THE RETAIL TENANCIES LEGISLATION: STAGE TWO IN THE LANDLORD-TENANT LAW REFORM SAGA

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In Victoria, landlord-tenant law reform has been on the political agenda since 1974. It was in that year that the Commonwealth Commission of Inquiry into Poverty published the first of its three reports on landlord-tenant law.[1] The three reports recommended the creation of a new, codified set of laws relevant to residential tenancies on the basis that it was inappropriate to apply the same common law landlord and tenant rules to residential as well as commercial leases. Specifically, the Poverty Inquiry recommended substantial modifications to the laws relating to the application of contractual principles to landlord-tenant law, repairs, security deposits, excessive rents, discrimination against families with children, quiet enjoyment, the termination of tenancy agreements and the recovery of possession. The Inquiry also recommended the establishment in each State of a new Tribunal with exclusive jurisdiction to hear and determine disputes relating to residential tenancy agreements. The majority of these recommendations were eventually adopted in the *Residential Tenancies Act* 1980 (Vic.), and in all other States[2] except Tasmania,[3] but not before the establishment and later reports of an Interdepartmental Working Party in 1976[4] and the Community Committee on Tenancy Law Reform in 1978,[5] and many political manoeuverings.[6]

The introduction of the residential tenancies legislation marked the completion of stage one of the landlord-tenant law reform saga. No sooner was this reform achieved, but moves were started to introduce reforms favour-

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1 Bradbrook, A.J., "Poverty and the Residential Landlord-Tenant Relationship", Interim Report, Melbourne, 1984; Bradbrook, A.J., *Poverty and the Residential Landlord-Tenant Relationship*, A.G.P.S., Canberra, 1975; Sackville, R., *Law and Poverty in Australia*, A.G.P.S., Canberra, 1975, Ch. 3.

2 See *Residential Tenancies Act* 1987 (N.S.W.); *Residential Tenancies Act* 1975 (Qld); *Residential Tenancies Act* 1978 (S.A.); *Residential Tenancies Act* 1987 (W.A.).

3 This was despite a recommendation by the Law Reform Commission of Tasmania that such legislation is required: *Tas. L.R.C.*, Report No.19 (1978). This report is discussed by Bradbrook, A.J., "Residential Landlord-Tenant Law Reform in Tasmania" (1978) 6 *U.Tas.L.Rev*, 83.

4 This report was never released publicly.

5 Community Committee on Tenancy Law Reform, *Reforming Victoria's Tenancy Laws*, Victorian Council of Social Service, Melbourne, 1978.

6 For an exhaustive discussion of the process of achieving reform, see Sackville, R., "Residential Tenancies Reform in Victoria: A Study of a Consultation", in *Consultation and Government*, Victorian Council of Social Service, Melbourne, 1981, 71-146.

ing tenants who did not fall within the scope of the *Residential Tenancies Act*. One push for reform occurred in relation to boarders and lodgers.[7] The Cain Labor government has committed itself to the need for special legislation in this area, but to date no Bill has been introduced into the Victorian legislature. Another push for reform occurred in relation to retail tenancies. This was more successful and led to the enactment of the *Retail Tenancies Act* 1986. This legislation marks stage two in the landlord-tenant law reform saga.

The purpose of this article is to explain the background to the *Retail Tenancies Act*, the significance of the reforms achieved by the Act, and to plot the future course for further landlord-tenant law reforms. Although the article is primarily related to the Victorian legislation, it has considerable significance for readers in other States for two reasons: first, the *Retail Tenancies Act* 1986 (Vic.) is in many respects uniform with similar legislation introduced earlier in Queensland, South Australia and Western Australia;[8] and secondly, as the developments over the past fifteen years have shown, the political processes in the various States involved in the move towards comprehensive and wide-ranging landlord-tenant law reform have followed a similar pattern in the past and are likely to continue to do so in the future.

BACKGROUND TO THE LEGISLATION

The *Retail Tenancies Act* 1986 (Vic.) (hereafter referred to as "the Act") had a gestation period which was almost as long as the *Residential Tenancies Act* 1980. Following the enactment of the 1980 legislation, the argument was advanced by traders in retail shopping centres that many of the reforms protecting residential tenants were equally appropriate for the protection of small businesses. Particular attention was focused on the inequality of bargaining power between the owners of retail shopping centres and small retail premises tenants and the resulting onerous conditions commonly found at that time in the lease forms. This theme, and numerous inequities, were revealed by a study of the Victorian Small Business Development Corporation, which was submitted to the government in October 1982.[9] The Corporation made the following recommendations: a Retail Tenancies Act, to be separate from the *Residential Tenancies Act* or any other Act, should be formulated; a Tribunal should be established to hear disputes; rent review

[7] The need for reform in this area was first advanced in 1978 by the Community Committee on Tenancy Law Reform, on cit. Note that legislation protecting long-term occupants of caravan parks has recently been enacted in Victoria in the *Caravan Parks and Movable Dwellings Act* 1988.

[8] *Retail Shop Leases Act* 1984 (Qld); *Statutes Amendment (Commercial Tenancies) Act* 1985 (S.A.) (which adds a new Part IV of the *Landlord and Tenant Act* 1936 (S.A.)); and *Commercial Tenancy (Retail Shops) Agreements Act* 1985 (W.A.). The relevant provisions of these Acts will be cited in footnotes throughout this article.

[9] Small Business Development Corporation, *Report and Recommendation on a Fair "Standard Lease"*, Melbourne, 1981.

disputes should be settled by recourse to the Valuer General's Department; and a pro forma retail tenancies lease, disclosure statement and option agreement for an offer period of seven days prior to execution of the lease should be attached as schedules to the Act.

This study induced the government to appoint a Retail Tenancies Advisory Committee in September 1983 to advise on the need for legislation. In recognition of the impact that any retail tenancies legislation would have on the retail industry as a whole and the need to ensure the viability of any such legislation, the Minister created a large Committee of fifteen persons in order to ensure a full and balanced representation of the various interests.[10] The terms of reference of the Committee were stated widely to include the generality of the law relating to retail tenancies, and specifically, statements made by either party prior to the signing of a lease, the basis for initial rents and reviews, the need for a cheap and rapid dispute-settling mechanism, the tenure of leases, options and lease renegotiation, security deposits and bonds, the disclosure of turnover details and the inclusion of goodwill in lease rentals.[11]

The Committee issued its report in February 1984, which advocated the introduction of a *Retail Tenancies Act*. The Committee made numerous recommendations as to the contents of the proposed legislation. The most significant proposals were as follows:[12]

(i) A Retail Tenancies Tribunal should be established with exclusive jurisdiction to conciliate upon and determine any dispute arising under a lease of retail premises.

(ii) At least three clear working days prior to the signing of any retail tenancies lease, the landlord should supply to the tenant a disclosure statement, setting out in summary details of the lease, including an estimate of all the financial obligations and costs that will be incurred by the tenant pursuant to the lease terms, together with all the material statements made by either party in negotiating the terms and conditions of the lease.

(iii) A tenant should have the benefit of a "cooling off" period of seven days prior to signing the lease.

(iv) The tenant's right to assign or sublet the lease should only be restricted by the landlord in certain limited circumstances.

(v) No portion of goodwill received by the tenant on the assignment of a lease should be payable to the landlord.

[10] The Committee, which was chaired by the Hon. Michael Arnold, M.L.C., Member for Templestowe Province, consisted of representatives of the Building Owners and Managers Association of Australia Ltd. (Victorian Division), Shop Distributive and Allied Employees Association (Victoria) Branch, Law Institute of Victoria, Ministry of Planning and Environment, Institute of Valuers, Victorian Chamber of Commerce and Industry, Real Estate Institute of Victoria, Ministry of Consumer Affairs, Retail Traders Association of Victoria, Small Business Development Corporation, and the Department of Industry, Commerce and Technology, plus one small business tenant.

[11] *Report of the Retail Tenancies Advisory Committee*, Melbourne, 1984, 4.

[12] Id. p.16-19.

(vi) Non-returnable bonds or key money should be prohibited.

(vii) A security deposit of not more than three months' net rental (excluding outgoings) may be required to be paid in advance, provided that such deposits are held in an interest-bearing trust account for the benefit of the party entitled to the proceeds of the deposit.

(viii) The automatic application of changes in the Consumer Price Index as a method of variation or review of rental should be prohibited.

(ix) In the event of a failure by the parties to agree on a rental, the appointment of an arbitrator for the determination of rental pursuant to the terms of the lease should not be prescribed.

(x) Certain practices should be proscribed in retail tenancies, and certain rights of tenants should be implied if they are not specifically provided for in the lease. The landlord and tenant should not be able to contract out of any provision of the Act.

The Committee recommended against the implementation of legislation for a "fair standard lease" on the basis that such a lease would be very difficult to draft, if it were to cover the whole range of retail situations, and would be difficult and costly to apply. The Committee noted that such a lease had not been attempted in other jurisdictions which had already enacted retail tenancies legislation.[13]

Following the receipt of the Committee's report, the government sought further public responses, and in August 1984 established another consultative committee, under the same Chairperson as the earlier committee, for the purpose of determining which aspects of the earlier report should be implemented and the best method of achieving reform.[14] This process was stated by the Minister for Industry, Technology and Resources to be in line with the government's policy of doing everything possible in the preparation of the legislation to ensure that the largest possible measure of agreement between all those in the retail industry was attained.[15] This ultimately led to the introduction of the initial Retail Tenancies Bill into the House of Assembly on 7 May 1986. This Bill incorporated the majority (but not all) of the earlier Committee's recommendations. Because of political controversy, debate on the Bill was adjourned until the spring sessions of the legislature to enable further consultations to take place with interested organisations and individuals. Following the government's decision to make significant changes to the existing Bill, the Retail Tenancies Bill (No.2) was introduced into the House of Assembly on 23 October 1986. This Bill became the *Retail Tenancies Act* 1986, which was assented to on 16 December 1986 and was proclaimed to commence on 21 September 1987. The *Retail Tenancies Regulations* 1987, made pursuant to this Act, came into operation on the same date.[16] The Act has continued in effect to the present day, subject to certain minor amendments effected by the *Retail Tenancies (Amendment) Act* 1988, which was assented to and proclaimed in effect on 27 April 1988.

