

**Consultation Paper**

**Questions for consideration**

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

June 2022

**How to have your say**

**Make a submission by answering questions in this workbook and responding to a brief survey**

This workbook of questions aims to assist you in making a submission to the review of the commercial tenancy legislation.   
The questions are from the Statutory Review *Commercial Tenancy (Retail Shops) Agreements Act 1985* (CT Act)Consultation Paper (June 2022).

You do not need to answer all the questions. Answer as many as you can based on your experience and knowledge.  
At the end of this paper there is an opportunity for you to provide comment on any other matters you have identified as relevant to the review.

Your comments will help in providing a review report to Government and will assist if changes need to be made to the CT Act.

Please submit your comments in this workbook as follows:

By mail: Commercial Tenancy Review

Department of Mines, Industry Regulation and Safety (Consumer Protection Division)

Locked Bag 100 East Perth WA 6892

By email: [consultations@commerce.wa.gov.au](mailto:consultations@commerce.wa.gov.au)

**Survey:** you are also invited to respond to a short survey (: <https://www.surveymonkey.com/r/Commtenancy>) which seeks feedback on key issues in the retail market.

We will receive your responses online when you press the submit button.

**Closing date:** Public consultation for this review closes on 8 August 2022.

**Information provided may become public**

After the consultation closing date, all responses received may be made publicly available on Consumer Protection’s website. Please note that as your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate this in your submission. As all submissions made in response to this paper will be subject to reedom of information requests, please do not include any personal or confidential information that you do not wish to become publicly available.

**Who are you?**

Please let us know which sector you represent.   
 Landlord  Landlord representative body (please specify)

Tenant  Tenant representative body (please specify)

