LANDLORD AND TENANT ACT 1954: REVIEW OF IMPACT OF PROCEDURAL REFORMS

INTRODUCTION

1. On 1 June 2004, the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI number 2003/3096 ("the Order") came into effect, reforming the procedures for renewing and terminating business tenancies in England and Wales under Part 2 of the Landlord and Tenant Act 1954 ("the 1954 Act"). During consideration by the House of Commons Regulatory Reform Committee, the Office of the Deputy Prime Minister (ODPM) undertook to review the impact of the reforms once they had been in effect for one year, and to report back to the Committee.

2. The ODPM (now the Department for Communities and Local Government) has reviewed the impact of the reforms with the assistance of a Panel comprising commercial property stakeholders, the professional bodies and property lawyers and practitioners. The membership and terms of reference of the Panel are at Annex A. This report discusses the effectiveness of the reforms in the light of the Panel's discussions and other feedback, and makes certain recommendations for further improvements.

3. The Department has also received some very useful feedback from a Forum hosted by Lovells on behalf of the Property Litigation Association, held on 22 November 2005. The Forum was held after Lovells had carried out a survey of members of the Property Litigation Association, the Royal Institution of Chartered Surveyors and the Chancery Bar Association, from which they received 231 responses almost evenly split between lawyers and surveyors. A brief summary of the issues raised in the survey and at the Forum is at Annex B.

PART 2 OF THE LANDLORD AND TENANT ACT 1954 - POLICY BACKGROUND

4. A brief overview of the provisions of the 1954 Act is at Annex C. Current Government policy is that business tenants should normally have a statutory right to renew their tenancies. There is however no objection to parties agreeing to exclude security of tenure provided the tenant is aware of the implications of doing so. The provisions for excluding security of tenure (also known as "contracting out") are intended to achieve that end.

5. The Department is aware of views that business tenants should no longer enjoy statutory rights of security of tenure, particularly against a background of greater flexibility in the property market and shorter leases. It does not share these views, however, especially as abolition could be damaging to small business tenants who could lose their premises after establishing a viable business. It appreciates that security of tenure may be less important at the larger end of the market, but the "contracting out" provisions do provide the necessary flexibility. For this reason, it aims to minimise the regulatory impact on businesses that do not want the protection of the 1954 Act, while providing safeguards for potentially vulnerable tenants and facilitating the operation of the 1954 Act for business tenancies where it continues to apply.
6. Moreover, it should be noted that while the reforms brought in by the Order are consistent with this policy, they are essentially changes of a technical nature designed to improve the workings of the 1954 Act. The reforms themselves and this review therefore are not intended to address fundamental policy issues.

ASSESSMENT OF THE REFORMS

Agreements to exclude security of tenure

7. The Order abolished the need for landlords and tenants to obtain prior court approval for agreements to exclude security of tenure. Research commissioned by ODPM in 2003 had confirmed that, beyond checking that applications were legally and technically sound and that the tenant (if not legally represented) had had the opportunity to take legal advice, the courts did not exercise any discretion in deciding whether or not to approve agreements to exclude security of tenure\(^1\). Earlier, the Law Commission had concluded that the court process "did not afford a real scrutiny of the circumstances, fairness or integrity of applications" and that "applications to the court to approve agreements that the statutory renewal rights should not apply to leases about to be granted [were] not an effective filter to prevent abuse of what is generally assumed to be the landlord's dominant position"\(^2\).

8. The reforms substituted a new procedure for validating agreements to contract out, providing new safeguards for tenants. The landlord now has to serve a warning notice on the prospective tenant before he or she is committed to taking the lease. The notice warns the tenant in plain English of the implications of agreeing to give up statutory renewal rights. Before signing the lease or tenancy agreement, the tenant must sign a declaration that he or she has received the warning.

9. The Order provided for alternative types of declaration:

- a **simple declaration**, which may be used where the tenant has had at least 14 days' advance warning. The tenant (or a duly authorised representative) merely has to sign a declaration confirming that he or she has had 14 days' advance warning, has read the notice and accepts the consequences of entering into an agreement to exclude security of tenure. The intention was that wherever possible tenants would be given the full 14 days' advance notice, so that they would have a realistic opportunity to consider possible alternative arrangements if on reflection they decided that they would prefer to obtain lease renewal rights;

- a **statutory declaration**, which could be used without any requirement for the tenant to have had 14 days' advance warning. This is a more onerous procedure, as it requires the tenant (or a duly authorised representative) to sign the declaration before an independent solicitor or other person qualified to administer oaths. The tenant has to declare that he or she has received and read the warning notice and accepts its consequence. The more formal

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\(^1\) *Section 38 Landlord and Tenant Act 1954 - Failed Applications*, University of Bristol and Sheffield Hallam University

The statutory declaration procedure was intended for use where 14 days’ advance warning was not feasible, for example where the tenant needed to occupy new premises urgently, perhaps in the event of an emergency. The use of a more formal and more onerous procedure was intended to alert prospective tenants who had not the benefit of 14 days’ advance notice of the prospective exclusion of renewal rights, and in particular to protect tenants from the possibility of a landlord seeking to remove renewal rights at the last minute when there was no realistic opportunity for the tenant to consider alternatives.

The new procedures were intended to ensure that the tenant becomes aware of the consequences of excluding security of tenure, while removing the need for court approval.

10. There is general agreement that abolition of the court procedure has simplified the process of excluding security of tenure for both landlord and tenant, without removing necessary protection from tenants. There are no signs that the change in the procedures for agreements to exclude security of tenure has, of itself, increased the number or proportion of leases without security of tenure. While there are trends towards more contracting out, it is the market that has driven this rather than the procedures themselves.

11. However, there is one significant difficulty with the reform of the contracting out procedures. Landlords' solicitors have generally been reluctant to use the 14 days’ advance warning notice procedure, combined with a simple declaration, instead relying on the statutory declaration procedure designed essentially for emergencies or other exigencies. This is because they are concerned that any changes to the wording of the lease since the date of service of the original notice may require service of a new notice, bearing in mind the implications of the judgement in the 2000 Palacegate case. The Palacegate judgement dealt with issues to do with contracting out procedures when there was a requirement to obtain prior court authorisation for an agreement to exclude security of tenure. It was held to imply that the authorisation related to the specific lease in prospect at the time the court authorised the agreement. It was interpreted as requiring a new authorisation in the event of a material change in the proposed lease terms.

12. Many legal advisers consider that the Palacegate judgement has implications for the new procedures, and hence that it would be necessary to issue a new warning notice in the event of any change in the lease terms since issue of the original warning notice. Paragraph 2 of the simple declaration requires the warning notice to be served at least 14 days before the tenant “enters into the tenancy to which the notice applies”. On one interpretation of this requirement, reference to “the tenancy” could be seen as relating to the particular lease. As it is not possible to know in advance what changes a court might consider to be material, some practitioners consider it prudent to issue a new warning notice even if changes in the terms are only very minor. Although over the whole period of negotiations, a 14-day warning notice would very often be feasible, many solicitors have been using the fast-track procedure in case there are any last-minute changes in the terms of the

lease. Many solicitors have taken the view that it is only safe to serve the notice when the tenancy is in an agreed form. Moreover, at that stage, both parties are usually anxious to proceed without further delay and therefore opt for the statutory declaration procedure.