[13] Id. p.6-7.
[14] *House of Assembly Debates*, 8 May 1986, 1959.
[15] *House of Assembly Debates*, 23 October 1986, 1512.
[16] S.R. No. 245, 1987.

THE RETAIL TENANCIES LEGISLATION[17]

The Act contains 26 sections, which can be conveniently discussed and criticised under the following headings:

1. PREMISES SUBJECT TO THE ACT

It is only premises which constitute "retail premises" which are within the scope of the Act. "Retail premises" is defined in s.3(1) as meaning:[18]

> "any premises that under the terms of the lease relating to them are used, or are to be used, wholly or predominantly for the carrying on of a business involving the sale or hire of goods by retail or the retail provision of services, but does not include—
>
> (a) premises that have a floor area that exceeds 1000 square metres; or
> (b) premises that are used wholly or predominantly for the carrying on of a business by the tenant under a name or mark identifying, commonly associated with, or controlled by the landlord or a person or corporation within the meaning of the *Companies (Victoria) Code* connected with the landlord; or
> (c) premises that are used wholly or predominantly for the carrying on of a business by the tenant on behalf of the landlord as an employee or agent of the landlord; or
> (d) premises the lease relating to which is held as a tenant by—
> (i) a corporation within the meaning of the *Companies (Victoria) Code* that would not be eligible to be incorporated in Victoria as a proprietary company; or
> (ii) a subsidiary of a corporation referred to in sub-paragraph (i); or
> (e) exempt premises."

The word "retail" is not defined in the Act. At common law, the natural meaning of "retail" has been said to involve "sale and delivery", although it is accepted that on occasion a retailer may enter into executory contracts to sell.[19] The traditional distinction between retail and wholesale trading is well established in case law.[20] This distinction was emphasised by Turner, J. of the Supreme Court of New Zealand in ***Bateman Television Ltd.*** v. ***Coleridge Finance Co. Ltd.***, who stated that to his mind "retail" necessarily involves the notion of sale to members of the public.[21]

The extension of the definition of "retail premises" in s.3(1) to include "the retail provision of services" appears to extend the scope of the legislation

[17] The Victorian legislation is also discussed in Redfern, M., "The Victorian Retail Tenancies Act" (1988) 62 L.I.J. 37; Paine, C., "Reviving the Recycled Retail Tenancies Restrictions" (1987) 61 L.I.J. 456; Paine, C., "Advanced Conveyancing and Property Law — Retail Tenancies Act 1986", B.L.E.C. Seminar Paper, May 1987. The first Bill was discussed by Paine, C., "The Retail Tenancies Bill 1986" (1986) 60 L.I.J. 826; Bradbrook, A.J., "The New Era of Tenancy Protection" (1987) 61 A.L.J. 593, 605-609.

[18] C.f. Qld., s.4(1) (definition of "retail shop"); W.A., s.3(1) (definition of "retail shop"); S.A., s.54 (definition of "shop premises").

[19] *Wright* v. *Edwards* (1961) S.A.S.R. 267, 282, *per* Napier, C.J.

[20] See, e.g. *Provident Life Assurance Co. Ltd.* v. *Official Assignee* [1963] N.Z.L.R. 961, 965, *per* North, P. and Turner, J.; *Plummer & Adams* v. *Needham* (1954) 56 W.A.L.R. 1, 15, *per* Virtue, J.

[21] [1969] N.Z.L.R. 794, 815, *per* Turner, J.

beyond the conventional understanding of retail premises to include, for example, solicitors' and accountants' offices, doctors' and dentists' surgeries, and government services, such as Australia Post. This extension did not form part of the recommendations of the Retail Tenancies Advisory Committee, and it may be wondered whether its full significance was appreciated by the legislature. Many of the justifications responsible for the establishment of the legislation do not extend to the protection of professional offices, and many of the Act's provisions (for example, relating to turnover) appear to be inappropriate and/or irrelevant in the case of the provision of services.[22]

Perhaps the most significant aspect of the definition of "retail premises" is the exclusion in para. (a) of premises with a floor area exceeding 1,000 square metres. This exclusion was not a part of the first Bill, which would have applied to all retail premises. The limitation was added in the second Bill out of recognition of the fact that large retail tenants do not suffer from inequality of bargaining power and do not need the statutory protection granted by the Act. A further reason was to provide uniformity with the legislation in Queensland and Western Australia.[23] The word "floor" does not make it clear whether open, unbuilt space areas, such as car parks, are to be included within the calculation of the total area. This issue has not yet been resolved, but it is submitted that the natural meaning of the word "floor" presupposes a closed building. This interpretation is supported by a dictum of Lord Kissen in *Sullivan* v. *Hall Russell & Co. Ltd.*[24] that "the normal and ordinary meaning of a floor is the lower surface of an enclosed space, such as a room or similar space".[25]

The "retail premises" must be subject to a "lease". "Lease" is defined in s.3(1) as meaning "a lease or sublease having a term of not less than one year and includes an agreement for such a lease or sublease".[26] Although s.3(1) is silent on this issue, s.8(1) makes it clear that leases may be either oral or written.[27] The exclusion of fixed term leases of less than one year

[22] McTiernan, J. stated in *Revesby Credit Union Cooperative, Ltd.* v. *Commissioner of Taxation* (1965) 112 C.L.R. 564, 578 that the rendering of services should consist of "the doing of an act for the benefit of another, which is more than the mere making of a contract and which goes beyond the performance of an obligation undertaken in the course of an ordinary commercial contract". For the meaning of "services", see also *Dwyer* v. *Hunter* [1951] N.Z.L.R. 177, 189-190, *per* Finlay, J.; *Re Oliver (deceased)* [1968] N.Z.L.R. 168, 170, *per* Tompkins, J.

[23] *House of Assembly Debates*, 23 October 1986, 1512. See Qld., s.4(1) (definition of "retail shop lease") and W.A. s.3(1) (definition of "retail shop lease").

[24] [1964] S.L.T. 192, 193.

[25] This dictum was cited with approval by Samuels, J.A. in *Leichhardt Municipal Council* v. *Daniel Callaghan Pty. Ltd.* (1983) 46 L.G.R.A. 29, 37. For further authorities on the meaning of "floor", see *Tate* v. *Swan Hunter & Wigham Richardson, Ltd.* [1958] 1 All E.R. 150, 152, *per* Denning, L.J.; *Pengelley* v. *Bell Punch Co. Ltd.* [1964] 2 All E.R. 945, 947, *per* Danckwerts and Diplock, L.J J.; *Harrison* v. *Metropolitan-Vickers Electrical Co. Ltd.* [1954] 1 All E.R. 404, 406, *per* Jenkins, L.J.

[26] C.f. Qld., s.4(1) ("lease" includes all fixed-term tenancies, periodic tenancies and tenancies at will); S.A., s.54 ("commercial tenancy agreement" includes all agreements under which a person is given a right to occupy, whether exclusively or otherwise, premises for the purpose of carrying on a business); W.A., s.3(l) ("lease" includes all fixed-term tenancies, periodic tenancies, tenancies at will and licences).

[27] See infra, n.42, and accompanying text.

also includes all types of periodic tenancies (except for yearly tenancies and tenancies with a recurring period in excess of one year), tenancies at will and tenancies at sufferance. Unlike the first draft Retail Tenancies Bill, which would have included within the meaning of "lease" any occupational licence, the Act incorporates the traditional common law requirement of a lease that the tenant must be granted exclusive possession.[28] It is difficult to understand the justification for restricting the definition of "lease", as the Act gives landlords the opportunity to avoid the legislation by creating short-term leases. This restriction is particularly strange as there is no similar restriction in the Queensland, South Australian and Western Australian legislation, with which the Victorian Act seeks uniformity.

The timing of the application of the Act is specified in s.4., Part 3 of the Act, relating to the determination of disputes by arbitration, applies to all disputes arising after the commencement of the section (21 September 1987), regardless of when the lease was entered into (s.4(2)). Parts 2 and 4 of the Act (relating to the rights and duties of the parties, and general provisions) do not apply where either the lease was entered into before 21 September 1987 (s.4(3)(a)) or the lease was entered into after 21 September 1987 under an option granted or agreement made before that date (s.4(3)(b)). Pursuant to s.4(1), the whole of the Act applies to a retail tenancies lease that is entered into after 21 September 1987 unless the lease is entered into under an option granted or agreement made before that date (s.4(1)).

Section 3(4) defines "entered into" as meaning:

(a) under the lease, the tenant enters into possession of the premises or begins to pay rent for them; or
(b) all of the parties to the lease have signed the lease — whichever first occurs".

Paragraph (b) of this definition is very broad and would cover a lease signed by the parties but which is not designed to take effect until some time in the future.

If a landlord is to avoid the application of the Act by relying on s.4(3)(b), it appears to be essential that the lease entered into under the option is in identical form to that allowed for in the option. If a different form is used, the lease will be classified as a new lease, which will be caught by s.4(1).[29] The extension of pre-21 September 1987 leases by way of deeds of variation would appear to be ineffective to avoid the application of the Act to the new term, as such extensions would amount to an agreement for a lease and be caught by the definition of "lease" in s.3(1).[30]

If the requirements in s.4(1)-(3) are satisfied by s.4(4), the Act applies to all retail premises leases in Victoria regardless of where the lease was entered

[28] *Radaich* v. *Smith* (1959) 101 C.L.R. 209; *Goldsworthy Mining Ltd.* v. *Federal Commissioner of Taxation* (1973) 128 C.L.R. 199; *I.C.I. Alkali (Aust.) Pty. Ltd. (In vol, lig.)* v. *Federal Commissioner of Taxation* (1977) V.R. 393; *General Discounts Pty. Ltd.* v. *Crosbie* [1968] Qd.R. 418; *Lapham* v. *Orange City Council* [1968] 2 N.S.W.R. 667.