Government agency (please specify)  Other (please specify) …………………………………………

| **Question** | Your comments, reasons, details, examples |
| --- | --- |
| **PART 2: LEASES COVERED BY THE CT ACT**  **2.1 Leases to small businesses providing services** | |
| 1. It is proposed that the CT Act continue to apply to any business premises situated in a retail shopping centre.  Do you support this? | Yes No  If no, provide your reasons here. |
| 1. On the CT Act applying to retail businesses selling mostly services,  do you prefer Option A or Option B?   (see options in Consultation Paper page 9) | Option A  Option B  State the reason for your preference here.  Taking a medium-to-long-term view, businesses in retail locations are evolving to more services-based business as a result of shifting trends and increased online FMCG retail market share. Pharmacies offering increasing vaccination services is an example of the increased proportion of revenue derived from services within retail businesses, while traditional personal care products (shampoo, soap, deodorant) are purchased online from major supermarkets. It is critical that these small businesses continue to be protected as revenue composition shifts from retail products to services. |
| 1. If Option A (status quo) is pursued – 2. Are there any additional small businesses selling services outside shopping centres that should be covered by the CT Act? | Comment here. |
| 2) Other than not having the benefit of CT Act protections, what risks are there for tenants if the CT Act does not apply to a lease to a non-retail business? | Comment about risks here.  The protections of the Act won’t apply to those businesses. Less investment, certainty and less entrepreneurial initiatives taken by small business owners in local communities. Potentially adverse outcomes such as rent hostage scenarios, ratchet clauses, and personal insolvencies in extreme cases due to no fault of the tenant other than extraordinarily high rent. |
| 1. If Option B is pursued: 2. Are there small businesses selling services outside shopping centres where it would not be appropriate for the CT Act to apply? | Yes No  Comment here. |
| (2) What costs are incurred by landlords and tenants in complying with the  CT Act in relation to these leases? | Comment here about costs incurred.  The CT provides standardised processes which provide simplicity. Extending the requirements of the CT to mandate standard lease templates (eg the disclosure document becomes the actual lease) would save landlords (and tenants) significant legal costs and time delays.  Standard lease terms are a great opportunity to reduce costs and ensure leases are easier to understand and comply with the CT.  Standardised documentation is prevalent with buying and selling property, and for residential leases.  Don’t be hoodwinked by landlords (and leasing agents) into thinking the commercial leasing is somehow inherently any more complex than other commercial transactions which are done on standard prescribed documentation! There is nothing special about commercial leasing as opposed to other types of property leasing and transactions which use standard contracts. |
| **2.2 Excluded businesses or premises** | |
| 1. In addition to vending machines and ATMs, are there any additional types of businesses or premises that should be excluded from the application of the  CT Act? | Yes No  Provide examples and reasons here. |
| **2.3 Coverage of small business tenants** | |
| 1. It is proposed that the CT Act would continue to exclude leases held by publicly listed companies and their subsidiaries, and most leases where the lettable area is greater than 1,000 m2.   Do you support Option A, Option B or Option C?  (see options in Consultation Paper page 13) | Option A  Option B  Option C  Provide reasons for your preference here. |
| 1. If Option B is preferred, which small businesses with premises that have a lettable area greater area than 1,000 m2 would be appropriate for the CT Act to capture? | Comment here |
| 1. If Option C is preferred, should the monetary threshold be linked to the lease’s occupancy costs, or the estimated payable annual rent? | Comment here |
| 1. If Option B or C is pursued, what are the costs or disadvantages for landlords if the CT Act was to apply to more large privately owned businesses? | Comment here |
| **PART 3: THE MINIMUM FIVE YEAR LEASE** | |
| 1. Is there a need to change the way the CT Act applies the right to a five year term? | Yes No  State your reasons here. |
| 1. What option do you prefer?   (see options in Consultation Paper pages18-19) | Option A  Option B  Option C  Option D  State your reasons here. |
| 1. What costs are incurred by landlords and tenants in complying with the current provisions of the CT Act in relation to the right to a five year term? | Comment here |
| 1. What are the risks to tenants if the right to a five year term does not continue in its current form? | Comment here  The right to a 5-year minimum term is a cornerstone protection of the Act and must not be watered down.  The right to a 5-year minimum term is often misrepresented landlords (leasing agents), and therefore misunderstood by tenants, particularly first-time tenants.  Despite the misinformation, a first-time tenant is actually NOT required to sign 5-year lease or nothing at all. That is just the way that some leasing agents choose to misrepresent the requirements of the Act to confuse tenants.  It is permitted under the Act that a tenant can lease for 1 year, or 2 or 3 years or whatever time frame less than 5 years that they wish.  There is no benefit at all to a tenant for this cornerstone protection to be watered down.  By watering down this protection, it allows landlord the opportunity to force tenants to accept shorter terms only, and continue to ratchet up rents with the regular threat of termination (take it or leave it). |
| 1. If Option B is implemented, what mechanism should be used to allow for contracting out of the right to a five year term? | Comment here  Not aware of any deficiencies of the current process. |
| **PART 4: DISCLOSURE REQUIREMENTS**  **4.1 Additional Disclosure To Prospective Tenants** | |
