduce a first right of refusal.

Financial hardship

Recommendation 29

29.1 The CT Act should not be amended at this stage to include a right to early termination of a retail shop lease due to financial hardship.

29.2 The CT Act be amended in line with clause 26B of the Franchising Code of Conduct to establish a formal process for a tenant to have a right to request the early termination of a retail shop lease from a landlord. Failure by the landlord to respond to an early termination request within a specified timeframe should give rise to a right of the tenant to seek an order from the SAT to compel the landlord to respond to the request and to give reasons for refusing the early termination request. A landlord's failure to give reasons may be a matter the SAT has regard to in determining a claim of unconscionable conduct under existing provisions.

Trading hours

Recommendation 30

Section 12C of the CT Act be retained without change. This will ensure that any clause in a retail shop lease that requires a tenant to open at specified times or hours continues to be void.

Recommendation 31

The CT Regulations not be amended to extend standard trading hours.

Unconscionable conduct

Recommendation 32

32 That consideration of an amendment to the CT Act to introduce an unfair trade practices provision be deferred until a decision has been made at national level regarding amendments to the Australian Consumer Law.

Dispute Resolution

Recommendation 33

Amend the CT Act to allow the SAT to hear a matter without all the matters of the dispute being listed on the SBC certificate and empower the SAT to grant leave to proceed in the absence of the SBC certificate.

Recommendation 34

Amend the CT Regulations to prescribe matters arising under the Strata Act as matters not requiring a certificate from the Small Business Commissioner.

1.0 Leases Covered by the Act

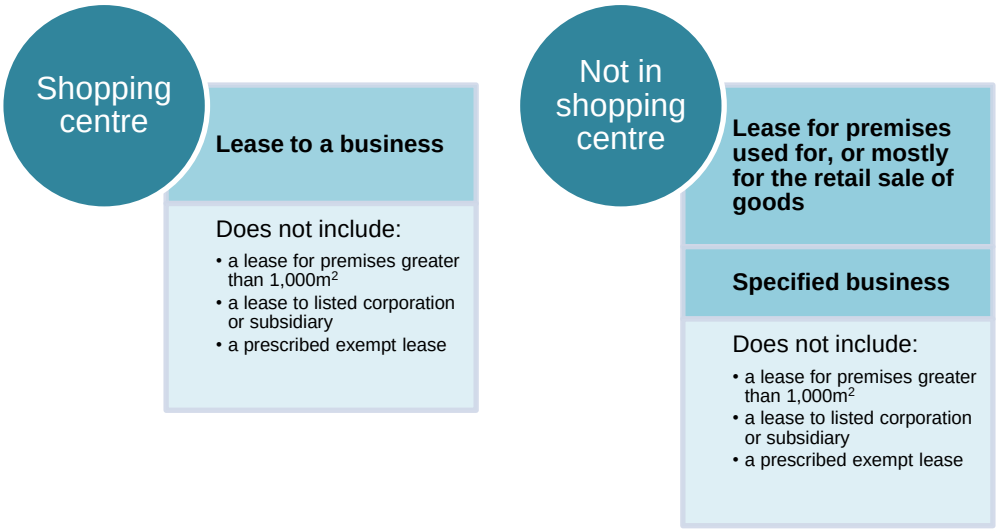
1.1 Leases to Small Businesses Providing Services

The CT Act generally applies to leases for the occupation of premises that are located in a retail shopping centre. Some exclusions apply. For example, if the shop has a lettable area greater than 1,000sqm, the lease is held by a listed corporation or its subsidiary, or the lease is listed as exempt in the CT Regulations.

If the premises are located outside a retail shopping centre, the CT Act will only apply to businesses that predominantly (i.e. mostly) involve the retail sale of goods, or a 'specified business' that is listed in the CT Regulations. The CT Act does not apply to a small business located outside a retail shopping centre that provides a service (e.g. watch or bike repairer). This means that some small businesses providing services outside retail shopping centres are not protected by the CT Act.

Currently, a 'specified business' under the CT Regulations includes businesses providing dry-cleaning, hairdressing, beauty therapy and treatments, shoe repair (which may include key cutting and engraving) and the sale or rental of videos tapes,[1] DVDs, electronic games and other similar amusements.

Figure 1 – What is a retail shop lease?



Other jurisdictions

Like WA, retail tenancy legislation in other jurisdictions applies to leases to small businesses (including those selling services) where the premises are situated in shopping centres. Some jurisdictions (ACT, NT, SA and Vic) go further and cover leases to small businesses selling services outside shopping centres.

[1] This regulation will be updated to remove references to video tapes.

Objective of consultation

To determine if the CT Act should:

- continue to apply to service-based small businesses located in a retail shopping centre; and
- be amended to automatically cover leases to service-based small businesses located outside retail shopping centres.

Consultation stakeholder feedback

Ninety three per cent of respondents to the consultation paper, comprising both landlords and tenants, agree the CT Act should continue to apply to service-based businesses located in a retail shopping centre.

Sixty per cent of respondents support the proposal to amend the CT Act so that it automatically applies to leases to small businesses that are selling services including small businesses located outside shopping centres.

One stakeholder commented that if the overarching goal of the CT Act is to protect small businesses, then a distinction between a retailer of goods and a retailer of services appears artificial. Other commentary in support of amending the CT Act referred to the rise of online shopping and a shift in revenue composition from retail products to services, which makes the distinction between goods and services increasingly blurry.

One argument against amending the CT Act to capture service-based businesses located outside shopping centres is that these businesses are not significantly reliant on location for goodwill because most services can be provided remotely or in any location and therefore do not require the same protections as retail businesses that are dependent on location for customer traffic.

Other arguments opposing an expansion of the coverage of the CT Act claim that this would significantly increase compliance costs of landlords which would ultimately be passed onto tenants as increased rent.

Impact assessment

The majority of stakeholders support the current provisions of the CT Act applying to both retail and service-based small businesses located in retail shopping centres. No significant issues requiring legislative amendment to the current provisions were identified.

A small majority of stakeholders supported the proposal outlined in the consultation paper to amend the CT Act to automatically cover leases to small service-based businesses located outside shopping centres.

However, the CT Act already provides a mechanism for including service-based businesses located outside shopping centres by prescribing them as a ‘specified business’ in the CT Regulations.

As the Parliament already contemplated the need to ensure other small businesses are protected under the CT Act by inclusion in regulations, further regulatory intervention should not be required unless there is evidence that the current CT Act provisions are not operating effectively.

The CT Regulations provide an opportunity for consideration of whether additional small businesses/business types should be protected by the CT Act within the existing legislative framework. An analysis of the consultation feedback and the types of service businesses currently protected by the CT Act suggests that the criteria for extending protection should include whether the type of business:

- is reliant on the goodwill generated by its physical location for customers;
- would experience difficulty (e.g. excessive financial costs) if it is required to relocate; and
- has less bargaining power than the landlord and/or insufficient access to lease information.

A number of stakeholders identified additional service-based businesses or business types that should be protected by the CT Act. Further work will be undertaken when drafting amendments to the CT Regulations to confirm which small businesses or categories of business should be added.

Recommendation 1
The CT Act to continue to apply to a lease for premises located in a retail shopping centre and used for the carrying on of any business – including any service-based business (status quo).

Recommendation 2
2.1 The CT Act to continue to apply to a lease for premises located outside a retail shopping centre used for a business mostly involving the retail sale of goods or a 'specified business' that is listed in the regulations (status quo).

2.2 Amend the CT Regulations to prescribe additional service-based businesses located outside shopping centres as a 'specified business' covered by the CT Act.

1.2 Coverage of small business tenants

A key focus of the CT Act is to protect small business tenants in relation to their lease and exclude larger businesses that do not require legislative protection. The CT Act currently provides for this by excluding leases held by a publicly listed company or its subsidiary, and excluding premises with a lettable area over 1,000sqm. The 1,000sqm threshold is based on the assumption that in most situations, if a business occupies a larger retail area it is likely to be a larger business that does not require the protection of the legislation.

The CT Act also allows for certain types of premises or leases to be excluded from the Act's coverage.[2] Currently, only leases for the purpose of operating a vending machine or automatic teller machine (ATM) are explicitly excluded by the Act.[3]

Other jurisdictions

Most other jurisdictions limit the application of retail tenancy legislation to small businesses using similar criteria to WA.

Some jurisdictions use monetary thresholds to limit the legislation to small business leases. Victoria has abolished the 1,000sqm limit and instead excludes leases where the estimated occupancy costs[4] exceed $1,000,000 per annum.[5] South Australia's legislation excludes leases where the amount of rent payable under the lease exceeds $400,000.[6] However, in both states the leases cannot be held by a publicly listed company or its subsidiary companies like WA.

Most other jurisdictions exclude a number of additional types of premises or leases from the coverage of their retail tenancy legislation. For example:

- NSW excludes a number of additional 'ancillary uses' such as children's rides, communication towers, digital display screens, internet booth, storage lockers and renewable energy storage batteries;[7] and
- Qld excludes premises that, if not leased, would be within a common area of a retail shopping centre and are used for an information, entertainment, community or leisure facility; telecommunication equipment; an ATM; a vending machine; an advertisement display; storage; or parking.[8]

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[2] See the definitions of 'retail shop' and 'retail shop lease' in the CT Act section 3(1) and the general exemption provisions in section 4(4).
[3] *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* (WA) regulation 3AB.
[4] *Retail Leases Act 2003* (Vic) section 4(3) provides occupancy costs to mean rent (not being rent that is to be determined by reference to the turnover of a business), outgoings as estimated by the landlord that the tenant is liable to contribute under the lease, and other costs of the prescribed kind that the tenant is liable to pay under the lease.
[5] *Retail Leases Act 2003* (Vic) section 4.
[6] *Retail and Commercial Leases Act 1995* (SA) section 4(2)(a) and 3(1a).
[7] Schedule 1A of the *Retail Leases Act 1994* (NSW).
[8] *Retail Shop Leases Act 1994* (Qld) section 5A(2)(g).

Objective of consultation

Stakeholder's views were sought on:

- whether the current criteria for excluding larger businesses which is linked to corporate status and size of premises is working as intended;
- alternative criteria for excluding larger businesses such as a monetary threshold related to occupancy costs or rent; and
- whether there are additional types of lease or premise that should be excluded from the coverage of the CT Act.

Consultation feedback

Two thirds (62 per cent) of responses to the consultation paper indicate support for retaining the current criteria for determining the application of the CT Act to smaller businesses.

These responses argue the current provisions are clear and easy to apply and are preferable to alternate criteria (such as monetary thresholds) that would involve additional complexity and uncertainty.

Twenty-three per cent of responses support the CT Act being amended to apply to leases for certain businesses with a lettable area greater than 1,000sqm where it is appropriate, and 15 per cent support the introduction of a monetary threshold. Some stakeholders suggest other criteria for determining the application of the Act such as audited profits not exceeding a certain amount.

Similar responses were received to the survey question of whether the current criteria for determining whether a business is covered by the CT Act is appropriate, with 46 stakeholders answering 'yes' and 30 answering 'no'.

A number of stakeholders also raised concerns that the current criteria in the CT Act is not effective in excluding larger national chain businesses and suggest these larger businesses could be excluded by introducing a store network threshold so that if, for example, there are more than four stores in the businesses network, the CT Act would not apply.

Seventy per cent of responses to the consultation paper, comprising both landlords (42 per cent) and tenants (21 per cent) suggest that additional types of businesses and/or premises should be excluded from the application of the CT Act. Stakeholders provided a number of examples including market stalls and temporary stalls, public telephones, car parking (except parking provided as part of the business of a car park) and various ancillary uses.

Impact assessment

Lettable area – 1,000sqm

While a majority of responses support the current criteria including the 1,000sqm threshold, a number of stakeholders identified numerous small businesses or categories of small businesses that due to the nature of their product (e.g. garden supplies, floor coverings, furniture etc.) or location (e.g. rural, semi-rural) have a lettable area greater than 1,000sqm and are excluded from the protection of the CT Act. This is contrary to the intent of the Act.

As indicated above, the CT Act already contemplates that some small businesses may be inadvertently excluded and has addressed this potential anomaly by including a mechanism in the definition of 'retail business' to ensure the Act applies to specific small businesses listed in the CT Regulations, that would otherwise unintentionally fall outside the protection of the Act.[9]

The alternative of removing the 1,000sqm threshold creates a risk that some larger businesses that do not need protection will inadvertently be captured by the CT Act. This could result in unnecessary administration costs for landlords and tenants and place additional pressure on existing dispute resolution processes and the SAT. This alternative could also create less certainty regarding the application of the CT Act.

Given the level of support expressed for retaining the 1,000sqm threshold and the potential risks of removing this criteria, on balance, the preferred approach is to retain the status quo, but apply the CT Act to specified small businesses with a lettable area greater than 1,000sqm where it is appropriate, by prescribing additional small businesses in the CT Regulations. Further work will be undertaken when drafting the regulations to confirm which small businesses should be added.

Monetary threshold and other criteria

A smaller percentage of responses to the consultation paper support the introduction of a monetary threshold. This preference is based on the assumption that the more significant the monetary consideration paid under the lease, the more likely the tenant is sophisticated and will not require legislative protection.

The main criticism expressed by stakeholders against a monetary threshold is that it is too uncertain and would impose an ongoing requirement for regular monitoring, updating and review. A number of stakeholders also expressed concern that the introduction of a monetary threshold could lead to reluctance on the part of some landlords to set rents at a lower level in order to avoid the application of the Act.

In relation to the issue of larger private businesses being inadvertently captured by the current definitions in the CT Act, some stakeholders comment that this issue only applies to a handful of businesses and is not a widespread issue that warrants regulatory intervention. It is possible that the introduction of a store limit in order to exclude these

[9] See definition of 'retail business' in the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section 3(1).

larger national chain businesses could also create uncertainty as businesses structures and size can likewise change over time.

Nevertheless, the intent of the CT Act is to exclude larger businesses on the basis that they have the bargaining power to look after their own interests. The potential for contradiction with the intent of the CT Act is even greater in the situation where the landlord is a small business and the tenant is a large private organisation.

Excluded businesses

With an increase in the number and type of facilities offered at shopping centres since the last review of the CT Act, there are now additional types of businesses or premises that should be excluded from the Act's coverage. This review has identified that the CT Regulations should be amended to exclude the additional facilities that section 5A(2)(g) of the *Retail Shop Leases Act 1994* (Qld) excludes from that legislation. Further work will be undertaken when drafting the regulations to confirm whether any additional premises or larger businesses should be excluded from the CT Act.

Recommendation 3

Retain the current provisions in the CT Act that exclude retail shop leases with a lettable area greater than 1,000sqm or leases held by a publicly listed company or its subsidiary.

Recommendation 4

Expand the application of the CT Act to specified small businesses with a lettable area greater than 1,000sqm where it is appropriate, by prescribing additional small businesses in the CT Regulations.

Recommendation 5

Amend the CT Regulations to prescribe additional types of businesses or premises that should be excluded from the coverage of the CT Act, including premises that, if not leased, would be within a common area of a retail shopping centre and are used for an information, entertainment, community or leisure facility; telecommunications equipment; an advertisement display; storage; and parking.

1.3 Application of the CT Act

The CT Act contains a number of definitions for determining whether a lease is either captured by or excluded from the application of the Act. During the term of the lease a number of scenarios can arise that have the effect of qualifying or disqualifying a lease from the ambit of the CT Act. For example, the following changes could occur during the term of a lease:

- the use of a business located outside a shopping centre shifts from the sale of services to the retail sale of goods (e.g. from service-based to retail or vice versa);
- body corporate status (e.g. the tenant could list on a stock exchange); and
- changes to the lettable area (e.g. to greater than or less than 1,000sqm).

While some of these changes may result in a new lease agreement, this will not always be the case.

Consultation feedback

Several stakeholders indicate that it is currently unclear whether the application of the CT Act is determined at lease commencement and continues for the duration of the lease or whether a lease may fall in, or out, of the operation of the CT Act due to a change in circumstance.

The recent Supreme Court case of *480 Hay Street Pty Ltd v Uber Australia Pty Ltd* [2019] WASC 461 Uber case) is authority for the proposition that the CT Act may cease to apply to a lease if the tenant becomes a public company during the term of the lease.[10] While not definitive, this case could also be authority for the proposition that:

- the CT Act could cease to apply if any other disqualifying circumstance occurs (e.g. change in lettable area); or
- a lease previously outside the scope of the CT Act could come within its ambit due to a change in circumstance (e.g. reduction in size of lettable area below 1,000sqm).

Some stakeholders have suggested the CT Act should be amended to clarify whether:

- the application of the CT Act is assessed at the time the lease is entered into so that its status does not change for the duration of the lease (even where there is a change in circumstance); or
- the application of the CT Act is assessed at the time the lease is entered into and can change throughout the term of the lease due to a change in circumstance.

[10] S.3 definition of 'retail shop lease'.

Other jurisdictions

In 2019, South Australia amended its legislation[11] to clarify that the legislation may apply or cease to apply to a retail shop lease depending on whether the tenant changes its corporate status, for example, whether it becomes or ceases to be a publicly listed company, an authorised deposit-taking institution or an authority with powers of a local government.[12] Similarly, the SA legislation states that it will not apply to a retail shop lease if the amount of rent payable under the lease exceeds a prescribed amount, regardless of whether the Act applies or does not apply to the lease at the time the lease is entered into or renewed.

Impact assessment

The two main options for clarifying the application of the CT Act are to amend the CT Act to provide that its application:

1. is to be determined at the commencement of the lease and cannot thereafter change during the term of the lease; or
2. may vary during the course of the lease if there is a change in circumstance that qualifies or disqualifies the lease from the coverage of the CT Act.