13. This has two consequences:

- some tenants are not receiving the full 14 days' advance notice as ODPM originally intended. Although the statutory declaration procedure will alert tenants to the prospective loss of renewal rights, it will be too late for them, at the end of the process, to be able to consider as an alternative other premises retaining security of tenure. It should be noted though that in many cases, tenants will enjoy the full period or longer even though a statutory declaration was used. This is because at the outset it was envisaged either that the legal agreement would be concluded within this timescale or that the lease might be subject to change, necessitating (according to the view mentioned above) a fresh declaration;

- the statutory declaration procedure is evidently not seen as a deterrent. Many parties are undergoing what they may still regard as an unnecessary bureaucratic obstacle in using the statutory declaration instead of the much simpler advance notice/simple declaration procedure.

14. The policy objective behind the warning notice is to alert the tenant that the lease is being offered on terms excluding security of tenure. Many of the problems outlined above could be removed if it was made clear that any changes to the proposed deal following service of the warning notice would not invalidate the notice. Indeed, it would be possible to extend this principle so that a single notice could be used to support leases between the same parties at a number of different premises. In each case, there would still be a declaration (either simple or statutory). Such a change would avoid the "Palacegate" problem identified above, and make it feasible for the 14-day warning notice to be used in most cases, as originally intended; the statutory declaration procedure would only need to be used when premises were required at very short notice.

15. The question arises of whether the use of a single warning notice despite changes in the draft lease (or even for different premises) would disadvantage tenants. The provisions are intended primarily to assist small business occupiers, who may not be aware of the implications of excluding security of tenure.

16. Many small business tenants occupy only one set of premises. If there are changes in the proposed terms, they will already have been warned of the implications of contracting out and should be aware of them. The issue of use of a single warning notice for multiple premises will not apply to tenants occupying only one set of premises, but could arise if the tenant subsequently moves to new premises let by the same landlord. In that event, the landlord would not need to issue a new warning notice; however, having already occupied premises without security of tenure, the tenant should be aware of his or her legal position, while the simple or statutory declaration (which the tenant would still have to sign) would remind the tenant of the position, referring back to the original warning notice and reproducing its wording.
17. There is a need to consider whether small business tenants leasing more than one set of premises from the same landlord would be disadvantaged if, on a subsequent transaction, the landlord relied on the warning notice that had been served for another set of premises. This is unlikely to be the case: as noted above, the original warning notice would have alerted the tenant to the loss of the statutory right to renew the tenancy. In any subsequent transactions, the tenant would still have to sign a simple or statutory declaration. As noted above, the declaration itself would contain the wording of the warning notice, which would remind the tenant of the contracted out status of the lease.

18. At the top end of the market, this change would have positive benefits in reducing unnecessary bureaucracy. Large business tenants will either have their own in-house expert professional advice or will take advice from external professional firms. It is safe to presume that they will be fully aware of the implications of contracting out. Indeed, in many cases, they will agree regularly to leases excluding security of tenure. The issue here perhaps is more of reducing the impact on the top end of the market of what could be seen as unnecessary bureaucracy designed to protect tenants at the lower end. The change outlined above would enable landlords in most cases to use the 14-day warning notice procedure, coupled with the simple declaration, which would obviate the need for a statutory declaration and a visit to an independent solicitor. This would be particularly beneficial in reducing the burden on larger tenants.

19. There are also technical difficulties that could make solicitors reluctant to use the simple declaration procedure. The tenant must receive a prescribed warning notice at least 14 days before entering into the lease or agreement for lease. Then, before entering into the lease or agreement, the tenant must sign a prescribed simple declaration to the effect that he or she received the warning notice at least 14 days before entering into the lease or agreement.

20. As the Regulations stand, they do not rule out the simple declaration being signed before the 14 days' warning period has elapsed. However, that would be anomalous, as the tenant would not yet be in a position to assert that the warning notice had been served at least 14 days before he or she entered into the lease or agreement. Some solicitors are concerned about the potential status of such a declaration, and consider that the statutory declaration procedure provides a safer audit trail.

21. This problem could be overcome by making it clear that the tenant should not sign the simple declaration until the 14 days have elapsed. It may then be signed at any time before the tenant enters into the lease or agreement; this would not rule out the declaration being signed immediately before execution of the lease or agreement. Together with evidence of service of the warning notice, this would provide a secure audit trail, and should make the less onerous simple declaration procedure more attractive than the statutory declaration procedure.

22. A further potential technical problem arises from the requirement that the statutory declaration procedure is to be used if the notice is served less than 14 days before the tenant enters into the tenancy or agreement. However, if a statutory
declaration is made, and 14 days subsequently elapse, it may be considered that the statutory requirements have not been met, and that the agreement to contract out is void. To avoid this risk, some solicitors advise the landlord to re-serve the notice and require the tenant to make another statutory declaration just before entering into the tenancy or agreement. It would be useful for the legislation to make it clear that there would be no need to repeat the process in these circumstances.

**Recommendation 1:** Amend the contracting out procedures to confirm that the essential requirement for a valid agreement to exclude security of tenure is that the tenant must have received a warning notice and signed a simple or statutory declaration before entering into the tenancy (or a legally binding commitment to enter into one). There would be no need for the warning notice to be specific to the lease; it would not be necessary to serve a fresh warning notice in the event of changes to the proposed lease terms, even major ones. However, the simple or statutory declaration would be specific to the lease and would need to refer back to service of the warning notice. There would be no need to repeat the process where a statutory declaration had been signed even though, in the event, more than 14 days elapses between service of the warning notice and the tenant entering into the agreement or lease. Amend the form of notice of the simple declaration to make it clear that it should be signed at any time between the expiry of the 14 days’ notice and the tenant entering into the agreement or lease, and clarify the circumstances in which it would be appropriate to use each type of declaration.

**Changes in the identity of the landlord**

23. Developers often find it necessary, for legal and financial reasons, to seek to exclude security of tenure from occupational leases on development schemes. In some cases, they will want to bring in an institutional investor after the occupational tenants have entered into an agreement for a contracted out lease but before the lease itself comes into effect. The parties will have had to comply with the contracting out requirements for this agreement to be valid. However, because the institutional investor has taken an interest in the land in place of the developer, it may now be necessary for the institutional investor rather than the developer to grant the leases to the occupational tenants. As the law stands, many solicitors believe that the institutional investor might be unable to rely on the warning notices the developer would have served or the subsequent simple or statutory declarations. And the institution itself might now be unable to comply with the contracting out procedures, as these need to be carried out before the tenant enters into a lease or agreement for lease. It is therefore possible that at this stage the institutional investor would be precluded from being able to grant leases without security of tenure.

24. This uncertainty could be resolved by a provision making it clear that once an agreement for lease has gone through the appropriate steps to ensure that the ensuing lease is contracted out, the subsequent lease will be contracted out regardless of any change in the identity of the landlord. This would not weaken the safeguards for tenants, as they would already have received a warning notice from the party with whom they entered into the original agreement, and would have signed a simple or statutory declaration. They would therefore have been made
aware that they would not enjoy statutory renewal rights. This would mirror the position where a landlord sells a property with sitting tenants who do not have security of tenure; the sale would not affect the status of the leases, and there would be no need for the parties to carry out a fresh set of contracting out procedures.

25. Similar uncertainties arise with a change in the identity of the tenant before the lease is entered into. However, it would be difficult to make similar provision without potentially compromising the safeguards for tenants, and therefore no recommendation is made.