| 1. Should the CT Act require additional information to be disclosed? | Yes No  Comment here  The full complete tenancy schedule (in the circumstance of shopping centres) detailing the rents, incentives etc of other tenants should be provided to the prospective tenant, or entry or renewal.  The contact details of the landlord decision maker (eg landlord personally) or the asset manager if a larger asset. This should include phone number and email. Far too often tenants never have the opportunity to speak with the landlord decision maker.  There is another major problem the way the Disclosure process currently operates in commercial leasing. That is that Disclosure Documents are only used merely as a formality (box-ticking exercise) once the tenant has already signed the landlord’s lease offer documents which include terms binding the tenant.  Documents such as Heads of Agreements, Letter of Offers etc are provided by the landlords leasing agent for the tenant to sign to make an offer on the premises.  These documents don’t include anywhere near the amount of information contained in a disclosure document. Instead, HOA/LOO’ include onerous conditions and bind the tenant. Once the parties reach the disclosure stage it’s all too late.  The CTA should include a provision that all initial contracts / offer documents etc provided by landlords or leasing agents must have a disclosure document attached. |
| 1. Could existing disclosures be made clearer? For example, by providing a standard list of outgoings? | Yes No  Comment here  Full outgoings budget should be provided. |
| 1. If yes to either of the above, please specify what additional information should be disclosed and what can be done to improve existing disclosure requirements to make them clearer. Please include reasons for your answer. | Comment here with reasons for your answer.  Answers above |
| **4.2 Disclosure on renewal of lease** | |
| 1. Do you prefer Option A, Option B or Option C?   (see options in Consultation Paper page 25) | Option A  Option B  Option C  State your reasons here.  Better and more equitable access to relevant information is critical for parties being informed and making sound decisions and not being taken unfair advantage of. |
| 1. If Option B or C is pursued, what additional costs would landlords incur? | Comment here  Negligible, landlords already maintain standard disclosure documents for their properties. There is minimal effort required to add in the specific details for a particular lease renewal. |
| **4.3 Disclosure at assignment of lease** | |
| 1. Do you prefer Option A or Option B?   (see options in Consultation Paper page 30) | Option A  Option B  Neither. Landlords should be required to provide current disclosure documents to prospective assignees.  It is not practical for an existing tenant to be required to provide a prospective assignee a disclosure document because the existing tenant’s disclosure document would be outdated. The existing tenant is likely to have received their disclosure document years ago and the details contained within the document would be outdated. The landlord is the only one who has ongoing direct access to the information required to be in a disclosure document (such as the lease expiries of the anchor tenants etc) so the landlord is the party which should provide a current and updated version of the disclosure document to any potential assignee. |
| 1. If Option B is pursued, what additional costs would exiting tenants and landlords incur? | Comment here |
| 1. If Option B is pursued, should the tenant be required to provide an additional assignor’s disclosure statement if the assignee is to continue the business? | Comment here |
| 1. Should the CT Act be amended to require that an existing tenant must provide a copy of the tenant’s guide to the assignee? | Comment and state your reasons here  Again, this is something the landlord should be responsible for when contracting the assignee, not the existing tenant. |
| **4.4 Disclosure and access to market rent information** | |
| 1. Are the current provisions in the CT Act regarding disclosure and access to market rent information operating effectively? . | Yes No  Absolutely not!  One easy change would be to: S.11(2)(a)  *S11(2)(a) “A provision in a retail shop lease purporting to preclude the tenant from voluntarily disclosing the rent under the lease is void.”*  Firstly, disclosing the “rent” is of very limited scope. The term ‘rent’ would not allow the tenant to disclose the area(square meter size of the shop), or the address, or commencement date, or annual increases, or incentives etc. This provision should allow ‘*disclosure of all matters and variables contained within the lease, and/or any ancillary or supporting information that is in connection with the landlord and tenant commercial relationship.”*  Secondly, “a provision in a retail shop lease” needs to be expanded because much of the critical information is contained within documentation and correspondence that is not strictly the ‘lease’. Eg a survey plan, concession deed, incentive deed, confidentiality agreement etc.  In the vast majority of cases currently, it is only the tenant which is bound by confidentiality, not the landlord. |
| 1. If not, how could disclosure and access to rent information be improved? | Comment here.  It needs to be a level playing field so tenants have access to market information when considering, commencing and renewing leases and well as market rent reviews.  Tenants need an easy, cheap and reliable way of understanding of what a fair and reasonable rent is, relevant for their space.  Looking at purchasing a house for example, it’s relatively easy to determine a fair price (within say a 10% margin of error) for what a house on the market is worth.   * Many house listings have an openly advertised price – (where as Westfield/Vicinity/Hawaiian etc NEVER openly advertise what they are leasing a retail ship for). * There are free websites (eg Domain.com.au / realestate.com.au) which use automated valuation models to price estimate for properties off the market and display these values on their website. * There is a database of transactions – eg Landgate which record sale prices and are accessible by all property professional and sophisticated business people. * The housing and residential market is a non-distorted market – there are no incentives – i.e. no one gives you a $300K cash back incentive when buying a house for $500K. Whereas some commercial landlords do offer significant incentives to achieve for higher commercial rents – i.e. this distorts the market.   