[29] Redfern, op.cit. p.37.

[30] Ibid.

into and even though the lease purports to be governed by a law other than the law of Victoria.

Section 5 authorises the Governor-in-Council to exempt any class or type of premises from the operation of the Act by regulation, either conditionally or unconditionally, and either completely or to a limited extent.[31] To date, s.5 has not been exercised.

Section 6 states:

> "This Act binds the Crown, not only in right of the State of Victoria, but also, so far as the legislative power of the Parliament permits, the Crown in all its other capacities".[32]

Section 6 thus appears to include within the scope of the Act all leases of retail premises owned by State government departments and instrumentalities. If the State government department or instrumentality classes as part of the Crown in right of the State, it will be subject to the *Retail Tenancies Act* by virtue of s.6. If the department or instrumentality does not class as part of the Crown in right of the State, it will be subject to the Act by virtue of s.4(l) and the definition of "retail premises" in s.3(1). The Act also binds retail premises leased by Commonwealth government departments and instrumentalities based on the clear intention in s.10 that the Crown in right of the Commonwealth is to be bound,[33] and the fact that the State appears to have the necessary legislative power to bind the Commonwealth in this matter.[34]

2. EXPRESS DUTIES OF THE LANDLORD

(a) *To Give the Tenant a Disclosure Statement*

Except on a renewal or an assignment of a retail premises lease, the landlord is required by s.7 to give the tenant a disclosure statement at least seven days before entering into such a lease.[35] The Schedule to the Act contains the approved form of the statement, which s.7(3) states must be adhered to in all cases. The Schedule requires the disclosure statement to contain details as to the tenancy, the rent, the charges to be borne by the tenant, the shop-

[31] C.f. S.A., s.73, which vests power in the Commercial Tribunal to grant an exemption from all or any of the retail tenancies provisions.

[32] C.f. S.A., s.3b; W.A., s.5, both of which read "This Act binds the Crown". As there is no similar provision in Queensland, the Crown is not bound by the *Retail Shop Leases Act* 1984 (Qld.).

[33] *Province of Bombay* v. *Municipal Corporation of Bombay* [1947] A.C. 58, *Bradken Consolidated Ltd.* v. *The Broken Hill Proprietary Co. Ltd.* (1979) 145 C.L.R. 107; *Superannuation Fund Investment Trust* v. *Commissioner of Stamps (S.A.)* (1979) 53 A.L.J.R. 614.

[34] See *Commonwealth* v. *Cigamatic Pty. Ltd. (In liq.)* (1962) 108 C.L.R. 372; *Commonwealth* v. *Bogle* (1953) 89 C.L.R. 229; *Federated etc, Service Association* v. *N.S.W. Railway Traffic Employers Association* (1906) 4 C.L.R. 488; *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91. See also the conflicting viewpoints in Howard, C., *Australian Federal Constitutional Law*, (2nd ed., Sydney, Law Book Co., 1979), 201ff; Lane, P., *The Australian Federal System*, (3rd ed., Sydney, Law Book Co., 1985), 966ff; and Evans, G.J., "Rethinking Commonwealth Immunity" (1978) 8 *Melb.U.L.Rev.* 521.

[35] C.f. Qld., s.14 (tenant's right to seek independent legal advice); W.A., s.6.

ping centre, the interest of the landlord, and all agreements and representations made by the parties. Even though renewals of a lease are exempted from this requirement, a disclosure statement will be compulsory if any new clauses are inserted in the agreement.

The requirement in s.7(1) that a disclosure statement be "given" to the tenant raises the meaning of the word "give". It is unclear whether the requirement is satisfied by compliance with the service of notice requirements in s.23. Logically, this should be the case, but it could be argued that giving imports a stricter requirement than service of notice.

The need for a disclosure statement raises some difficult practical issues for the landlord. For example, regarding the details of tenancy, the date of commencement may not be known at the time the disclosure statement is given. This may easily occur where the premises require renovation after a prior tenant has vacated, or where the premises are in the course of construction. Where a shopping centre is under construction, the landlord may be unaware of the nature of changes to the surrounding roads.[36]

The remedy available to the tenant if the landlord fails to comply with s.7 is termination of the tenancy. Pursuant to s.7(1), if a tenant has not been given a disclosure statement at least seven days before entering into a retail premises lease, or if the statement is misleading, contains false information or does not contain all the required information, the tenant may give the landlord a written notice of termination at any time within 28 days after entering into the lease.[37] By s.7(4), the lease terminates 14-days after the notice is given, subject to the proviso that within the 14-day period "the landlord may give the tenant a notice of objection to it on the ground that the landlord has acted honestly and reasonably and ought fairly to be excused for the contravention and that the tenant is substantially in as good a position as the tenant would have been in if there had been no contravention". If the tenant accepts the landlord's notice of termination, the lease does not terminate (s.7(6)). The tenant is deemed to have accepted the notice if he or she does not notify the landlord whether or not he or she accepts the notice of objection within the 14-day period (s.7(7)). Any dispute is resolved by arbitration under Part 3 of the Act (s.7(9)). Prior to the determination of the dispute, the operation of the notice of termination is suspended (s.7(8)).

The issues whether a disclosure statement is "misleading", within the meaning of s.7(1), and whether the landlord has acted "honestly and reasonably", within the meaning of s.7(5), are questions of fact in each case. No guidance as to the meaning of those words is given in the Act. In the context of the interpretation of "misleading" in s.52(1) of the *Trade Practices Act* 1974 (Cth.), "misleading" has been stated to mean "to lead astray in action or conduct; to lead into error, to cause to err".[38] According to Northrop, J. in *Keehn* v. *Medical Benefits Fund of Australia Ltd.*,[39] a statement is

[36] See further the discussion of these problems in Paine, C., "Advanced Conveyancing and Property Law – Retail Tenancies Act 1986", B.L.E.C. Seminar Paper, May 1987, 4-7.
[37] See s.3(4) for the meaning of "entering into" and s.23 for the service of notice provisions.
[38] *Weitmann* v. *Katies, Ltd.* (1977) 29 F.L.R. 336, 343, *per* Franki, J.
[39] (1977) 14 A.L.R. 77, 81.

misleading "if it would lead one ordinary member of the public . . . into error".[40]

The fourteen-day notice rule in s.7(4) appears to be absolute, and the original lease cannot be restored by a decision of an arbitrator. A new lease requiring a new disclosure statement would be required if the parties agree to continue with the lease after the expiry of the 14-day period.[41]

(b) *To Give the Tenant a Copy of the Lease*

Section 8(1) reads:

"If a retail premises lease is, or any of the terms of a retail premises lease are, in writing signed by the tenant, the landlord must give the tenant a copy of the lease or these terms signed by the landlord after the lease (which copy may be a photocopy) within 28 days after the lease is entered into or the terms are agreed, whether or not at that time stamp duty has been paid on the document containing the lease or those terms."[42]

The remedy for the tenant if the landlord breaches s.8(1) is similar to the remedy applying when the landlord fails to give the tenant a disclosure statement under s.7(1). If a landlord breaches s.8(1), the tenant may give the landlord a written notice of termination at any time within 42 days after entering into the lease (s.8(2)). The lease will then terminate 14 days after the notice is given (s.8(3)), subject to the landlord's right to serve a notice of objection as under s.7(5) and have the issue determined as under s.7(6-8) (s.8(4)).

Due to a presumed oversight, the 42-day period during which the tenant may give the landlord a written notice of termination runs from the date the lease is "entered into", within the meaning of s.3(4), rather than from the last date on which the landlord may provide a copy of the lease. The effect of this is that if the tenant gives his notice under s.8(2) before the 28th day of the 42-day period, the landlord may still comply with s.8(1) by giving a copy before the end of the 28th day. Legislative change is required.

The application of the definition of "entered into" in s.3(4) may cause problems in this context where a rent deposit is taken, as this may start the 28-day period under s.8(1) running. This problem arises because of the wording of s.3(4)(a), which refers to "when . . . the tenant . . . begins to pay rent for [the premises]". The period may also start to run where a tenant is let into possession before the lease is signed, as the date of first occupation rather than the date of the signing of the lease is the relevant date for the purposes of s.3(4)(a).

[40] See also *Parkdale Custom Built Furniture Pty. Ltd.* v. *Puxu Pty. Ltd.* (1982) 149 C.L.R. 191; *C.R.W. Pty. Ltd.* v. *Sneddon* (1972) A.R. (N.S.W.) 17, 28, *per* Sheldon and Sheppard, JJ; *Taco Co. of Australia* v. *Taco Bell Pty, Ltd.* (1982) 42 A.L.R. 177; *Global Sportsman Pty. Ltd.* v. *Mirror Newspaper Ltd.* (1984) 2 F.C.R. 82; *Bill Acceptance Corporation Ltd.* v. *G.W.A. Ltd.* (1983) 78 F.L.R. 171. For the meaning of "honestly" in other contexts, see *Re Second East Dulwich 745th Starr-Bowkett Building Society* (1899) 68 L.J. Ch. 196, 197-198, *per* Kekewich, J.; *Re Voets Investments Pty. Ltd.* [1963] N.S.W.R. 70, 75, *per* Jacobs, J.; *Jacques* v. *Pacific Acceptance Corporation, Ltd.* [1963] N.S.W.R. 1377, 1380, *per* Sugerman, J.; *Marchesi* v. *Barnes* [1970] V.R. 434 at 438, *per* Gowans, J.

[41] See Redfern, op.cit. p.38.

[42] C.f. S.A., s.62 (2-5).