While it is preferable that the application of the CT Act to a particular lease should be as clear and certain as possible, it may be considered contrary to the intent of the legislation if, for example, the CT Act continues to apply to a retail shop that becomes publicly listed after commencement of the lease such that the business no longer requires the protection of the legislation.

As such, it is recommended that the CT Act be amended to make it clear that a lease may fall in, or out, of the operation of the CT Act and to clarify which sections of the CT Act apply from the time the CT Act starts to apply. It is notable that some sections of the CT Act cannot practicably be complied with if the CT Act starts to apply to a particular lease at a point after the lease term commences. For example, section 6 permits a tenant to terminate a lease within six months if the landlord does not provide a disclosure statement within seven days of the agreement being 'entered into'.

If the CT Act starts to apply to a lease that was not covered by the CT Act when the lease was 'entered into' then the landlord cannot practicably comply with this provision. To this end, a clearer distinction may be required between provisions of the CT Act with a temporal component that impose an obligation or right when the retail shop lease '*is entered into'* and those provisions that do not have a temporal component and can be complied with from the time the CT Act starts to apply. Further work will be undertaken in drafting the amendments to determine the details of how the CT Act should be amended to clarify which sections of the CT Act apply from the time the CT Act starts to apply.

[11] *Retail and Commercial Leases (Miscellaneous) Amendment Act 2019* (SA).
[12] *Retail and Leases Act 1995* (SA) section 4(6).

Recommendation 6

Amend the CT Act to clarify that a lease may fall in, or out, of the operation of the CT Act.

2.0 Minimum Five Year Lease

2.1 The statutory right - Section 13(1)

The CT Act currently provides most retail shop tenants with the right to a minimum five-year lease term. Tenants with leases longer than six months have the option to renew and extend the lease term so that the total term can be up to five years (the statutory option).[13]

The intent of the statutory option is to provide tenants with security of tenure, allowing the tenant time to establish a viable business and recoup any establishment and fit out costs.

The statutory option was introduced when the CT Act became law in 1985 to assist tenants who, due to inexperience and an imbalance in bargaining power, were unable to negotiate lease terms to adequately protect their lease interests and tenure.

Other jurisdictions

Retail tenancy legislation in all Australian jurisdictions except Qld and NSW provides for a statutory minimum five-year lease term. In some jurisdictions, this applies to all retail leases, in others it applies to leases longer than six or 12 months.

Objective of consultation

To determine whether policy settings underpinning the minimum five-year term are appropriate for current and future retail tenancy markets and assess if greater flexibility is required.

Consultation stakeholder feedback

A small majority (55 per cent) of respondents to the consultation paper, comprising mainly tenants and tenant representatives and 51 per cent of survey responses on this issue, indicated a preference to retain the tenant's right to the statutory option.

Several stakeholders argue that as the goodwill and investment of many tenants is tied to the leased premises, tenants are particularly vulnerable to accepting unfair lease terms in order to remain in the premises. Some stakeholders gave examples of tenants not discussing problems with landlords for fear of being refused a renewal and of landlords using the goodwill a tenant had built-up as leverage to attract another tenant at a higher rent. It has been argued that should the statutory option be diluted or removed, this would shift greater risk onto the tenant and force more tenants to accept shorter lease terms and higher rents.

The SBDC submits that, in its experience, there is no evidence of a failure in the marketplace that suggests the need for intervention in relation to the statutory option.

[13] CT Act section 13.

Twenty four per cent of respondents to the consultation paper and 37 per cent of respondents to the survey, being predominantly landlords and landlords representatives, indicated a preference to remove the statutory option.

Many of the respondents claim the current provisions are ineffective and result in unnecessary administration costs to tenants and landlords.

One of the principal reasons given for removing the statutory option is to create a more flexible commercial environment where parties can agree to a lease term that best suits them and the shopping centre.

It has been suggested that, as the retail landscape has changed significantly since the previous amendments to the CT Act, there is now a demand from landlords and tenants for short-term leases that allow new businesses to test their product or service in the market.

Several stakeholders argue the statutory option impedes innovation by making it difficult for parties to enter into shorter term leases.

Some submissions from landlords and their representatives also claim the inflexibility of the statutory option has led to premises being unlet and shopping centres being underutilised as some landlords are reluctant to grant tenants lease terms longer than six months to avoid being locked into a minimum five-year term.

Impact assessment

The CT Act does not prevent parties from entering into short term leases. Rather, the CT Act shifts some of the risks from the tenant onto the landlord. The existing legislative framework currently allows landlords and tenants to agree on a shorter lease term. For example:

- The parties can agree to a lease term that is less than six months (so that the statutory option does not apply) – arguably, in this scenario it is the tenant who bears the most risk because there is no certainty and often no expectation that the lease will be renewed at the end of the lease term.
- The tenant can seek an order from the SAT waiving their statutory right to a five-year term leaving the parties free to negotiate a shorter lease term.
- The landlord can seek an order from the SAT approving a provision in a lease allowing for termination of the lease before the expiry of five years in ‘special circumstances’. For example, where the landlord plans to redevelop and/or demolish a shopping centre.
- The parties can simply agree to a lease term of less than five years and not seek an order from the SAT. This option carries with it a risk to the landlord that the tenant may change their mind and decide to exercise their statutory option.

It has been suggested that some stakeholders do not fully understand how the statutory option operates or appreciate the flexibility provided within the existing legislative framework to allow parties to negotiate shorter term leases. The SBDC indicates that in

its experience when tenants enter into short term leases of less than six months, the tenant often ends up complaining about having to vacate the premises completely or move to another part of the shopping centre because the landlord will not grant them a longer-term lease.

Some of the submissions claim that if a tenant is performing well and supporting the demands of the trade catchment area, their lease will generally be renewed. This claim was advanced in support of the argument that a large volume of leases, including shorter term leases, will be renewed if the tenant is performing well and therefore the need for a statutory option is unnecessary and creates additional cost.

The statutory option provides security of tenure to protect the interests of tenants as well as a reasonable amount of time to amortise set-up costs. As indicated above, the primary criticism of the statutory option is that it prevents parties from entering into shorter term leases. However, parties to a retail shop agreement can, by mutual agreement or statutory waiver, enter into short term leases.

Given the protection the statutory option provides to tenants and the fact the CT Act already allows for short term leases, on balance, there is insufficient evidence to support removing the statutory option.

It also appears from stakeholder feedback that any lack of flexibility does not primarily relate to the statutory option itself, but rather, to the operation of the statutory waiver processes in sections 13(7), (7a), (7b) of the CT Act. These issues are discussed further below.

A number of stakeholders raised another issue regarding the application of the statutory option when a tenant has been in continuous possession of the retail premises.

Where a tenant has been in continuous possession of the same retail shop in excess of five years, and is granted a new lease with a term of five years or more, there would appear to be some uncertainty as to whether the new lease is caught by section 13(6)(ab) of the CT Act so that a further minimum five year term applies to the new lease. Such an interpretation is neither consistent with the intent of the legislation nor with recent findings of the SAT that the statutory right to a five-year term will not apply to a new lease if the tenant has already been in continuous possession of the retail premises in excess of five years.[14]

[14] In the recent decision of *Hyde Park Management Limited v Teresina Ann Pearson* [2023] WASAT 12, the SAT interpreted section 13(2)(a) of the CT Act to mean that the statutory right in section 13(1) of the Act will not apply to a leasehold estate created by a new lease if the tenant has already enjoyed occupation of the premises for a period of 5 years or more under the original lease prior to the 'immediate and seamless commencement of the term of the new term'.

Recommendation 7
7.1 Retain the statutory right to a five-year term in section 13(1) of the CT Act.

7.2 Amend the Tenant Guide in the CT Regulations and develop education materials to provide information on the circumstances in which parties can enter into shorter term leases under existing provisions of the CT Act.

7.3 Amend the CT Act to clarify that the statutory right in s 13(1) does not apply if the tenant is granted a new lease for retail premises in which the tenant has been in continuous and seamless occupation for five years or more.

2.2 Waiver of the statutory right - Sections 13(7)(7a) and (7b)

The CT Act currently provides landlords and tenants with the right to seek an order from the SAT to effectively waive the tenant's statutory option and allow for the termination of the lease before the expiry of the minimum five-year lease term.

Under sections 13(7) and 13(7a) of the CT Act, a landlord can apply to the SAT to approve a clause in a retail shop lease (or leases) that allows for the termination prior to the minimum five=year term if 'special circumstances' exist.

Under section 13(7b) of the CT Act, the tenant can apply to the SAT for an order that the statutory option does not apply to the lease. The SAT will only make the order if satisfied that the application was made of the tenant's own free will and it is appropriate in the circumstances to grant the application.

Other jurisdictions

Other jurisdictions have different mechanisms to enable a tenant to waive the statutory option. In Victoria, the tenant must obtain a certificate from the Victorian Small Business Commissioner, and in other jurisdictions the tenant must obtain a certificate from a legal practitioner or an accountant stating that the tenant understands the implications of foregoing the right.

WA is the only jurisdiction to give an independent body (i.e. the SAT) the broad discretion to determine whether 'special circumstances' exist to justify termination before the end of the minimum five year term. Most other jurisdictions contemplate particular circumstances in which a lease may contain an early termination clause, such as demolition of the building or relocation of the retail shop and include minimum requirements for termination in those circumstances. For example, if a landlord plans to demolish a shopping centre, the lease cannot be terminated unless notice is given and the tenant has been provided with sufficient details of the proposed demolition.

Objective of consultation

To determine whether the process for waiving the statutory option under the CT Act is operating effectively and as intended to allow for:

1. shorter term leases if agreed by both landlords and tenants; and
2. early termination by landlords in special circumstances where termination is required to accommodate the broader commercial needs of the landlord.

Consultation stakeholder feedback

A number of stakeholders contend there are problems with the interpretation and application of the waiver processes under sections 13(7), 13(7a) and 13(7b) (collectively, the waiver processes). Some responses indicate that the SAT application process is time consuming and costly, creating unnecessary delays in leasing transactions and uncertain outcomes as applications are routinely denied without adequate reasons.

A review of recent SAT decisions indicates that the SAT has on several occasions rejected applications by landlords for approval of a clause allowing for a term of less than

five years, but the same clause has subsequently been approved by the Supreme Court on appeal.

In relation to applications made by tenants under section 13(7b), 17 per cent of stakeholders indicate a preference for replacing the SAT approval process with an exclusionary certificate similar to that used in other jurisdictions in order to streamline the waiver process.

Other stakeholders express concern that the use of exclusionary certificates could lead to tenants obtaining the certificate without fully understanding the implications of foregoing their statutory option.

A number of stakeholders suggest that what constitutes 'special circumstances' in sections 13(7) and 13(7a) is unclear and further guidance should be given as to when special circumstances exist. For example, what event triggers the special circumstances and how SAT should assess whether the circumstances are sufficiently 'special' to justify early termination. Further clarity could also be given about when compensation is payable by the landlord and how that should be calculated where a tenancy is terminated early due to special circumstances.

It has been suggested this guidance could be given by amending the CT Act to include a non-exhaustive list of examples of what may constitute special circumstances or by including specific provisions and requirements in the CT Act that allow early termination of the statutory option. Some stakeholders argue this guidance would produce more consistent decisions, assist landlords and tenants to decide whether to pursue early termination applications and reduce pressure on SAT's resources.

There is limited judicial guidance on what 'special circumstances' means. In the recent case of *480 Hay Street Pty Ltd v Irwin St Lower Pty Ltd* [2020] WASC 59 at [42] Curthoys J stated (obiter), the term 'special circumstances' has been held to mean 'circumstances that are out of the ordinary, but without having to be extraordinary or exceptional'. Justice Curthoys also identified a number of factors that when considered together, comprised 'special circumstances' justifying termination of the lease before the expiry of the minimum five-year lease term. These circumstances included the fact the tenant had approved the termination and was compensated by a significantly reduced rent and other favourable terms.

While recent judicial interpretation provides some assistance, it appears that stakeholders would benefit from additional guidance and clearer examples of what constitutes 'special circumstances'.

Justice Pritchard in *Synicast Pty Ltd and Showroom X Pty Ltd* [2023] WASAT 47 (the Synicast case) suggests that "… *the Parliament might see fit to amend the Act to clarify the test for the grant of approval or to give further examples of when early termination clauses should be permitted".*

Other suggestions made through submissions to the consultation paper include adding a requirement for the SAT to provide reasons[15] for its decision and amending the CT Act to clarify when section 13(7) and (7a) applications should be made. That is, to clarify whether the application to the SAT should be made before or after the lease is entered into and whether the 'special circumstances' must exist at the time of the application or if SAT approval could be given for special circumstances that might arise in the future.

Impact assessment

The waiver process in the CT Act is intended to provide maximum protection for tenants by ensuring the interests of the tenant are considered by an independent, statutory body that is both cost and time effective.

The alternatives, including the option for the tenant to obtain an exclusion certificate from a solicitor are not broadly supported by stakeholders. This alternative has a number of disadvantages, the most significant being the risk of a tenant agreeing to waive their statutory option without fully understanding the implications for their business, as well as the cost involved in getting the certificate.

A number of substantive issues have been raised by stakeholders particularly in relation to the operation and interpretation of the current waiver provisions for landlords seeking early termination of leases in 'special circumstances'. Several matters before the SAT and the Supreme Court (on appeal from the SAT)[16] also indicate that there is confusion regarding the interaction between s.13(7) and s.14A[17] of the CT Act where a landlord is seeking SAT approval of a redevelopment clause that allows for early termination of a lease but does not contemplate the possibility that the landlord might relocate the tenant's business. While the recent decision of Justice Pritchard in the Synicast case clarifies the interpretation of these provisions, the judgment also highlights the need for legislative reform to remove any uncertainty about the way in which s.13(7) and s.14A interact with each other.

The Synicast case also considered the statutory meaning of the word 'exist' in sections 13(7) and (7a). Justice Pritchard's decision in this case clarified that the 'special circumstances' the subject of the early termination application must 'exist' or be 'part of objective reality' at the time of the application to the SAT.

Prior to the Synicast case, dealing with applications under section 13(7) and (7a) involved a substantial allocation of the SAT's resources. However, Justice Pritchard's decision in the Synicast case appears, at least in the short term, to have significantly reduced the number of these applications being made to SAT and, consequently, the strain on SAT's resources.

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[15] Note that section 78 of the *State Administrative Tribunal Act 2004* (WA) allows parties to request the SAT to provide reasons for its decision.

[16] *480 Hay Street Pty Ltd v Irwin St Lower Pty Ltd* [2020] WASC 59;*WASCF Alliances Pty Ltd v Bowling Centres Australia Pty Ltd* [2020] WASC 41; *Synicast Pty Ltd as trustee for the Quentin Avenue Unit Trust v Showroom X Pty Ltd* [2921] WASC 449; *Hay & Colin Pty Ltd v West End Hospitality Pty Ltd* [2021] WASC 458.

[17] Section 14A regulates provisions in a retail shop lease that relate to the relocation of a tenant.

While the SAT waiver processes may provide the greatest protection for tenants, amending the CT Act to clarify the circumstances in which a retail shop lease may be terminated before expiry of the statutory option is required to streamline the process and provide certainty for landlords and tenants. Further work will be undertaken in drafting to determine the details of the amendments.

Recommendation 8
8.1 Retain the current requirement in section 13(7b) for tenants to apply to the SAT to waive the statutory option.

8.2 Amend the CT Act to clarify the circumstances in which termination of a retail shop lease before the expiry of the statutory option may be justified. In doing so, consider aligning with other jurisdictions by replacing sections 13(7) and (7a) with specific provisions to regulate specific circumstances such as: the proposed 'demolition' of a building (where demolition includes repair, renovation and reconstruction of a building) and damage and destruction.

8.3 Amend the CT Act to clarify the operation of sections 14A and 13(7) where a landlord is seeking SAT approval of a redevelopment clause that allows for early termination of a lease.

3.0 Disclosure requirements

Landlords generally possess a significant amount of leasing information about their tenancies. This can place landlords in a stronger bargaining position during lease negotiations. In order to address the potential for information asymmetry, the CT Act includes disclosure requirements[18] intended to ensure prospective tenants are provided with the necessary information to make an informed decision before entering into a lease.

The consultation paper and survey sought feedback from stakeholders in relation to the efficacy of the current disclosure requirements in the CT Act, specifically whether:

- the CT Act should require additional information be disclosed to prospective tenants;
- landlords should be required to provide updated disclosure information upon renewal of the lease;
- tenants should be required to provide disclosure information to prospective assignees of the lease; and
- the current requirements relating to disclosure of rent information are operating effectively or whether there have been changes in the marketplace that justify the introduction of additional measures to improve access to lease information.

3.1 Additional disclosure to prospective tenants

The CT Act requires a landlord to provide a prospective tenant with a disclosure statement (DS) and tenant guide (TG) at least seven days before signing the lease. The DS contains key information about the lease, including details on the shop premises, the lease term, options to renew, rent and operating expenses, fit-out requirements, refurbishment or alterations, trading hours, and other information regarding the retail shopping centre.

The 2013 CT Regulation Amendments updated the DS to require landlords to specify whether the tenant had exclusivity for the permitted use of the retail premises and whether there were any restrictions on the provision of certain goods and services by the tenant.[19] These amendments were made in response to feedback that one of the key determinants of success for a small business is exclusivity of permitted use.

Other jurisdictions

Retail tenancy information requirements for disclosure statements are generally consistent across Australian jurisdictions. Some states and territories require landlords to disclose the shopping centre's estimated annual turnover and customer traffic flow (where this information is collected).[20] South Australia also requires disclosure about proposed changes to the current tenant mix in a shopping centre.[21]

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[18] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section 6.
[19] *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* (WA) Schedule 2 Form 1.
[20] *Retail Leases Act 1994* (NSW) Schedule 2 clause 22 and 25.
Retail Shop Leases Regulation 2016 (Qld) regulation 2(q).
Retail Leases Regulations 2013 (Vic) Schedule 2 Item 22 and 25.
[21] *Retail and Commercial Leases Act 1995* (SA) section 12(3)(g).