The solutions to provide greater transparency are difficult but absolutely necessary to achieve. Tenants going into a lease would almost never contact a valuer to find out what a fair rent should be, so simply increasing valuer access to information would be a completion solution. (However, for market rent reviews, valuers need increased access to information).  It is clear that Landlords must be required to make available / publish detailed information for prospective tenants and other professionals (eg lease negotiators) to access.  In addition to market information disclosure as mentioned in 4.1, a role of the SBDC could be to explore options to gather, analyse and publish localised leasing benchmarking information for business of certain types in certain locations. There would need to be a statutory requirement for landlords to regularly hand over this information to the SBDC for this purpose.  LeaseMap.com.au is a new initiative over the past few years which has been developing new cost-effective and workable solutions to this long-standing issue. |
| 1. Have there been any changes in the retail tenancy market to justify further reform? | Yes No  Provide details here.  Covid and its impact on the CBD and certain shopping centres are noteworthy examples of where transparency of information is critical to help landlords and tenants adjust to a new normal.  The shift to online retail and its impact on brick and mortar (retail lease) retail is an ever-increasing reality which retailers and landlords will need to adjust to. The pace of change has increased significantly over the past 10 years. Efficiency of information when making commercial decisions (particularly by small business people) is much more important that it was several years ago.  Also, technology capacity and capability for solving important problems in new ways has also evolved and improved significantly with more data and digital options which can make it far easier to manage, share, analyse market rent information that it was 5 or 10 years ago. The practical barries to solving this problem have reduced significantly. |
| 5. LEASE COSTS  5.1 Turnover rent | |
| 1. Which of the options do you support?   (see options in Consultation Paper page 36) | Option A  Option B  State your reasons and any additional costs/benefits here.  Neither, online sales should be excluded from the turnover rent calculations entirely because online sales are generated from the tenant’s direct and additional investment in the online environment.  If a business owner leases a typical premises in a shopping centre or high st location, but also invests tens or hundreds of thousands of dollars in an online store and digital advertising, why should the tenant pay a higher rent to the landlord than another small business which has not spent the significant and ongoing additional investment in online?  The total rent for a property should be dependent on the property’s capability in providing foot traffic and customers to the business, not on additional investments made by the business owner at their own expense.  Online sales at very high scale (eg Amazon, or Wesfarmers Catch), can be profitable because of the lower property (eg warehouse costs), and lower wages expenses for those pure online-only businesses.  However, the cost base of an existing retail located business is entirely different. Retail business with online and bricks and mortar retail leases don’t benefit from the same cost advantages as Amazon etc. They have higher property and wages costs (the 2 main operating costs of doing business).  Additionally, delivery fees are most often paid by the retail business – i.e. the customer receives free delivery and the small business pays. Plus, the business has to pay for the development, maintenance and advertising of the online store.  The other example of platforms – eg Think of Uber and what they charge small food and beverage outlets.  Online sales for a small retail business with a bricks and mortar store are generally done for ‘hygiene’ reasons – i.e. to satisfy the omni channel customer, to try and retain them as engaged with the business. Online is generally not profit accretive, they are not generated from landlord investment. There is no justification from the landlord deriving additional rent from online. |
| 1. Are the current provisions in the CT Act relating to turnover rent operating effectively? | Yes No  If no, detail any additional issues here.  Landlords like to take the upside of turnover rent but still have the tenant paying base rent (regardless of performance) so the landlord always gets paid. If turnover rent is in a lease, it should be the only method of collecting rent – eg no base rent.  Further, there is a prevalence of landlords mandating turnover rent in their leases (but with a high sales threshold set) which the tenant is never expected to achieve. The provision is in the lease simply for the purposes of the landlord gathering sales figures which the landlord then uses against the tenant as a justification to increase the rent at lease renewal.  Based on the turnover, the landlord reverse-engineers calculations to determine how much they can increase rent to just within the limits of the tenant not going broke. |
| **5.2 Land Tax** | |
| 1. Which of the options do you support?   (see options in Consultation Paper page 39) | Option A  Option B  State your reasons and any additional costs/benefits here.  Particularly for new developments (eg shopping centres). Landlords should not be able to charge for any outgoings that adjacent vacant parcels of land.  In such instances, the landlords tend to annex only a small section of the entire commercial land area, develop that, but leave a remaining portion completely vacant and undeveloped, however, tenants in the centre are charged outgoings such as land tax, council rates, fencing maintenance, mowing etc for this entire parcel including the undeveloped land. |