**Recommendation 2: amend the 1954 Act to make it clear that compliance with the statutory procedures for an agreement for lease without security of tenure would remain valid for any lease made pursuant to the agreement, regardless of whether or not there had been any subsequent change in the identity of the landlord.**

**Service of warning notices**

26. It has been suggested that provisions on the service of warning notices are anomalous in requiring service on "the tenant", while permitting the tenant's authorised representative to sign the subsequent simple or statutory declaration on the tenant's behalf. Views differ on whether the provisions as they stand permit service on the tenant's authorised representative, or whether (in view of the absence of any reference to the latter) they require service on the tenant personally. There is thus a case for clarifying the law.

27. The case for clarifying the law so that it becomes clear that service may be made on the tenant's authorised representative is that this would ease administrative burdens, reducing delays and legal costs, particularly in cases where the tenant is consciously consenting to contracting out arrangements. The landlord would clearly need to be satisfied that the tenant has authorised the representative on whom notice is served; service on a representative who had not been authorised would be invalid. However, the landlord will often know the tenant's authorised representative, as will be the case where the tenant appoints a lawyer to advise on the terms of the lease.

28. Could such a clarifying amendment lead to abuse and, if so, should consideration rather be given to restriction to service on the tenant personally? The intention of the provisions is for the tenant to be aware of the implications of agreeing to exclude security of tenure. It would be the responsibility of an authorised representative accepting service of a warning notice to ensure that the tenant was aware. The representative would need to decide whether it was necessary to give the tenant specific advice on the implications of the proposed agreement or whether it would suffice to rely on more general advice that had already been given on the implications of agreements to exclude security of tenure. In any event, it would be open to a tenant to pursue a claim for negligence if he or she could claim that their

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4 Paragraphs 1 and 4 of Schedule 2 to the Regulatory Reform (Business Tenancies)(England and Wales) Order 2003
duly authorised representative who had accepted service had not provided advice on
the implications of a contracting out agreement.

29. Any abuse would be of more concern at the lower end of the market. However, service personally on the tenant is more likely here, as in many cases tenants will either be legally unrepresented or the landlord may not know who is the authorised representative. Solicitors acting for small business tenants are likely to be particularly conscious of the possibility of an action for negligence, especially as they will be aware that many such tenants will have no knowledge of property law.

30. Restriction to service on the tenant personally would add to legal costs and impose unnecessary bureaucracy. Overall, our conclusions are that clarifying the law to permit service of warning notices on tenants’ authorised representatives would be helpful in reducing administrative burdens while not giving rise to abuse. The same considerations apply to the parallel provisions on agreements to surrender.

Recommendation 3: amend the provisions on service of warning notices for agreements to exclude security of tenure and agreements for surrender to make it clear that service may be made either on the tenant or (where known) the tenant’s authorised representative.

Implications for guarantees and options

31. Changes in the contracting out procedures have also had implications for various types of agreement envisaging a potential future lease, but where at the time of the agreement there is no actual tenancy in immediate prospect. As the law stands, the parties to any tenancies that materialise as a result of any such agreements will need to have fulfilled the statutory procedures before the tenant enters into the original agreement that envisages a lease if security of tenure is not to apply. Notable among these agreements are guarantees and options.

Guarantees

32. Potential problems have arisen over the exercise of “put” options, where the landlord may require a guarantor to take a lease of the premises when the guarantee is invoked. Under the old contracting out procedures requiring prior court approval, the parties could make a joint application to the court when the guarantee was invoked. The landlord and guarantor did not need to make a separate application to the court on the grant of the initial lease to the tenant. This was because the old contracting out procedures did not require parties to obtain a court order before they became contractually bound to each other, so contracts were often made before a court order was obtained.

33. This may not be possible under the new contracting out procedures, which require all parties to exchange a notice and declaration, or statutory declaration, before any contractual commitment is made. So, as the guarantee itself is binding

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5 Paragraphs 1 and 4 of Schedule 4 to the Regulatory Reform (Business Tenancies)(England and Wales) Order 2003
from the time the guarantor enters into the guarantee, the guarantor is also then committed to take up a fresh lease if and when the guarantee is invoked.

34. It may be possible to follow the contracting out procedures before the guarantor enters into the guarantee agreement. This would mean that the landlord must serve a notice on, and obtain a simple or statutory declaration from, the guarantor before the guarantor enters into the guarantee or, if earlier, becomes contractually bound to do so. (Where there is more than one guarantor, the landlord would need to serve a notice on, and obtain a declaration from, each guarantor. However, at the time the guarantor enters into the guarantee agreement, he or she has a contingent liability to take a lease; the actual obligation will only arise if the tenant defaults and the guarantee is invoked. So fulfilling the contracting out requirements on the grant of the initial lease to the tenant is difficult and burdensome. But fulfilling these requirements when the guarantee is invoked (or when the landlord exercises the option) would be impossible, because the guarantor would already be contractually committed to take up a replacement lease by virtue of his or her guarantee, and would therefore be unable to comply with the new statutory procedures.

35. It is worth bearing in mind that most guarantees will not be invoked, while the issue of whether it is really necessary for a guarantor to receive a warning notice about potential future contracting out is discussed further below. Moreover, it would not be appropriate to offer the guarantor in effect a choice of taking an alternative lease that is not contracted out, as that option would not exist in those circumstances.

36. The problem could be resolved by amending the legislation to make it clear that where the guarantor is guaranteeing a contracted out lease, any lease taken by the guarantor following the invocation of the guarantee would remain contracted out. The question arises of whether there should be any special protection for the guarantor before entering into the guarantee; and, if not, whether this would work to the disadvantage of guarantors.

37. There are a number of different circumstances in which landlords seek guarantees for leases: for example, a PFI-type transaction; a holding company guaranteeing the performance of a subsidiary; an assignor guaranteeing the performance of an incoming tenant; and a private individual guaranteeing the performance of a small business. The greatest risk to the guarantor is a default by the tenant whose performance is being guaranteed, and hence the invocation of the guarantee. The primary need is for the guarantor to understand the nature of that risk, and of its potential consequences, a matter that is outside the scope of the 1954 Act. By comparison, the risk that there would be no renewal rights for any tenancy taken on after the guarantee being invoked would be far less significant. Indeed, many guarantors are likely to want to rid themselves of an unwanted leasing obligation as soon as possible, and therefore may well be uninterested in lease renewal rights even if these were available.

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6 As could happen in the case of an agreement for lease, backed by a guarantee
Recommendation 4: amend the 1954 Act to make it clear that where a landlord invokes a lease guarantee on the default of a tenant under a contracted out lease, any new lease entered into by the guarantor pursuant to the guarantee will be contracted out, without any need for the landlord and guarantor to have followed the prescribed procedures for contracting out, either when the guarantor entered into the guarantee or before the new lease is taken up.

Options

38. As with guarantees, an option to take a lease raises the question of how to deal with a potential future lease without renewal rights. Once the tenant exercises an option for a new lease, he or she is committed to the lease and it is therefore then too late to carry out the required statutory procedures.

39. On the one hand, parties entering into contracts conferring future rights to a contracted out lease will generally have access to good quality professional advice. It is not unreasonable to assume that as part of the advice on the wider contract, such parties are likely to receive advice on the implications of taking up the option, including the terms of any lease taken in pursuance of the option. It is likely that this would embrace the absence of renewal rights for any such lease. On the other hand, simply dispensing with the contracting out procedures for options could give rise to abuse, as a landlord could present an ordinary agreement for lease as an option, thereby enabling him or her to circumvent the normal contracting out procedures. The report therefore does not recommend special provision for options, except for the specific case discussed below.