(c) *Not to Require Key Money or Consideration of Goodwill*

Pursuant to s.9(1), a provision in a retail premises lease is void if it enables the landlord or a person claiming through the landlord to get from the tenant any key-money or any consideration for the goodwill of the business.[43]

"Key-money" is defined in s.3(1) to mean:

> "(a) money that a tenant is to pay; or
> (b) any benefit that a tenant is to confer —
> by way of a premium or something of a like nature in consideration of the granting of or agreeing to grant a lease or the renewal of a lease or the consenting to an assignment of a lease or to the sub-leasing of the premises to which a lease relates."[44]

Pursuant to s.9(2), the landlord may legitimately recover from the tenant costs which the landlord reasonably incurred in investigating a proposed assignee of the tenant or sub-tenant of the premises, and any costs which the landlord reasonably incurred in connection with the documentation of the lease, an assignment of the lease or a sub-lease, and the obtaining of any necessary consents to the assignment or sublease.[45] These costs do not constitute "key money".

Despite the recommendation of the Report of the Retail Tenancies Advisory Committee that security deposits should be restricted to a maximum of three months' net rent,[46] it appears that the landlord may legitimately charge any amount by way of security deposit and rent in advance. The Act is silent on these issues, and neither security deposits nor rent in advance fall within the scope of the statutory definition of "key-money".

"Goodwill" is not defined in the Act, unlike in Queensland and Western Australia.[47] It was defined by Lord MacNaughten in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ltd.*[48] as "the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom". Rich, J. stated in *Federal Commissioner of Taxation* v. *Williamson*[49] that "The goodwill of a business is a composite thing referable in part to its locality, in part to the way in which it is conducted and the personality of those who conduct it, and in part to the likelihood of competition, many customers being no doubt actuated by mixed motives in conferring their custom".[50]

[43] C.f. Qld., s.8; W.A., s.9; S.A., s.63.
[44] C.f. Qld., s.4(1); W.A., s.3(1).
[45] C.f. Qld. s.8(2); W.A., s.9(2).
[46] *Report of the Retail Tenancies Advisory Committee*, op.cit. p.17.
[47] Qld., s.4(1), defines "goodwill" as meaning "an intangible, saleable asset separate and distract from the value of the stock, fixtures, fittings and other tangible assets of the business arising from the reputation and the relations formed with customers of the business and the nature of its location". The definition of "goodwill" in W.A., s.3(1) is similar.
[48] [1901] A.C. 217, 223-224.
[49] (1943) 67 C.L.R. 561, 564.
[50] See also *Daniell* v. *Federal Commissioner of Taxation* (1928) 42 C.L.R. 296, 302-303, *per* Knox C.J.; *Hill* v. *Fearis* [1905] 1 Ch 466, 471, *per* Warrington, J.; *Trego* v. *Hunt* [1896] A.C. 7, 17-18, *per* Lord Herschell; *Austen* v. *Boys* (1858) 2 De G. & J. 626, 635-636; 44 E.R. 1133, 1136, *per* Lord Chelmsford; L.C.; *Wedderburn* v. *Wedderburn (No.4)* (1856) 22 Beav. 84, 104; 52 E.R. 1039, 1047, *per* Romilly, M.R.; *Potter* v. *Inland Revenue Commissioners* (1854) 10 Exch. 147, 159; 156 E.R. 392, 396-397, *per curiam*.

Despite the general prohibition on charges for goodwill, by s.9(2)(c) a landlord may claim goodwill from the tenant in relation to the sale of a business which the landlord operated from the retail premises immediately before its sale, if the lease was granted to the tenant in the course of the sale of the business.[51]

Pursuant to s.9(2)(d), the landlord may also recover from the tenant certain charges in connection with the assignment of a lease if the retail premises are in a retail shopping centre. The maximum level of permissible charges varies from one month's rent to four months' rent, depending on the length of time the tenant has been trading prior to the assignment. The landlord is required by s.9(3) to pay any amount received under s.9(2)(d) to a fund for the benefit of the retail shopping centre. "Retail shopping centre" is defined in s.3(2) as meaning:[52]

> "a cluster of premises –
> (a) 5 or more of which are retail premises; and
> (b) all of which have, or if leased would have, a common head lessor –
>
> but does not include a building with more than one storey except in relation to each storey of the building on which is situated a cluster of premises in respect of which paragraphs (a) and (b) apply."

By s.9(4), a tenant who has paid any sum which is void under s.9(1) may recover it from the landlord in a court of competent jurisdiction as a debt due; alternatively, the landlord may be ordered to return the sum or the value of the benefit to the tenant by an arbitration award under Part 3 of the Act.[53]

(d) *To Give the Tenant Details of the Operating Expenses of the Building or Retail Shopping Centre*

Section 15(1)(a) states:[54]

> "If in addition to the rent a retail premises lease provides for the tenant to pay all or part of the expenses of the landlord in operating (including repairing and maintaining) the building in which the retail premises are situated and, if those premises are situated in a retail shopping centre, any common area, then—
> (a) the lease must specify –
>   (i) those items of expense which are to be included as operating expenses; and
>   (ii) how those operating expenses will be calculated and apportioned to the tenant; and
>   (iii) how those operating expenses may be recovered by the landlord from the tenant."

[51] For the meaning of "business", see *Walker* v. *Valuer-General* (1978) 5 Q.C.L.R. 347; *Hope* v. *Bathurst City Council* (1980) 54 A.L.J.R. 345; *American Leaf Blending Co.* v. *Director-General of Inland Revenue* [1979] A.C. 676, 683-684, *per* Wallace, P.; *Commissioner of Inland Revenue* v. *Watson* [1960] N.Z.L.R. 259, 262, *per* Henry, J.; *Abernethie* v. *A.M. & J. Kleiman Ltd.* (1970) 1 Q.B. 10, 20, *per* Widgery, L.J.

[52] C.f. the definition of "retail shopping centre" in Qld., s.4(1); W.A., s.3(1).

[53] C.f. Qld., s.8(4); W.A., s.9(3); S.A., s.63(4).

[54] C.f. Qld., s.12; W.A., s.12.

The landlord is required by s.15(1)(b) to give the tenant annual estimates of each of the relevant items of expense at least one month before the beginning of the period to which the expense relates or at the time when the tenant enters into the lease, and by s.15(1)(c) to give the tenant annual statements of expenditure incurred on each of those items of expense within three months after the annual period to which the expenditure refers.

Regulation 6(1), made pursuant to s.15(2)(a), prohibits the landlord from obtaining payment from a tenant for the following items of expense: (a) expenditure of a capital nature; (b) contributions to a depreciation or a sinking fund; (c) management fees or commissions in relation to rent collections; (d) insurance premiums for insurance for loss of profits; (e) land tax (in certain specified circumstances only); (f) contributions by a landlord to a merchants' association or other similar fund; and (g) interest and charges on money borrowed by the landlord.

Regulation 6(2), made pursuant to s.15(2)(b), prescribes the manner in which various expenses may be calculated and apportioned to a tenant. Pursuant to reg.6(2)(a), expenses must be apportioned by reference to the percentage which the leased premises bears to the total lettable area in respect of which the expenses are incurred. Regulation 6(2)(b) states that expenses incurred in respect of "common areas", as defined in s.3(1), are deemed to be incurred in respect of the total lettable area.

The landlord's duty under s.15 extends not only to cases where the leased premises form part of a larger building, but also where the premises form the whole building. This is implicit in the wording of s.15(1). This requirement appears strange and unnecessary in light of the purpose of the section. The tenant will clearly be aware of the operating expenses of the building if he or she occupies the whole of it. The Queensland and Western Australian legislation carefully avoids the application of the legislation in this situation by limiting the statutory requirement to "the building of which the retail shop in question forms a part".[55]

The tenant is entitled under s.15(4) to a refund from the landlord if the tenant has paid more than the actual amount of the operating expenses. The refund is to be made when the landlord gives the tenant the annual statement concerning those expenses. The tenant's remedy here would lie with the arbitration proceedings under Part 3 of the Act.

Section 15(3) prohibits a landlord from accepting payment from a tenant for any particular item of expense of more than the greater of the actual amount or the total estimated amount of that item of expense. No penalty is provided for a breach of this provision.

(e) *To Identify the Tenant for Amounts Recoverable from the Tenant by a Public Statutory Authority*

Section 19(3) requires the landlord to indemnify the tenant for any amount recoverable from the tenant by a public statutory authority for charges, rates or taxes payable under any Act for the retail premises. Exceptions are speci-

[55] Qld., s.12; W.A., s.12.

fied in favour of charges for the supply of water by measure in excess of the minimum rate in respect of the tenant's period of occupation of the retail premises, and charges, rates or taxes for which, under the terms of the retail premises lease, the tenant is liable. The last-mentioned exception gives a clear incentive to landlords to ensure that the lease makes express mention of all charges which may be levied in respect of the premises. Any omission will mean that the landlord will be under an obligation to reimburse the tenant for the full costs.

3. OTHER DUTIES

Unlike the *Residential Tenancies Act* 1980 (Vic.), the *Retail Tenancies Act* is not designed to codify the law of landlord-tenant in respect of the premises subject to the Act. Accordingly, except to the extent to which the Act covers the field, the rights and duties of both parties established at common law remain in existence. The most important of these are as follows:

(a) *Landlord's Duties*

(i) The covenant of quiet enjoyment.[56]
(ii) The duty not to derogate from the grant.[57]
(iii) The implied condition of fitness for habitation at the commencement of a lease.[58]
(iv) The duty to allow the removal of fixtures in certain circumstances.[59]

(b) *Tenant's Duties*

(i) Not to commit waste.[60]
(ii) To use and deliver up the premises in a tenant-like manner.[61]
(iii) To deliver up the premises at the expiration of the term.[62]

[56] See, e.g., *Malzy* v. *Eichholz* [1916] 2 K.B. 308; *Lavender* v. *Betts* [1942] 2 All E.R. 72; *Perera* v. *Vandivar* [1953] 1 All E.R. 1109; *J.C. Berndt Pty. Ltd.* v. *Walsh* [1969] S.A.S.R. 34; *Telex (Australasia) Pty. Ltd.* v. *Thomas Cook & Son (Australasia) Ltd.* [1970] 2 N.S.W.R. 257. See also Brooking, R., and Chernov, A., Tenancy Law and Practice – Victoria, (2nd ed., Sydney, Butterworths, 1980) para. 99.

