LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

THE TENANCY OF COMMERCIAL PREMISES

Report of the Select Committee on the Tenancy of Commercial Premises
February 1990

Preface

As Chairman of the Tenancy of Commercial Premises Committee I would like to thank the many people who have helped us during the course of our inquiry. Not only those who placed submissions before us but especially those from the other States and in particular New South Wales and Victoria.

I urge all parties to accept reform in the spirit it is given and set about achieving a code mutually acceptable to all involved. I offer my best wishes in what the Committee hopes will be a speedy achievement.

Robyn Nolan

Members of the Committee

Mrs R Nolan, MLA (Chairman)
Mr N A Jensen, MLA
Ms C Maher, MLA

Secretary to the Committee

Mr J R Cummins

Secretary to the Inquiry

Mr C K Kent (Until 30 November 1989)
Miss C A Scarlett (From 10 January 1990)

Clerical/Keyboard

Miss M Stirling
Mrs K Blackburn

Terms of Reference

On 26 July 1989 the ACT Legislative Assembly established a Select Committee on the Tenancy of Commercial Premises to:

(1) examine difficulties currently being encountered by tenants of privately subleased commercial premises so far as those difficulties arise out of the contractual relationship between landlord and tenant;

(2) consider whether the commercial tenancy relationship should be regulated by legislation and if so, in what manner; and

(3) consider whether the Business Leases Review Board should be established along the lines of the draft Business Leases Review Ordinance, 1984.

Report on 20 February 1990.

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RECOMMENDATIONS

The Committee recommends that:

1. **the relevant Minister invite the principal industry associations acting on behalf of the landlord and tenant groups to enter into negotiations to formulate a Code of Practice relating to tenancies, including an appropriate dispute settlement mechanism;**

   (paragraph 4.4).

2. **Fair Trading Legislation be enacted to support the Code of Practice; and**

   (paragraph 4.6).

3. **if general agreement on a Code of Practice cannot be reached within six months of tabling this report the Government should prepare a Code for discussion within the industry.**

   (paragraph 4.8).

1. INTRODUCTION

Background

1.1 Legislation to regulate commercial tenancy relationships in the ACT was first mooted in 1975 but lapsed with the change of Government at the Federal Election that year.

1.2 In 1983, as a result of complaints from lessees the then Federal Minister for Territories and Local Government proposed that a Business Leases Review Board be developed, and the Business Leases Review Ordinance 1984 was drafted. A Working Party was established in February 1984 to consider the proposed legislation. The terms of reference for the Working Party specifically excluded an option of not recommending legislation. The report was tabled in November 1984 recommending inter alia that a Business Leases Review Board not be empowered to consider disputes concerning rents.

1.3 With the establishment of the ACT Legislative Assembly there was renewed interest in addressing the issues relating to commercial tenancy practices. This led to the establishment of a select committee to investigate a range of issues.

The Inquiry

1.4 On 26 July 1989 the Legislative Assembly established a Select Committee on the Tenancy of Commercial Premises to inquire into:

- difficulties currently being encountered by tenants of privately subleased commercial premises so far as those difficulties arise out of the contractual relationship between landlord and tenant;
- whether the commercial tenancy relationship should be regulated by legislation and, if so, in what manner; and
- whether the Business Leases Review Board should be established along the lines of the draft Business Leases Review Ordinance, 1984.

1.5 The Committee conducted 4 public and 3 in camera hearings, received 27 submissions and took evidence from 35 witnesses. Procedures were put in place to conceal the identity of people who gave evidence in closed session, not only to encourage small retailers with problems to come forward but also to protect them. All information received in closed session was treated in the strictest of confidence. The various procedures that were implemented received wide publicity. Despite these precautions the response of retailers to the call for submissions was disappointing. However, the Committee was told that some people were reluctant to appear as witnesses because they believed it might adversely affect the future of their lease.

1.6 The Committee also held informal discussions with representatives of government and landlord and tenant groups in Melbourne and Sydney. The Committee visited these States as two differing situations occur. The commercial tenancy relationship is subject to legislation in Victoria while New South Wales has prepared a Code of Conduct, negotiated between the parties and backed by Fair Trading Legislation.

1.7 The submissions to the inquiry focused on retailing space. Throughout this report the term 'commercial' is used to refer to office space to distinguish it from retail space. Despite a shortage of commercial office space in Canberra tenancy disputes in this sector appear to be minimal. There are however commercial and mixed–use buildings (commercial and retail) for which the Committee's findings and recommendations may be relevant.

The Retail Industry

1.8 Change in the industry is most obvious in the proliferation of large "one stop" shopping centres. These centres bring tenants and their customers together under the one convenient roof, forging in the process a unique relationship between landlords and tenants. This relationship is ratified in the contractual agreement and exists in response to market conditions, not just for retail goods but for trading space itself. In recent times it has also brought into question the fairness and equity of certain aspects of the landlord tenant relationship, particularly as it relates to rent levels, rent reviews, forced relocation and the non–renewal of leases because of the alleged strong bargaining position of the landlord.