40. Special consideration should be given to one particular type of option, a contracted out lease with an option to renew on contracted out terms, or to take a further lease of different premises. There are some cases where a landlord would be prepared to grant limited rights of renewal, but wants to avoid granting continuing renewal rights. Such arrangements would facilitate shorter leases and greater flexibility in commercial leases, to the benefit of tenants. Such contracts are common, for example in the case of PFI contracts where there is a need to tie in the property lease with the overall service contract or development agreement. Tenants would already have had a warning notice about the tenancy being let on contracted out terms, and in the course of exercising the option to renew should be aware that there will be no further right to renew.

Recommendation 5: amend the 1954 Act to enable a contractual option to renew a contracted out lease to be granted without the need to comply, on renewal with the prescribed procedures for agreements excluding security of tenure. The same treatment should also apply where the landlord offers a further lease of different premises. However, this should not automatically preclude the possibility of a future lease being granted with full 1954 Act rights, if that is what the parties intend. The parties would still of course need to comply with the statutory procedures for the original lease.

7 Often a feature of PFI deals and development agreements where the landlord may need to move the tenant around the site as part of a phased development process.
Sale and leaseback: auctions

41. There is a need to cater for sale and leaseback contracts, where the current owner-occupier is selling the property at auction on condition that the buyer grants an immediate leaseback on contracted out terms. The difficulty that has arisen is that the commitment to enter into a lease would arise at the drop of the auctioneer's hammer, at which point the seller and successful bidder would be committed to the sale and leaseback deal. By that time, in order to comply with the contracting out procedures, the successful bidder must have served a warning notice on the seller, while the seller will have had to have completed a simple or statutory declaration. This would only be feasible if, before the auction, all the intending bidders had served notice on the seller, who in turn would have had to have signed simple or statutory declarations for each of the bidders, in case they were successful at the auction.

42. This raises logistical difficulties while being overly bureaucratic. It should be noted that such agreements are complex and would be most likely to occur at the top end of the market, where both parties would have expert advice. The party selling and leasing back would already be in occupation of the premises and would be driving the deal. It seems very doubtful that a party entering into a sale and leaseback agreement would need any protection with regard to a contracted out leaseback.

Recommendation 6: amend the contracting out procedures to enable an owner-occupier to enter into a sale and leaseback auction contract without the need for the parties to comply with the normal contracting out requirements. This could be done by exempting the new owner from the contracting out provisions when granting the leaseback to the immediately preceding owner (or member of the same group of companies) after the auction.

Service of multiple notices

43. Concern has been raised about the need to serve multiple notices in certain circumstances, which is costly and time-consuming. The problem arises more with guarantors than with joint tenants; the requirement for the latter is for notices to be served on joint legal tenants, of which there may be no more than four. However, this problem will no longer arise if notices no longer have to be served on guarantors, as recommended above.

Ownership and control of businesses

44. The 1954 Act makes it clear which business entities enjoy rights under the Act or are subject to its obligations, ie who can be regarded as the landlord or tenant. This is relevant, for example, if the person or organisation in occupation of the premises is different from the one named on the lease, but there is nevertheless some relationship between the two. The reforms rationalised these arrangements, placing tenants on the same footing as landlords. The basic principle is that while the rights and obligations rest with the parties named on the lease, they extend to other entities under the same effective control: for example, a company in the ownership of the landlord or tenant named on the lease.
45. We have not received any specific feedback on these provisions. We assume that they have been helpful to tenants in permitting them to renew where there has been a change in the designation or corporate structure of the business entity occupying the premises, but where the effective ownership and control is unchanged.

46. One issue that has been raised, however, is the treatment of Limited Liability Partnerships (LLPs). An LLP is a new alternative corporate business entity providing the benefits of limited liability while allowing its members the flexibility of organising their internal structure as a traditional partnership. Panel members have confirmed that LLPs are becoming increasingly significant, especially as corporate governance vehicles for professional firms.

47. While the amendments in the Order to the provisions on ownership and control enable occupation by a company under the tenant's control to qualify as occupation for the purposes of business use by the tenant, the same principle was not extended to occupation by an LLP. Section 46(2) of the 1954 Act defines "company" as having the meaning given by section 735 of the Companies Act 1985. It is argued that as limited liability partnerships (LLPs) are outside the definition of "company" in section 735 of the latter Act, this amendment to section 23 would not embrace cases where the tenancy is held by individual members of an LLP, but business occupation is by the LLP as a corporate body. The implications are that where there is a tenancy held by persons who are members of an LLP, the occupation by the LLP for its business use would not qualify as occupation by those persons, and so there would be no renewal rights under the 1954 Act.

Recommendation 7: amend the provisions on ownership and control so that tenancies held by individual members of an LLP, but where business occupation is by the LLP as a corporate body, will qualify for renewal.

Notices requiring information

48. Landlords and tenants need to be able to get information from each other so that they can pursue renewal or termination procedures. The 1954 Act has always facilitated this process, but revised, more effective provisions require the parties for six months to update any information already provided; cater for parties transferring their interests; and lay down more effective civil enforcement procedures.

49. The Panel recommends two minor changes to these provisions. Section 40(2)(a) requires tenants to tell landlords, on receipt of service of the required notice, whether they occupy the premises or any part of them wholly or partly for the purposes of a business they are carrying on there. Similarly, section 40(4)(a) requires the "reversioner or the reversioner's mortgagee", in most cases the landlord, on receipt of the tenant's notice, to reveal whether he or she owns the premises or any parts, or is the mortgagee in possession of any such owner. In cases where tenants occupy part of the premises for their own business use, or the landlord owns part of the premises, or there is a mortgagee in possession of part, it would be useful to require them to indicate which part. This would facilitate the renewal or termination process, by enabling the other party to set out the relevant details in the termination notice or request for a new tenancy.
Recommendation 8: amend section 40(2)(a) of the 1954 Act to require tenants who are occupying a part of business premises for the purposes of a business they are carrying on, to indicate which part they are occupying, on receipt of the landlord's notice requesting information. Similarly, amend section 40(4)(a) to require a reversioner, who owns part of the premises or a reversioner's mortgagee in possession of part of the premises, to indicate which is the relevant part of the premises.

Renewal and termination procedures

50. The new provisions have introduced significant reforms to the procedures for renewing and terminating tenancies, removing some notorious legal traps for tenants, enabling landlords to apply to court for the renewal or termination of the tenancy, and giving parties the opportunity if they wish to continue negotiating without the need to go to court.

51. However, there is concern that collectively some elements of the reforms have now made it difficult and costly for landlords to find out whether the tenant intends to renew the tenancy when it comes to an end. This issue is discussed further after consideration of individual elements of the reforms.

Landlord's section 25 termination notice and tenant's section 26 request for a new tenancy

52. A new provision requires landlords not opposing renewal to set out their proposals for the new tenancy in the section 25 termination notice. Mirroring the pre-existing requirement for the tenant to set out proposed terms in a section 26 request for a new tenancy, the landlord is required to set out details of the property to be comprised in the new tenancy, the rent payable and the other terms. The notice warns the tenant that the proposals are purely for negotiation and do not bind either party.