[57] See, e.g. *Aldin* v. *Latimer, Clark, Muirhead and Co.* [1894] 2 Ch. 437; *Cable* v. *Bryant* [1908] 1 Ch. 259; *Frederick Betts Ltd.* v. *Pickfords Ltd.* [1906] 2 Ch. 87. See also Elliott, D.W., "Non-Derogation from Grant" (1964) 80 L.O.R. 244.

[58] See, e.g., *Smith* v. *Marrable* (1843) 11 M. & W. 5; 152 E.R. 693; *Cruse* v. *Mount* (1933) Ch. 278; *Pampris v. Thanos* (1968) 1 N.S.W.R. 56. See also Brooking and Chernov, op.cit, para. 100.

[59] See, e.g., *Climie* v. *Wood* (1869) L.R. 4 Ex. 328; *Martin* v. *Roe* (1857) 7 E. & B. 237; 119 E.R. 1235; *Spyer* v. *Phillipson* [1931] 2 Ch. 183; *Weller* v. *Everett* (1900) 25 V.L.R. 683; *Re May Bros. Ltd.: Geita Sebea* v. *Territory of Papua* (1941) 67 C.L.R. 549; *Clarke* v. *Tresider* (1867) 4 W.W. & a'B. (L.) 164.

[60] See, e.g., *Marsden* v. *Edward Heyes Ltd.* [1927] 2 K.B. 1; *Regis Property Co. Ltd.* v. *Dudley* [1959] A.C. 370; *Yellowly* v. *Gower* (1855) 11 Exch. 274; 156 E.R. 833; *Brian Stevens Pty, Ltd.* v. *Clarke* (1965) 83 W.N. (Pt.1) (N.S.W.) 32. See also Brooking and Chernov, op. cit, para. 110.

[61] See, e.g., *City of Ballarat* v. *Waller* [1924] V.L.R. 115; *Warren* v. *Keen* [1954] 1 Q.B. 15; *Marsden* v. *Edward Heves Ltd.* [1927] 2 K.B. 1. See also Brooking and Chernov, op. cit. para. 101.

[62] See *Henderson* v. *Squire* (1869) L.R. 4 Q.B. 170, and Brooking and Chernov, op. cit, para. 103.

Both parties will be liable for the "usual covenants".[63] In addition, there will be applied the general common law rule that a covenant will be implied wherever it is necessary to give "business efficacy" to the contract.[64]

4. STATUTORY COVENANTS

Section 17 creates a number of statutory covenants, the breach of which give rise to a liability on the landlord to compensate the tenant for any loss or damage suffered by him or her as a consequence.[65] Reasonable compensation as agreed between the parties is required, or failing agreement, compensation as determined by an arbitrator.[66]

Section 17(1) creates, in effect, six statutory covenants: (a) not to inhibit in any substantial manner the access of the tenant to the rented premises; (b) not to take any action that would substantially alter or inhibit the flow of customers to the retail premises without the tenant's consent; (c) not to cause, prevent or remove any disruption to trading within the retail shopping centre, if the premises are located within a centre;[67] (d) to rectify any breakdown of plant or equipment under the landlord's care and maintenance; (e) to comply with any requirement of a public statutory authority or government department if it is the landlord's responsibility to do so; and (f) if the retail premises are situated in a retail shopping centre, to adequately clean, maintain, repair or repaint any common area.[68] In any of these circumstances, if the landlord does not rectify the matter within a reasonably practicable time after receiving from the tenant a written notice asking him to do so, he or she is liable to pay the tenant for any loss or damages suffered by the tenant as a consequence, reasonable compensation as agreed in writing between the parties or, in the absence of agreement, as determined by arbitration.

Section 17(2) creates a similar entitlement to compensation for the tenant in the following two circumstances: (a) if the retail premises are situated in a retail shopping centre and the tenant mix or usage mix of the centre when the tenant enters into occupation of the premises is significantly different from that set out in the disclosure statement; and (b) if the landlord seeks to deprive the tenant of his or her right to renew the lease pursuant to the statutory

[63] "Usual covenants" are discussed in detail in Brooking and Chernov, op. cit, ch. 9. See also *Hodgkinson* v. *Crowe* (1875) L.R. 10 Ch. 622; *Hampshire* v. *Wickens* (1878) 7 Ch.D. 555; *Sharp* v. *Milligan (No.2)* (1857) 23 Beav. 419, 422; 53 E.R. 165; *Blakesley* v. *Whieldon* (1841) 1 Hare 176; 66 E.R. 996.

[64] *Liverpool City Council* v. *Irwin* [1977] A.C. 239, 258, *per* Lord Cross of Chelsea; *Karaggianis* v. *Malltown Pty Ltd.* (1979) 21 S.A.S.R. 381, 392, *per* Wells, J.; *Dikstein* v. *Kanevsky* (1947) V.L.R. 216, 221; *Southern Foundries (1926) Ltd.* v. *Shirlaw* [1940] A.C. 701, 712-713; *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555, 594.

[65] C.f. Qld., s.15; W.A., s.14.

[66] For the meaning of "loss or damage" in other contexts, see *Dixon* v. *Calcraft* [1892] 1 Q.B. 458, 466, *per* Lopes, L.J.; *Price & Co.* v. *Union Lighterage Co.* [1904] 1 K.B. 412, 414-416, *per* Lord Alverstone, C.J.; *Board of Trade* v. *Employers' Liability Assurance Corporation Ltd.* [1910] 2 K.B. 649; 656, *per* Buckley, L.J.; *The Millie* [1940] p.1, 8, *per* Langton, J.

[67] See the definition of "retail shopping centre" in s.3(1).

[68] See the definition of "common area" in s.3(1).

option under s.13[69] by serving a notice under s.13(2)(d)[70] stating that the premises are to be demolished or substantially repaired, renovated or reconstructed, and such work is not carried out within a reasonably practicable time after the tenant ceases to occupy the premises.[71]

5. VOID TERMS

Four terms of a retail premises lease are declared by ss.18 and 19 to be void:[72]

(a) A clause that purports to prevent or restrict the right of the tenant to form or join any tenants' association, chamber of commerce or other similar body (s.18(1)).

(b) A clause that purports to require the tenant to join any merchants' association or other similar body (s.18(2)).

(c) A clause that purports to indemnify or require the tenant to indemnify the landlord against any action, liability, penalty, claim or demand for which the landlord would otherwise be liable or subject (s.19(1)). This subsection may have the effect of preventing the landlord from requiring the tenant to insure the premises or requiring him to pay for the landlord's costs of insurance.

(d) A clause that purports to make the tenant liable for or subject to any action, liability, penalty, claim or demand in respect of any act, matter or thing done or omitted to be done by the landlord or any other person if the tenant would not otherwise be liable (s.19(2)).

In addition, s.18(3-5) authorises the making of regulations specifying matters to be provided for in the rules of a merchants' association and declares any rule of such an association which is inconsistent with a provision of the regulations void to the extent of the inconsistency. To date, no such regulations have been made.

6. ASSIGNMENTS AND SUBLEASES

The existing common law rules regarding the tenant's right to assign or sublet have been replaced by new statutory provisions in s.16 and s.9.[73] In addition, pursuant to s.16(6), s.144 of the *Property Law Act* 1958, which states that in every covenant prohibiting assignment without the consent of the land-

[69] See infra, n.86 and accompanying text.

[70] See infra, n.90 and accompanying text.

[71] For the meaning of "repair", see, e.g., *Lurcott* v. *Wakely and Wheeler* [1911] 1 K.B. 905, 923-924, *per* Buckley, L.J.; *Graham* v. *Markets Hotel Pty. Ltd.* (1943) 67 C.L.R. 567, 579, *per* Latham, C.J.; *Lazar* v. *Williamson* (1886) 7 L.R. (N.S.W.) 98; *New Zealand Insurance Co. Ltd.* v. *Keesing* [1953] N.Z.L.R. 7; and the discussion in Brooking and Chernov, op. cit. para.113. For the meaning of "reconstruction", see *Cadle (Percy E.)* v. *Jacmarch Properties Ltd.* [1957] 1 Q.B. 323, 328, *per* Denning, L.J.; *Independent Order of Oddfellows and Gresham Hotel Ltd.* v. *Mallan* [1946] S.A.S.R. 234, 244, *per* Abbott, J.; *Returned Sailors, etc, League of Australia* v. *Abbott* [1946] S.A.S.R. 270, 272, *per* Mayo, J.; *Williams* v. *Evans* [1966] 1 N.S.W.R. 245, 251-252, *per* Asprey and Holmes, JJ.A.

[72] There are no similar provisions in the Queensland, South Australian and Western Australian legislation.

[73] C.f. Qld., s.11; W.A., s.10; S.A., s.64.

lord, the covenant shall be deemed to include a proviso that consent not be withheld unreasonably, does not apply to retail premises leases. The regime created by s.16 is very similar to the new rules on assignments and subleases applying to residential tenancies under s.108 of the *Residential Tenancies Act* 1980 (Vic.).[74]

A clause in a retail premises lease is void to the extent that it purports to prevent the assignment of a lease (s.16(4)), or imposes unreasonable terms, conditions or requirements as a prerequisite to the granting by the landlord of consent to an assignment of the lease (s.16(5)). Curiously, these provisions do not apply to subleases. As there is no logical reason justifying the omission of subleases, it must be assumed that this is a drafting error.

The remaining subsections in s.16 deal with the situation where the consent of the landlord to an assignment or sublease of the premises is required by the lease. Where the tenant has given the landlord a written request to consent, the name and address of the proposed assignee or subtenant, two references as to his or her financial circumstances, two references as to his or her business experience, and a copy of the proposed deed of assignment or sublease, the landlord is taken to have consented if he or she fails to reply within 42 days (s.16(1)).