1.9 There is a belief that the commercial tenancy relationship is distorted and unfair, and that legislation is urgently required to redress the imbalances which are claimed to exist. This view was put by the Commercial and Retail Traders Association (CARTA), the Shopping Centre Tenants Association/ Retail Traders Association of New South Wales (SCTA/RTA), the Residents Rally and others who appeared before the Committee. However, the opposing view was put forward by the Building Owners and Managers Association (BOMA) who claimed that there can never be a balance. Markets are dynamic, tenants, prices and products all change and the community which is served by the providers of retail space and by retailers changes daily. There is no such thing as a level playing field. Similar views were expressed by the Australian Institute of Valuers and Land Administrators (AIVLA), Westfield Group, Canberra Property Owners Association Limited (CPA) and others.

1.10 Retail and commercial floor space at various centres is shown in the following table.

RETAIL AND COMMERCIAL FLOOR SPACE – JUNE 1989

Centre	Number of Business Premises		Floor Space Per cent		Total Floor Space m^2
	Retail	Other	Retail	Other	
Civic	291	229	62.8	37.2	91162
Belconnen	232	134	74.5	25.5	102685
Woden	238	128	76.1	23.9	80131
Tuggeranong	122	54	87.0	13.0	58992
Group/Local	658	629	62.3	37.7	195735
Other	239	71	82.0	18.0	99824

Source: Commercial Research Bureau, Department of Industry and Development

1.11 In Canberra there are four Town Centres, Civic, Belconnen, Woden and Tuggeranong. Between 1987 and 1988 Town Centre floor space increased by twenty two percent and smaller centres by seven percent. The increase in total floor space would suggest that a possible oversupply existed. Town Centre floor space grew by a further seven percent and smaller centres by thirteen percent approximately in 1989.[1]

1.12 The forces of growth and change are likely to intensify in the foreseeable future. The recent introduction of 26 retail stores new to Canberra in the Section 38 Development in Civic signals changing retail patterns with developers providing "capital city" shopping facilities to Canberra and surrounding regions. These facilities have had an immediate impact on competition between retailers and between the major shopping centres.

1.13 Demand for office space was also expected to remain strong. The Canberra Office Market Report for January 1989, complied by BOMA, indicated that the office vacancy rate for Civic was one percent, the lowest for any Central Business District office market in the country. Despite this low vacancy factor, the occurrence of tenancy disputes in the office market appears minimal as the commercial section has not been subject to the dynamic pace of growth and change which has occurred in the retail industry.

The Landlord and Tenant Relationship

1.14 CARTA, the Residents Rally and SCTA/RTA argued that the tenancy relationship is fundamentally flawed. In their view the bargaining power of the parties is distorted to the point where tenants are unable to redress alleged harsh and unfair practices. They further claimed that this necessitates the urgent introduction of extensive legislative measures to correct what they perceive to be an imbalance.

1.15 On the other hand BOMA, AIVLA and others argued that the landlord/tenant relationship includes intangible concepts such as trust and mutual benefit as well as the basic contract itself. This view holds that the parties have a vested interest in the each other's performance. The owner of the property provides the premises for use by the tenant in return for rent received. Both parties are therefore interdependent on one another for the same motives of gain. The bargaining power of the parties is the product of the demand for and the supply of retail space.

1.16 Increased competition is likely to lead to increased expectations on the part of both landlords and tenants. This could well lead to further pressures on the tenancy relationship. The underlying issue appears to be the ability of the parties to satisfy these expectations to their mutual benefit. The relationship between the landlord and tenant is not one of competition between themselves, but rather between retailers and owner/managers in competing shopping centres. Such is the nature of retailing. On the whole the Committee considers that even in a planned environment like the ACT, where availability of strip shopping is limited, retailing is not unlike retailing elsewhere in Australia. Retail space is traded like any other commodity and demand and supply conditions apply.

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[1] Based on data from the Canberra Retail Centres Inventory, National Capital Development Commission, June 1988 pp 1–15

1.17 There is a perception that there are relatively few major tenants for shopping centres; they are difficult to replace if they leave; and there are always new tenants willing to replace smaller businesses that fail. To some extent, centre managers can therefore be more selective in their choice of smaller tenants. This could then lead to differences in the terms and conditions offered to prospective tenants. The Committee recognised these perceived views when deliberating.

2. ISSUES RAISED

Introduction

2.1 Most of the tenant's submissions the Committee received were from small retailers in group and local centres. Submissions were received from traders in Civic, Aranda and Manuka, with few from the major shopping centres. One submission was received from a trader at the Westfield Shopping Centre (Belconnen Mall), two from former traders at the Woden Plaza and none from tenants at the Tuggeranong Hyperdome. There was no apparent trend in the other submissions the Committee received. The Committee did not receive any submissions from the larger more established stores.