53. In many cases, this has helped to speed up the renewal process. Although there will usually need to be further negotiations about the terms cited, this cuts out a round of initial correspondence about the revised terms. The prescribed termination notice tells the tenant that he or she is not bound to accept the terms. Although some respondents to the Lovells survey considered that sometimes initially there is some posturing, with landlords quoting inflated terms, overall it is thought to be a helpful reform.

54. The question has arisen of whether the notice should require the landlord to specify the proposals for the new tenancy in more detail. It would be helpful for the courts, where they are called on to settle the terms of the tenancy, for the notice to set out the proposals for the new tenancy under the various headings that the courts would need to address under sections 32-35 of the 1954 Act. These are, respectively, the property to be comprised in the new tenancy; the duration of the new tenancy; the rent payable; and the other terms of the new tenancy. However, at present it is unclear whether section 25 requires the landlord to set out proposals for the duration of the new tenancy. It would therefore be desirable to amend section 25 to make this clear.
55. We do not favour imposing any further requirements on landlords as to how they should set out their proposals for the new tenancy. We consider that this would be too prescriptive, bearing in mind that the intention of the notice is primarily to initiate negotiations for a new tenancy. The present arrangements permit landlords to include more detail if they wish to do so.

56. It would be logical as a consequence to make a similar amendment to the requirements that tenants have to meet in setting out their proposals in their section 26 requests for a new tenancy, so that landlords and tenants continue to have corresponding requirements. This again would require an amendment to section 26 to require the tenant specifically to set out proposals for the new tenancy.

Recommendation 9: amend sections 25 and 26 of the 1954 Act to require landlords and tenants respectively to set out their proposals for the duration of the new tenancy, in addition to the existing requirements for them to set out the details of the property to be comprised in the new tenancy, the rent payable and the other terms.

Abolition of the tenant's counternotice

57. Before the reforms came into effect, the tenant had to serve a counternotice in response to a landlord's section 25 notice, within strict time limits. A tenant failing to do so would lose the right to renew. By the same token, the landlord would know that such a tenant had no legal rights to renew, and could safely arrange to relet the premises without a void at the end of the tenancy. The abolition of this provision has removed a significant trap for tenants and their legal advisers which resulted in many tenants losing their renewal rights. However, it has given rise to some problems for landlords, which are discussed below.

Termination by tenant

58. As long as the tenant continues to carry on business in the premises, the 1954 Act automatically extends a business tenancy beyond the agreed end of the lease until one of the parties takes action to renew or end it. If the tenant of a fixed term tenancy stays on beyond the end of the lease, he or she must give the landlord three months' notice of termination.

59. Before the reforms came into effect, there had been some confusion about what a tenant wishing to quit at the end of a fixed term tenancy needed to do. It had been assumed that section 27(1) of the 1954 Act as it then stood required a tenant to give at least three months' notice of termination, to avoid continuing obligations after the end of the fixed term. However, in 1997 the Court of Appeal decision in the Esselte\(^8\) case called this into question. When preparing the Order, the Government essentially decided to confirm rather than reverse the Esselte decision.

\(^8\) *Esselte AB v Pearl Assurance plc*, [1997] 02 E.G. 124; [1997] 2 All E.R. 41
60. New provisions thus clarify what a tenant who wants to quit at the end of the lease has to do to avoid continuing obligations. They make it clear that a tenant who has either given three months' notice before the end of the lease or who has quit the premises by the end of the lease, will not face any continuing lease obligations.

61. As with abolition of the tenant's counternotice, the decision to confirm the Esselte judgement calls into question whether the landlord now has sufficient means to establish whether the tenant is planning to stay or go at the end of the lease. This issue is discussed further below.

**Time limits for application to the court**

62. Before the reforms, the tenant had to apply to the court for a new tenancy within tightly defined and somewhat complex timescales. The tenant had to apply to the court not earlier than two months, but not later than four months, after the landlord's section 25 termination notice or the tenant's own section 26 request for a new tenancy. Failure to do so would result in loss of the right to renew.

63. The reforms simplified the position considerably, by providing that applications to the court can be made at any time before the deadline specified in a section 25 notice. In the case of a section 26 request, the tenant can apply at any time before the deadline, once the landlord has served a counternotice, or has had two months within which to do so. Although it was considered necessary to retain a final deadline for applications to court, the reforms enable landlords and tenants to agree in writing to an extension of the deadline; with provision for further extensions provided they are made within the current deadline.

64. The ability to agree an extension of the deadline has been helpful in facilitating renewal agreements between landlords and tenants without the need to involve the courts. Before the reforms came into effect, many tenants needed to make applications to the court merely to preserve the legal right to renew, despite the prospect of agreement without involving the court. Agreed extensions of the deadline enable landlord and tenant to continue negotiating without any artificial restriction until they are either able to agree renewal terms or need to go to court to resolve issues that are still in dispute. This provision has reduced unnecessary court business and legal costs for the parties.

65. However, there is some concern that, although welcome, the new provision to extend deadlines for applications to court may impose a new type of trap for tenants. Under the new provisions, the tenant must apply to court within the currently agreed time limit or secure an agreement to extend the current deadline before it expires. Frequent extensions of the deadline could give rise to some confusion, particularly where it is the surveyor who is negotiating the terms of the new tenancy, while it falls to the solicitor to ensure that there is compliance with the legal procedures.

66. Four options have been considered:

- **abolition of time limits.** While this would eliminate traps for tenants, the only way the landlord would be able to terminate a tenancy would be to
apply to court. This would conflict with one of the main aims of the reforms, the reduction of litigation;

- **open-ended extension of time limits, subject to notice of termination.** An alternative to abolition would be to enable either party to give (say) 14 days' notice of the end of the deadline. This would remove the automatic trap for the tenant, but the landlord would be able to reinstate it at any time by giving notice of termination;

- **reinstatement of a deadline:** provision for a tenant who narrowly misses a deadline to apply to court for the deadline to be reinstated. However, this would add complexity and uncertainty to the procedures, especially if the courts had a wide degree of discretion; and

- **provision for a general extension of three months.** While this might be helpful in some cases, particularly when the parties were close to agreement, there still remains an ultimate deadline and hence a trap.

67. On balance, the Department considers that there are problems with each of these options and does not favour change. It is important that throughout the tenancy and during any extension, there should be no doubt about when the lease is due to come to an end. Any departure from this principle risks introducing unintended consequences.

68. One further possibility would be to require use of a prescribed notice where the parties agree to extend a deadline. The notice could have a clear "health warning" that the tenant will lose the right to renew if there is either no application to court within the currently agreed deadline or no agreement to extend the current deadline. However, the Panel considered that this would add to regulatory burdens without producing commensurate benefits.

**Applications to court by landlord**

69. Previously, only the tenant could apply to the court. The landlord could only prompt proceedings indirectly by serving a notice initiating termination, giving the tenant the opportunity to renew. The new provisions allow the landlord to apply either:

- for renewal, thus being able to counter any delay by the tenant; or

- for termination without renewal. If the court agrees that the landlord has valid grounds of opposition to a new tenancy, it will refuse to order the grant of a new tenancy. But if the landlord fails to establish any such grounds, the court will order the grant of a new tenancy and fix its terms; there will be no need for the tenant to make a fresh application.