Section 16(2) states that a landlord must not unreasonably withhold consent to an assignment or a subletting of the premises. Any dispute over the landlord's withholding of consent is determined by arbitration under Part 3. By s.16(3), if an arbitrator determines that a landlord has unreasonably withheld consent to an assignment or sublease of the premises, the assignment or sublease may be done without such consent.

Regardless of whether the landlord gives or withholds consent to an assignment or a sublease, he or she may recover from the tenant costs reasonably incurred in investigating the proposed assignee or subtenant (s.9(2)(a)). If the landlord consents to the assignment or sublease, he or she may also recover from the tenant costs reasonably incurred in connection with the documentation associated with the assignment or sublease, and the obtaining of any necessary consents to the assignment or sublease (s.9(2)(b)).

7. RENT FIXING AND REVIEW

(a) *Rent Review*

Rent review clauses are significantly circumscribed by provisions contained in s.10[75]. A rent review clause which does not specify how the review is to be made is void (s.10(3)). A rent review clause which provides that the rent payable after the review must exceed or be not less than the rent payable immediately before the review is similarly void (s.10(1)). The correct interpretation of this provision is open to dispute. The Editors of the *Property Law Bulletin*[76] state that a clause providing that the new rent shall be not less than $x less than the rent payable before the review is not affected by the subsec-

[74] See Bradbrook, A.J., MacCallum, S.V. and Moore, A.P., *Residential Tenancy Law and Practice — Victoria and South Australia*, (Sydney, Law Book Co., 1983) ch. 21.
[75] C.f. Qld., s.10; W.A., s.11; S.A., s.62(1)(a).
[76] *Property Law Bulletin*, October 1987, p.4.

tion. On this basis, the subsection could be easily circumvented and would be ineffectual in practice. Paine[77] also believes that the subsection is of little practical consequence. He states that if the rent is increased at a fixed percentage per annum compound during the term of the lease, such an arrangement is not precluded by the Act because a percentage increase is not a review of rent. On the other hand, Redfern[78] takes the view that such a clause offends s.10(1) as it effectively requires an adjustment of rent which must exceed the previous rent. He does not believe that the argument that this type of clause is a mere adjustment rather than a review of the rent is tenable. It is submitted that this latter view is correct as it is more in keeping with both the specific wording and the spirit of s.10(1). As conceded by Redfern,[79] however, s.10(1) does not prevent a clause providing for fixed increased rents as no element of "review" is involved. Thus, a clause stating that the rent in year 1 is $A, in year 2 $A + $B, and in year 3 $A + $B + $C would circumvent the operation of the subsection. The danger inherent in this course of action for the landlord is that the future rate of inflation is always uncertain, and he or she may make inadequate provision for it.

Section 10(2) states that a provision in a retail premises lease that the rent is to be determined either wholly or in part by reference to any C.P.I. is void to the extent to which it so provides. The philosophy of this subsection is similar to s.10(1) in that clauses which automatically require a rent increase are to be treated as void. Although s.10(2) is defined as a tenant protection measure, in times of unremitting inflation this is somewhat unrealistic. It may also be regarded as misguided and inappropriate in the sense that tenants frequently prefer C.P.I. adjusted rents as this is usually in line with their increase in prices and they can accurately estimate in advance the level of their future rent obligations.[80]

If a provision in a retail premises lease concerning rent review is made void by s.10, the parties must attempt to reach a written agreement as to the rent. Failing such agreement within 30 days after the landlord serves on the tenant a notice specifying the amount of the rent, the rent is to be as determined by a registered valuer (s.10(4)). The rent is also to be determined by a registered valuer where the lease provides for a rent review, but does not provide for what is to happen in the event of a disagreement between the parties about the result of the review (s.10(5)).

In conclusion, it should also be noted that nothing in the Act alters the common law rule that in the absence of a rent review clause, the rent remains fixed for the duration of the term.[81]

[77] Paine, C., "Advanced Conveyancing and Property Law – Retail Tenancies Act 1986", B.L.E.C. Seminar paper, May 1987, at 18.

[78] Redern, op. cit. p.40.

[79] Ibid.

[80] Redfern, op. cit. p.40.

[81] See *Glossop* v. *Ashley* [1922] 1 K.B. 1 and *Hill and Redmond's Law of Landlord and Tenant*, (17th ed., London, Butterworths, 1982) 320-321. This proposition does not prevent the parties agreeing during the term for a rent increase. An increased rent can be agreed on verbally, provided that there is consideration on the part of the landlord, such as the execution of improvements (*Donellan* v. *Read* (1832) 3 B. & Ad. 899, 905; 110 E.R. 330, 332-333), although such an agreement must be in writing if the lease is in written form (*Hilton* v. *Goodhind* (1827) 2 Car & P. 591; 172 E.R. 269).

(b) *Rent based on Turnover*

The Act permits the determination of rent by turnover, but provides a number of statutory safeguards in order to protect the economic position of the tenant.

The relevant legislation is contained in ss.11 and 12.[82] By s.11(1), a provision in a retail premises lease that the rent is to be determined either wholly or partially by reference to the turnover of the business is void unless the lease specifies how the rent is to be determined. If the provision overcomes this hurdle, the issue arises as to the meaning and calculation of "turnover". "Turnover" is not defined in the Act. According to McNair J. in *Aris-Bainbridge* v. *Turner Manufacturing Co. Ltd.*,[83] "turnover . . . must be taken to include all sums received and receivable in the year as the result of . . . trading, whether normal or abnormal." Despite its lack of a comprehensive definition, the Act by s.11(4) exempts from the calculation of "turnover" a number of charges and payments. The most important of these are: discounts reasonably and properly allowed to any customer in the usual course of business; the value of trade-ins purchased from customers; uncollected credit accounts written off by the tenant; refunds on the return of merchandise; refunds given when a lay-by sale is cancelled; taxes on the purchase price of goods and services; delivery charges; the price of merchandise returned to shippers, wholesalers or manufacturers; and "any other matter which the landlord and the tenant agree does not form turnover". Section 11(4) adds that turnover does include the amount recovered of a credit account previously written off by the tenant. The purpose of s.11(4) is to ensure that the turnover figures used for the purpose of rent calculation accurately reflect the true financial position of the tenant, and to prevent the fixing of an artificially high rent by taking into account matters which the legislature has determined do not constitute genuine receipts and profits.

Where a valid rent turnover clause is in operation, by s.11(2) the tenant is required to submit to the landlord a monthly written turnover statement within 14 days after the end of each month (unless the lease allows for a longer period) and a yearly written turnover statement together with an audit report within 42 days after the end of each year (unless a longer period is specified).

If a provision in a retail premises lease concerning rent based on turnover is made void by s.11, s.11(6) requires the parties to attempt to reach a written agreement as to the rent. Failing such agreement within 30 days after the landlord serves on the tenant a notice specifying the amount of the rent, the rent is to be as determined by a registered valuer.

Except where turnover figures are required for the purpose of determining rent, or the landlord and tenant are corporations that are considered to be related to each other by virtue of s.7(5) of the *Companies (Victoria) Code*, turnover figures are not required. Any provision in a retail premises lease which requires the production of turnover figures in other circumstances is void

[82] C.f. Qld., ss.6, 7, 9; W.A., ss. 7, 8.
[83] [1950] 2 All E.R. 1178, 1178.

(s.12(1)). The purpose of this provision is to ensure that the tenant's business affairs remain confidential, and are not available to competitors. Subject to certain exceptions specified in s.12(4), a landlord must not communicate to any person any information about the turnover of the tenant's business unless the communication is made with the consent of the tenant (s.12(3)). A landlord who contravenes this subsection is liable to pay the tenant for any loss or damage suffered by the tenant as a consequence of that contravention reasonable compensation as agreed in writing between the parties or, in the absence of agreement, determined by arbitration (s.12(4)).[84]

In two respects, the interrelationship between s.11 and ss.10 and 12 appears to be unclear. First, it could argued that a turnover rent clause, which is valid under s.11, is void under s.10(1) if it provides for an inevitable increase in the rent during the term. This will depend both on the wording of the relevant clause and the later interpretation given by the courts as to the interrelationship between the two sections. Secondly, as stated by Redfern:[85]

> "[T]here is an apparent conflict between the turnover disclosure requirements of s.11(4) and those anticipated by s.12(1). As any requirements beyond those provided for by s.11(4) appear unenforceable (s.11(4)), it would appear that the conflict is not real and s.12(1) will, as a matter of course, be read subject to the terms of s.11(4)".

8. DURATION OF LEASE

(a) *Right to at least Five Years' Tenancy*

Section 13 creates a basic right for retail tenants in most circumstances to be granted a minimum period of tenancy of five years.[86] The purpose of this is to enable the tenant to benefit from the goodwill established in respect of the business. The operative provision is s.13(1), which reads:

> "Subject to sub-section (2), a retail premises lease gives the tenant an option which is exercisable, subject to subsection (3), by giving notice to the landlord in the prescribed form, to renew the lease for a term beginning immediately after the end of the current term and continuing until a day specified in the notice being a day that is not later than—
> (a) if the premises were occupied by the tenant as retail premises during any period which ended immediately before the current term began — the day that is 5 years after the beginning of that period;
> (b) if the premises were not occupied by the tenant as described in paragraph (a) — the day that is 5 years after the beginning of the current term."

By s.13(3), this right of renewal (the statutory option) is exercisable not less than 90 days before the current term ends and only if the tenant has remedied any default under the lease about which the landlord has given the tenant written notice. Further, pursuant to s.13(4), a lease is not renewable

[84] For the meaning of "loss or damage", see n.66, supra.
[85] Redfern, op. cit. p 40.
[86] C.f. Qld., s. 13; W.A., s.13.

under the statutory option if at the end of the current term the tenant has not remedied any default under the lease about which the landlord has given the tenant written notice. Section 13(9) states that if a dispute arises as to whether the option is exercisable on account of a default under the lease and the dispute is referred to arbitration, the arbitrator has power to order that the default be ignored for the purposes of s.13 if he or she is satisfied that the tenant has acted honestly and reasonably and ought fairly to be excused for the default, and that the landlord is substantially in as good a position as he or she would have been in if there had been no such default.