2.2 On the basis of these submissions it appears that the problem is essentially – although by no means exclusively – one between smaller tenants and their landlords and exists mainly in local and group shopping centres. This reflects the experience in Victoria, for example, where about 95 percent of arbitrations to disputes are for local and group shops. The smaller the shopping centre or outlet seemingly the greater the need for mediation and/or arbitration. The problem is not as great in the larger shopping centres because they generally act to maximise competition. The Committee heard from the Westfield Group that the more competitive the retail environment the more customers will be drawn into the shopping centre and the greater the benefit for each retailer. In short, competition and returns appear to be closely linked.

2.3 The Committee considers that the majority of complaints received fell into two broad categories:

- complaints against centre management, and
- lease specific complaints.

The Westfield Group advised that complaints of the first type are "ongoing and fairly continual", and include matters likely to effect the day to day trade of retailers. An example would be the heating and cleaning of common areas. This view was supported by other submissions. Complaints of the second category are more substantive in that they are lease specific, being concerned with matters that go to the core of the tenancy relationship. The view of the Committee is that complaints of the first type are difficult to address by legislation but that various forms of legislation may be employed against the second group.

Rent

2.4 Rent was a major concern of some of those who provided submissions to the Committee. Concern was mainly expressed in terms of high rent levels and the incidence of rent reviews, particularly in shopping centre complexes. Mid term reviews were frequently cited as a source of grievance. Rent can be reviewed or escalated at agreed regular intervals. These include review to current market levels, by regular percentage increases, or they could be set as a percentage of turnover. Any combination of these three methods is possible.

2.5 Where market rent applies, rent payable is effectively set by the competing forces of demand and supply as reflected in the market place. If rent is disputed then the level of rent to be paid is determined by a qualified member of the Australian Institute of Valuers and Land Administrators with reference to market level rents. The Institute contends that comparable market evidence is a matter of fact and is indisputable as proper evidence. The Committee was however also told that market rents could be artificially inflated by agreement between the landlord and some tenants.

2.6 Percentage rent is applied in cases where rent is reviewed by a pre–agreed percentage or by reference to the Consumer Price Index or some other index. The Committee was advised that percentage increase review is less common today because of past experience where it led to rent levels well in excess of market levels. The consequence has been a trend back towards market rent reviews.

2.7 Turnover rent reflects the ability of the tenant to pay. It also reflects fluctuations in trading activity, loss of pedestrian traffic or increased competition resulting from a variation to the tenant mix. Under this particular system rent either increases or decreases in line with movements in turnover. However, there was no evidence to suggest that rents were ever reviewed downwards.

2.8 The Committee heard that some tenants are particularly aggrieved with changes in rent levels which exceed movements in the Consumer Price Index or the capacity of retailers to pay as reflected in the turnover of a business.

Forced Relocation and Renovation

2.9 Retail premises are usually redeveloped for economic reasons or to overcome many types of obsolescence. Ultimately relocation of tenancies as a consequence of redevelopment or upgrading is one attempt by the owner to re–establish market share of the shopping complex and consequently improve the performance of tenants. In respect of renovation, CARTA has submitted that management often seeks to enforce a common standard on all tenants and that the costs involved represent a financial loss for tenants. It was also stated that the benefits of improvements of a capital nature are long term and benefit the landlord more then they do the tenant. The Committee is concerned about the suggestion that tenants are required to pay for improvements or renovations of a capital nature as a precondition to their lease being renewed.

Outgoings

2.10 A number of tenants expressed misgivings about the payment of outgoings. These are the occupancy costs which tenants pay in addition to base rent. They include items such as promotion levies, air conditioning costs, maintenance levies and other centre management costs. CARTA stated that these charges are excessive and can add as much as twenty per cent to the base rental payment. It was also claimed that while outgoings were paid, services were often not provided and there were cases of non receipt of audited statements of outgoings.

Disclosure Statements

2.11 Some tenants also advised the Committee that disputes often arose when landlords did not comply with verbal agreements given prior to the signing of a lease. There were also occasions when landlords gave no indication of plans to make changes which could have affected the tenant's decision to accept or renew the lease. However, it was argued that landlords did not always know what was in the future or that they should be obliged to share their future plans with the tenants.

Renewal of Leases

2.12 Some tenants feel that there is a need for security of tenure to preserve the value of their business. This matter involves the question of retailers livelihoods and the resale value of their businesses. It necessitates consideration of the term of the lease and whether or not there should be a right of renewal. This must, however, be balanced against the landlord's right to conduct their business.

2.13 A number of witnesses suggested that there should be a minimum equitable initial term of the lease of sufficient duration to allow the tenants to amortise their capital investment. While the Committee received advice from several sources that this period should be five (5) years, it also accepted that for some tenants a shorter term would be more appropriate.