**Ascertaining the tenant’s renewal intentions**

70. One of the intended benefits of allowing landlords to apply to court for the renewal of the tenancy was to enable them to establish whether or not the tenant intended to renew the tenancy, where this was in doubt. The assumption was that
the landlord would write to the tenant before issuing proceedings and that a tenant not wishing to renew would respond before the landlord applied to court. Landlords and tenants would thus avoid unnecessary legal costs.

71. It was thought that this provision would counter difficulties for landlords arising from:

- **abolition of the tenant's counternotice:** before the reforms, tenants had to respond to a landlord's section 25 termination notice. This was a limited indicator of the tenant's intentions: a positive response did not bind the tenant, but tenants who did not respond lost the right to renew, and in those cases the landlord could arrange to relet without risk of challenge; and

- **absence of any requirement for tenants to give notice of termination:** amended provisions (section 27(1)) confirmed the 1997 *Esselte* judgement that tenants of fixed term tenancies can avoid continuing lease obligations by merely vacating the premises on or before the termination date. Before *Esselte*, the assumption had been that section 27(1) of the 1954 Act as it then stood required tenants to give three months' notice of termination. On that reading, the landlord would be able to use the three months' notice to market the property with a view to immediate re-occupation, on the assurance that the tenant would leave on or before the termination date.

72. However, it is now suggested that landlords are reluctant to apply to court for renewal as they will have no opportunity to recover their costs if the tenant asks for the case to be dismissed. Landlords can incur significant costs in pursuing an action for renewal. They would need to undertake substantial preparatory work after issuing proceedings, involving the preparation of witness statements etc. Section 29(5) of the 1954 Act requires the court to dismiss the landlord's application if the tenant informs the court that he or she does not want a new tenancy, and there is no provision for costs. The landlord would be the "losing" party and there would be no entitlement to costs, nor any opportunity to press for costs. The inability of the landlord to recover costs in these circumstances makes it a less attractive option to apply to court.

73. As a matter of policy, we would not wish to reinstate the tenant's counternotice or reverse the *Esselte* position. The potential loss to the tenant would be disproportionate to the potential benefit for the landlord.

74. The issue thus arises of whether there should be provision for an award of costs, where appropriate, in cases where the tenant informs the court that he or she does not want a new tenancy, which triggers the court’s dismissal of the landlord’s application. This raises difficult issues, as the legislation does not require the tenant to signify that he or she wants a new tenancy. The case could therefore go into court without the tenant formally expressing any interest in renewal. Is it appropriate for the court to order the tenant to pay the landlord's costs where there has been no failure to comply with any formal or statutory requirement?

75. There is however a parallel. Section 36(3) gives the court a wide discretion on the making of an order for costs where the tenant applies for the revocation of an
order for the grant of a new tenancy, regardless of which party brought legal proceedings. While section 36(3) does not automatically revoke any previous provision for costs, it gives the court powers to revoke or vary any such provision; or, if no order has been made, to make an award for costs. It seems clear that the court has discretion to order the tenant to pay the landlord's abortive costs if it considers this appropriate, even though the tenant has acted within his or her rights under the Act and has not failed to comply with any procedural or statutory requirement.

76. The Panel favours similar provision where the landlord applies for renewal. It suggests giving the court wide discretion to award costs in favour of either party (or none), depending on the circumstances and taking account of the reasonableness of the parties' behaviour. For example, if a landlord was precipitate in bringing proceedings before the tenant had had a chance to negotiate, the court might want to award costs in favour of the tenant, on any subsequent withdrawal by the tenant. On the other hand, if the landlord could show that he or she had only applied to court after repeated unsuccessful attempts to get the tenant to negotiate, the court might want to award costs in favour of the landlord.

77. Section 29(5) requires the court to dismiss an application by the landlord for renewal if the tenant informs the court that he or she does not want a new tenancy. The Panel suggests an amendment to enable the court, before dismissing the landlord's application, to invite the parties to apply for an award of costs. The court would have discretion to make an award of costs to either party or none. The termination date for the tenancy would be set at three months from the date on which the tenant informed the court that he or she did not want a new tenancy; this would require an amendment to section 64(1) of the 1954 Act.

78. Maintaining the status quo would make it difficult for landlords to overcome the disadvantages for them of the abolition of the tenant's counternotice and confirmation of the Esselte decision. As noted, restoring the counternotice and reversing Esselte would be disproportionately harmful to tenants.

Recommendation 10: amend section 29(5) to enable the court, before dismissing the landlord's application, to invite the parties to apply for an award of costs. The court would have discretion to make an award of costs to either party or none. Amend section 64(1) so that the termination date for the tenancy would be set at three months from the date on which the tenant informed the court that he or she did not want a new tenancy.

Interim rent

79. There are several changes to the rules on interim rent (rent payable pending renewal of the tenancy):

- tenants as well as landlords may apply for interim rent;
- changes to the rules on the timing of interim rent remove any incentive for landlord or tenant to delay renewal proceedings;

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- the amount of interim rent will be fairer to both parties. Usually, it will be the rent for the new tenancy (ie open market rent), backdated, but subject to adjustment if market conditions change significantly over the period interim rent is payable. Similarly, there may be an adjustment if the new occupational terms are significantly different from the old ones. In some cases, the old method of determining interim rent will continue to apply.

80. These provisions are undoubtedly somewhat complex, in the interests of a market-based solution that is fair to both parties. However, it is too early to assess the impact of these reforms, as there have been few applications for interim rent. This could be a sign that the renewal application procedure is working faster, as intended. It is thought likely that applications for an adjusted rent will only occur when there has been considerable movement in the market, conditions that have not been seen since the introduction of the reforms.

Surrenders and agreements to surrender

81. Changes to the law on the surrender of tenancies make it clear that the parties may agree to an immediate surrender of the tenancy (where for example the tenant can no longer afford the rent) without the need for any special arrangements. However, safeguards are still required for agreements to surrender (ie an agreement to surrender the tenancy at some definite time or event in the future), as the tenant may not immediately realise that such an agreement involves the abandonment of renewal rights. The parties no longer need court approval, but have to follow new procedures very similar to those for agreements to exclude security of tenure (see above).

82. However, the new provisions only cater for agreements to surrender "the tenancy". It has been suggested that it should be made clear whether they can also be used to facilitate agreements where the tenant wishes to surrender only part of the tenancy. At present, some legal advisers take the view that the only safe way to secure a surrender of part at present is for the tenant to agree to surrender the whole tenancy, and then enter into a new lease for those parts of the premises that he or she will continue to occupy. This has disadvantages for landlords which may make them reluctant to agree to a surrender of part of the premises. Where the lease predates the Landlord and Tenant (Covenants) Act 1995, surrendering the whole and granting a new lease will affect the degree which landlords can hold the original tenant responsible; the landlord will lose the benefit of previous tenants' covenants and those of guarantors. Even with leases taken out since 1995, surrendering the whole would result in the landlord losing the benefit of any authorised guarantee agreement. There are also potential disadvantages for tenants. A tenant having to surrender the whole may not benefit from overlap relief from Stamp Duty Land Tax (SDLT); this would be the case if the lease back is not of substantially the whole of the original premises or if the original lease was subject to stamp duty rather than SDLT.

83. It would be useful to amend the provisions to make it clear that a tenant may enter into an agreement to surrender part of the premises. There should be no difficulty in identifying those parts of the premises which are the subject of the agreement to surrender, by means of a plan attached to the declaration.
Recommendation 11: amend the provisions to make it clear that it is possible for a tenant to enter into an agreement to surrender part of the premises.