Section 13(2) specifies four circumstances where the statutory option is not exercisable:[87]

(a) Where the lease provides for a minimum term of five years, taking into account any period immediately preceding the commencement of the current term during which the premises were occupied as retail premises by the tenant, and any period contained in an option in the lease to renew it.

(b) Where the statutory option to renew would be inconsistent with the terms of a head lease under which the landlord holds the premises. This is statutory recognition of the common law principle of "title paramount".[88]

(c) Where the lease is not the first retail premises lease entered into by the tenant as a tenant, whether before or after the commencement of the *Retail Tenancies Act*. For the purpose of this subsection, a retail premises lease entered into by a person associated with the tenant is to be taken to have been entered into by the tenant. An associated person includes the tenant's spouse,[89] partner, joint venturer, a corporation of which the tenant or the tenant's spouse is or was a director or secretary, and (if the tenant is a corporation) a corporation that is or was a related corporation within the meaning of the *Companies (Victoria) Code*.

(d) Where the landlord gives notice to the tenant at least 90 days before the end of the lease that at the end of the term the premises are to be either demolished, or "substantially repaired, renovated and reconstructed and the repair, renovation or reconstruction cannot be carried out practically without vacant possession".[90] The wording of this provision is similar to s.122(1)(a) and (b) of the *Residential Tenancies Act* 1980 and is presumably entitled to a similar interpretation.[91] If the landlord invokes this subsection and does not carry out the work within a reasonably practicable time after the tenant vacates the premises, the landlord is liable to pay the tenant for any loss or damage suffered by him or her as a consequence, reasonable compensation as agreed in

[87] C.f. Qld., s.13(1)(a-d); W.A., s.13(2).

[88] See e.g., *Jones* v. *Lavington* (1903) 1 K.B. 253; *Markham* v. *Paget* [1908] 1 Ch. 697; *Kenny* v. *Preen* [1963] 1 Q.B. 499.

[89] Note the definition of "spouse" in s.3(1), which includes heterosexual partners but excludes homosexual marriages.

[90] See supra, p.17.

[91] See Bradbrook, MacCallum and Moore, op. cit. pp.424, 642.

writing between the parties, or failing agreement, as determined by arbitration.[92]

The terms and conditions under which a lease is renewable under the statutory option are specified in s.13(5). With limited exceptions, these are the same as under the original lease except that the tenant does not have any further statutory option to renew the lease. If the lease does not provide for rent review, the rent payable during the term of the statutory option is to be as agreed between the parties, or failing agreement within 30 days after a notice specifying the rent served on the tenant by the landlord, as determined by a registered valuer. It is understood that the inherent uncertainty in the rent fixed by valuation has induced most landlords to create the initial lease for a minimum term of five years, or for a lesser term with an option to renew, to ensure that the statutory option does not arise.

(b) *Options to renew*

Section 14 concerns the operation of an express option to renew contained in the original lease between the parties, and contains a number of measures for the protection of tenants. The section has no application to the statutory option created under s.13.

Pursuant to s.14(3), if a retail premises lease contained an option to renew, the landlord must notify the tenant in writing of the date after which the option is no longer exercisable under the terms of the option at least three months before that date. If the landlord fails to give this notice, the lease is deemed to provide that the date after which the option is no longer exercisable is the day that is 3 months after the landlord gives the tenant notice, and the lease will continue in effect until that date (s.14(4)). This provision is subject to the right of the tenant to serve notice on the landlord determining the lease with effect from any day that is not earlier than the expiry of the term of the lease (s.14(9)(a)), and not later than the day on which the lease would otherwise have continued under s.14(4) (s.14(9)(b)). Section 14(3) thus heavily penalises a landlord who fails to serve the notice at the required time. It seems that the requirement in s.14(3) that the landlord "notify" the tenant means that a separate form of notice is needed and that the landlord cannot rely on the terms of the disclosure statement or the lease itself.[93] However, it is legitimate for landlords to give tenants the necessary notice at the time of execution of the lease, and it is understood that this is the common practice.

If a retail premises lease contains an option to renew, by s.14(5) the only circumstances in which the option is not exercisable is if the tenant has not remedied any default under the lease about which the landlord has given the tenant written notice, or "the tenant has persistently[94] defaulted under the

[92] C.f. *Residential Tenancies Act* 1980, s.122(3).

[93] See Redfern, op. cit. 41.

[94] For the meaning of "persistently" in other contexts, see *Dale* v. *Smith* [1967] 2 All E.R. 1133, 1136, *per* Lord Parker, C.J.; *Re D. (Minors)* [1973] 3 All E.R. 1001, 1005, *per* Sir George Barker, P.

lease throughout the term and the landlord has given the tenant written notice of the defaults". The meaning of this latter clause is inherently ambiguous. How many defaults have to occur? Do the defaults all have to be in relation to the same clause of the lease? Does the word "throughout" mean that the default must have occurred, for example, during every month, every quarter or every year of the lease? While the purpose of the clause is understandable, its drafting is unfortunate. Cases interpreting the provision will be awaited with interest.

If a retail premises lease does not provide for an option to renew, the landlord is nevertheless required by s.14(6) at least 3 months before the lease ends to notify the tenant in writing whether or not the landlord wishes to renew the lease and, if so, the terms and conditions. Failing such a notice, the lease continues until a day specified in a notice (containing the information required by s.14(6)) given by the landlord to the tenant that is at least 3 months after the notice (s.14(7)). This subsection is subject to the right of the tenant to serve notice on the landlord determining the lease from any day that is not earlier than the expiry of the term of the lease (s.14(9)(a)), and not later than the day on which the lease would otherwise have continued under s.14(7) (s.14(9)(b)).

9. TERMINATION OF LEASE

The Act does not contain special sections relating to the forfeiture of leases. In the absence of such provisions, the basic common law rules as to termination by forfeiture (as amended by s.146 of the *Property Law Act* 1958)[95] will continue to apply to retail premises leases.

Termination by the landlord of the statutory option to renew created under s. 13(1) before the end of the term provided for by the option is permitted by s.13(5)(b) in three specified circumstances:

(i) "The tenant has not remedied a default under the lease about which the landlord has given the tenant written notice".

It is unclear whether this provision applies in addition to s.146(1) and (2) of the *Property Law Act* 1958 or is in substitution for it. Section 146(1) is more specific than s.13(5)(b) of the *Retail Tenancies Act* in as much as it requires the landlord to seek monetary compensation for the breach and prevents the landlord from exercising a right of forfeiture for breach unless the tenant fails within a reasonable time (which must be not less than 14 days) to make compensation, to the satisfaction of the landlord, for the breach. Section 146(2) gives the court a discretion to grant relief against forfeiture. As s.13 is designed as a measure to assist tenants, it submitted that s.13(5) must be read as applying in addition to the requirements of s.146(1) and (2) of the *Property Law Act*. Any other interpretation would result in tenants under retail premises leases being in a significantly weaker legal position than

[95] For a discussion of the interpretation and effect of s.146, see Brooking and Chernov, op. cit. pp. 431-434.

under the general landlord and tenant law, which was not the intention of the legislature.

(ii) "The whole or any part of the retail premises or, if the retail premises are situated in a retail shopping centre, the whole or any part of the retail shopping centre has been destroyed or so damaged as to render the retail premises or a substantial part of them or the usual means of access to them unfit for occupation or use by the tenant".

The meaning of the word "substantial", where it appeared in the now-repealed *Rent Act* 1968 (U.K.), s.2(3)[96], has been considered by the English courts, which decided that each case must be decided on its merits and that no precise mathematical formula is possible.[97] Based on the English Court of Appeal decision in *Woodward* v.*Docherty*[98], which held that where the value of the furniture in a furnished flat constituted 14 percent of the annual rent, the value of the furniture was "substantial", but that where the value constituted only 7 percent, it was not "substantial", it is submitted that the Victorian courts should construe "substantial" in s.13 (5)(b)(ii) as applying where 10 percent or more of the retail premises has been destroyed or damaged.[99]

The meaning of "unfit for habitation" will presumably be construed similarly to the implied condition by a landlord of fitness for habitation of a furnished house.[100]

(iii) "It would be inconsistent with a head lease under which the landlord holds the premises for the retail premises lease to continue".

As in the case of s.13(2)(b), this appears to be a further application of the "title paramount" principle.[101]

The common law rule that a fixed-term lease will expire due to the effluxion of time without the need for notice by either party[102] has been replaced in part by s.13(1), which creates a statutory option to renew at the end of a tenancy in certain specified circumstances,[103] and by s.14(6), which requires the landlord, where there is no option to renew, to give the tenant at least three months' notice in writing whether or not he or she wishes to renew the lease.[104]

[96] Until its repeal by the *Rent Act* 1974 (U.K.), s.1(1), the 1968 Act provided for different rules in relation to security of tenure depending on whether the rented premises were furnished or unfurnished. Section 2(3) of that Act provided that for the premises to be classified as furnished, the amount of rent attributable to the furniture had to be "substantial". and left it to the courts to solve the meaning of that word.

[97] See e.g., *Palser* v. *Grinling* (1948) A.C. 291) 317, *per* Viscount Simon. C.f. *Maclay* v. *Dixon* [1944] 1 All E.R. 22. *Palser* v. *Grimling* was applied by analogy by Dillon, J. in *Attorney-General* v. *G.E. Overton (Farms) Ltd.* [1981] Ch. 333, 343.

[98] (1974) 28 P. & C.R. 62.

[99] For the meaning of "substantial" in other contexts, see *Ashburton Borough* v. *Clifford* [1969] N.Z.L.R. 927, 941, *per* Turner, J.; *Ladbroke (Football), Ltd.* v. *William Hill (Football), Ltd.* [1964] 1 All E.R. 465, 481, *per* Lord Pearce; *Terry's Motors, Ltd.* v. *Pinder* [1948] S.A.S.R. 167, 170, *per* Mayo, J.; *Angland* v. *Payne* (1944) N.Z.L.R. 610, 625, *per* Myers, C.J.