Small Business Management Training

2.14 The Committee was told of a need for small business management training. It appeared to the Committee that while many options in this area are available there should be continuing involvement from principal industry associations acting on behalf of tenants encouraging member participation.

Legal and Financial Representation

2.15 The Committee was told that there were occasions where tenants were being ill advised by their legal and financial advisors. The Committee encourages organisations representing these professions to assist in improving the service they provide to their clients. However, the Committee also encourages tenants to recognise their responsibilities and have greater involvement before signing any documentation; tenant organisations also have a role in assisting their members in this matter.

Standard Leases

2.16 The Retail Tenancy Act in Victoria encourages the use of a standard lease. The Committee was also told that the standard business lease which is in use in New South Wales has proven to be useful in smaller commercial tenancies and therefore suggests further consideration of this issue would be appropriate during the negotiations between both parties.

3. LEGISLATIVE ARRANGEMENTS

Introduction

3.1 Legislation to regulate retail and/or commercial leases has been enacted in Queensland, Western Australia, South Australia and Victoria. Neither the Northern Territory nor Tasmania have such legislation. In New South Wales BOMA and RTA have agreed on a Code of Conduct and are currently awaiting its passage through the New South Wales Parliament. The Code will be supported by an amendment to the New South Wales Fair Trading Act 1987. Details of each States' legislative arrangements is shown in Appendix 3.

Victoria and New South Wales

3.2 The Committee travelled to Victoria and New South Wales in November 1989 to meet with representatives of government and landlord and tenant groups, to ascertain their experience with and perceptions of the various regulatory measures in these States. These States were chosen because of their proximity to the ACT and the need to compare the situation between States where there is legislation and where there is none. The approach of these States represent two of the three options available to the Committee – detailed tenancies legislation as exists in Victoria (Retail Tenancies Act 1986) or a Code of Conduct along the lines of New South Wales. The third option is no regulation.

3.3 The Victorian Act provides for arbitration but not mediation. Arbitration is by panel in respect of all matters except rent. Where a rental dispute occurs it is arbitrated by a valuer appointed by the Real Estate Institute of Victoria. In reality, however, most disputes involving rent tend to involve other matters as well, and so qualify for arbitration by panel. The Valuer also has the opportunity to mediate disputes but this is more implicit than explicit.

3.4 The Victorian Government strongly supports the regulation of the commercial tenancy relationship by legislation. During its visit to Melbourne the Committee was advised that the retail base in Melbourne is so broad that it tends to mitigate against a Code. Although there is also a broad retail base in New South Wales there has been a move towards co–regulation. It appears that the approach in each State arose out of different expectations within each State.

3.5 The NSW Code is somewhat akin to voluntary self–regulation but differs in that it exists within the ambit of fair trading legislation. The Committee was advised that the Code offers two particularly attractive benefits over detailed legislation:

- it helps identify the self regulatory schemes that the Government should support and encourage; and

- it provides a pointer to what should be made a mandatory requirement of all participants in a particular market.

3.6 The Committee was told that business regulation of this sort attracts a natural commitment and because of its commercial good sense, achieves widespread compliance and support. There is no over reliance on expensive administration. The Committee was also told that the Code is couched in a language and content to which both parties agreed. In addition, it complements the law, provides for mediation and arbitration and is cost effective. It was argued that it is a flexible and adaptable agreement.

ACT Draft Business Lease Review Ordinance

3.7 The Committee's terms of reference required it to examine the 1984 draft Business Leases Review Ordinance. The Ordinance provided for the establishment of a Review Board to exercise control over certain aspects of the leasing of business premises in the ACT. The Board was to comprise a Chairman, a person practising in the ACT as a barrister and/or solicitor, and a member who is a qualified accountant or a valuer. Each member was to be appointed by the Minister for a period not exceeding three years and would be eligible for reappointment.

3.8 The draft Ordinance empowered the Board to determine a fair rent where a dispute existed, determine operating costs which were specified in the lease and to vary and set lease clauses and conditions. In addition the proposed Board had the power to determine compensation for improvements and loss of use and enjoyment on lease termination, certify improvements as proper improvements which the lessee would have a right to carry out, transfer leases from one lessee to another, and impose penalties for various offences. The Ordinance also provided for disputes which could be resolved by the Review Board to be reviewed by the Administrative Appeals Tribunal.

3.9 Despite the general level of interest in the recommendations of the 1984 report, no action was taken to implement the recommendations of the report and the matter lapsed. The Committee heard from the ACT Government witnesses that this was in large partly due to the perception at the time that the report was weighted in favour of tenant interests.

3.10 The draft Ordinance elicited a mixed response from the various parties who approached the Committee. CARTA submitted that the draft Ordinance addressed many of their concerns, namely the provision for rent determination by a statutory body created by legislation rather than reliance on valuers, but that certain matters relating to the determination of rental value were not to their liking. The SCTA/RTA similarly praised the draft Ordinance and in particular welcomed the provision for compensation for retailers in some situations and the power of the Board to set aside a lease condition which was unfair, harsh, or unconscionable. These views were not shared by BOMA and others who submitted that the Ordinance was onerous and brought into question basic fundamental rights in respect of the ownership of property.