**Compensation**

84. The 1954 Act has enabled tenants to claim compensation from a landlord whose misrepresentation has led the court to refuse the grant of a new tenancy. The new provisions extend this to cases where the tenant is induced not to apply to court, or withdraws an application, because of misrepresentation. The new provisions also rationalise the rules for compensation payable in certain cases where the landlord successfully opposes renewal of the tenancy. We have had no specific feedback on these amendments.

**Other changes**

85. The new provisions include other minor changes:

- abolishing the requirement that a tenant's three months' notice to end a continuation tenancy (a tenancy that the 1954 Act has automatically extended following the end of the agreed fixed term) must end on a quarter day. So the tenant now needs to give just three months' notice;

- enabling the courts to order the grant of new leases up to a maximum period of 15 years, rather than 14 as previously. This is more compatible with modern leasing patterns, where leases tend to have three or five yearly rent reviews; and

- clarifying the procedures to be used where there is a single lease but there are separate landlords of different parts of the property.

We have had no specific feedback on these provisions.

**General matters**

86. This report makes various recommendations for minor modifications to the procedures under the 1954 Act. It is important that any provision for exceptions or modifications to the normal contracting out procedures in particular circumstances should be accompanied by requirements to ensure that there is an adequate explanation on the face of the lease so that the status of the lease is not in doubt. It is also important that any amending legislation should not be held of itself to substantiate or negate any particular interpretation of the law applied in the period between the Order coming into effect and the coming into effect of the further amending legislation. These points are discussed further below.

**Documentation**

87. The report recommends various changes to the contracting out procedures, among them a number of circumstances in which the normal contracting out procedures should not apply:
• where there is a change in identity of the landlord (recommendation 2);
• guarantees (recommendation 4);
• contractual right to renew (recommendation 5); and
• sale and leaseback auctions (recommendation 6).

If the law is changed to accommodate these arrangements, it would be important to avoid any ambiguity about the status of the lease. In these cases, leases or agreements for lease should include a clear statement that the lease is contracted out with a reference to the relevant provisions permitting the normal contracting out procedures to be waived. Similarly, where there is provision for a guarantee or some other conditional agreement, the agreement should have a statement about the contracted out status of any lease that materialises, again with a reference to the relevant provisions.

Recommendation 12: where parties who are agreeing to an actual or potential contracting out arrangement are relying on provisions that permit the normal contracting out to be waived, the lease or agreement should contain a clear statement that the lease (or any lease that materialises under the agreement) is contracted out with a reference to the relevant provisions permitting the normal contracting out procedures to be waived.

Interpretation: no retrospective effect

88. There have been some differing interpretations of some of the new provisions which came into effect on 1 June 2004, notably the new contracting out procedures. This report makes recommendations to accommodate certain difficulties that have arisen from particular interpretations. This should not be taken to imply that those interpretations were necessarily sound, or that other interpretations which did not envisage such difficulties were necessarily unsound. Amending legislation should not have retrospective effect, and should make it clear that the amendments themselves have no bearing on whether any particular interpretation of the provisions in force between 1 June 2004 and the new amending legislation was correct.

Recommendation 13: amending legislation should not be retrospective and should not have any bearing on interpretation of the law between the date that the Order came into effect and the coming into effect of the further amending legislation. The amending legislation should make it clear that the amendments (or for that matter any provisions that are left untouched) do not of themselves imply that any particular interpretation of the provisions applied during that period was wrong, and should not constitute grounds for proceedings to that effect.

Conclusions and recommendations

89. Overall, the reforms have been very successful in streamlining the procedures under the Landlord and Tenant Act 1954. The Lovells survey of those operating the provisions on a day-to-day basis found that 72% of respondents considered that
overall the reforms had been successful while 81% found them easy to understand and put into practice. Generally, the aims of making the provisions "quicker, easier, fairer and cheaper" to operate have been achieved. However, as discussed above, now that the reforms have been in place for more than a year, it has been possible to identify certain further specific improvements.

Summary of recommendations

90. Proposed amendments are summarised below.

1. Amend the contracting out procedures to confirm that the essential requirement for a valid agreement to exclude security of tenure is that the tenant must have received a warning notice and signed a simple or statutory declaration before entering into the tenancy (or a legally binding commitment to enter into one). There would be no need for the warning notice to be specific to the lease; it would not be necessary to serve a fresh warning notice in the event of changes to the proposed lease terms, even major ones. However, the simple or statutory declaration would be specific to the lease and would need to refer back to service of the warning notice. There would be no need to repeat the process where a statutory declaration had been signed even though, in the event, more than 14 days elapses between service of the warning notice and the tenant entering into the agreement or lease. Amend the form of notice of the simple declaration to make it clear that it should be signed at any time between the expiry of the 14 days' notice and the tenant entering into the agreement or lease, and clarify the circumstances in which it would be appropriate to use each type of declaration.

2. Amend the 1954 Act to make it clear that compliance with the statutory procedures for an agreement for lease without security of tenure would remain valid for any lease made pursuant to the agreement, regardless of whether or not there had been any subsequent change in the identity of the landlord.

3. Amend the provisions on service of warning notices for agreements to exclude security of tenure and agreements for surrender to make it clear that service may be made either on the tenant or (where known) the tenant's authorised representative.

4. Amend the 1954 Act to make it clear that where a landlord invokes a lease guarantee on the default of a tenant under a contracted out lease, any new lease entered into by the guarantor pursuant to the guarantee will be contracted out, without any need for the landlord and guarantor to have followed the prescribed procedures for contracting out, either when the guarantor entered into the guarantee or before the new lease is taken up.

5. Amend the 1954 Act to enable a contractual option to renew a contracted out lease to be granted without the need to comply, on renewal with the prescribed procedures for agreements excluding security of tenure. The same treatment should also apply where the landlord offers a further lease of different premises. However, this should not automatically preclude the possibility of a
future lease being granted with full 1954 Act rights, if that is what the parties intend. The parties would still of course need to comply with the statutory procedures for the original lease.

6. Amend the contracting out procedures to enable an owner-occupier to enter into a sale and leaseback auction contract without the need for the parties to comply with the normal contracting out requirements. This could be done by exempting the new owner from the contracting out provisions when granting the leaseback to the immediately preceding owner (or member of the same group of companies) after the auction.

7. Amend the provisions on ownership and control so that tenancies held by individual members of an LLP, but where business occupation is by the LLP as a corporate body, will qualify for renewal.

8. Amend section 40(2)(a) of the 1954 Act to require tenants who are occupying a part of business premises for the purposes of a business they are carrying on, to indicate which part they are occupying, on receipt of the landlord’s notice requesting information. Similarly, amend section 40(4)(a) to require a reversioner, who owns part of the premises or a reversioner’s mortgagee in possession of part of the premises, to indicate which is the relevant part of the premises.

9. Amend sections 25 and 26 of the 1954 Act to require landlords and tenants respectively to set out their proposals for the duration of the new tenancy, in addition to the existing requirements for them to set out the details of the property to be comprised in the new tenancy, the rent payable and the other terms.

10. Amend section 29(5) to enable the court, before dismissing the landlord’s application, to invite the parties to apply for an award of costs. The court would have discretion to make an award of costs to either party or none. Amend section 64(1) so that the termination date for the tenancy would be set at three months from the date on which the tenant informed the court that he or she did not want a new tenancy.