In relation to operating expenses, the DS in some states and territories provide a prescribed list of outgoings or a checklist for landlords to complete, instead of landlords providing their own list.[22]

Victoria has recently made changes to their legislation to require a different disclosure statement depending on whether the retail shop is located in or outside a shopping centre. There are also separate disclosure statements required for the renewal of a lease as well as for an assignment of a lease with an ongoing business.[23]

In NSW if the disclosure statement provides an estimate of outgoings that is less than the actual amount of outgoings and there is no reasonable basis for the estimate, the tenant is only liable to pay the estimated outgoings amount.[24] This provision does not apply to outgoings in the nature of a tax or costs associated with advertising or promotion.

Objective of consultation

To ensure prospective tenants are provided with relevant leasing information to enable them to make an informed decision before entering into a lease, while also ensuring the benefits of the disclosure outweigh the costs of providing the information.

Consultation stakeholder feedback

Sixty eight per cent of respondents to the consultation paper, comprising mainly tenants and tenant representatives, agree the CT Act should require additional information be provided to prospective tenants. Some landlords and landlord representatives (30 per cent) also support the provision of additional information. In contrast, survey results were fairly closely distributed between tenants who agreed that they received sufficient information about their rental terms (37 tenants) and tenants who responded that they did not (30 tenants).

A larger majority of respondents to the consultation paper (89 per cent) agree that existing disclosures should be made clearer.

A number of stakeholders suggest there should be different disclosure statements depending on the circumstances. For example, a more comprehensive DS for larger shopping centres and a shorter DS for smaller shopping centres. A standardised list of outgoings was also proposed as a way of improving the clarity of disclosure.

Additional disclosure in DS

Numerous stakeholders indicate it would be beneficial for the DS to provide prospective tenants with additional information about matters that could potentially impact the success of their business, including:

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[22] *Leases (Commercial and Retail) Act 2001* (ACT) section 4 Approved form AF2003-4.
Retail Leases Act 1994 (NSW) Schedule 2 clause 14.
Business Tenancies (Fair Dealings) Regulations 2004 (NT) Schedule Prescribed forms clause 5.5.
Retail Leases Regulations 2013 (Vic) Schedule 2 Item 14.
[23] Retail Leases Regulations 2023 (Vic) Schedules 1-4.
[24] *Retail Leases Act 1994* (NSW) section.12A.

- the existence and location of competing businesses – for example, the number of current or proposed tenants with the same or similar type of business;
- the annual sales of the shopping centre; and
- a recent foot traffic count indicating the volume of customer traffic (if readily available).

It has been suggested the 2013 amendments to the DS did not go far enough and further information is required in relation to competing businesses.

A number of stakeholders indicate that the current requirement in the DS to provide details of any proposed alterations or works to the premises or shopping centre[25] should be expanded to include details of any additional costs to the tenancy that could result from the works. The example provided was a redevelopment that had resulted in the introduction of paid parking for tenants and customers.

Lack of transparency and adequate detail regarding operating expenses was also raised by several stakeholders, particularly in relation to maintenance and repair costs. It was also argued that maintenance costs should be itemised where possible (e.g. elevator repair, air-conditioning maintenance).

It was further suggested that the CT Act should require landlords to provide copies of invoices to tenants if requested by the tenant.

Franchisees – disclosure issues

Numerous questions were raised in relation to the application of the disclosure obligations in the CT Act to franchisors and franchisees.

In some instances, the franchisor may own the premises and lease to the franchisee (Situation one) or the franchisor may be the tenant under a lease, with the franchisee occupying the premises as a sub-tenant or licensee (Situation two).

Situation one:

Situation two:

Some stakeholders argue that franchisees and sub-lessees often enter into leases to their detriment without adequate disclosure regarding the leased premises because the franchisor (or sub-lessor) is unaware of relevant information that is only within the landlord's knowledge. It has been suggested that the CT Act should be amended in line

[25] *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* (WA) Schedule 2 Part 7.

with provisions in Qld to enable a sub-lessor (or franchisor) to request an up-to-date disclosure statement from the head-lessor (at the franchisor's/sub-lessor's expense) which can be used, in part, to satisfy the sub-lessor's obligation to provide a prospective sub-lessee (or franchisee) with a DS.

Electricity costs

A number of respondents to both the consultation paper and survey raised concerns about electricity costs. One stakeholder commented that the tenant's inability to source alternative energy providers underscores the particular importance of electricity costs being transparent.

Tenants may be charged for electricity consumed by:

1. the tenant within their individual shop premises that is directly billed to the tenant; and
2. the landlord in common areas of the shopping centre or group of premises that is passed on to tenants as an operating expense.

Some landlords may also be including maintenance costs for the embedded network infrastructure as a component of the outgoings that they charge tenants.

The issues raised in relation to electricity costs primarily relate to:

- lack of transparency, and confusion, about costs, which may lead to disputes;
- lack of contestability (i.e. tenants cannot go out and source their own electricity); and
- a concern that some landlords may be adding a profit margin on top of the actual cost to them.

It appears these issues are heightened in embedded networks where the shopping centre purchases the electricity from the retailer and on-sells it to tenants.

Embedded networks currently operate under an exemption order to the licensing regime that applies to electricity retailers in Western Australia.[26] Under the exemption framework, customers who pay for electricity through embedded networks do not have the same rights or consumer protections as other electricity customers.

Energy Policy WA (EPWA) is currently proposing to introduce a regulatory framework for alternative electricity service providers (AES Provider), including an industry code of practice. This code may include obligations around disclosure and the provision of specific information on pricing, and price control mechanisms that rely on the regulated tariff applicable to electricity retailers. It is proposed that different kinds of alternative electricity services, including embedded networks, will each need to be prescribed in regulations following a regulatory impact assessment process for this regulatory regime to apply. It is currently proposed that, should embedded networks be prescribed as an AES Provider, the obligations in the code will only apply to electricity supplied to

[26] *Electricity Industry Exemption Order 2005*.

the tenant's retail shop premises. The code will not apply to the electricity supplied to the common areas that is charged to tenants as part of operating expenses.

Related parties

Some tenants gave examples of costs, including operating expenses, for the supply of a service, such as cleaning or fit-out, by a third party or an entity related to the landlord, being passed onto tenants at a cost that appeared to be well-above the market rate. It was argued there should be an obligation on the landlord to provide greater disclosure about any arrangements with suppliers that are related to the landlord or that could otherwise cause the tenant to pay an above market cost. It was noted that similar disclosure requirements apply under the Franchising Code of Conduct to require landlords to disclose any arrangements with suppliers of goods and services that are related to the landlord.

Case study – related third parties

A common issue raised by feedback to the consultation relates to the scenario where the tenant is responsible for charges issued by a related third party to the landlord. A related third party may include an entity in which the landlord has a controlling interest or which is owned or operated by a relative of the landlord.

Tenants may encounter a related third party of the landlord in two broad situations:

1. Where the landlord directly enters into a contract with a related third party to provide a service relating to the common areas of a shopping centre. For example, a landlord may enter into a contract with a related third party to clean the common areas. The landlord then seeks to recover the costs of the contract from tenants in accordance with the operating expenses provisions in s 12 of the CT Act.
2. Where the landlord requires tenants to use a fit-out contractor that is a related entity of the landlord.

There are legitimate commercial reasons why a landlord would use or require a tenant to use a related third-party in both situations. For example, in the first situation landlords may be able to obtain better than market rates by engaging a related third-party to provide the services to the common areas. In the second situation, landlords have an interest in maintaining a level of control over fit out requirements as it is important to the 'brand' and appeal of the whole shopping centre that certain fit-out standards are met.

While it may be legitimate in some situations for landlords to rely on third parties, tenants also have an interest in ensuring transparency regarding third party costs.

An analogous regulatory context in which a party's interest in transparency has been recognised is franchising. Franchisors may require franchisees to obtain goods or services from particular suppliers. The Franchising Code provides some protection to franchisees in this situation by requiring franchisors to disclose details of ownership by the franchisor or an associate of the franchisor of an interest in any supplier from which the franchisee may be required to acquire goods or services. The Franchising Code also

seeks to regulate the behaviour of the franchise industry participants more generally through placing an obligation on the parties to a franchise agreement to act towards each other in good faith.

Notice of intention

A number of issues were raised by tenants regarding the potential vulnerability of tenants at lease end. To mitigate some of the uncertainty for tenants at lease end, the 2011 Amendments to the CT Act included an amendment to require the landlord, upon request by the tenant, to disclose its intention about whether the lease will be renewed and a statement of the terms and conditions or any renewal. It was submitted as part of the consultation feedback that this protection is not adequate as some tenants are not aware of their right to seek an indication of the landlord's intention.

Most other jurisdictions require the landlord to notify the tenants of its intention about whether the lease will be renewed without the tenant first being required to request notification from the landlord.[27]

Where a lease contains an option to renew, the CT Act, and legislation in Queensland and Victoria, also require the landlord to give the tenant a written notice that, among other things, notifies the tenant of the date by which the option to renew may be exercised.[28] Where the retail lease provides for a market rent review, some jurisdictions also allow the tenant to request an early rent review at a certain time before the option to renew is exercised (see discussion below).[29]

No additional disclosure

Those stakeholders who oppose the imposition of additional disclosure requirements argue that existing disclosure requirements are comprehensive and heavily regulated and there is no market evidence to suggest any shortcomings with the status quo.

Feedback received from one landlord representative suggest that their members regularly provide tenants with additional information on outgoings and other shopping centre information both on request and pro-actively as part of their day-to-day operations so further disclosure requirements are not necessary. Other stakeholders refer to the cost to landlords of complying with the current disclosure requirements and question whether tenants derive sufficient benefit to justify the cost. Some stakeholders suggest that any changes to the disclosure statement should be consistent with disclosure requirements in other jurisdictions to make compliance easier for landlords with premises in other locations across Australia.

[27] *Retail Leases Act 2003* (Vic) s 64(1) and (2); *Retail Shop Leases Act 1994* (Qld) s 46AA; *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) cl 29(2); *Retail and Commercial Leases Act 1995* (SA) s 20J(1); *Retail Leases Act 1994* (NSW) s 44(1); *Business Tenancies (Fair Dealings) Act 2003* (NT) s 60. The procedure in ACT is more akin to that in WA.
[28] CT Act s 13C; *Retail Leases Act 2003* (Vic) section 28; *Retail Shop Leases Act 1994* (Qld) s 46(2).
[29] *Retail Leases Act 2003* (Vic) section 28A. *Retail Shop Leases Act 1994* (Qld) s 27A; *Retail and Commercial Leases Act 1995* (SA) s 36; *Retail Leases Act 1994* (NSW) s 32; *Business Tenancies (Fair Dealings) Act 2003* (NT) s 30.

Impact assessment

Disclosure of lease information to prospective tenants can be a valuable regulatory tool to improve the bargaining power of tenants and avoid disputes caused by a lack of awareness about lease terms and conditions. Imposing disclosure obligations can also be less intrusive on the lease arrangement than alternative regulatory measures that seek to prohibit or constrain specific lease terms or behaviour.

However, disclosure requirements impose a cost on landlords. In addition, some information may be of limited practical value and may mislead tenants if provided out of context or without understanding other relevant variables. Therefore, any disclosure obligations should be reasonable and should assist tenants in understanding and negotiating their lease arrangements.

The DS in the CT Regulations contains a list of disclosure items that landlords must provide to prospective tenants. While some disclosure requirements vary slightly between jurisdictions, the obligations are broadly similar.

Once a landlord has collated the required information for one tenant, the cost of providing similar information to multiple tenants should not be prohibitive. In addition, it appears from comments by landlords that they already regularly provide tenants with ongoing information as part of their day-to-day operations. From a policy perspective, the benefits of supplying relevant information to tenants on key leasing matters including the potential benefit of avoiding future disputation outweigh the additional costs of disclosure.

It appears reasonable to require disclosure of information to tenants that, if available, could have an impact on the success of a small business including further information regarding the number and location of current and proposed tenants with the same or similar type of business or selling the same or similar goods or services. A recent customer traffic count, if available, could also assist tenants to gauge the potential volume of customers to their premises. While it has been suggested that landlords should also provide details of the average rent for the shopping centre, it is possible this information could be of limited value and potentially misleading given the multiple variables that impact rent for a retail shop including size, location, time of contract, incentives etc.

Lack of transparency regarding operating expenses was a common source of concern among tenants who responded to the consultation. These concerns appear to be heightened when the operating expense relates to the supply of goods or services by a third party arranged by the landlord or related entity of the landlord. Related parties may sell goods to one another or provide services that are not on ‘arm’s length’ or normal commercial terms. For this reason, disclosure of related party arrangements is common in legislation regulating other industries (e.g. franchising and property industries such as real estate). Without further disclosure about these arrangements and costs, there is a greater risk (or at least, perceived risk) that the costs could be charged at an above-market rate.

It is also possible that the form of the disclosure material, including the tenant guide, could be streamlined and improved to provide greater clarity. The inclusion of information notes to tenants explaining why specific disclosure is required or important could also assist in improving the understanding of lease terms.

While some jurisdictions require different disclosure statements to be provided to tenants in certain circumstances, the experience with the use of prescribed documents in other WA consumer legislation is that this approach adds unnecessary complexity to the disclosure requirements and can cause confusion for users.

A standard list of outgoings could also provide greater consistency in the disclosure of these costs. While it has been argued that a standard list of outgoings could mislead tenants and landlords into thinking they only have to charge/pay for those costs included in the list, this issue could be addressed by including an explanatory note.

One stakeholder also supports a provision similar to NSW's s.12A that provides if the actual outgoings are greater than the estimated outgoings and there is no reasonable basis for the estimate, the tenant is only required to pay the estimated outgoings. A provision of this kind could however result in a perverse incentive to overestimate outgoings or give rise to disputes over what constitutes a 'reasonable basis' for an estimate where the estimate is less than the actual amount. On this basis, it is not recommended that this provision be adopted in WA.

Recommendation 9
9.1 Amend the DS in the CT Regulations to require additional disclosure in relation to the following:

- *the number and location of current or proposed tenants with the same or substantially similar type of business (e.g. selling similar goods and services);*
- *if available, a recent foot traffic count at the retail shopping centre;*
- *the annual sales of the shopping centre and annual estimated turnover for each category of retail shop (if collected) - (e.g. food, non-food and services);*
- *if applicable, details of specific fit-out requirements;*
- *if any of the suppliers of goods or services to the shopping centre are related to the landlord and if so, details of the supplier and the service/good they supply; and*
- *if any of the planned alterations works will result in an additional cost to the tenancy (e.g. the introduction of paid parking for tenants or customers).*

9.2 Amend the DS to include a standard list of operating costs.

Recommendation 10
Amend the CT Act to require a landlord to comply with a tenant's reasonable request for further information (including invoices) relevant to an operating cost payable by the tenant.

Recommendation 11
Amend the CT Act to enable a sub-lessor (franchisor) to request an updated disclosure statement from the head-lessor and to clarify the operation of the sub-lessor's (franchisor's) obligation to provide the prospective sub-lessee with a disclosure statement. The franchisor to pay the landlord's reasonable expenses in preparing the updated disclosure statement.

Recommendation 12
Amend the CT Act to require the landlord to provide the tenant with an original or certified copy of the lease agreement within 30 days of signing the agreement.

Recommendation 13
Amend the CT Act to require the landlord to provide a tenant with a notice of intention (in relation to renewal of the lease) between three and six months before the lease ends.

3.2 Disclosure on renewal of the lease

Currently the CT Act provides that a landlord is not required to provide a disclosure statement or tenant guide on the renewal of a retail shop lease on the exercise of an option (including the option arising from the right to a minimum five-year lease term).

Other jurisdictions

Most other jurisdictions provide that the landlord is to disclose updated information from the previous disclosure statement before lease renewal, or where the tenant exercises the option to renew or extend the lease. In some jurisdictions, the previous disclosure statement is provided in addition to the updated disclosure statement. In Queensland, the tenant may waive, or not require the landlord to provide another disclosure document at renewal, by signing and giving the landlord a waiver notice.

Objective of consultation

To ensure that tenants are provided with all relevant information required to make a fully informed decision before renewing or extending a lease.

Consultation stakeholder feedback

A small majority of respondents to the consultation paper, comprising mainly tenants and tenant representatives, preferred the option of amending the CT Act to require landlords to provide updated disclosure or confirm there have been no changes on renewal of a lease by a sitting tenant.

These respondents argue that since the date the original DS was provided a number of changes may have occurred or be planned, which could have a material impact on the lease and the viability of the tenant's business. For example, where the landlord has new plans to refurbish or redevelop the shopping centre.

Those respondents that indicated a preference for the status quo argue that further disclosure on renewal is unnecessary and will increase costs to landlords and prolong lease renewals.

The survey indicated strong support for the general proposition that an updated disclosure statement be provided to tenants when they renew or take over an existing lease (i.e. take on a lease as an assignee).

Impact assessment

The information required to complete an updated disclosure statement should already be available to landlords. If there are no changes to the information disclosed in the original DS, there would be minimal cost impact on landlords of the additional disclosure. The provision of updated information to tenants could better inform their decision to renew a lease and potentially limit disputes resulting from lack of disclosure regarding matters relevant to the tenancy.

Most jurisdictions already require disclosure to tenants prior to renewal of their retail shop lease.

In these circumstances, it is suggested that the benefits to tenants of disclosure on renewal outweigh any additional compliance costs for landlords.