ACT Regulatory Requirements

3.11 CARTA favoured detailed tenancy legislation to overcome an alleged imbalance of market power which favoured the landlord in the ACT. The Association also commented on the existence of certain irreconcilable differences between the parties and doubted that a mutually acceptable code of practice could ever be negotiated. While CARTA supported many of the provisions of the draft Ordinance 1984 it expressed concern about the "Refusal of Direction in Certain Cases Section" whereby lease renewal could be withheld in certain circumstances (eg. the proposed redevelopment of the premises). The Association's submission did not include a suggested legislative format.

3.12 The SCTA/RTA also supported calls for specific legislation. Their submission included very detailed provisions for possible legislation. These related to the definition of a tenancy, the negotiation of leases, lease documentation, lease terms, outgoings, assignment and subleasing, promotional levies, alteration to premises, relocation and demolition clauses, and the termination and renewal of leases. The draft legislation also mentioned the refurbishment of shops, the right of tenants to join a tenants association and general matters such as security deposits and key money or premium. Significantly, it did not mention the necessary machinery for a disputes settlement model nor the powers it should possess. It is assumed that the SCTA/RTA generally supported the original provisions of the draft Ordinance as they relate to the composition and powers of the Review Board.

3.13 The Residents Rally suggested that some form of legislation should be introduced to protect tenants. This legislation should address the issues of the right of the tenant to renew a lease, the right of a tenant to assign or sublease a premise, the method of fixing rent variations, the payment by the tenant for landlords outgoings in addition to rent and disclosure statements by landlords of retail shopping centres as well as those issues covered in the legislation existing in other States.

3.14 Implied in all these submissions which supported tenancy legislation was that this legislation will reduce the number of disputes between tenants and landlords. However, the Committee was told that the incidence of complaints in Victoria has increased since legislation was enacted in 1987.

3.15 Other submissions however opposed the need for legislation. For example, BOMA considered that the relationship between shopping centre lessors and lessees should be regulated only to the extent that there is clear evidence from the market that sufficient problems exist to warrant public expenditure on regulation. BOMA suggested that if such evidence was available they recommended three possible approaches to the introduction of regulation:

- informal mediation of disputes with legal redress available to either party;
- a Code of Practice which could be given the force of law; or
- a legislative framework for a disputes settlement procedure.

3.16 The Canberra Property Owners Association Limited also believed that neither the complaints of lessees nor the proposed legislation are relevant to most of the commercial tenancies in the ACT and therefore the introduction of legislation is totally unnecessary and would be counterproductive.

3.17 This view was also supported by the AIVLA. They considered that the free market system is adaptive and self–correcting and can adequately cope with demands placed upon it by both tenants and landlords. The majority of bankruptcies are not attributable to the "unfair practices of landlords" and are due to the lack of business ability, lack of sufficient initial working capital, economic conditions, personal reasons, excessive interest repayments, excessive drawings, inability to collect debts, seasonal fluctuations, speculation, failure to keep proper books and other business reasons. They therefore conclude that legislation is not necessary.

4. CONCLUSIONS

4.1 The Committee's view is that complaints and grievances in themselves do not represent examples of harsh and unconscionable practice. Fundamentally, the Committee rejects the notion that the Residents Rally's survey of about 30 tenants out of the 2,790 individual business premises in the ACT proves that the problem exists in the proportion it is claimed, or that the parties themselves are incapable of resolving problems. The Committee itself received only twenty–seven submissions from interested parties and took evidence from 35 witnesses. The Committee was told that some people were reluctant to appear before it because they believed such an appearance might adversely affect the future of their lease. This was despite the fact that they were protected by parliamentary privilege and the provisions for confidentiality of the inquiry were well publicised.

4.2 The various matters raised in submissions are perhaps more properly examples of individual grievances and complaints than they are "issues". They are not issues because the tenants never established that they exist on a scale and an intensity that might necessitate measures such as legislation. The Committee accepts that there is a requirement for reform, and found that the landlords also want and accept this. The Committee concludes that the need for detailed tenancy legislation, while believed essential by some, is not justified on the basis of the evidence received by the Inquiry.

4.3 To the extent problems do occur, the Committee found that there is a need for a disputes settlement mechanism. This can best be achieved by the twin processes of mediation and arbitration. The best practical solution appears to be the development of a model based on the New South Wales Code of Conduct. That Code provides for the existence of clear procedures for the settlement of disputes and standards for the behaviour of the industry. Among the various options the Committee considered, the Code is unique in that it is acceptable to the parties because it is something they formulated themselves.