| 1. Are there any other outgoings or expenses that you believe should not be passed onto the tenant? | Comment and state your reasons here  Landlords should not be able to charge any mark up at all for the supply of electricity to tenants. Landlords do not manufacture, store, or accept any risk in the purchase and supply of electricity, therefore there is no justification that a margin is charged. Sometimes these margins are excessive. The electricity is simply passing through the infrastructure which the tenant is paying for (leasing the building).  There should also be a positive obligation on the landlord or managing agent to source the best value supply for the various outgoing’s expenses. For example, landlords are currently entitled to use their own or a relatives cleaning or gardening company for instance which may charge double the price of a similar provider alternative in the market. Or a business such as Westfield may be able to charge security expenses in the outgoings from a security business also owned by Westfield. The excessive fees are passed directly on to the tenant.  There MUST be a provision that landlords are required to act reasonably in determining whether landlord plant and equipment still has a useable life and is repairable, or should be replaced. There are so many examples of equipment such as air-conditioning continuing to break down but the landlord refuses to replace. The tenant has to foot the ongoing bill for repair works, because the landlord refuses to replace what should be replaced. If an item of landlord property plant and equipment is repaired at the tenants, the tenant should be free from any repair costs for the same item for a further 2 years. (Subject to the tenant not being the fault of the breakdown with the plant or equipment). |
| **5.3 Marketing Funds** | |
| 1. Which of the options do you support?   (see options in Consultation Paper page 41) | Option A  Option B  State your reasons and any additional costs/benefits here.  Neither, marketing funds should be made non-compulsory (abolished).  Despite any existing provision(s) in a lease, a landlord should not be able to force a tenant to make a payment in to a marketing fund if the tenant doesn’t want to.  If a landlord wants to marketing their shopping centre, then go for it – at their expense.  Tenants are best placed to market their business to their customers. A dollar invested by the tenant in their marketing campaign is significantly more valuable to the tenant and to the centre that the landlord investing the dollar.  At the point of lease negotiation, the larger shopping centres all demand specialty tenants (small businesses) contribute to a marketing fund for the landlord to spend. However, the value of this expenditure for the tenant is almost non-existent. That’s why the CTA must void these existing marketing provisions. |
| **5.4 Security Bonds, Bank And Personal Guarantees** | |
| 1. Which option do you support and why?   (see options in Consultation Paper page 44 ) | Option A  Option B  State your reasons and any additional costs/benefits here.  Recommend to ‘regulate the payment and release of security instruments’  *(there appears to be an error in the Consultation Paper describing A and B).*  Fundamentally every tenant is leasing retail space for access to customers – and no other reason!  Fundamentally every landlord is leasing space to receive rental income.  Why should the landlord’s fundamental interest in the lease contract be protected via access to multiple forms of guarantees provided the tenant, while the tenant receives no commensurate guarantee for its fundamental interest in the contract from the landlord (access to customers)?  Look at CBD retail space for example post covid, or examples of shopping centres where the supermarket closes down. The fundamental interest of the tenant (access to customers) has been significantly diminished. Yet, the landlord is still legally entitled to full rent, plus rent increase, or can take the tenant’s guarantees, personal property.  All guarantees should be void unless there is a commensurate guarantee protecting the fundamental interest of the tenant as well. |
| 1. If you support Option B, should the CT Act be amended to include the following: 2. *the maximum amount a landlord can collect as a security bond or require as a bank guarantee?* | Yes No  State your reasons and any additional costs/benefits here.  The maximum amount should be equivalent to 3 months gross rent plus GST. |
| 1. *when the landlord should return the security deposit or release or return a bank guarantee;* | Yes No  State your reasons and any additional costs/benefits here.  The landlord should be required to return the guarantee within 30 days of the expiry of the lease or after 5 years of continuous tenure (whichever is less). It’s an additional and unnecessary cost, particularly for tenants who are proven and have been in place long-term. |
| 1. *a provision allowing a tenant to elect which form of security they would like to use; and/or* | Yes No  State your reasons and any additional costs/benefits here.  Yes, because depending on the tenant’s business and finance structure, either a lump sum security deposit or bank guarantee may suit better. |
| 1. *a provision preventing a landlord from requesting more than one form of security (eg a security bond and a bank guarantee) or from refusing to accept a bank guarantee.* | Yes No  State your reasons and any additional costs/benefits here. |
| **6. FIRST RIGHT OF REFUSAL** | |
| 1. 1) Is there justification for providing sitting tenants with a preferential right to renew their lease? | Yes No  Comment here.  The justification is the power imbalance which landlords have in their favour and how they use this use this power imbalance unreservedly to make more money more their multinational companies while sending individual small business people broke by charging rents far in excess of any economically rationally level. |