Recommendation 14
Amend the CT Act to:

- *Require a landlord to provide a renewing tenant with an updated disclosure statement, or if there are no changes to the information in the original disclosure statement, a statement confirming the previous DS remain current.*
- *Include a right to compensation or termination of a renewed lease if the landlord fails to provide disclosure (based on current section 6(1)).*
- *Provide that termination is not permitted if a landlord has acted honestly and reasonably and the tenant is in substantially the same position as if disclosure had been provided (based on current section 6(3)).*

Recommendation 15
Amend the CT Act to allow the tenant to waive the requirement for disclosure on renewal of the lease by signing and giving the landlord a waiver notice.

3.3 Disclosure on assignment of the lease

The CT Act provides that tenants have the right to assign their retail shop lease with the landlord's consent. The landlord cannot withhold their consent without reasonable grounds. However, the prospective assignee is not entitled to a disclosure statement or the tenant's guide at the assignment of the lease.[30]

Other jurisdictions

All states and territories other than WA and Tasmania, require the existing tenant to provide disclosure to a prospective assignee before assigning the lease. Any required disclosure usually is in the form of the tenant providing the prospective assignee with the most recent or updated landlord's disclosure statement together with details of any changes that have occurred since any previous disclosure statement.

In most jurisdictions that require disclosure, the tenant may request the landlord provide them with the most recent disclosure statement which they can then provide to the prospective assignee (ACT, NSW, NT, SA, Vic). Where the landlord does not comply with this request, the tenant would either no longer be required to provide the disclosure statement to the assignee (SA, Vic), or the tenant may complete the disclosure statement to the best of their knowledge before providing it to the assignee (NSW).

Where the assignee is to continue the retail business, some jurisdictions (NSW, NT, Qld, SA, Vic) require the tenant to also provide an "assignor disclosure statement" to the prospective assignee and the landlord before the lease is assigned. This statement discloses whether there are any outstanding notices or encumbrances in relation to the lease or the shop itself, whether rent concessions or other benefits had been given or were available to the tenant by the landlord, and information on the shop's trading performance.

For jurisdictions that require disclosure to the assignee, this disclosure is to occur before the tenant requests the landlord's consent to assign the lease. In some jurisdictions, disclosure is a procedural requirement before requesting consent (ACT, Vic), or the landlord is entitled to withhold consent (NSW).

Some retail tenancy legislation protects the tenants (as an assignor) and their guarantors from liability for performance of obligations or payment under the lease where the tenant has complied with a certain process (such as giving the required disclosure to assignees and landlords).

Another consequence for non-disclosure is that the tenant may not be afforded any protection from any liability in respect to the amounts payable under the lease. The protection may be set out in the relevant Act (NSW, NT, SA, Vic), or implied in law. For example, if a tenant fails to provide disclosure to a prospective assignee before an assignment is entered into, and the assignee fails to pay rent and any contribution towards operating expenses – the tenant could be liable for these costs.

[30] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section 6(6)(b) and 6A(6)(b).

Objective of consultation

To ensure that an assignee, as an oncoming tenant, is provided with all relevant information required to make a fully informed decision before taking on rights and obligations under a lease.

Consultation stakeholder feedback

There was strong support from both landlord and tenant groups in the responses to the consultation paper for the proposition that the CT Act should be amended to require the existing tenant to provide disclosure information to a prospective assignee before requesting the landlord's consent to the assignment.

These stakeholders argue that assignees should have the same benefit of disclosure as any other tenant and as a minimum, they should be provided with a copy of the original DS and lease.

Opinion was more divided in responses to the consultation paper on the question of whether the tenant should also be required to provide an assignor's disclosure statement, if the assignee is continuing the retail business. The main argument against this additional disclosure requirement is that an assignor's disclosure statement is potentially a duplication of matters generally addressed in the contract of sale documentation and could result in extra red tape and time delays.

As noted above, the survey indicated strong support for the general proposition that an updated disclosure statement be provided to tenants when they renew or take over an existing lease (i.e. take on a lease as an assignee).

Impact assessment

The requirement for a tenant to provide an assignee with the landlord's disclosure statement should not be overly onerous or cost prohibitive. Assignees are currently at a significant disadvantage to other tenants who have access to relevant leasing information before signing their lease.

Most other jurisdictions require disclosure to assignees. In these circumstances, it is suggested that the benefits to assignees of disclosure outweigh any additional compliance costs for landlords or tenants.

Recommendation 16
Amend the CT Act to require a tenant to provide a prospective assignee with a copy of the original disclosure statement, tenant guide and lease and a statement of any changes the tenant is aware of or could reasonably be expected to be aware of.

3.4 Disclosure and access to market rent information

The CT Act contains provisions intended to ensure rent reviews are fair and accurate. The consultation paper sought feedback from stakeholders on whether the current requirements relating to disclosure of rent information are operating effectively or whether there have been changes in the marketplace to justify the introduction of additional measures to improve access to market rent information.

The issue of disclosure and access to market rent information was previously examined by Consumer Protection through a public consultation process undertaken in 2010 and 2012. The previous consultation process considered a number of options for improving access to rent information including amending the CT Act to require landlords to provide land valuers with access to additional rent information in the event of a market rent review dispute under section 11(3B) of the CT Act. Other options included the possibility of a public lease register of key lease information, as well as a new requirement for landlords of shopping centres to maintain a register of lease information for shops in the centre and provide access to the register to tenants in the centre and bona fide potential tenants.

Submissions to the consultation did not indicate majority support for any particular option. A key concern raised by a number of stakeholders was that increased access to lease information may not achieve the intended benefit of significantly improving the bargaining power of tenants because a number of variables need to be considered when comparing rents across shopping centres. For example, rentals will vary depending on the size and location of the retail premises and the strength of the retail tenancy market at the time the lease was negotiated.

The previous review recommended an amendment to the CT Act to require landlords to provide valuers with access to additional rent information in the event of a dispute.

Other jurisdictions

Most jurisdictions in Australia have relatively consistent legislative provisions regarding access to rent information and require landlords to provide land valuers with specific rent and other information relevant to determining the market rent of a particular retail shop lease when there is a dispute between the parties regarding the market rent.

Objective of consultation

To ensure that tenants are provided with an appropriate level of market rent information to assist in the negotiation of leases and rent reviews, while also minimising the cost to landlords and tenants and ensuring the information is current and useful to tenants and not likely to mislead or be easily misunderstood.

Consultation stakeholder feedback

Feedback to the current consultation process indicates that a large majority of respondents to the consultation paper, comprising mostly tenants and tenant representatives, believe the current provisions of the CT Act regarding access to market rent information are not operating effectively. The SBDC indicates that although there has not been any significant change in the market, they continue to receive enquiries

from retail shop tenants relating to whether rents being requested by landlords are fair, or what the market rent is for a comparable shop.

Some stakeholders suggest access to rent information could be improved by introducing a public lease register while other stakeholders suggest the CT Act should be amended to require landlords to provide valuers with rental information at the commencement of the lease or at other times during the lease term (and not just in the event of a dispute over market rent). Some stakeholders also commented that the reference to 'rent' in section 11(2a) of the CT Act is too narrow in that it only makes void any provision in a lease that precludes a tenant from voluntarily disclosing their rent. It was suggested that tenants should not be restricted from disclosing other information relevant to their rent amount such as the size and location of the premises.

Rent information – lease renewal and exercise of option

Two stakeholders cited issues with obtaining rent information from landlords before exercising an option to renew or upon renewal of the lease. It was argued that in practice, many tenants are required to decide whether to exercise an option or to renew their lease without knowing the applicable rent for the renewed term and without this information tenants are not able to make a fully informed decision. It has been suggested that the CT Act should be amended in line with Victoria and Queensland to allow a tenant to request an early rent review before deciding whether to exercise an option to renew. An early market rent review in these circumstances is also available in NSW, NT and SA.

Impact assessment

The feedback to the consultation indicates that a majority of respondents believe the current provisions of the CT Act regarding disclosure and access to market rent information are not operating effectively. Numerous suggestions were made for improving disclosure.

Submissions to the consultation did not indicate majority support for any particular option. A key concern raised by a number of stakeholders in response to the option of establishing a register of lease information, was that increased access to lease information may not achieve the intended benefit of significantly improving the bargaining power of tenants. This is because a number of variables need to be considered when comparing rents across shopping centres. For example, rentals will vary depending on the size and location of the retail premises and the strength of the retail tenancy market at the time the lease was negotiated. A number of tenants also enter into side agreements with landlords that effectively lower the 'real rent'. For example, landlords may offer rent free periods or cover the fit-out costs. Without access to these agreements and all relevant information, rent data may be misleading or misinterpreted. Other concerns raised by stakeholders related to confidentiality of commercially sensitive information and the costs in establishing and updating the data.

In order to provide a benefit to tenants, any option to improve access to market rent information should minimise the risk that the information provided could be misleading or misinterpreted.

The benefit of the suggestion to amend the CT Act to require landlords to provide rent information to valuers during the lease negotiation/renewal stage is that valuers possess the requisite expertise to understand and analyse the rental information and the variables impacting rental data. Many landlords already collate lease information and provide it to tenants upon request so this option should not result in a significant cost impost for landlords. In addition, valuers in Western Australia are bound by a Code of Conduct[31] that imposes confidentiality and honesty obligations on valuers. This should address some of the concerns stakeholders raised around confidentiality of information or fishing expeditions.

Providing tenants with an indication of the applicable rent for the renewed term before exercising an option to renew, appears to be important information that would assist tenants to decide whether to renew their lease. This information could also assist in reducing disputes over rent following a lease renewal. Several jurisdictions already require this information to be provided to tenants.

Recommendation 17
Amend the CT Act to:

- *require landlords to provide valuers appointed by a prospective tenant or tenant with relevant rental information at the commencement of the lease or at other times during the lease term for the purpose of assisting a prospective tenant or tenant in considering or negotiating the terms of their lease;*
- *expand the reference to 'rent' in section 11(2a) of the CT Act to include information directly relevant to the value of the rent (e.g. side agreements such as rent abatement agreements or lease incentives that may impact or distort the rent value); and*
- *allow a tenant to request an early market rent review before deciding whether to exercise an option to renew.*

[31] *Licensed Valuers Code of Conduct 2016*.

4.0 Lease Costs

There are various costs imposed on a tenant as part of their lease agreement. Some of these costs may be ongoing and some may increase during the lease term. Lease costs include: rent; operating expenses (or outgoings); insurance; a security bond; fit-out refurbishment; and marketing costs.

One of the objectives of the CT Act is to ensure the various costs incurred by tenants as part of their lease agreement are fair and reasonable and have been adequately disclosed to the tenant.

4.1 Turnover rent

The Australian Bureau of Statistics (ABS) has recorded a steady increase in online retail sales since 2015. The ABS notes that online sales have become particularly popular during the COVID-19 pandemic as restrictions placed on physical stores resulted in both businesses and consumers moving online.[32]

With the increase in online shopping in recent years, and changes in consumer behaviour as a result of the COVID-19 pandemic, a question arises as to whether sales from online transactions should be included in business turnover where the rent payable under the lease is based on that turnover?

Other jurisdictions

In 2017, New South Wales amended its legislation to provide that turnover rent does not include online transactions, unless:

- the goods or services are delivered or provided from the retail shop (or the retail shopping centre in which the shop is located); or
- the online transaction takes place while the customer is at the retail shop – whether or not the goods or services being purchased are delivered from or at the retail shop.[33]

NSW is the only jurisdiction to specifically address how to treat online sales in the calculation of turnover rent.

Objective of consultation

To consider whether the CT Act should be amended to specify whether online sales should be included in the calculation of turnover rent of a retail shop and if so, in what circumstances.

Consultation stakeholder feedback

A small majority (52 per cent) of respondents to the consultation paper support the status quo with the remaining respondents (48 per cent) supporting an amendment to the CT Act in line with the NSW provisions to exclude revenue from online sales in the calculation of turnover rent unless there is a sufficient connection with the physical retail shop.

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[32] ABS Online sales analysis.
[33] *Retail Leases Act 1994* (NSW) sections 20(1)(m) and 47(2).

Some stakeholders indicated support for the joint industry initiative 'The Reporting of Sales and Occupancy Costs: Retail Industry Code of Practice'. This is a voluntary code to which the SCCA is a signatory along with some national retailer organisations. The code states that it does not cover the reporting of online sales as it is accepted that, as a general principle:

> *"if the store is used in any way for the sale (such as for the fulfilment of the order or for the collection) then this should generally be considered a sale from that store".*

The code acknowledges that these issues are likely to remain matters for negotiation between individual landlords and retailers. These stakeholders argue the established industry position should not be undermined by regulation that might curtail ongoing innovation in the retail sector.

Other stakeholders contend that revenue from online sales should be excluded entirely from the calculation of turnover rent on the basis that if a business has invested in the online environment, then a tenant should not be required to pay a higher rent to the landlord as a result of their own investment.

A number of other stakeholder's support amending the CT Act in line with NSW and to clarify that tenants cannot be required to provide turnover information to landlords on online sales unless there is a sufficient connection with the physical retail shop.

Impact assessment

Retail transactions are increasingly taking place online. Online platforms provide businesses with an opportunity to adapt to customer preferences and increase sales.

As the CT Act is currently silent on the treatment of online sales for the purpose of determining rent based on turnover, parties have discretion to decide how to treat online sales. If WA adopts a similar approach to NSW, then the circumstances in which online sales are included in the calculation of turnover would be based on a consideration of whether there is a sufficient connection with the physical retail shop. For example, where goods or services are delivered or provided from or at the retail shop or where the transaction takes place while the customer is at the retail shop.

It is likely that the requirements to establish a sufficient connection will vary depending on the circumstances of the particular transaction. It is possible that the question whether there is a sufficient connection (e.g. whether the goods are delivered to or from the retail shop) could create uncertainty and disputes between the parties, particularly as the use of online platforms evolves over time.

This issue does not currently appear to be the cause of significant disputes between parties. The consultation feedback did not provide evidence of market failure in the treatment of online sales. Therefore, it is reasonable to conclude that regulatory intervention is not warranted at this stage. The status quo provides the parties with flexibility to determine how to treat online sales for the purpose of their business and commercial needs and allows for innovation in this space to continue.

Recommendation 18
The CT Act should not be amended at this stage to regulate the circumstances in which online sales are included in the calculation of turnover for the purpose of determining rent based on turnover.

4.2 Land Tax

The CT Act currently allows for the tenant to be required to pay land tax in relation to land on which the retail shop is situated as part of the operating expenses.

Other jurisdictions

Several jurisdictions including Victoria, Queensland and South Australia legislate to prohibit land tax from being recovered from a tenant and New South Wales limits a tenant's liability to contribute to land tax.[34] It is not possible to determine with any degree of confidence whether in these jurisdictions the prohibitions on recovery of land tax have been passed on to tenants in the form of higher rent.

Objective of consultation

To consider issues in relation to the payment of land tax by retail shop tenants and whether payment of land tax by tenants is fair and consistent with the intent of the legislation.

Consultation stakeholder feedback

Feedback to both the consultation paper and survey indicates that stakeholders are fairly evenly divided on this issue with only a small majority of respondents indicating a preference to amend the CT Act to prohibit landlords from passing on land tax as an operating expense.

Those stakeholders who support the status quo comprise mainly landlords/representatives with one landlord representative strongly opposing any amendment to restrict a landlord's ability to recover the relevant proportion of notional land tax from tenants. It is argued that such a measure would result in land tax being passed onto tenants as increased rent, making the payment of land tax less transparent. One stakeholder also commented that if landlords are prohibited from passing on land tax, they will have to estimate the land tax payable and build that into the rent, which could end up costing tenants more if the estimated contribution to land tax amount is higher than the actual amount.

The opposing argument made by some stakeholders is that land tax is an ownership expense of the landlord and the payment of land tax by tenants can place a significant and often unanticipated financial burden on tenants. It is also argued that the current provisions can lead to uncertainty as the notional land tax can be difficult to determine and there are other matters such as tax-free thresholds that further cloud the calculation of the amount of land tax payable by tenants.

The claim that a prohibition on tenants paying land tax will lead to an increase in rent is disputed by some stakeholders who suggest rent is ultimately determined by economic factors such as supply and demand for retail space. Therefore, the cost of land tax would not necessarily be incorporated into the rent in a competitive rental market where the landlord is incentivised to reduce rent to attract tenants.

[34] *Retail Leases Act 1994* (NSW) section 26.

Impact assessment

The CT Act specifically refers to the payment of land tax by tenants.

As such, it is clear that the CT Act currently contemplates that tenants may be required to contribute to the payment of land tax as an operating expense of the landlord. What is less certain, is whether this policy remains appropriate.

The 2003 review of the CT Act recommended that land tax should not be excluded from recoverable outgoings as any prohibition would result in land tax being recovered in the gross rent. Instead, the review committee recommended reforms to the land tax valuation and collection process to address unanticipated increases in the value of the land and accordingly, the land tax.

Parties to a retail shop agreement are free to negotiate the terms of their lease, including the tenant's contribution to various costs such as land tax. Depending on the market, landlords may or may not be amenable to negotiating these terms. Consultation feedback indicates that many tenants believe they have to accept the lease terms presented to them. One suggestion made by a stakeholder is to amend disclosure materials (e.g. the Form 4 Tenant Guide) to better inform tenants that they can negotiate all the terms of their lease including the payment of various operating expenses such as land tax.

While the proposal to prohibit landlords passing on land tax may have the benefit of reducing lease costs for tenants there is a risk that these costs continue to be passed onto tenants but in a less transparent way. Given this risk, the status quo (i.e. no legislative amendment) is recommended. As tenants are already contributing to land tax, retaining the status quo will not result in any increased costs to tenants.