4.4 Accordingly the Committee recommends that:

the relevant Minister invite the principle industry associations acting on behalf of the landlord and tenant groups to enter into negotiations to formulate a Code of Practice relating to tenancies, including an appropriate dispute settlement mechanism.

4.5 It is the Committee's view that this Code should be supported by Fair Trading legislation. At present no such legislation exists in the ACT. The New South Wales Act and the Commonwealth Trade Practices Act provide good models for the legislation. The Commonwealth Trade Practices Act for instance not only prohibits misleading deceptive and fraudulent commercial conduct but also includes remedies for conduct that are so unfair that it is "unconscionable". The application of this general term is guided by statutory criteria which relate to the manner in which goods and services are traded. The Committee also considers that the Fair Trading Legislation should not only deal with tenancy agreements but also include aspects relating to the relationship between retailers and their customers.

4.6 Accordingly the Committee recommends that:

Fair Trading Legislation be enacted to support the Code of Practice.

4.7 The Committee acknowledges that there may be difficulties in developing a Code within a reasonable time. This is not only because of the reluctance of some parties but also because retailers in the ACT do not have an association which covers the majority of tenants. It is the Committee's view that CARTA should be encouraged to expand its membership to a greater diversity of tenants. However if general agreement cannot be reached on a Code within six months of the tabling of this report, the Government itself should prepare a Code for discussion within the industry.

4.8 **The Committee recommends that:**

if general agreement on a Code of Practice cannot be reached within six months of tabling this report the Government should prepare a Code for discussion within the industry.

4.9 The Committee does not propose to provide detailed recommendations on the matters which should be included in the Code. This would pre-empt the discussions which will take place on what is hoped will be a mutually acceptable agreement between landlords and tenants. The Committee would suggest, however, that the Code should address matters such as:

- an appropriate disputes settlement mechanism
- rent review
- compensation for relocation
- outgoings
- minimum lease terms with the option for renewal
- standard leases
- disclosure statements

4.10 While the Committee firmly believes that a lease should be available to tenants prior to occupancy, it is clearly the responsibility of both parties to ensure that this takes place.

4.11 The Committee concludes that there are definite limits to legislative controls. These include rents and the basic rights in connection with the ownership of property. The Committee doubts that prescriptive legislation could ever restore a relationship that has reached the point where irreconcilable differences exist. The Committee believes however that its proposals, if implemented, will enable a dual system of mediation and arbitration which will assist the landlords and tenants to reconcile differences.

ROBYN NOLAN, MLA
CHAIRMAN

FEBRUARY 1990

APPENDIX 1

LIST OF WITNESSES

Adrian, Dr. Colin	First Assistant Secretary, Commerce and Industry Division, Office of Industry and Development.
Barda, Peter	National Director, Building Owners and Managers Association.
Barlin, Brian Kenneth	Private Citizen.
Bradford, John Walter	National Director, Shopping Centre Tenants Association of Australia Pty. Ltd.
Carnell, Kate	President, Pharmacy Guild (ACT Branch).
Cummins, Maurice	Consultant, MacPhillamy, Cummins and Gibson, Solicitors.
Dickson, James Richard	Director, Australian Society of Accountants (ACT Division).
Donohue, Chris	President, Residents Rally for Canberra.
Grace, Elizabeth	Secretary, Commercial and Retail Tenants Association (CARTA).
Hodge, Eric	Director, Commercial Policy, Commerce and Industry Division, Office of Industry and Development.
Howarth, Braven	Pharmacy Guild (ACT Division).
Livingstone, Bruce	Executive Director, Motor Trades Association, ACT Limited.
Lowy, David	Managing Director, Westfield Holdings Limited.
McFadden, John	Vice–President, Building Owners and Managers Association (ACT Division).
Newton, Ian Edward William	General Manager, Leasing, Westfield Group.
Nugent, Peter Martin	Commercial and Retail Tenants Association (CARTA).
Rabey, Ronald	Councillor, Canberra Chamber of Commerce.
Roberts, Lindsay Russell	Vice–President, Building Owners and Managers Association (ACT Division)
Rowell, Bill	Executive Director, Canberra Chamber of Commerce.
Springer, Peter Laurence	President, Australian Institute of Valuers and Land Administrators.
Steiner, Daniel	General Manager, Commercial Research Bureau, Office of Industry and Development.
Triming, Brian George	Committee Member, Commercial and Retail Tenants Association (CARTA).
Triming, John	Committee Member, Commercial and Retail Tenants Association.
Walker, Ray	Private Citizen.

In addition, a further eleven witnesses appeared before the Committee during private hearings.

APPENDIX 2

LIST OF SUBMISSIONS

Abels Records, Manuka.

ACT Labor Government

Australian Institute of Valuers and Land Administrators, ACT Division (AIVLA).

Australian Society of Accountants, ACT Division.

Barlin, Brian.

Building Owners and Managers Association (BOMA).

Canberra Chamber of Commerce.

Canberra Property Owners Association Limited (CPA).