| 2) Is this a widespread issue? | Yes No  Absolutely, David Lowy says so……  David Lowy, former Managing Director and deputy chairman at Westfield:  <https://www.theaustralian.com.au/business/out-of-retail-the-lowy-clan-bet-on-global-equities/news-story/d8e118bf04dc55ee71821b04d4b98a94>  **“The value of the rental stream was not based on the supply and demand of retail space. It was based on the amount of business a retailer could do in the mall, which wasn’t a function of the square metres that they rented. “**  The above is a direct quote from David Lowy and clearly confirms that Westfield don’t negotiate rents based on ‘fair market’ demand and supply – they base it on how much they can extract from a retailer. Therefore, they get either (A) the highest ‘market price’ or (B) the highest price the tenant will pay without going broke (whichever is greater).  The McGowan Government needs to implement policy which delivers a sustainable small business sector, supporting small business owners, teams and local communities throughout Western Australia.  Small business is a critical part of WA’s economy, history and culture. These businesses require extensive capital and staff investment which are almost always self-funded with all the risk taken by individual people (business owners). Improved tenure for small businesses will minimise the uncertainty and risk of investment and negative outcomes at a personal level.  Measures required to encourage small business investment and entrepreneurial initiatives include: A statutory right of renewal for leases, subject to compliance with the lease and statutory conditions.  Minimum right of renewal option of 5 years, with the rent to be set either via negotiation between the landlord and tenant (or if this fails), via the independent market rent review process.  This is required to support and develop business models and businesses adapting to changing to the evolving requirements of local West Australian communities. Security of tenure is critical to enable business to grow and broaden income streams through diversification, and in turn create local jobs for local WA communities in all areas of WA.  Report after report has highlighted the direct and flow on effects of poor leasing outcomes and impact on business owners and communities. In additional to formal state and federal government reports over the past 30 years, case study evidence from WA precincts such as Subiaco, Fremantle, Beaufort St, and Perth CBD demonstrate the problem.  A statutory right of renewal (along with a market rent review), is needed to help ensure that small business continue to play an important role in our states’ future. |
| 1. Do your prefer Option A or Option B?   (see options in Consultation Paper page 47) | Option A  Option B  State your reasons and any additional costs/benefits here. |
| 1. If Option B was pursued: 2. *what exceptions should apply?(e.g. similar to those in South Australia and the Australian Capital Territory?); and/or* | State what exceptions should apply here. |
| 1. *what conditions should apply?*   *(e.g. should the offer of a renewed lease have to be on terms no less favourable than those of a proposed new lease? or, determined by independent valuer if agreement can’t be reached between the parties).* | State what conditions should apply here.  Rent determined by an independent market rent review process, as per the Act currently. |
| **7. EARLY TERMINATION DUE TO SEVERE FINANCIAL HARDSHIP** | |
| 1. Which of the options do you support? Please provide an explanation for your response and include examples and any potential costs or benefits.   (see options in Consultation Paper page 51) | Option A  Option B  Option C  Provide an explanation and examples and potential costs or benefits here.  Tenants must be able to terminate a lease early due to financial hardship.  There is an existing bill in WA parliament which could be easily amended to decouple reference to covid – and then passed into legislation.  <https://www.parliament.wa.gov.au/Parliament/Bills.nsf/7CDCFDA8EE2BA09C4825854C00139362/$File/188-1.pdf>  This should be done as a matter of urgency and can be done independently of the full-scale review of the commercial tenancy act.  Further to the above.  Financial hardship could be formally defined by a shortfall in working capital over a 3-month period. I.e. operating income being insufficient to cover expenses over a 3 month period.  Small businesses don’t have a great deal of financial resilience – they are not publicly listed companies with benefits of vertical integration, supply chain funding, international networks and easy access to cheap funding. If a small business has a shortfall in paying bills for 3 months or more, the likelihood is it’s going to fail. It’s just a matter of how much mess the failure is going to make. Landlords still retain their property and can re-lease it.  If the landlord objects to a voluntarily surrender and re-lease to a new tenant, it is most likely indicative of an underlying economically distorted rent. i.e. the landlord knows they are ripping off the tenant by charging too much and that if the property was vacant they wouldn’t get the same rent.  Examples such as in shopping centres where the anchor tenant supermarket vacates, and if the landlord still demands and is legally entitled to demand full rent from the specialty retailers – that should be considered unacceptable by the government and legislation put in place to ensure tenants can terminate due to financial hardship.  The termination process cannot be drawn out for months to years! The whole intent of terminating due to financial hardship is to limit damage quickly. The time fame needs to be a trigger of a 3-month short fall in working capital, then a 2-month final forward payment of rent and the tenant is out. |
| 1. Can you suggest any alternative options to those presented above? | Yes No  If yes, comment and state your reasons here.  **Tenants must also have the opportunity to trigger a market rent review.**  This would occur following the trigger due to a 3-month short fall in working capital, and be an option for the tenant to action prior to a termination scenario. |
| 1. What criteria should be considered to establish whether: 2. *a tenant is suffering severe financial hardship; and* 3. *the circumstances were unforeseeable at the time the tenant entered into the lease?* | State the criteria that should be considered here. |