In addition, while the Tenant Guide already notifies tenants that their "contributions to operating expenses are negotiable", the consultation feedback suggests that this text is not adequately informing all tenants of their right to negotiate these lease costs with the landlord. The idea of updating disclosure materials (including the Tenant Guide and the Disclosure Statement) to better inform tenants of their rights to negotiate to reduce lease costs therefore has merit and is recommended below.

Recommendation 19

19.1 The CT Act not be amended to prohibit landlords from passing on land tax to tenants as a recoverable operating expense.

19.2 The disclosure material be updated to inform tenants of their right to negotiate lease costs including any contribution to land tax.

4.3 Marketing funds

Some retail shop leases may contain a clause requiring a tenant to contribute to a fund for marketing or promotion of the retail shopping centre. If this is the case, the CT Act includes the following requirements:

- the purpose of the fund must be specified in the retail shop lease;[35]
- funds are to be deposited into an appropriately designated interest-bearing account;[36]
- funds and interest can only be applied for the specified purpose, tax or imposts and audit costs; and[37]
- the landlord is to keep accurate records and accounts, have the accounts audited and provide tenants with a copy of the audit report.

While the CT Act requires the landlord to specify the purpose of any marketing fund in the lease agreement, there is no obligation on the landlord to provide any specific details on the marketing plan.

Other jurisdictions

Most other Australian jurisdictions require a landlord to provide the tenant with a marketing plan or budget detailing the advertising and promotion expenditure for the upcoming accounting period.

Objective of consultation

To consider whether the current provisions in the CT Act about the contribution by tenants to marketing funds is fair and whether reforms are required in relation to the obligation of landlords to provide marketing plan details.

Consultation stakeholder feedback

Survey data shows that 25 per cent of respondents, comprising tenants, landlords and representative groups, said the payment of marketing costs was a source of confusion or dispute. The SBDC advised that the application of marketing funds by landlords was a common area of dispute particularly in shopping centres with common complaints being that marketing funds are wasted or not applied in an effective manner and that tenants have no say in how the funds are applied.

A large majority of respondents to the consultation paper (74 per cent) indicate support for the proposal to amend the CT Act to require landlords to provide a marketing plan to the tenant before each accounting period and an auditor's report confirming expenditure. The supporters of this proposal comprise mainly tenants and representatives. However, some landlords also indicated support for the proposal on the basis it would align WA with the approach in other jurisdictions.

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[35] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section 12A(2).
[36] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section 12A(3)(a).
[37] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section 12A(3)(b).

The majority of respondents express the view that as marketing charges can place a significant financial burden on tenants (approximately two per cent to five per cent of the annual rent) their use and application should be transparent and fully disclosed prior to signing the lease. A few stakeholders argue that tenants should not be required to contribute to marketing at all. These stakeholders believe tenants receive very low return on investment as the marketing fund is used to promote the shopping centre itself rather than the individual retail shops. Many of these retail shops also pay for their own marketing of their individual store/business on top of their contribution to the landlords marketing fund.

Impact assessment

One of the key objectives of the CT Act is to promote fair and transparent retail lease arrangements. Tenants in WA are currently not afforded the same protections as tenants in other jurisdictions in relation to the disclosure of marketing plans. An amendment to the CT Act to require landlords to provide tenants with a marketing plan or budget detailing the advertising and promotion expenditure for the upcoming accounting period, will improve transparency and accountability. While this additional requirement will result in some cost impost for landlords, this cost is outweighed by the benefits to tenants and is potentially offset by a reduction in the cost of disputes regarding the allocation of marketing funds.

Recommendation 20
Amend the CT Act to require landlords to provide a marketing plan to the tenant before each accounting period and an auditor's report confirming expenditure.

4.4 Security Bonds, Bank and Personal Guarantees

Some landlords of retail premises will require a form of security from a tenant in order to protect themselves if a tenant defaults or breaches their obligations under a lease. The security instrument can take various forms including cash bonds, bank guarantees or third party guarantees. Bank guarantees can be preferable in some instances as they may not require the same outlay of funds upfront.

The CT Act does not specifically regulate security instruments. There is currently no regulation of the payment or holding of security instruments and no time limits for the return of security instruments to tenants. Therefore, the landlord has discretion as to the type of security required and when the security is to be returned.

The requirement for a tenant to provide security bonds or bank guarantees when entering into a lease can require significant funds. Consultation feedback also indicates that they are often the subject of dispute.

Other jurisdictions

Western Australia and Queensland are the only jurisdictions in Australia to not specifically address payment and holding of security instruments. Most other jurisdictions regulate the payment, holding and return of security instruments. New South Wales, South Australia and Victoria include a timeframe for landlords to return security instruments to the tenant. In NSW the landlord (or agent) is required to deposit any cash bonds with the NSW Government's Retail Bond Scheme within 20 days of receiving it. Most jurisdictions also prohibit landlords from unreasonably refusing to accept a bank guarantee instead of a bond and most jurisdictions regulate the holding of security instruments, including a requirement to deposit the security into an interest bearing or other regulated account. South Australia, the ACT and Tasmania limit the amount a landlord can request as a security deposit.

Objective of consultation

To consider issues in relation to the payment, holding and return of security instruments and whether amendment to the CT Act is required.

Consultation stakeholder feedback

Stakeholder feedback to the consultation paper was equally divided on the issue of whether the CT Act should be amended to regulate security instruments, although a majority of responses to the survey supported better regulation of security instruments. Respondents indicating support for the status quo (no regulation of securities) predominantly comprised landlords/representatives. Respondents indicating support for regulating the holding and return of securities predominantly comprised tenants/representatives.

Regulation of timeframe to return securities

Of the respondents to the consultation paper who support an amendment to the CT Act to regulate security instruments, a large majority (90 per cent) comprising both tenants, landlords and their representative groups indicated support for the proposal that the CT

Act should be amended to regulate when the security should be returned. In relation to the timeframe for the return of securities, some stakeholders indicated a preference to require the release or return of the security instrument within two months of the tenant discharging their lease obligations. The majority of these stakeholders support a shorter time frame of 30 days to return or release a security instrument as this will free up capital for small businesses who need to access their capital quickly to start up their next business venture.

The SBDC propose that by a prescribed time after the end of the lease the landlord should be required to notify the tenant in writing of the details of any outstanding obligations the tenant has not discharged. The SBDC also propose that the landlord should be required to pay compensation for any loss or damage suffered by the tenant if the landlord fails to return the security within the required timeframe.

Regulation of the amount of a security

Of the respondents to the consultation paper who support an amendment to the CT Act to regulate security instruments, a large majority (71 per cent) comprising mainly tenants/representatives support the proposal in the consultation paper that the CT Act should be amended to regulate the amount landlords can require tenants to pay as a security deposit. Most of these stakeholders argue that a maximum-security amount equivalent to three months' rent is reasonable and consistent with some other jurisdictions (e.g. ACT, TAS and SA). One stakeholder commented that it is already common practice for the amount of a commercial tenancy security bond to be one to three months' rent.

Those stakeholders who do not support a maximum-security amount argue that there may be circumstances where it is appropriate for the tenant to provide an increased security payment. For example, if the tenant is high-risk, will have a long-term lease or where the landlord is required to input large amounts of capital into the property. One landlord representative strongly opposes any maximum threshold for securities on the basis this will reduce landlord investment and undermine the parties' freedom to negotiate an arrangement that meets their specific commercial needs.

Regulation of the form of security

Of the respondents to the consultation paper who support an amendment to the CT Act to regulate security instruments, a majority (65 per cent) agreed with the proposal in the consultation paper to amend the CT Act to allow a tenant to elect their preferred form of security instrument.

A number of stakeholders including some tenant representatives cautioned that restricting the number and form of securities the landlord can request could have unintended consequences. For instance, a landlord could avoid leasing to prospective tenants that cannot provide the required level of security through one form of security, even though they would be able to satisfy the required level of security through a combination of securities (for example, having a charge over land as well as a security

bond). Tenants able (and willing) to provide the level of security through more than one form of security would therefore be detrimentally impacted.

The SBDC advise that in relation to the form of security they are unaware of this being an issue for small business tenants in the marketplace and should be a matter for the parties to negotiate before entering into the lease.

Impact assessment

Tenants in WA are currently not afforded the same protections as tenants in other jurisdictions in relation to the regulation of security instruments. Withholding a bank guarantee or security deposit at lease end may significantly limit a tenant's capacity to obtain finance, prevent a tenant from securing new lease premises and increase bank costs and potential disputes.

An amendment to the CT Act to require landlords to return or release a security instrument within a specified timeframe will enable small business operators to recover their money/discharge bank obligations and free up capital for future investment. Regulation of the return of securities should also reduce the need for court action to recover secured amounts.

In relation to the proposal to impose a maximum-security amount it is noted that there are a range of commercial factors that could potentially impact the amount a landlord may require to secure the tenant's obligations under the lease including the length of the lease, landlord works, leasing incentives and extent of make good obligations. While the provision of a security instrument, particularly for a larger amount, can be a financial burden for tenants, there does not appear to be market evidence to justify capping the amount of security a landlord may require from a tenant to protect themselves if a tenant defaults or breaches their obligations under the lease. Introducing a cap on the security amount could also have the unintended consequence of some landlords refusing to enter into certain riskier lease arrangements or all landlords requiring a security for every lease and setting the security at the maximum amount allowable.

Similarly, restricting the number and form of securities the landlord can request could be detrimental to some tenants and constrain the commercial needs of both landlords and tenants.

Recommendation 21
Amend the CT Act to require the landlord to:

- *Return/release the tenant's security instrument within 30 days of the tenant discharging their obligations under the lease.*
- *Notify the tenant in writing (within a prescribed time after the end of the lease) of any obligations the tenant has not discharged.*
- *Pay compensation to the tenant for any loss or damage if the landlord fails to return the security instrument within the 30 days.*
- *Place any monies paid to the landlord as security for the tenant's obligations into an interest-bearing account.*

Recommendation 22
The CT Act not be amended to impose a maximum amount a landlord can collect as a security bond or require as a bank guarantee.

Recommendation 23
The CT Act not be amended to restrict the form or number of security instruments a landlord may require to secure the tenant's obligations under the lease.

Recommendation 24
The disclosure material (e.g. tenant guide) be updated to encourage tenants to seek advice on the amount and type of security instrument they provide to the landlord so they are better informed of their potential liability under the lease.

4.5 Other lease costs – fit-out

The consultation paper raises the broad issue of lease costs and whether they are fair and reasonable and adequately disclosed to the tenant. Even though the issue of fit-out costs was not specifically referred to in the consultation paper, several stakeholders raised concerns regarding a lack of contestability in relation to fit-out services and fees.

Other jurisdictions

Most Australian jurisdictions including WA provide that any requirement in a lease that obliges a tenant to contribute towards the cost of fit-out (e.g. finishes, fixtures, equipment or services) is void unless notification of the cost is outlined in the disclosure statement.

All other jurisdictions also prohibit tenants from paying rent or any other amount until the landlord has substantially complied with its fit-out obligations. The CT Act is currently silent on this issue.

In NSW if a landlord in a shopping centre requires a particular standard for the fit-out it must provide the tenant with a tenancy fit-out statement (fit-out guide) containing all relevant information. The tenant is not liable to carry out the fit-out to the landlord's requirements unless those requirements are outlined in the fit-out guide.

Objective of consultation

To consider whether the current provisions in the CT Act regarding fit-out requirements are fair and adequately disclosed.

Consultation stakeholder feedback

Some feedback to the consultation paper indicates that shopping centre leases can stipulate which fit-out contractors (e.g. designers, suppliers, tradespeople) a tenant can engage. The SBDC commented that tenants commonly raise issues with them regarding fit-out costs and requirements. In particular, tenants complain of what appears to be exorbitant costs by contractors selected by (or related to) the landlord with no competitive pricing.

It is recognised that landlords have a legitimate commercial interest in setting standards for stores in a shopping centre and prescribing fit-out requirements and contractors is a means of ensuring those standards are met. In some instances, these contractors may be related parties of the landlord.

One landlord representative contradictorily claims that it is not common for landlords to require tenants to use fit-out contractors that are selected by the landlord and tenants are usually free to select their own contractors provided they meet requisite standards. This representative suggests that only in specific circumstances will a landlord require a tenant to use a particular contractor to carry out 'lessor works', for example work that could affect the landlord's building or impact safety or other requirements imposed by law.

Some stakeholders suggest the CT Act should be amended in line with NSW provisions to require the tenant and landlord to agree on the maximum amount of fit-out costs where

the landlord requires the tenant to pay for fit-out works carried out by the landlord. These provisions also state that the tenant is not liable to pay any amount that is more than the agreed maximum amount.

It has also been suggested that the CT Act be amended in line with provisions in Victoria to provide that if the tenant is liable to pay fit-out costs related to the building or compliance requirements (e.g. safety) of the landlord that the work must be carried out by someone with suitable skills and who is approved by the landlord.

Impact assessment

While some stakeholders have commented that a landlord's control over fit-out requirements and contractors may lead to a lack of contestability and higher costs, it is recognised that certain fit-out standards are critical to a landlord's 'brand' and commercial needs as well as to the landlord's compliance requirements and safety standards. Prescribing fit-out contractors and requirements in the lease agreement may be necessary to achieve these standards. In addition, it is possible that a landlord may leverage economies of scale to engage certain contractors for all of their properties at a discounted (rather than inflated) price.

Any regulatory amendment to address the issues raised by stakeholders regarding transparency and appropriateness of fit-out costs needs to be balanced with the need to ensure landlords have control over fit-out requirements when appropriate, including, when the works directly impact the landlord's building or other statutory obligations.

Recommendation 25
Amend the CT Act to provide for the following:

- *If a tenant is liable to pay for fit-out works carried out by or on behalf of the landlord, the maximum amount (or formula) payable for those works is to be agreed between the parties and the tenant is not liable to pay more than the agreed amount (in line with section 13* Retail Leases Act 1994 *(NSW)).*
- *A tenant is not required to use a contractor selected by the landlord, provided the contractor engaged by the tenant is suitably experienced and qualified and approved by the landlord (approval to be provided within specified timeframe and not to be unreasonably withheld) (in line with section 30* Retail Leases Act 2003 *(Vic)).*
- *A landlord can require a tenant to use a particular contractor in certain limited circumstances when the fit-out works impact the landlord's building or relate to compliance (e.g. safety) obligations of the landlord (in line with section 30* Retail Leases Act 2003 *(Vic)).*

4.6 Other lease costs – electricity

The issue of utility costs, including electricity, was raised in the consultation paper in the context of disclosure. While electricity costs are already discussed in chapter 3 of this report, issues relating to electricity costs are also relevant to this chapter.

Other jurisdictions

Retail tenancy legislation in other jurisdictions does not specifically provide for the regulation of electricity costs.[38] It should be noted that there are significant differences in how the sale of electricity, particularly through an embedded network, is regulated in WA compared to the rest of the country. In respect of embedded networks, these differences include:

- no requirements in WA regarding the amount an embedded network on-seller can charge commercial customers for the consumption of electricity. In other states, small business customers can be charged no more than the standing offer prices that a local area retailer can charge;
- other states have additional consumer protections for commercial customers, including for complaints handling and dispute resolution, compared to WA; and
- consumers in other states have the option to buy electricity from either the embedded network on-seller or an authorised retailer (although consumers may experience practical difficulties in finding an authorised retailer willing to sell to them where they are in an embedded network).

Objective of consultation

To consider whether the current provisions in the CT Act regarding electricity costs are fair and adequately disclosed.

Consultation stakeholder feedback

As discussed in chapter 3 of this report, respondents raised numerous issues regarding electricity costs in embedded networks, including lack of transparency and contestability, and a concern that landlords are adding a profit margin to these costs.

Some stakeholders suggest that electricity costs charged by landlords to tenants should be limited to the actual cost to the landlord of supplying the electricity.

Impact assessment

The cost of electricity consumed by landlords in common areas can be passed on to tenants as an operating expense. Section 12 of the CT Act regulates provisions in a retail lease that require a tenant to contribute to the landlord's operating expenses. Section 12(3) of the CT Act defines the term 'operating expenses' to mean "expenses of the landlord in operating, repairing or maintaining" the building or shopping centre of which the retail shop is part. A tenant's contribution to the landlord's operating expenses is

[38] Excepting the reference to 'electricity' in the standard list of outgoings that some jurisdictions require the landlord to provide the tenant by way of disclosure. As is discussed in the impact assessment section below, section 12 of the CT Act indirectly regulates the cost of electricity consumed by landlords in common areas that is passed on to tenants as an operating expense.

negotiable, although section 12 of the CT Act provides that a tenant cannot be required to contribute more than the 'relevant proportion' of an operating expense.

The policy intent recognises that it is legitimate for landlords to recover their operating expenses from tenants where this is agreed as a result of commercial negotiations between the parties. However, it is not legitimate for landlords to add a profit margin to, or otherwise inflate, the costs they seek to recover from tenants as operating expenses.

Chapter 3 of this report makes recommendations for improving disclosure obligations regarding operating expenses to increase transparency and thereby support the policy intent of the operating expense provisions as a cost recovery mechanism. The policy intent may be further supported by amending the definition of 'operating expenses' in s 12(3) of the CT Act to clarify that landlords may recover from tenants the actual costs incurred but no more.

Tenants may also be directly invoiced by landlords for electricity that is consumed by the tenant within their individual shop premises. This invoice may include both a consumption charge for the electricity the tenant actually consumes and a daily fixed supply charge to cover the electricity seller's costs of providing these electricity services. SBDC argue that it is not appropriate that these costs be subject to the 'relevant proportion' provisions in s 12 of the CT Act as the cost will relate to the tenant's actual consumption of electricity which is independent of the area of the leased premises. However, SBDC also argue that these costs should be regulated by amending the CT Act to include a specific provision limiting the amount a tenant can be charged to the actual cost to the landlord.