Commercial and Retail Tenants Association (2) (CARTA).

The Law Society of the Australian Capital Territory.

MacPhillamy, Cummins and Gibson, Solicitors, ACT.

Motor Trades Association of the ACT.

Pharmacy Guild, ACT Branch.

Residents Rally for Canberra (2).

Shopping Centre Tenants Association of Australia and the Retail Traders Association of New South Wales. (joint submission) (SCTA/RTA).

Trade Practices Commission.

Walker, Ray

Westfield Group.

In addition, the Committee received a further seven submissions in–confidence.

APPENDIX 3

STATE LEGISLATION

Queensland

The Queensland Retail Shop Leases Act, 1984 refers to premises for specified businesses or those situated in a retail shopping centre and extends to "retail shop leases" which are defined to be leases that provide for the tenancy of a retail shop other than a tenancy:

(a) that is of a retail shop with a floor area that exceeds 1,000 square metres, and

(b) that is held by a corporation within the meaning of the Companies (Queensland) Code, which would not be eligible to be incorporated in Queensland as a proprietary company, or that is held by a subsidiary such as a corporation.

The legislation provides for a two-tired system for the determination of disputes between lessors and lessees. The first level comprises the Retail Shop Leases Mediation Panel and the second level comprises the Retail Shop Leases Tribunal. In practice, only one mediator has been appointed. Initially disputes are heard by the Mediation Panel. Disputes which cannot be resolved by mediation are referred to the Tribunal. The Tribunal comprises a Chairman who is a District Court Judge, one member representing lessors and one member representing lessees. The Tribunal is appointed by the Queensland Governor in Council.

Neither the Mediation Panel nor the Tribunal has jurisdiction over any dispute concerning areas of rent or the amount of rent payable. The Tribunal only has jurisdiction in determining disputes that relate to the prohibited or implied conditions dealt with in the Act. Unless a lease provides for a determination of market rent by a named person, or a person appointed by a named organisation, rent review disputes are to be resolved by arbitration. A "specialist retail valuer" engaged as an expert can determine disputes on market rent review. The legislation also describes covenants to be included in leases and nominates prohibited payments to the lessor.

The Act gives a minimum five year occupancy for the first lease for a retail shop. It also provides for compensation payments in certain circumstances to rents.

Western Australia

In Western Australia Commercial Tenancy (Retail Shops) Agreements Act, 1985 the definition of a "retail shop lease" is similar to that of Queensland. The Commercial Tribunal Act 1984 provides for a Commercial Registrar who may hear any question arising between parties to a retail lease, with a view to attaining a solution. The Commercial Tenancy (Retail Shops) Agreements Act 1985 states that where appropriate the Registrar may refer matters to the Tribunal which is established under the Commercial Tribunal Act 1984. The Tribunal, which is appointed by the Minister, comprises a panel of persons representing the interests of lessors and lessees.

If the amount is disputed the matter shall first be referred to a licensed valuer. Each party may nominate a valuer if they wish. If agreement is not reached the question is referred to the registrar. The legislation gives tenants the right to at least five years tenancy. It also provides for compensation payments to tenants in certain circumstances.

South Australia

The Statutes Amendment (Commercial Tenancies) Act 1985 provides for the establishment of a Commercial Tenancies Tribunal to determine lease disputes. The Commercial Tribunal comprises a Chairman, and two members, each representing the interests of lessors and lessees. The Tribunal has exclusive jurisdiction over any claim in respect of a commercial or retail tenancy agreement. However where proceedings involve a monetary claim exceeding five thousand dollars, the Tribunal has the power to order that the proceedings be removed to a court.

The South Australian legislation does not specify duration of initial or subsequent lease, or provision of compensation payments to tenants.

Victoria

The Retail Tenancies Act 1986 provides for commercial arbitration to resolve disputes between landlords and tenants. The Tribunal comprises a panel of arbitrators with expertise in retail leasing appointed by the Governor in Council for a term not exceeding five years.

The Tribunal has jurisdiction to hear any dispute under a retail tenancy or any disputes in relation to rights and duties under the Retail Tenancies Act 1986. Disputes over rent review or a claim by the landlord for the payment of rent, however are referred to arbitration. Arbitration is conducted in accordance with the Victorian Commercial Arbitration Act 1984 and to the extent provided by the Act, an arbitrator who is a registered valuer may act as a conciliator.

The cost of dispute settlement at both levels is borne by the disputing parties. The legislation is intended to encourage the use of standard leases whenever possible.

The Victorian Retail Tenancies Act gives a minimum five year term to a tenant entering his first retail premises lease. It also provides for compensation payments in certain circumstances to tenants.