| 1. Do you think that tenants who terminate their leases early due to severe financial hardship should be relieved of all or some of their obligations?   If so – which obligations should the tenant still be required to comply with?  *For example, should the tenant still be required to: pay compensation; pay damages to the landlord associated with early termination of a lease (often referred to as ‘break lease costs’) and/or make good the premises?* | Yes No  If yes, comment and state your reasons here.  It should be limited to 2 months net rent to cover all termination, make good, releasing costs etc, and the tenant just walks away. Personal and additional bank guarantees and void. |
| 1. Do you support termination on grounds of severe financial hardship applying to landlords as well as tenants? | Yes No  If yes, comment and state your reasons here.  The property owned by the landlord has inherent value. The property has market value and is saleable regardless of whether it is tenanted or not.  A retail business on the other hand, has no value other than its going concern value, which requires it to be operational and profitable. If a tenants business experiences financial hardship, then by the nature of this situation the business would effectively have no value (other than potentially some stock). If the business was highly profitable and saleable, it is hard to see how financial hardship could possible apply?  If a landlord runs into financial hardship, they can always sell the property.  Tenants who terminate the lease are effectively giving up their location which is a critical component of the identity of the business, and goodwill. They are effectively giving up the business to the landlord – if you’re in a shopping centre (say Garden City News) – and you terminate your lease due to financial hardship – the business no longer exists. They landlord will be able to re-lease to another newsagent because the landlords own the location which is the identity of the business. It is not a decision tenants would take lightly. It would only be a last resort. |
| **8. TRADING HOURS**  **8.1 Minimum Trading Hours** | |
| 1. Do you prefer Option A or Option B?   (see options in Consultation Paper page 56) | Option A  Option B  State your reasons and any additional costs/benefits here. |
| 1. If Option B is pursued, what requirements should be included in order for the lease to be able to set core trading hours?   For example, restrictions on certain days and times, or a requirement for the majority of shopping centre tenants to agree any changes to core hours? | Comment here and state what requirements should be included.  Tenants should not be forced to trade certain hours. Particularly small independent businesses (i.e. those covered by the Act). Small business owners at this level are impacted personally by their own health, and staff absences, family, health protocols etc. The staff rosters may be just one or 2 people in many instances. Failure to trade must not be able to result in a potential breach of lease situation simply because staff or the owner operator is not available to trade. |
| **8.2 Standard Trading Hours** | |
| 1. Do you prefer Option A or Option B?   (see options in Consultation Paper page 59) | Option A  Option B  State your reasons and any additional costs/benefits here.  Tenants deciding to trade on Sunday can be effectively disadvantaged by being charged an abnormally high proportion of outgoings given that the outgoings are split only between the trading tenants and not those which decide not to trade.  By sharing the Sunday outgoings equally (per sqm) between all tenants regardless of whether they trade on Sundays or not means that there is no disadvantage or barrier to Sunday trade. |
| 1. If Option B is pursued – 2. Which hours should be prescribed as standard trading hours?   For example, 11.00 am to 2.00pm on a Sunday; | State your reasons here as to which hours should be prescribed as standard trading hours. |
| 1. *Should certain conditions be met before a landlord can charge operating costs for extended trading?*   *For example, retail shop lease is located in a shopping centre in the Perth metropolitan area.* | Comment here and state what conditions should be met. |
| **9. UNCONSCIONABLE CONDUCT** | |
| 1. Which of the options do you support?   (see options in Consultation Paper page 64) | Option A  Option B  Option C  Provide an explanation, examples and any potential costs or benefits here.  Requiring parties to ‘act in good faith’ should be the conduct requirement. This was the conduct requirement during covid (mandatory code).  The principles and purpose of the federal unfair contract terms legislation should be reflected in commercial leasing contracts via the CTA. |
| **10. DISPUTE RESOLUTION**  **10.1 Matters exempt from alternative dispute resolution** | |
| 1. Does the current list prescribed in regulation 10 of the CT Regulations require amendment?   If so, what matters should be included or removed from the list? . | Yes No  If yes, comment here and state what matters should be included or removed from the list. |
| 1. Do you support including matters arising under the Strata Titles Act to the list of matters that do not require a certificate from the Small Business Commissioner and therefore may proceed directly to the SAT for determination? | Yes No  Comment here. |
| **10.2 State Administrative Tribunal** | |
| 1. Are there any gaps or issues with the SAT’s jurisdiction and powers under the CT Act? | Yes No  Comment here and provide details and examples.  Progressing to SAT is far too expensive and time consuming in many instances. You really need a litigation solicitor to manage the process and they charge upwards of $600/hour. The process of multiple direction hearings and time involved. There needs to be a SBDC capacity to determine disputes under a certain dollar threshold. Eg should air-conditioning be replaced or continue to be repaired. |
| **11 IMPACT OF COVID-19 AND OTHER ISSUES** | |
| 1. Are there any issues resulting from the COVID-19 pandemic that aren’t dealt with by the CT Act and that you think should be covered by the CT Act? Please identify these issues and provide examples. | Yes No  Identify any COVID-19 issues that should be covered by the CT Act and provide examples here. |
| 1. Are there any issues not identified in this paper relating to the operation or effectiveness of the CT Act?   Please identify any additional issues and provide examples. | Yes No  Identify any additional general issues relating to the operation or effectiveness of the CT Act and provide examples here. |