There is scope to amend the CT Act to regulate electricity charges to the tenant's premises where the landlord on-sells the tenant electricity from an embedded network through their retail shop lease. The exemption order for on-sellers of embedded networks includes price control provisions for where the electricity is on-sold to residential customers. However, there is no equivalent provision that limits what embedded network on-sellers can charge commercial customers. Any amendment to the CT Act should ensure that the landlord's ability to achieve cost recovery is maintained and should therefore not limit the landlord's right to charge a daily fixed supply charge to cover their costs of providing the electricity services to the tenant.

While expanded consumer protections to customers of embedded networks are being explored by EPWA through policy development on the AES framework (as discussed in chapter 3), retail tenants that are supplied electricity through an embedded network are currently vulnerable and at a potential disadvantage. However, given the complexities involved, and noting that regulating the on-selling of electricity through the CT Act would represent a significant departure from the current regulatory position, further impact assessment would need to occur before final recommendations could be made on this issue.

Recommendation 26
Amend the CT Act to specify that the definition of 'operating expenses' in s 12(3) only enables a landlord to recover the total actual costs to them of an operating expense but no more.

Recommendation 27
The CT Act should not be amended at this stage to regulate electricity charges to the tenant's premises where the landlord on-sells the tenant electricity through their retail shop lease.

5.0 First right of refusal

A key concern of tenants at the end of the lease term (and after any options to renew the lease have been used) is whether a further lease term will be granted. The CT Act currently requires a landlord, at the tenant's request, to indicate whether they will offer a lease renewal.[39] However, other than the statutory option for the tenant to renew their lease for up to five years in section 13 of the CT Act, the landlord is not required to offer the existing tenant a lease renewal or a further lease term.

Other jurisdictions

SA[40] and the ACT[41] are the only jurisdictions with retail tenancy legislation that provides a preferential right for existing tenants within shopping centres to extend or renew the lease.

In SA, the landlord must presume that the existing tenant wants to renew their lease unless the tenant notifies the landlord otherwise 12 months before the end of the lease. The landlord is required to begin negotiations with the existing tenant at least six months before the end of the lease.[42] In addition, before agreeing to enter into a lease with another person, the landlord must make an offer to the existing tenant on terms no less favourable than those of the proposed lease.

This preferential right does not apply in certain circumstances, including:

- where the landlord reasonably wants to change the mix of tenants in the shopping centre;
- the tenant has seriously or persistently breached the lease;
- the landlord requires vacant possession of the premises; or
- where the landlord would be substantially disadvantaged by the renewal or extension of the lease.

In the ACT, the legislation also provides tenants with an opportunity to 'opt out' of having the preferential right if there is an acknowledgement that they have received legal advice and have not been acting under undue influence in agreeing to the exclusion.

No jurisdiction provides preferential rights for existing tenants that are outside a shopping centre.

Objective of consultation

To examine whether the current policy settings in relation to lease renewal or extension are appropriate and provide a balance between the expectations of retail shop tenants and landlords.

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[39] CT Act section 13B.
[40] *Retail and Commercial Lease Act 1995* (SA) sections 20C-20G.
[41] *Leases (Commercial and Retail) Act 2001* (ACT) sections 108-112.
[42] *Retail and Commercial Lease Act 1995* (SA) section 20E.

Consultation stakeholder feedback

A small majority of respondents to the consultation paper (56 per cent) and a larger majority of respondents to the survey (72 out of 115, or 63 per cent), predominantly tenant and tenant representative stakeholders, support amending the CT Act to provide a preferential right for an existing tenant. Forty four per cent of respondents to the consultation paper and 30 per cent to the survey, predominantly landlord and landlord representatives, did not support an amendment.

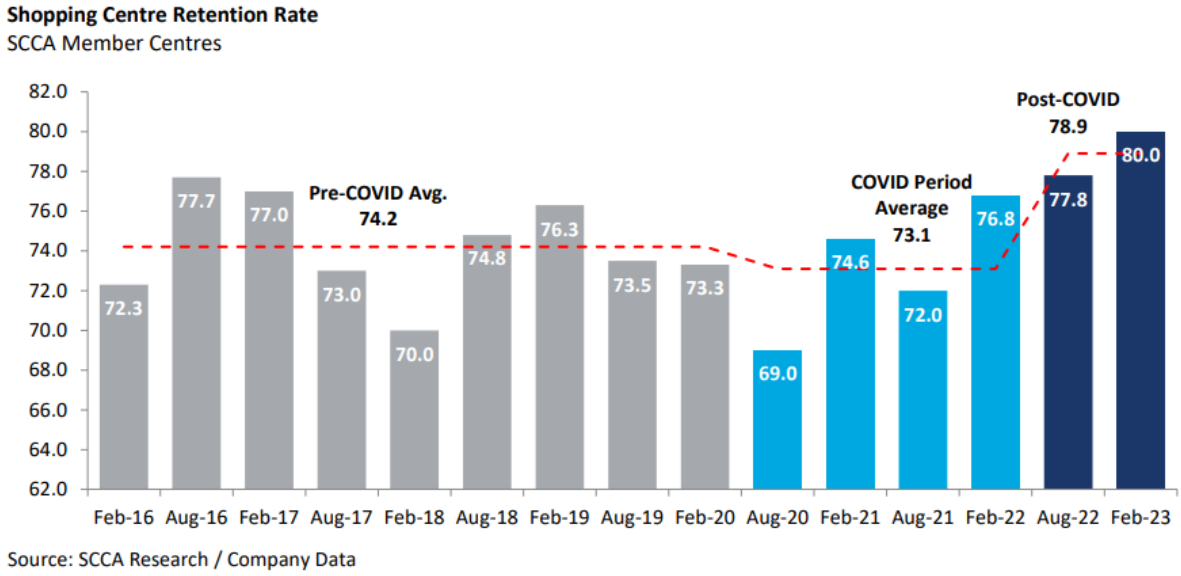
Impact assessment

Responses to the consultation paper were nearly equally divided between support for the status quo and for amending the CT Act to introduce a preferential right for existing tenants, although a larger majority of responses to the survey supported an amendment. Landlord and tenant stakeholders were generally divided over whether the issue regarding a sitting tenant's security of tenure is sufficiently widespread to justify regulatory intervention.

Arguments raised by respondents in favour of the status quo include:

- a statutory preferential right would be unfair because it would interfere with a landlord's right to contract freely, undermine their existing property rights, and restrict their ability to make decisions about their assets;
- landlords need flexibility to deal with changing commercial circumstances and imperatives, such as a need to refresh the tenancy mix in a shopping centre; and
- the existing statutory right to a five-year lease term already gives tenants sufficient protection.

The SCCA provided data gathered from its members showing that retention rates for tenants across Australia are high:



Source: SCCA Research / Company Data

It was argued that this data supports the idea that landlords do not seek to replace good tenants, and that there is no evidence of a market failure to justify introducing a first right of refusal.

In contrast, stakeholders that support an amendment to the CT Act argue that preferential rights are a necessary protection for the goodwill that has been built up in a business over time. The SBDC noted that tenants can be 'economic captives' especially if the goodwill of their business is tied to the rented premises. Respondents also argue that the power imbalance between tenants and landlords leads to unfair negotiations where a sitting tenant feels forced into agreeing to unfavourable or unacceptable renewed lease conditions.

As noted in the consultation paper, the review committee for the 2003 CT Act Review[43] considered that the inclusion of new unconscionable conduct provisions in the CT Act would adequately address circumstances where a tenant is:

- wrongfully denied a further term under a lease; or
- granted a further term only after agreeing to onerous conditions.

Stakeholder feedback to the present review tends to suggest that the unconscionable conduct provisions have not operated in practice as the earlier review envisaged. As is discussed further in chapter 8 of this report, tenants have found it challenging in seeking to rely on the unconscionable conduct provisions in the CT Act, and there is a strong argument that these provisions are not providing adequate protection.

Some respondents argue that the CT Act should be amended in line with the preferential right provisions in SA and the ACT. However, it is worth reiterating in this context that the consultation paper referenced criticisms of these provisions, including that they allow the landlord to obtain alternate offers from other retailers who may be able to afford a higher rent than the sitting tenant. A mechanism for addressing this criticism would be to give tenants that exercise a preferential right the ability to ask for an independent market rent review where negotiations with the landlord fail, a proposal supported by numerous respondents. A market rent review provision may also act as a kind of 'fairness' requirement, in that it may partially redress the power imbalance between tenants and landlords in negotiating the terms of a renewed lease. However, it would also arguably act as a further constraint on the landlord's right to contract freely.

Several respondents raised additional criticisms. For example, one respondent argues that the market will find a way to work around any statutory first right of refusal, and the SBDC cautions that the provisions in SA and the ACT were drafted too widely which has enabled them to be circumvented. The SBDC further argues that there is uncertainty over how some of the exclusions in these jurisdictions operate. For example, the law is uncertain as to what constitutes a 'reasonable' change to the tenancy mix and whether a landlord 'legitimately' requires vacant possession (e.g. for refurbishments or redevelopments). However, the SBDC ultimately supported

[43] The review committee was appointed by the Hon Clive Bowen MLA, the Minister for State Development; Tourism and Small Business and comprised of: Mr Keith Bales (Chair), solicitor and part time Registrar of the Commercial Tribunal of Western Australia; Mr Richard Todd, licensed valuer and member of the Australian Property Institute's Arbitration and Determination Panel; and Mr George Etrelezis, from SBDC.

the introduction of a first right of refusal on the condition that these issues with the SA and ACT provisions be addressed in drafting any amendments to the CT Act.

Respondents were also divided over whether tenants should have an opportunity to 'opt out' of having the preferential right if there is an acknowledgement that they have received legal advice and have not been acting under undue influence, as in the ACT legislation.

The consultation has provided evidence to suggest that introducing a first right of refusal may have an impact on the market. For example, it was claimed that regulatory intervention could lead to some landlords becoming more reluctant to lease to businesses with unproven performance in the first instance. Given this potential economic impact, the lack of evidence of a market failure, and the other above referenced policy issues, it is recommended that amending the CT Act to introduce a first right of refusal is not pursued at this stage.

Recommendation 28
The CT Act should not be amended at this stage to introduce a first right of refusal.

6.0 Early termination due to severe financial hardship

The experience of small business tenants during the COVID-19 pandemic brought the issue of severe financial hardship into sharp focus. Government imposed restrictions to stop the spread of the virus affected the ability of tenants to trade and, in some cases, resulted in forced business closures.

The CT Act does not currently provide for the early termination of a lease by a tenant on the grounds of severe financial hardship. Tenants are therefore reliant on the agreement of the landlord, the specific terms of the lease, or common law principles to terminate the lease early.[44] For tenants facing severe financial hardship, there can be serious legal consequences if they breach their agreement by failing to pay rent. The landlord has the right to terminate the lease, take possession of the premises and/or pursue defaulting tenants for damages and compensation.

For a tenant who has provided their personal assets as security against their lease obligations or given a personal guarantee, any default could result in the loss of the family home. While personal guarantee insurance appears to be an emerging product on the Australian market, tenants may not be insured for this type of loss.

Other jurisdictions

Other jurisdictions in Australia do not currently provide early termination rights for commercial tenants on the basis of severe financial hardship due to unforeseen or exceptional circumstances.

Objective of consultation

To consider whether the CT Act is (or should be) sufficiently flexible to respond to unforeseen circumstances that result in the tenant experiencing severe financial hardship and being unable to fulfil their lease obligations.

Consultation stakeholder feedback

Forty seven per cent of respondents to the consultation paper, predominantly landlords and their representative groups, preferred to maintain the status quo and not introduce any provisions for severe financial hardship into the CT Act. Many of these stakeholders argue that any change would inappropriately transfer the tenant's risk in running their business to the landlord and have negative impacts on the retail leasing market. In response to the survey question as to whether parties should be able to terminate the lease agreement early if they are suffering severe financial hardship, a slightly smaller portion of 35 per cent (again mostly landlords and their representative groups) disagreed (i.e. preferred the status quo).

Only 10 per cent of respondents to the consultation paper preferred the option to amend the CT Act to allow for early termination in specific circumstances of severe financial hardship.

[44] There may be scope to assign the lease or if the agreement allows sub-leasing the premises, but these options are unlikely to be practical for tenants facing severe financial hardship.

Forty three per cent of respondents to the consultation paper, predominantly tenants and their representative groups, preferred a hybrid option to amend the CT Act to allow for temporary adjustments to the lease in addition to early termination in specific circumstances of severe financial hardship. In support of this hybrid proposal, stakeholders raised arguments such as the lack of financial resilience of small businesses in response to events beyond their control, and the continuing impacts of the COVID-19 pandemic.

A large majority of 83 per cent of respondents to the consultation paper did not support an early termination right due to severe financial hardship applying to landlords as well as tenants. Some respondents consider that neither landlords nor tenants should be given an early termination right. Others argue that landlords are not subject to the same level of financial risk as tenants because the rental property retains its market value and the landlord can sell the property if they face financial hardship.

Impact assessment

No jurisdiction in Australia currently provides early termination rights for commercial tenants on the grounds of severe financial hardship due to unforeseen or exceptional circumstances.

During the COVID-19 pandemic, the *Commercial Tenancies (COVID-19 Response (Early Termination)) Bill 2020* (WA) (Early Termination Bill) was introduced in the Legislative Assembly on 16 April 2020, but did not progress. The Early Termination Bill proposed giving tenants in severe financial distress caused by the COVID-19 pandemic a mechanism for terminating their lease such that they would not be liable for the usual compensation or damages associated with early termination of a lease (often referred to as 'break lease costs').

Respondents to the consultation paper were nearly equally divided on whether the status quo should be maintained or the CT Act amended to include a hybrid of hardship provisions allowing for temporary adjustments to the lease and/or a right to early termination for tenants. As discussed above, only a very small minority supported landlords being given an equivalent right for early termination.

Defining or establishing financial hardship

A common issue raised by respondents in support of the status quo is that it would be difficult to establish objective criteria to assess when a tenant is suffering severe financial hardship.

Stakeholders have suggested various criteria for establishing financial hardship, including:

- defining financial hardship as a three-month shortfall in working capital (e.g. where operating income is insufficient to cover expenses over a three-month period); or
- requiring a tenant to provide evidence of a specified reduction in turnover over certain periods of time. Some stakeholders suggested a 30 per cent reduction in

turnover while others suggested a 50 per cent reduction in turnover as the test for severe financial hardship.

While the SBDC does not support amending the CT Act to include financial hardship provisions unless there is evidence of widespread market failure, it considers that:

- any test for financial hardship should use as a starting point the definition of "severe financial distress" in s. 8 of the Early Termination Bill;[45] and
- financial hardship provisions should only apply where:
    - the tenant does not have business assets that can be realised to discharge their financial and other obligations under the lease;
    - there is no prospect of business recovery; and
    - the impact of the circumstances causing the hardship does not allow for the tenant or their immediate family to provide for basic needs such as food.

The consultation paper specifies that the proposals to amend the CT Act to include rights to early termination and adjustments to the lease are to apply to specific circumstances of severe financial hardship that are unforeseeable.

Stakeholders gave examples of various specific circumstances that could trigger the early termination provisions including natural disaster, a declaration of a state of emergency (e.g. for the COVID-19 pandemic), and the serious illness or death of the owner of the tenant's business or a family member.

Several stakeholders caution that the introduction of early termination provisions could lead to an undesirable expectation that if a tenant's business does not succeed they will have the right to terminate their lease. One stakeholder commented that it could be counterproductive to a healthy and innovative small business environment if a business owner seizes the opportunity to exit the business in difficult times. The SBDC also argue that the 'foreseeability' of the specific circumstances may be an inappropriate test as foreseeability can be difficult to determine. An alternative to foreseeability would be to consider whether the tenant acted reasonably to protect themselves to avoid the financial hardship.

Continuing obligations of tenants

Tenants are subject to continuing obligations under a lease, including where they break lease. The consultation paper sought feedback on whether tenants who terminate a lease early under a financial hardship provision should be relieved of all or some of their obligations.

Some tenant representatives argue that 'early termination' costs should be limited to two months net rent, which would cover all termination, make good and re-leasing costs.

[45] The section requires tenants to use reasonable endeavours to negotiate waivers or deferrals of rent, or other concessions, from the landlord and, despite these reasonable endeavours and any concession by the landlord, it be reasonable to conclude that, because of the tenant's financial hardship, the tenant is not, or will not at some later time, be in a position to perform the tenant's obligation under the commercial lease.

Under this proposal, the tenant would 'walk away' from the lease on payment of the two months net rent, with personal and additional bank guarantees to be void.

Other stakeholders, including both tenant and landlord representatives, consider that tenants should still be responsible for the obligation to make good the premises to enable the landlord to re-let the premises without further financial burden.

The SBDC submitted that, if a right to early termination is included in the CT Act, the SAT should determine the extent to which tenants be relieved of their obligations, having regard to principles of proportionality, fairness and reasonableness.

Relieving a tenant of all or some of their obligations may have a significant impact on the landlord's financial position and lead to unintended consequences if the landlord's interests are not taken into account. A benefit of having SAT oversight of hardship provisions would be to ensure that the landlord's interests are considered in determining the extent to which tenants would be relieved of their obligations where the tenant exercises a right to early termination.

Temporary adjustments

A number of stakeholders raised issues regarding legislating temporary adjustments to the rent payable by a tenant suffering financial hardship.

For example, landlords may also be small businesses and reliant on that rental income. Rent relief may impact a landlord's ability to repay their mortgage and put them at risk of a default, and/or may increase the landlord's loan costs.