New South Wales

A Code of Practice, known as a Code of Conduct in New South Wales, has been devised to provide guidelines for the conduct of owners, managers and retailers and for the settlement of disputes between them. It retains the status of mandatory obligation and legal sanctions for breach but offers opportunity for day–to–day administration away from the exclusive control of the public sector. The Code is prescribed in accordance with Section 74 of the New South Wales Fair Trading Act 1987. The Code of Conduct was agreed to by BOMA and RTA in November 1989 and is awaiting passage through the New South Wales Parliament.

The Code provides for mediation through a panel comprising members of landlord and tenant groups and for a separate system of arbitration. In New South Wales, mediation will be undertaken by the industry with arbitration being the responsibility of the government. Where arbitration occurs both parties pay their own costs. The Government of New South Wales will shortly begin a campaign to educate landlords and tenants of what the Code involves and provides for. The campaign will be designed to increase basic awareness of the various avenues available to the parties to a dispute.

ADDITIONAL COMMENTS – NORM JENSEN

INTRODUCTION

It was not considered appropriate to submit a formal dissenting report as I fully participated in the process by which the report was agreed to by the Committee.

However, the following are additional comments on paragraphs where I considered that the report was not strong enough or the Committee was unable to come to a total agreement over the form of words to be used.

SPECIFIC COMMENTS

Paragraph 1.17

There is also a degree of imbalance in the way in which landlords treat major tenants (eg chains, banks and insurance companies) as oppossed to smaller tenants. The latter are normally available in reasonable numbers and any vacancy caused by business failure (a not uncommon occurence) is normally filled. This is often at some continuing cost to the failed business.

Major tenants who are sought by building owners and managers for a new or redeveloped centre, are often given rent and other incentives to come to a centre. While it is accepted that such tenants are needed to provide passing traffic for the small retailer, the balance is definitely not towards small retailers who do not have the same bargaining power because of the many hopefuls waiting to take their place. For example major tenants only pay their own legal costs while leases for smaller tenants require them to pay legal costs for the landlord. This attitude of "I am doing you a favour by letting you enter my centre", or "take it or leave it" when dealing with the small businessman or women, is not conducive to healthy relations between landlord and tenant.

Paragraph 2.11

The Committee also heard a counter argument that landlords do not always know what is in the future or do not consider that the tenant needs to know what changes the landlord may have in mind. While acknowledging that the first situation does occur, I do not accept the latter argument. The tenant has a right to know what the landlord is planning for a centre before making a final decision to sign a lease. The requirement for a disclosure statement is part of the Victorian legislation and the Code of Conduct in NSW. I strongly support the inclusion of disclosure statements in the Code of Practice proposed by the ACT.

Paragraph 2.13

On balance a five year initial lease term is supported. The availability of a lease which provides for initial shorter term with an option to renew the lease to meet a five year lease term is also supported. However, tenants should not be forced into a lease of less than five years unless both parties agree.

Paragraph 4.1

While acknowledging that the survey of 30 tenants and of the 2,790 individual business premises in the ACT does not indicate a problem of plague proportions, I was sufficiently concerned by the issues raised to sponsor the motion before the Assembly to establish the Select Committee. However, I was made aware during the inquiry that considerable distrust had built up between some small retailers and building owners and managers. It is now important for both parties to work together to change this attitude in the best interest of the tenants, the building owners and managers and consumers

I am also still concerned that the reason why more tenants did not come forward to Committee was because of a concern for the future of their leases. Rightly or wrongly many small businesses owners have their total assets tied up in their business and it takes great courage to run the risk of losing that. It is unfortunate that the wall of distrust that has built up between both sides has lead to this situation. Notwithstanding this it is also acknowledged that there are also faults on the side of the small retailer. Many of these are as a result of failure to heed advice from solicitors and accountants or a desire to be ones own boss at any costs. It is very difficult or even impossible to legislate to protect some people from themselves. However, I remain concerned that the relationships between some landlords and tenants had deteriorated to such an extent that some tenants may not have been prepared to appear before the Committee because of concerns for their future . It seems that considerable bridge building is required.

Paragraph 4.7

While acknowledging that because of this situation some tenants are concerned about the difficulty in negotiating a Code of Practice, the NSW experience shows that it can be done provided both sides have the will. It is important that the tenants groups develop a strong negotiating team and wide membership base to develop a reasonable and workable code of practice. I am committed to ensuring that when this agreement is reached that supporting legislation by way of fair trading legislation will be introduced. The building owners and managers and the tenants must play a key role in developing this legislation.

Conclusion

There was insufficient evidence to support the need for that sort of prescriptive legislation recommended by those representing the interests of the tenants. However, there was clearly a need for some form of regulation despite statements to the contrary from the various representatives of the building owners and managers.

It is to be hoped that what has been recommended by the Committee will now be taken up by all parties with a view to finding a way to ensure that some of the undesirable practices that have been allowed to develop in ACT are removed. Only when good working relationships is developed between both landlords and tenants will this issue be resolved. Failure to take on this problem in a spirit of cooperation will result in effects that are not in the best interests of landlords, tenants and consumers.

NORM JENSEN

February 1990