[100] See supra, n.58.

[101] See supra, n.88 and accompanying text.

[102] *Rogers* v. *Moonta Town Corporation* (1981) 37 A.L.R. 49, 54; *Cobb* v. *Stokes* (1807) 8 East 358; 103 E.R. 380; *Ackland* v. *Lutley* (1839) 9 Ad. & El. 879; 112 E.R. 1446.

[103] See 86 and accompanying text.

[104] See supra, p. 24.

10. DETERMINATION OF DISPUTES

Contrary to the recommendation of the Report of the Retail Tenancies Advisory Committee, which urged the establishment of a specialist tribunal to determine disputes regarding retail tenancies,[105] the government decided to use the system of commercial arbitration, enshrined in the *Commercial Arbitration Act* 1984, as the means for settling and determining disputes.[106] A special panel of arbitrators has been established under s.20 to hear disputes arising under the *Retail Tenancies Act.*

Pursuant to s.21(1), except in cases where the Act requires the rent to be fixed by a registered valuer, all disputes arising between landlords and tenants under a retail premises lease must be referred to arbitration. Notwithstanding anything to the contrary in any other Act, by s.21(4) a dispute which is capable of being referred to arbitration under s.21 is not justiciable in any court or tribunal. As discussed by Redfern,[107] the Act is not able to exclude the exercise of the jurisdiction possessed by the Federal Court in relation to retail tenancy matters, such as under Part V of the *Trade Practices Act* 1974. The issue arises whether the exclusion of jurisdiction of the State Courts by s.21(4) prevents the cross-vesting to the Federal Court of the powers which the Supreme Court would have held in respect of retail premises leases but for the terms of the *Retail Tenancies Act.* This matter is regarded by Redfern as an open issue,[108] but it is submitted that the only viable answer is that cross-vesting cannot occur under these circumstances. This result appears to be dictated by the fact that there is no power remaining in the State courts which is capable of vesting in the Federal Court. Thus, it seems that the Federal Court will be limited to its original jurisdiction in relation to disputes involving retail premises leases.

Every arbitration must be conducted in accordance with, and subject to, the provisions of the *Commercial Arbitration Act* 1984. This means, for example, that the arbitrator may conduct proceedings in such manner as he or she thinks fit and may disregard the normal evidentiary and procedural requirements,[109] and that unless the lease expressly states to the contrary, the leave of the arbitrator is required before either party can be represented by a legal practitioner or other representative.[110] The rules as to the conduct of arbitration proceedings are contained in Part III of the *Commercial Arbitration Act.*

The powers of arbitrators are contained in ss.28-37 of the *Commercial Arbitration Act.* These powers are supplemented by s.22(2) of the *Retail Tenan-*

[105] *Report of the Retail Tenancies Advisory Committee*, op. cit. pp.28-31.
[106] For a general discussion of the Victorian *Commercial Arbitration Act*, see Hannah, "The Commercial Arbitration Bill" (1984) 58 L.I.J. 1456; Kerr, "Arbitration and the Courts – The Changing Scene" (1985) 59 L.I.J. 1336; Roskill, "Commercial Disputes and Arbitration" (1984) 58 L.I.J. 947; Sharkey, J.J.A. and Dorter, J.B., *Commercial Arbitration*, (Sydney, Law Book Co., 1986).
[107] Redfern, op. cit. p.43.
[108] Ibid.
[109] *Commercial Arbitration Act* 1984, s.14.
[110] *Commercial Arbitration Act* 1984, s.20(1).

cies Act, which gives arbitrators the power previously possessed by the Supreme Court to make declarations as to the rights of the parties to the dispute and to grant injunctive relief, and the power to order a party who in the arbitrator's opinion has acted in a frivolous or vexatious manner to pay the total fees and expenses of the arbitrator and the costs of the other party to the dispute. Unless the parties agree in writing, any issue that arises for determination must be decided according to law. The effect of this is that an arbitrator does not have the power to decide a dispute by reference to considerations of justice and equity, and must strictly apply the terms of the lease unless the terms are inconsistent with a provision of the *Retail Tenancies Act*. In most cases, the Act gives very little scope for the arbitrator to exercise discretion.[111]

Pursuant to s.28 of the *Commercial Arbitration Act*, unless a contrary intention is expressed in the lease, the award of the arbitrator is final and binding on all parties. Section 38(1) states that the Supreme Court does not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award. However, an appeal lies to the Supreme Court on any question of law arising out of an award (s.38(2)). Unless both parties to the dispute consent to the appeal, the appeal requires the leave of the Supreme Court (s.38(4)). The Supreme Court must not grant leave unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the dispute (s.38(5)(a)).

The *Retail Tenancies Act* is silent on the issue of the enforcement of the arbitrator's orders. By s.33(1) of the *Commercial Arbitration Act*, leave of the Supreme Court may be sought to enforce an arbitration award in the same manner as a judgment or order of the Supreme Court.

FUTURE DEVELOPMENTS

In conclusion, it is apparent that although the *Retail Tenancies Act* 1986 is not as wide-ranging and comprehensive as the *Residential Tenancies Act* 1980,[112] it has nevertheless achieved a significant number of worthwhile reforms. In general terms, justice appears to have been done for small retail premises leaseholders without creating injustice or hardship for landlords, and the reforms achieved by the Act seem to have been accepted without demur by the community.

In the immediate future, it is submitted that a further legislative amendment is required to rectify some of the ambiguities and omissions in the present

[111] See Redfern, op. cit. p.43.

[112] See generally Bradbrook, A.J., Gardam, J.G. and MacCallum, S.V., *A Manual of the Victorian Residential Tenancies Act*, (Sydney, Law Book Co., 1982); Bradbrook, A.J., MacCallum, S.V. and Moore, A.P., *Residential Tenancy Law and Practice — Victoria and South Australia*, (Sydney, Law Book Co., 1983); Teh, G., *Residential Tenancies Handbook — Victoria*, (Sydney, Butterworths, 1981).

Act discussed earlier in this article. The time may also be ripe to extend the protection for tenants to include those recommendations in the Report of the Retail Tenancies Advisory Committee which were not acted upon in the initial legislation. The most appropriate and desirable of these recommendations, it is submitted, are the proposed restrictions on the amount of security deposit and the use to which it can be put during the terms of the tenancy, the proposed seven-day "cooling-off" period for tenants prior to signing the lease, and the desirability of offering the tenant alternative methods of rent-fixing and review.[113] The notion of a "cooling-off" period is well recognised in vendor-purchaser and consumer protection legislation,[114] and the taking and use of security deposits in the residential tenancies context have been controlled in most States for many years.[115] These reforms are thus far from revolutionary and appear to have been sacrificed unnecessarily at the time of the drafting of the second Retail Tenancies Bill in order to achieve consensus. In this case, consensus appears to have led to weakness.

Does the introduction of a *Retail Tenancies Act* mark the final stage in the landlord-tenant law reform saga? The answer is surely NO. As noted earlier,[116] despite the comprehensive nature of the *Residential Tenancies Act*, reforms have not finished in the residential tenancies context, as further legislation is needed to protect boarders and lodgers. Legislation to achieve this goal will constitute stage three of the landlord-tenant law reform saga.

The fourth and final stage in the saga is likely to be the comprehensive reform and codification of the law relating to commercial tenancies. This is desirable for two reasons. First, there is no inherent logic in giving special protection to tenants of retail premises. Similar problems of inequality of bargaining power and onerous lease forms are equally likely to apply to tenants of wholesale premises, and of all types of commercial premises. The only reason why tenants of retail premises were given special protection is that through the Small Business Development Corporation they formed their own political lobby group. The special protection currently available to retail tenancies can only be justified on political terms. Secondly, the current limitation of the legislation to premises with a floor area of 1,000 square metres or less is without merit. Despite the justification of the Minister for Industry, Technology and Resources that tenants of large retail premises do not need legislative protection as they do not suffer from inequality of bargaining capacity,[117] the 1,000 square metres limit is very arbitrary and does not recognise that the operation of the law of supply and demand and other market forces may well determine who has the upper hand in the lease negotiations. The size of the premises is only one factor of many that would have to be considered in determining the relative bargaining strengths of the parties. If

[113] *Report of the Retail Tenancies Advisory Committee*, op. cit. pp.16-17.

[114] See, e.g., *Consumer Affairs Act* 1972 (Vic.), s.16; *Motor Car Traders Act* 1986 (Vic.), s.43.

[115] *Landlord and Tenant (Rental Bands) Act* 1977 (N.S.W.); *Residential Tenancies Act* 1980 (Vic.), ss. 65-79; *Residential Tenancies Act* 1978 (S.A.), ss. 32-35; *Residential Tenancies Act* 1987 (W.A.), ss. 27-31.

[116] See *supra*, n.7 and accompanying text.

[117] *House of Assembly* 23 October 1986, 1512.

legislation such as the *Retail Tenancies Act* is introduced on the basis that it fairly balances the interests of the parties, surely it should apply universally regardless of notions of bargaining capacity. To argue to the contrary can only be justified by an adherence to the principle of freedom of contract, which has been abandoned in modern times as outmoded and inappropriate in an increasing number of commercial contexts.[118]

The on-going saga of landlord-tenant law reform will only finish when a general reform of the law of commercial tenancies occurs. The most desirable result, and the goal to seek to achieve, is the codification of the law, as in many respects the common law in this area is obscure and anachronistic. The *Retail Tenancies Act* should be regarded as the forerunner to the reform of commercial tenancy law, and just one stage in the comprehensive reform of all landlord-tenant laws.

[118] See Bradbrook, A.J., "The New Era of Tenancy Protection" (1987) 61 A.L.J., 593, 613-614. Freedom of contract has been increasingly criticised as a legal principle in recent years; see in particular the seminal article by Kessler, F. "Contracts of Adhesion — Some Thoughts About Freedom of Contract" (1943) 43 *Columbia L. Rev.* 629.