Alternatives to early termination or temporary adjustments

The consultation paper invited proposals for alternatives to a right to early termination and temporary adjustments to the lease due to severe financial hardship.

Some tenant stakeholders suggest that the CT Act be amended to give tenants a right to trigger an independent market rent review where they suffer severe financial hardship, or in other specified circumstances that were unforeseen by the tenant. The right to trigger an independent market rent review could be either an independent remedy or a precursor step to exercising a right to early termination. An issue raised by these suggestions is whether:

- the tenant must demonstrate they are experiencing severe financial hardship because of a specified circumstance occurring; or
- the right to a market rent review should automatically be triggered if a specified circumstance occurs, e.g. a loss in an anchor tenant or serious illness of a tenant business owner.

It should be noted in this context that s.14 of the CT Act already makes a landlord liable to pay reasonable compensation to a tenant where they cause or fail to make reasonable efforts to prevent or remove, any disruption to trading within a shopping centre where the disruption causes loss of profits to the tenant. The landlord is only liable to pay compensation where they do not rectify the matter after being advised in writing by the

tenant. The CT Act therefore already gives tenants some protection for disruptions to their business that are outside their control.

Another option for reforming the CT Act is to formalise this negotiation process by allowing the tenant to apply to an independent third party, such as the SAT or the SBC for mediation in the case of severe financial hardship. In this situation the parties would be obliged to take part in mediation and prevented from taking legal or other enforcement action until the mediation is complete.

The Franchising Code of Conduct provides another example of how the negotiation process for a tenant suffering hardship could be formalised. To address the absence of early termination rights for franchisees, in 2021 the Franchising Code was amended to include a clause that gives a franchisee a right to request early termination of a franchising agreement from a franchisor. The clause imposes (1) an obligation on the franchisor to provide a substantive written response to the franchisee's request that includes reasons for any refusal and (2) a time limit of 28 days for the franchisor to provide the response.[46] While there is no guarantee that the franchisee will be granted early termination or relieved of their obligations under this process, the clause establishes a formal framework to facilitate the parties engaging in timely negotiations to minimise losses, without impinging on contractual rights. A franchisor's refusal to terminate or to provide reasons for the refusal may give rise to a dispute which is dealt with under the Code's alternative dispute resolution process. In some circumstances, the refusal to terminate may breach the Code's good faith obligations or constitute unconscionable conduct.[47]

Evidence required to interfere in the market

Numerous respondents in favour of the status quo argue that including financial hardship provisions in the CT Act would significantly impact the rights of parties to contract freely and have negative flow-on effects in the retail tenancy market. For example, regulatory intervention has the potential to negatively impact investment in commercial property, lead to higher rents, and create uncertainty for both landlords and tenants. However, it should also be acknowledged that small tenants can be particularly vulnerable and may face severe consequences when suffering financial hardship, especially where they have given a personal guarantee and their family home is at risk.

Given the potential for negative impact on the commercial property market, there would need to be evidence of widespread market failure to justify introducing a right to early termination. In the absence of this evidence, giving tenants a right to request an early termination similar to that afforded to franchisees by the Franchising Code of Conduct intervenes less in the commercial tenancy market and preserves the contractual rights of the parties while also assisting tenants wanting to negotiate with the landlord about a possible early exit from a lease. This mechanism could help to minimise losses and be beneficial to both parties, including in circumstances where a tenant is experiencing financial hardship. While it is intended that this provision will provide tenants with an

[46] Franchising Code of Conduct clause 26B.
[47] Franchising Code of Conduct clause 26B(5)

explicit avenue to commence negotiations to terminate their lease early, it does not give a tenant the right to exit the lease on demand.

Recommendation 29

29.1 The CT Act should not be amended at this stage to include a right to early termination of a retail shop lease.

29.2 The CT Act be amended in line with clause 26B of the Franchising Code of Conduct to establish a formal process for a tenant to have a right to request the early termination of a retail shop lease from a landlord. Failure by the landlord to respond to an early termination request within a specified timeframe should give rise to a right of the tenant to seek an order from the SAT to compel the landlord to respond to the request and to give reasons for refusing the early termination request. A landlord's failure to give reasons may be a matter the SAT has regard to in determining a claim of unconscionable conduct under existing provisions.

7.0 Trading Hours

7.1 Minimum Trading Hours

Core trading hours refers to the hours that a shopping centre is actually open. The landlord can set the core trading hours for the shopping centre, subject to any restrictions imposed by the RTH Act.

However, unlike other jurisdictions, under the CT Act, a landlord cannot include a term in a lease requiring a tenant to open its retail shop during the core trading hours (or any other specified times). Currently, a tenant can choose which hours to open up shop.

For example, if a shop is located in a retail shopping centre with weekday core trading hours until 9pm, a lease cannot require the shop to open until 9pm. The purpose of this provision is to allow tenants the 'right to determine their own trading hours to satisfy the needs of their business, their marketing environment and their personal circumstances'.[48]

Unlike core trading hours, **standard trading hours** are set out in the CT Regulations and are used only for the purpose of determining a tenant's contribution to the landlords operating expenses. Tenants who choose not to open during standard trading hours can be required to contribute to the landlord's operating costs. However, tenants cannot be required to contribute to operating costs if they choose not to open during 'non-standard' hours (i.e. hours that fall outside the standard trading hours).

The differences between standard trading hours and retail trading hours are dealt with in the second half of this chapter.

Other jurisdictions

Most jurisdictions generally allow for trading hours to be specified in a lease with specific exceptions in each jurisdiction.

For example, in Victoria, a term of the lease requiring the premises to be open after certain times on a Saturday or at any time on a Sunday or public holiday is void.[49]

Some jurisdictions allow landlords to set core trading hours when a new shopping centre opens with future changes requiring either approval of the majority of tenants in the centre who hold a retail premises lease (NSW, NT), or by the majority of tenants in the centre who are affected by the proposal (ACT, Vic, SA).

South Australia allows the lease to set core trading hours provided the shop is within an enclosed shopping complex, does not reduce hours to less than 50 hours a week, and the core trading hours do not exceed 54 hours per week or include any time on Sunday.

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[48] Commercial Tenancy (Retail Shops) Agreements Amendment Bill 1997 Second Reading Speech 27 November 1997.
[49] *Shop Trading Hours Reform Act 1996* (Vic) section 7.

Objective of consultation

To consider whether the CT Act's current settings in relation to core trading hours remain appropriate for the current and future retail shops marketplace.

Consultation stakeholder feedback

The consultation paper and survey asked whether section 12C (i.e. the status quo) should be retained or whether the CT Act should be amended to allow leases for premises in a retail shopping centre to set core trading hours if certain requirements are met (e.g. cannot include any time on Sundays).

A large majority (76 per cent) of respondents to the consultation paper and a smaller majority of respondents to the survey (52 per cent) indicated support for the status quo. These respondents comprised mainly tenants/representatives, but some landlords/representatives and law firms also support retaining the current provisions which prohibit leases from setting core trading hours.

A number of reasons were provided in support of the status quo including:

- tenants should have flexibility to select trading hours that align with their business needs as tenants are in a better position to determine trading hours that are efficient, suitable and profitable for them and their staff;
- there is no evidence of market failure to justify changing the status quo; and
- many small businesses are not in a financial position to trade certain core hours (e.g. due to staff shortages).

The SBDC argues that a one size fits all approach to core trading hours does not serve the ever-changing commercial environment, especially in shopping centres which may also have "after hour" destinations such as restaurants, bars and amusement centres. In this environment core trading hours may benefit some retail shops but disadvantage others depending on the type of business they operate. The SBDC indicates this is not an issue that has been raised with them and they are unaware of any market failure of the current provisions of the CT Act.

Stakeholders who support core trading hours requirements argue this will result in more shops being open and increase customer attendance to the centre which benefits both landlords and tenants.

One landlord representative indicates that its members in Western Australia receive regular feedback from consumers who are disappointed to find certain tenants not trading during core trading hours. It is suggested this creates confusion and frustration for consumers who seek the convenience of all retailers being open at the same time.

The SCCA indicates that the types of businesses that are more likely not to open during extended trading hours are generally defined as 'non-retail' and include: beauty and medical services (including optometrists), banking and insurance services, government offices and post offices.

Most stakeholders who support core trading hours also suggest certain exceptions should apply. For example, one landlord representative said that there should be no more than 54 trading hours per week and there should be no mandatory Sunday trading. Another stakeholder suggested retail shops should be granted leeway to close 30 minutes early and that core trading hour requirements should not apply in extended trade periods or in circumstances beyond the tenant's control such as illness.

A number of stakeholders are critical of the requirement in other jurisdictions for a majority of tenants to vote on changes to trading hours. It is suggested that as the tenancy mix of shopping centres differ from one centre to the other, voting to change core trading hours could cause inconsistencies and unfairness across different shopping centres.

Impact assessment

The main criticism of the current prohibition on setting core trading hours for retail shops is that inconsistent and uncertain trading hours of retail shops reduces customer foot traffic and has a detrimental effect on the consumer experience and retail sales. A further concern is that customers will be motivated to shop online if they are not certain the shop they wish to purchase from will be open for trade on any given day.

Generally, the greatest detriment of a business not opening for trade is to the business itself. Most small businesses understand that operating a successful business and making a profit necessitates keeping their business open for trade as much as possible. As one stakeholder commented, 'retail tenants generally work core trading hours and outside trading hours', so if it's profitable for a small business to open for trade it will.

One landlord representative remarked that in its experience the significant majority of tenants open for trade during a shopping centre's core trading hours, notwithstanding there is no prescribed minimum trading hours. While this observation may suggest there is no need for regulation, it also seems to indicate there is currently no market failure as most retail shops will trade during a shopping centre's core hours even without a contractual obligation in their lease to do so.

Consultation feedback has not established sufficient evidence of market or regulatory failure in relation to the operation of section 12C to justify removing this provision from the CT Act.

Recommendation 30
Section 12C of the CT Act be retained without change. This will ensure that any clause in a retail shop lease that requires a tenant to open at specified times or hours continues to be void.

7.2 Standard Trading Hours

Standard trading hours are prescribed under the CT Act and are currently different to some retail trading hours prescribed under the RTH Act. Standard trading hours are used solely for the purpose of determining the tenant's contribution to the landlord's operating expenses under section 12(1)(a)(ii) of the CT Act. The standard trading hours were prescribed in the CT Regulations in 1999 and have not changed since that date. By contrast, the retail trading hours have been extended over the years with Sunday trading being introduced in 2012 and extended weekday trading (until 9pm) introduced in 2020.

Many retail businesses in WA can and do trade during retail trading hours including during the non-standard trading hours. The different time settings under the CT Regulations and the RTH Act are set out in the table below:

CT Standard Trading Hours	Retail Trading Hours (general retail shops - Perth metro area)	Non-Standard Trading Hours
8am - 6pm Mon Tue Wed Fri 8am - 9pm Thurs 8am - 5pm Sat[50]	8am - 9pm Monday to Friday 8am - 5pm Saturday 11am - 5pm Sunday 11am - 5pm Public holidays[51] Closed ANZAC Day, Christmas Day and Good Friday[52]	6pm – 9pm Mon Tue Wed Fri 11am – 5pm Sunday 11am - 5pm Public holidays

Under the CT Act, tenants cannot be required to contribute to the landlord's operating expenses that relate to non-standard trading hours unless the tenant chooses to open.[53] However, tenants can be required to contribute to operating expenses incurred during standard trading hours even where they choose not to open during some or all of those hours.

For example, if a retail shop does not open on a Saturday, it may still be charged operating expenses incurred during the standard trading hours for a Saturday (i.e. 8.00am – 5.00pm). However, if the shop does not open for trade on a Sunday, it cannot be charged operating expenses for that day.

Under the RTH Act there are no trading hour restrictions for small retail shops[54] and special retail shops are permitted to open from 6.00am to 11.30pm every day. On 1 November 2020, Western Australia's retail trading hours legislation was amended to enable general retail shops the option to open until 9.00pm on weeknights.

[50] *Commercial Tenancy (Retail Shops) Agreements Regulations 1985* (WA) regulation 5A.
[51] The *Retail Trading Hours Act 1987* (WA) provides that general retail shops are to be closed on public holidays, however an ongoing variation order has been in place since 2012 allowing shops to open from 11.00am to 5.00pm. Further variation orders are generally made to extend hours to 8.00am to 6.00pm for most public holidays.
[52] *Retail Trading Hours Act 1987* (WA) section 12E (3A).
[53] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section 12(1)(c).
[54] *Retail Trading Hours Act 1987* (WA) section 10(3). A 'small retail shop' is generally regarded as a shop with no more than six owners and employs no more than 25 employees at a time, and own no more than four retail shops.

Since 26 August 2012, all retail shops in the Perth metropolitan area have been permitted to open for trade on Sundays between the hours of 11.00am and 5.00pm. The Minister for Commerce at the time, the Hon Simon O'Brien MLC, said that despite the extended trading hours, the CT Act would still protect retail tenants from being forced to open on Sundays to ensure retailers in shopping centres could only be charged operating expenses for those Sundays that they choose to open.[55]

This means that the operating expenses incurred during non-standard trading hours can only be distributed among those tenants who choose to open for trade during those hours. If there are fewer tenants trading during non-standard hours, the operating expenses are distributed among fewer tenants which results in those tenants paying a greater proportion of the operating expenses.

Other jurisdictions

Western Australia is the only jurisdiction with the 'standard trading hours' mechanism for determining a tenant's contribution to the landlord's operating costs under the lease. The provisions are intended to ensure tenants are not financially disadvantaged if they chose not to open during extended retail trading hours, in particular Sundays.

Objective of consultation

To examine whether the CT Act's current settings in relation to standard trading hours should more closely align with retail trading hours permitted under the RTH Act. Stakeholders were asked whether they support the status quo (i.e. no change to standard trading hours) or if the standard trading hours should be amended to align with extended trading hours so that tenants will be required to contribute to operating expenses during extended trading hours even if they don't open for trade.

Consultation stakeholder feedback

The majority of respondents to the consultation paper (67 per cent) comprising both tenants and landlords support an amendment to align the standard trading hours in the CT Act with retail trading hours. The majority of tenants/representatives who support an extension of the standard trading hours, represent businesses that are more likely to open during extended trading hours. These include pharmacies, restaurants and hospitality businesses. However, the survey responses revealed greater support for the status quo from smaller businesses that are less likely to open during extended trading hours i.e. no change to the current prescribed standard trading hours.

A number of reasons were advanced in support of the option to extend standard trading hours. One stakeholder remarked that the difference between standard trading hours and actual trading hours has created a significant administrative burden for shopping centre landlords in calculating after-hours trading charges.

[55] Media statement.

One landlord representative commented that determining which tenants trade during extended hours is an inefficient and manual process that requires additional staff, such as a dedicated security officer, to manually check the tenants who open during extended trading hours. The estimated cost of calculating tenants' contributions to outgoings during extended trading hours was presented as equating to on average $65,000 p.a. per shopping centre.

Some tenant representatives argue that while no tenant should be forced to trade on Sundays, they should not be disadvantaged from trading on a Sunday by being charged an abnormally high proportion of the outgoings. One stakeholder commented that some tenants choose not to open during extended non-standard trading hours because it costs more for them to do so because the outgoings are shared amongst fewer tenants. This stakeholder provided an example of one tenant paying $10.65 per hour for outgoings on a Sunday compared to $8.70 per hour on a normal trading day.

Other stakeholders claim that standard trading hours are out of date with current consumer expectations around shopping hours and are inconsistent with the requirements in most other jurisdictions.

Those stakeholders who support the status quo and no change to standard trading hours suggest that small business tenants would be subject to increased commercial pressure to trade during the extended hours in order to defray the additional occupancy cost of the increased contribution to the landlord's operating expenses. These stakeholders argue that in view of the likely adverse impact on small business operations, and irrespective of recent changes (and any further liberalisation) to retail trading hours' laws, the CT Act's standard trading hours should remain unchanged. In addition, the SBDC argue that any increase in a small business tenant's contribution to the landlord's operating expenses could, for some small businesses, materially compromise business viability and continuity.

Some submissions also referred to the current economic climate in which increasing interest rates, high inflation and labour shortages are placing additional pressures on many small businesses which means some may struggle right now to absorb any additional requirement to contribute to operating costs.

Impact assessment

The current provisions in the CT Act regarding standard trading hours are intended to ensure tenants are not financially disadvantaged if they choose not to open for extended hours, in particular on Sundays. Retail trading hours have been extended over the years on the proviso that retailers will only be charged operating expenses for the days they choose to open.

Originally when introduced, standard trading hours more closely aligned with retail trading hours for general shops. However, changes to retail trading hours over the years has increased the gap between the provisions. It is also possible that with the extension of retail trading hours, consumer expectations around extended trading hours have shifted. For example, Sunday trading has become normalised with most metropolitan

shopping centres opening on Sunday. Those tenants who open for trade during non-standard trading hours are potentially disadvantaged as they are required to pay a higher proportion of the operating costs during those times. One stakeholder described this situation as creating a financial barrier to trade.

Calculating the allocation of operating costs among those retailers who open for trade during non-standard trading hours also involves an administrative cost for landlords in Western Australia.

On the other hand, the SBDC suggest that tenants that trade during non-standard trading hours get the benefit of the services provided by the landlord for which they are charged operating expenses. Their profits would cover the operating costs charged, making it viable for them to open. The SBDC argue that these tenants would not open if it was not commercially viable for them to do so and that is why the current standard trading hours provisions works so well as it allows the market to operate fairly.

The consultation feedback provides some evidence of a shift in consumer shopping trends with more businesses trading during extended trading hours, particularly Sundays. The question is whether the change warrants a reconsideration of the current policy settings underpinning the standard trading hours provisions in the CT Act.