11. Amend the provisions to make it clear that it is possible for a tenant to enter into an agreement to surrender part of the premises.

12. Where parties who are agreeing to an actual or potential contracting out arrangement are relying on provisions that permit the normal contracting out to be waived, the lease or agreement should contain a clear statement that the lease (or any lease that materialises under the agreement) is contracted out with a reference to the relevant provisions permitting the normal contracting out procedures to be waived.

13. Amending legislation should not be retrospective and should not have any bearing on interpretation of the law between the date that the Order came into effect and the coming into effect of the further amending legislation. The amending legislation should make it clear that the amendments (or for that
matter any provisions that are left untouched) do not of themselves imply that any particular interpretation of the provisions applied during that period was wrong, and should not constitute grounds for proceedings to that effect.

Regeneration, Land and Property Division
Regional, Urban and Economic Policy Directorate
Department for Communities and Local Government

August 2006
ODPM PANEL ON BUSINESS TENANCIES LEGISLATION

TERMS OF REFERENCE

To provide advice to the Office of the Deputy Prime Minister (subsequently Department for Communities and Local Government) on certain aspects of legislation on business tenancies, in particular:

- a review of the reforms of Part 2 of the Landlord and Tenant Act 1954 introduced last year by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003;
- technical issues arising from the ODPM's review of assignment and sub-letting;
- other matters to do with the Landlord and Tenant Act 1954, including the working of the Notices Regulations.

Membership

Chair        Patrick Martin  ODPM/DCLG
Secretary    John Bryan      ODPM/DCLG

Nominated Members

British Property Federation  Peter Best
British Retail Consortium   Richard Bartholomew
Law Society                 Philip Freedman CBE
Property Litigation Association Richard Hanson
RICS                      Graham Foster

Invited Members

Allyson Colby            Wragge & Co LLP
Jacqui Joyce             Lovells
Sandi Murdoch            University of Reading
Emma Slessenger          Allen & Overy LLP
Stephen Stephens  Lawrence Graham
Peter Williams  Eversheds
Theresa Graves  ODPM/DCLG
Headline results from Lovells’ survey on the reforms

- 227 responses: 53% surveyors; 43% solicitors
- 72% considered the changes a success; 18% no change; 10% unsuccessful
- 81% found the reforms easy to understand, put into practice; 11% did not; 7% had other views
- The reforms have not affected the level of contracted-out leases

Summary of contributions to the Forum

Panel: Jacqui Joyce (Lovells) - Chair
       District Judge Langley (Central London County Court)
       Peter Best (Prudential)
       Simon Purcell (CB Richard Ellis)
       Patrick Martin (ODPM)

Contracting out procedures
The new procedures were an improvement for straightforward leases but did not adapt well for more complicated transactions. There was uncertainty about the position of guarantors.

Abolition of the tenant’s counternotice
There was concern that landlords would not be able to ascertain a tenant's intentions at the end of the term, i.e. whether they wished to stay or renew. Commentators also suggested that landlords had been issuing proceedings to discover if tenants intends to stay.

Extensions of time for proceedings
Considerable use was being made of these, though negotiating them could be time-consuming. There was concern that tenants’ representatives would miss the extension deadline and tenant would lose the right to apply to court for a new tenancy. There was a suggestion that a tenant should be able to apply to court to re-instate the right to renew if the court application deadline was missed. There was a suggestion that there should be a special or statutory form the parties should use to extend time to apply to court.

Interim rent
There was consensus that the changes to the procedures had removed the tactical advantages of serving notices, but the new methods of calculating interim rent were complicated. However, it was also thought to be too early to comment as very few renewals had reached the interim rent stage.

Section 25 and 26 notices
Two thirds of the respondents to the Lovells survey thought that including the landlord’s terms in the section 25 notice had made negotiations quicker and more
effective. If terms were stated in good faith, then there will be little effects on costs even if the terms change later.

**Landlord's perspective**
Overall, the reforms had removed the advantages of adopting tactics for lease renewals and the new procedures were more conducive to keeping costs in check and speeding up the process. Also welcomed was the broadening of the definition of tenancies, the penalties for section 40 notices and the increase to 15 years in the maximum term of the courts can order for a business lease.

**Tenant's perspective**
The current commercial property market favoured tenants and until this changed, it would be difficult to assess the full impact of the reforms. The ability of both parties to apply to court was welcomed. The reforms encouraged simplicity but there were some surprisingly landlord-friendly changes.

**Judicial perspective**
There has been a puzzling increase in lease renewal proceedings recently. However, more generally, more cases were being settled before trial and more landlords were instituting proceedings.
PART 2 OF THE LANDLORD AND TENANT ACT 1954: A BRIEF OVERVIEW

1. The 1954 Act broadly gives business tenants security of tenure - a statutory right to remain in their business premises when their lease ends and to seek a new tenancy. However, the landlord may oppose renewal on limited specific grounds. If the landlord and tenant cannot agree on a new lease, the tenant can apply to the court, which will fix the terms of the new tenancy. These will ordinarily reflect the terms of the existing tenancy, but the new rent will reflect the current open market rent for similar premises. There is also provision for interim rent, which the court can order to be payable for the period from the end of the existing tenancy until the tenant takes up the new lease or vacates.

2. The landlord may oppose renewal on limited, specific grounds set out in the 1954 Act. Among these are grounds where the tenant has failed to pay the rent or to meet other lease obligations, but the landlord may also seek possession on certain specific grounds where the tenant is not "at fault". These include the provision of alternative suitable accommodation; the need to reorganise the holding where sub-letting has taken place; the redevelopment of the premises; and, subject to certain safeguards, the landlord's intention to carry on a business at the premises or live there. A landlord successfully opposing the grant of a new tenancy under certain of the "no fault" provisions must pay compensation to the tenant. The amount payable depends on the rateable value of the premises and how long the tenant has occupied them.

3. The 1954 Act however permits parties to agree to a lease excluding security of tenure. For such an agreement to be valid, the parties must follow the required procedures laid down in the Act. Before the Order came into effect, the parties had to apply jointly to the court for approval. Court approval, however, was a formality, rarely involving the exercise of judicial discretion. The Order has abolished the need for court approval, substituting a new procedure involving the serving of warning notices and the making of declarations. Where the parties have followed the required procedures, the tenant has no statutory right to renew the tenancy, and no entitlement to compensation at the end of the tenancy. The procedures for agreements to surrender a tenancy are essentially similar.

4. The renewal or termination process begins with either the landlord serving a notice of termination on the tenant (section 25 notice) or the tenant submitting a request for a new tenancy (section 26 request). Before the Order came into effect, a tenant wishing to renew the tenancy had to serve a counternotice to the landlord's section 25 notice within strict time limits, but the Order has abolished this requirement. However, there is a continuing obligation on a landlord wishing to oppose renewal to serve a counternotice to the tenant's section 26 request. The parties may then agree terms for a new tenancy without going to court. But if there is no agreement, the tenant must apply to the court within certain time limits (which the Order has relaxed) or loses the right to renew. There are now also provisions enabling a landlord to apply to the court for the renewal or termination of the tenancy.
5. Other provisions deal with matters such as obtaining preliminary information in order to carry out the statutory procedures; the clarification of which business entities have rights and responsibilities under the Act; the determination of interim rent; and compensation payable to the tenant in certain circumstances.