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| **Please provide comment on any other matter you have identified as relevant to the review.** |
| Extend 30-day termination notice periods to 6 months.  One of the most stressful and vulnerable positions tenants find themselves in, is when they are in holdover (month to month) and the landlord has the ability to issue a 30-day termination notice at any time.  When tenants are the most vulnerable, a significant number of landlords use this time to be the most exploitative.  Leases generally have a 30-day termination period once the lease term has ended and the tenant is in hold-over (a month-to-month tenancy). It is impossible to relocate a retail business within 30 days’ notice. Relocation involves much more than just practically shifting stock. Firstly, the tenant has to secure a lease for alternative premises (which is often quite a time and resource consuming process), then the tenant has to proceed with architectural drawings, local government building approvals for fit out, business licencing requirements, insurances, practical relocation, and THEN make good of the existing tenancy.  Landlords know that retail tenants have nowhere to go within 30 days. The landlords know that if they issue or threaten to issue a 30-day termination notice to a retail tenant, the tenant will be faced with the prospect of inevitable closure for at least a few months in not longer, or face closing down entirely if they can’t secure a suitable site to relocate to. The only alternative is to accept any lease offer the landlord puts forward, regardless of whether it’s a fair market deal or not.  When given a 30-day termination notice, tenants literally have just hours to decide whether to proceed with the termination and therefore begin to arrange defit trades etc, or to sign the landlord’s offer – no negotiation. In theory, the negotiation process and should have been well underway by the expiry of the lease, but a hallmark strategy of landlords is to not negotiate until the last minute.  The reason why is because Landlords aim to position tenants in to this environment of tenancy vulnerability and emotional fear, and they do this by delaying and delaying, non-responding, refusing to negotiate throughout as the lease tenure winds down. Then, they simply give them an ultimatum at the end.  This unfair and predatory modus operandi of landlords must be dismantled, and one of the ways to assist this would be by ensuring that no termination can occur without 6 months’ notice.  Category one costs:  Category one costs should be abolished.  Tenants should not be forced to pay for capital costs such as air-conditioning, and other capital building expenses. |