The consultation feedback has provided insufficient evidence of the cost or other impacts of extending the standard trading hours on those tenants who currently do not open during some standard and non-standard trading hours. In addition, although current arrangements impose some costs on landlords and those tenants that choose to open during standard and non-standard hours, there is insufficient evidence of market failure.

On this basis, it is difficult to justify a recommendation to extend standard trading hours in the current economic climate.

Recommendation 31
The CT Regulations not be amended to extend standard trading hours.

8.0 Unconscionable conduct

The CT Act prohibits landlords and tenants from engaging in unconscionable conduct in connection with a retail shop lease and sets out a non-exhaustive list of matters the SAT may consider in determining whether a party has acted unconscionably.[56] These matters include the relative strengths of the bargaining positions of the landlord and tenant, and the extent to which the party acted in good faith.[57] A landlord or tenant, or former landlord or tenant, who suffers loss or is likely to suffer loss as a result of unconscionable conduct can apply to the SAT for an order for compensation.[58]

The consultation paper and survey sought feedback from stakeholders on the efficacy of the current unconscionable conduct provisions in the CT Act, specifically whether:

- the current unconscionable conduct provisions should be retained and the interpretation of 'unconscionable conduct' left to the courts and the SAT to continue to evolve;
- the CT Act should be amended to introduce a prohibition on unfair practices. This would be designed to apply a lower threshold of misconduct to provide greater protection against unfair practices in the retail sector; or
- the CT Act should be amended to provide for a wider range of conduct to be defined as unconscionable or broaden the list of factors the SAT can consider in assessing whether conduct is unconscionable or make the protections prospective so that they extend to conduct that is 'likely to be unconscionable.'

Other jurisdictions

Retail leasing legislation in all Australian jurisdictions except for South Australia include unconscionable conduct provisions and a non-exhaustive list of matters the relevant court or tribunal may consider in determining whether a party has acted unconscionably.[59] The matters included in the non-exhaustive lists are generally consistent across jurisdictions.[60]

In the ACT, the legislation applies to conduct that is unconscionable or "harsh or oppressive".[61] Without limiting what constitutes "harsh or oppressive" conduct, the ACT

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[56] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) sections 15C and 15D.
[57] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) sections 15C(2)(a), 15D(2)(a), 15C(2)(k) and 15D(2)(k).
[58] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section 15F(1).
[59] *Retail Leases Act 1994* (NSW) sections 62A and 62B;
Retail Leases Act 2003 (Vic) sections 76-80;
Business Tenancies (Fair Dealings) Act 2003 (NT) sections 76-81;
Fair trading (Code of Practice for Retail Tenancies) Regulations 1998 cl.3(1) (see also: *Retail Leases Act 2022* (Tas) sections 67-69);
Retail Shop Leases Act 1994 (Qld) sections 46AB-46B; and
Leases (Commercial and Retail) Act 2001 (ACT) section 22.
[60] Most notably, Tasmania has a significantly shorter list. There are some other minor differences between the jurisdictions.
[61] *Leases (Commercial and Retail) Act 2001* (ACT) section 22(1). The provision in the Tasmanian Code has a similar reference to conduct that is "harsh, unjust or unconscionable" (cl.3(1)).

provision deems that a lessor is "taken to have engaged" in harsh or oppressive conduct if:

- the lessor discriminates against a tenant because the tenant is a member of, or intends to become a member of, an association to represent or protect the interests of tenants, or intends to form such an association; or
- the lessor's conduct has the effect of preventing a tenant from forming or joining, or compelling a tenant to form or join, an association to represent or protect the interests of tenants.[62]

While the South Australian legislation does not include a prohibition on unconscionable conduct, it provides that the statutory right to a five-year lease term is intended to achieve 'fair dealing' between the parties.[63] South Australia also has a unique provision prohibiting a party from engaging in conduct that is, in all the circumstances, 'vexatious'.[64]

Objective of consultation

To ensure that the unconscionable conduct provisions in the CT Act are operating as intended to protect parties from behaviour that is unconscionable or whether additional provisions are required to prevent certain unfair conduct.

Consultation stakeholder feedback

Thirty seven per cent of respondents, predominantly landlords and their representative groups, preferred to maintain the current unconscionable conduct provisions in the CT Act and not introduce any changes. These stakeholders raised numerous arguments in favour of the status quo, including that introducing any new concept of fairness into the CT Act would result in more disputes and litigation and that the current provisions are well-understood in the market.

Forty eight per cent of respondents, predominantly tenants and their representative groups, preferred an amendment to the CT Act to introduce greater protection against unfair practices. These stakeholders argue that the unconscionable conduct provisions as interpreted by the courts and the SAT have had limited impact as a deterrent in the retail tenancy sector. In this regard, one tenant stakeholder noted that that the provisions had "failed miserably to improve the level of conduct in commercial leasing".

Fifteen per cent of respondents, including both landlords and tenant representatives, supported a hybrid of amendments to broaden the list of factors the SAT can consider in assessing whether conduct is unconscionable and potentially extending the protections to prospective unconscionable conduct.

Impact assessment

Consultation feedback indicates that stakeholders are divided on the efficacy of the current unconscionable conduct provisions in the CT Act and the options for reform.

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[62] *Leases (Commercial and Retail) Act 2001* (ACT) section 22(3).
[63] *Retail and Commercial Leases Act 1995* (SA) section 20.
[64] Ibid section 75.

Some feedback suggests that the current provisions in the CT Act have had only limited impact in reducing unfair behaviour in the retail leasing market, and tenants are discouraged from relying on the provisions as the threshold of misconduct is too high. This is supported by data showing that only a relatively small number of applications have been made to the SAT alleging unconscionable conduct and an even smaller number have resulted in a finding of unconscionable behaviour.

The consultation paper noted that courts are beginning to interpret statutory unconscionable conduct more broadly so that it does not require the stronger party to take advantage or exploit a vulnerability, disability or disadvantage of the other party. The 2021 decision of the Federal Court cited in the consultation paper to that effect has since been followed by a similar decision of the Supreme Court of South Australia delivered on 23 September 2022.[65] However, the issue has yet to be ruled on by the High Court and both these previous cases concerned the interpretation of the unconscionable conduct provisions in the Australian Consumer Law.

Amending the CT Act to introduce a 'fairness' requirement would lower the threshold of misconduct imposed by the unconscionable conduct provisions and provide greater protection against unfair practices in the retail sector.

At national level, the ACCC strongly supports the introduction of an economy-wide prohibition on unfair trading practices into the Australian Consumer Law.[66] The ACCC's current commitment to this reform reflects a long-held view which it has repeated in numerous past reports.[67] On 31 August 2023, the Commonwealth published a Consultation Regulatory Impact Statement to seek public submissions on this proposal and feedback on, among other things, evidence of the nature of unfair trading practices in Australia. Consultation closes on 29 November 2023.

Some respondents argue that it would be inadvisable for Western Australia to move ahead of the national agenda on unfair trade practices to prescribe a statutory prohibition on unfair conduct in the CT Act.

In addition, amendments to the unfair contract terms provisions in the Australian Consumer Law will commence in November 2023. These amendments will apply the unfair contract terms regime to new or renewed retail shop leases where the lease is a standard form contract and either the tenant or the landlord meets the statutory definition of a small business. Where the regime applies, the new provisions will impose a fairness requirement in relation to the terms of a retail shop lease and create penalties under the Australian Consumer Law.

Other respondents support including a fairness requirement in the CT Act by way of an amendment to require the parties to a retail lease to act in good faith. The CT Act already

[65] *Commissioner for Consumer Affairs v John Goros, Demolition Experts Pty Ltd (in Liquidation)* [2022] SASC 107.
[66] ACCC, Digital Platforms Services Inquiry: Interim Report No.5 – Regulatory Reform. September 2022 (link).
[67] For a list of previous reports see Ibid at p. 66.

provides that in determining whether a party has acted unconscionably, the SAT may consider the extent to which a party has 'acted in good faith'.[68] However, good faith is only one of the matters the SAT may consider in determining whether the party "in all the circumstances" engaged in unconscionable conduct and does not operate as an independent threshold of misconduct.

No other jurisdiction has introduced a general obligation to act in good faith in relation to retail tenancy legislation.[69] However, codified obligations to act in good faith already operate in Australia in some sector-specific regulatory environments and are increasingly common in mandatory and voluntary industry codes of practice. For example, since 1 January 2015 the national Franchising Code has required that every party to a franchising agreement must act in "good faith, within the meaning of the unwritten law from time to time".[70] Case-law has found that the wording of this provision applies the common law of good faith to give content to the obligation under the Franchising Code.[71] At common law, parties have been found to be in breach of the obligation of good faith when one party has acted dishonestly for some ulterior motive or in a way that denies the other party the benefit of the contract. The obligation does not require a party to act in the best interests of another party.

Under the Franchising Code, the obligation of good faith applies during the course of the franchising agreement as well as during pre-contractual negotiations and when varying or terminating the agreement.

In support of the status quo under the CT Act and against introducing an obligation of good faith, stakeholders have argued that:

- there is a volume of case law to assist in the interpretation of unconscionable conduct; and
- any new definition or concept of fairness or good faith being introduced into CT Act would result in a new area of dispute or litigation.

In the case of the Franchising Code, the introduction of an obligation to act in good faith in 2015 does not appear to have resulted in a deluge of litigation, with one academic study from 2017 noting a "surprising lack of jurisprudence to date" concerning the new provision.[72] The Franchising Code is also an example of how a provision may be drafted to rely on the existing volume of case-law on the meaning of good faith at common law, while also taking into account future developments in the common law.

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[68] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) sections 15C(2)(k) and 15D(2)(k).
[69] However, there are some limited good faith requirements in the retail leasing legislation of other jurisdictions. For example, *Retail and Commercial Leases Act 1995* (SA) section 20E provides that negotiations for implementation of a preferential right "are to be conducted in good faith".
Some jurisdictions also include reference to "good faith" in the context of provisions dealing with the confidentiality of turnover information (e.g. *Retail Leases Act 1994* (NSW) section 50(f)).
[70] Franchising Code of Conduct Clause 6.
[71] *ACCC v Ultra Tune Australia Pty Ltd* [2019] FCA 12. See also *ACCC v Geowash Pty Ltd* [2019] FCA 72 and *Lanhai Pty Ltd v 7-Elevan Stores Pty Ltd* [2022] VSC 132.
[72] Djung B., 'The Statutory Role of Good Faith', *Canberra Law Review* (2017) 15(1) (link).

The third option canvassed in the consultation paper was to amend the unconscionable conduct provisions to provide for a wider range of conduct to be defined as unconscionable. This option was supported by only a small minority of respondents, including the SBDC.

The SBDC submitted that specific, significant and persistent retail tenancy practices that are 'unfair' be identified, and if legislative intervention is warranted, be addressed by specific provisions being enacted in the CT Act. Potential practices that may be addressed include:

- if a landlord introduces excessive competition to a retail shopping centre that causes severe damage to the tenant's business; and
- unfair advantage taken of a sitting tenant with considerable goodwill attached to a business whose lease is due to expire or has expired and the landlord is demanding an exorbitant rent increase to renew the lease.

Recommendation 32
That consideration of an amendment to the CT Act to introduce an unfair trade practices provision be deferred until a decision has been made at national level regarding amendments to the Australian Consumer Law.

9.0 Dispute Resolution

The CT Act makes provision for dispute resolution by giving the SAT broad powers to consider and make decisions in relation to a 'question arising under a lease'[73] and the SBC has the role of assisting the parties to resolve a matter including by providing alternative dispute resolution services.[74]

The current dispute resolution process under the CT Act requires that, except in certain prescribed circumstances,[75] the parties should attempt to resolve the matter via the SBC before an application can be made to the SAT. In order to make an application to the SAT the SBC must have issued a certificate in respect of the matter.[76]

The SBC can only issue the certificate to a person if the SBC is satisfied:

- the matter is unlikely to be resolved with the assistance of alternative dispute resolution; or
- it would not be reasonable in the circumstances to commence an alternative dispute resolution proceeding in respect of the matter; or
- alternative dispute resolution has failed to resolve the matter.[77]

Some matters prescribed in the CT Regulations do not require a certificate from the SBC and may proceed directly to the SAT for determination. For example, applications under sections 13(7), 13(7a) and (7b) to waive the statutory option of a minimum five-year term. The consultation paper asked stakeholders to consider whether the list of matters prescribed in the regulations requires amendment. The consultation paper also specifically asked whether the CT Regulations should be amended to prescribe matters arising under the *Strata Titles Act 1985* (WA) (Strata Act) as matters not requiring a certificate from the SBC following amendments to the Strata Act.

The SAT currently has extensive powers to make orders to resolve disputes including orders for a party to pay money, vary a retail shop lease, terminate a lease or give equitable relief (e.g. an injunction). The consultation paper sought feedback on whether there are any gaps or issues with the SAT's jurisdiction and powers.

Other jurisdictions

Most Australian jurisdictions have a similar dispute resolution process as WA with a dispute arising under the lease to be referred to a statutory officer (e.g. the SBC) for mediation before the matter can be referred to a tribunal or court of competent jurisdiction on appeal.

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[73] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section.16; see section 3(2) for definition of 'question arising under a retail shop lease'.
[74] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section.25A.
[75] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section 25D(2).
[76] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section. 25D(1).
[77] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) section. 25C(1).

Objective of consultation

To ensure the dispute resolution mechanisms within the CT Act are efficient, effective and user-friendly.

Consultation stakeholder feedback

Consultation feedback regarding dispute resolution issues was very limited. Some of the more general comments include:

- attending the SAT can be time consuming and costly as often a litigation lawyer is required to manage the process;
- more matters should proceed directly to the SAT;
- there should be no extension of the SAT's powers particularly if this results in further interference in commercial contracts;
- SAT is not intended to be a substitute for a court and its jurisdiction should be limited to deciding more straightforward administrative issues with a quick turnaround time;
- there should be no extension of the SAT's jurisdiction to more complex issues such as the interrelationship between different legislative regimes (e.g. property law matters); and
- the current process is unnecessarily overburdened with applications seeking to waive the statutory option to a five-year term or approve relocation clauses.

Both the SAT and SBDC raised a matter relating to the requirement in section 25D of the CT Act for the SBC to issue a certificate setting out the matter(s) that were considered by the SBC before the matter can proceed to the SAT. The SBDC relayed that, on occasion, the SBC certificate has not adequately covered all the matters in dispute or new matters have arisen during SAT proceedings. In these circumstances, in order to strictly comply with section 25D, the SAT has been required to refer the applicant back to the SBC to obtain another certificate. This potentially prolongs the process and creates additional delays and costs.

The SBDC suggest the CT Act be amended to allow the SAT to hear a matter without all the matters in dispute being listed on the SBC certificate provided the fundamental nature of the dispute has not changed. The SAT has asked for consideration to be given to empowering the SAT with discretion to grant leave to proceed in the absence of the SBC certificate.

Impact assessment

The intent of the dispute resolution mechanisms in the CT Act are to provide low cost, accessible and expeditious processes to assist parties to resolve disputes that arise under their lease agreement. Consultation feedback indicates that a considerable amount of the SAT's time and resources are expended on applications to waive the statutory option or approve relocation clauses, although the number of these applications appears to have significantly declined following the Synicast case (as discussed in chapter 2 of this report).

As indicated in chapter 2 of this report, it is recommended that further consideration be given to amending these early termination provisions in the CT Act to provide additional clarity and streamline the application process. Further consultation with the SAT will be required in implementing these recommendations and to ensure the processes and procedures for dealing with matters and disputes under the CT Act are streamlined and operating effectively.

Providing the SAT with greater flexibility to deal with matters that are not listed or not accurately listed on the SBC certificate will improve access to justice for landlords and tenants and reduce costs and unnecessary delays in proceedings. This may be achieved by amending the CT Act to allow the SAT to: (a) hear a matter without all the matters of the dispute being listed on the SBC certificate provided the fundamental nature of the dispute has not changed and (b) grant leave to proceed in the absence of the SBC certificate.

Minor consequential amendment arising from changes to the Strata Act

Recent amendment to the Strata Act may result in parties to a retail shop lease appearing before the SAT under the Strata Act (e.g. where a strata company proposes to terminate a strata title scheme). To provide certainty, an amendment to the CT Regulations is required to prescribe matters arising under the Strata Act as matters not requiring a certificate from the SBC.

Recommendation 33
Amend the CT Act to allow the SAT to hear a matter without all the matters of the dispute being listed on the SBC certificate and empower the SAT to grant leave to proceed in the absence of the SBC certificate.

Recommendation 34
Amend the CT Regulations to prescribe matters arising under the Strata Act as matters not requiring a certificate from the Small Business Commissioner.

10.0 Implementation and Evaluation

Implementation

Implementation of a number of the recommendations will require amendments to the CT Act, which will require approval by the Government and then the Parliament. Other changes will be implemented through amendments to the CT Regulations and the development of education materials.

Consumer Protection will coordinate the drafting of the amendments to the legislation by the Parliamentary Counsel's Office. The detail of the amendments will be subject to the usual conventions of drafting legislation in Western Australia. Where necessary, key stakeholders will be consulted during the drafting process.

Transitional issues will be carefully considered and appropriate lead in times for implementation of the changes will be determined.

A community education and advice campaign will be developed and implemented in conjunction with the proposed legislative amendments and will include:

- an education campaign to advise of the amendments;
- information on Consumer Protection's website; and
- targeted information to industry stakeholders.

Evaluation

The CT Act requires a review of the operation and effectiveness of the legislation to be carried out every five years.[78] The implementation of the changes proposed in this report will be evaluated in the next statutory review.

[78] CT Act section 31.