Department of Justice and Attorney-General

Review of the *Retail Shop Leases Act 1994*

Options Paper

May 2013

Contents

Attorney-General's Foreword

The *Retail Shop Leases Act 1994* provides important safeguards for small retail tenants and addresses the imbalance of bargaining power in favour of landlords, in particular large institutional shopping centre landlords. It protects retail tenants through mandatory minimum standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.

The operation of the Act is currently under review to ensure its provisions remain appropriate.

The Queensland Government is committed to protecting the interests of small retail shop lease tenants. At the same time, unnecessary red tape and regulatory burden needs to be removed to allow business to prosper. An aim of the review is to ensure that government regulation does not unnecessarily intrude into commercial private sector relations.

This Options Paper details options for legislative amendment that have been suggested in the course of stakeholder consultation to date. A reference group of key tenant, landlord, valuation and legal stakeholder representatives will be established to assist the Government's consideration of these options and associated issues.

I am releasing this Options Paper to provide further opportunity for public and stakeholder input to the review. Submissions received will also be referred for the reference group's consideration. The results of this consultation will assist the Government in deciding its position on appropriate amendments to the Act.

I encourage interested stakeholders to make their views known.

The Honourable Jarrod Bleijie MP
Attorney-General and Minister for Justice
14 May 2013

1. Introduction

The *Retail Shop Leases Act 1994* (the Act) has the object of promoting efficiency and equity in the conduct of certain retail businesses in Queensland. The Act establishes a framework for addressing the imbalance in access to information and negotiating power between landlords and small retail tenants through mandatory minimum standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.

The Act's operation is being reviewed to ensure its provisions remain appropriate. This is a statutory review required to be undertaken by the Attorney-General (as the Minister with portfolio responsibility for the Act) on a seven yearly basis.

The objectives of the review are to identify opportunities for:

- improving the efficiency and effectiveness of the Act;
- reducing red tape for tenants and landlords and leaving appropriate matters to commercial negotiation or education, rather than legislating;
- continuing to address imbalance in access to information and negotiating power, while not interfering with commercial arrangements or outcomes;
- aligning with the position in other jurisdictions (where this improves the Act) for enhanced operational efficiency and legal certainty for landlords and tenants operating across jurisdictions; and
- clarifying the meaning of provisions, as appropriate.

A discussion paper was released by the Department of Justice and Attorney-General November 2011 for the purpose of public and stakeholder consultation on the current review of the Act. The discussion paper can be accessed at:

http://www.justice.qld.gov.au/__data/assets/pdf_file/0005/129749/retail-shop-leases-act-review-discussion-paper.pdf

1.1 Overview of submissions to the review

Submissions on the discussion paper were received from thirty-three interested stakeholders, including retailer, industry, legal and valuation representative bodies. Departmental officers have met and consulted further with key stakeholders to clarify their submissions.

The review submissions and consultation to date generally reflects the historical and ongoing divide between the interests and negotiating power of small retailers and shopping centre landlords across the retail tenancy market nationally.

While consensus on specific issues is relatively limited, there is broad in-principle stakeholder agreement that legislation governing retail shop leasing arrangements remains appropriate.

Many stakeholders indicated as a foundation for their submissions, strong support for various findings and recommendations of the Productivity Commission in its 2008 report entitled *The Market for Retail Tenancy Leases in Australia* (2008 PC Report).

The broad themes of tenants' submissions, also considered in the 2008 PC Report, were: security of tenure; occupancy costs (including rent and fit out costs); transparency; disclosure; and unconscionable conduct. Other key areas of concern for tenant submitters were extending protections under the Act to franchisees and compensation for business disturbance, relocation and demolition.

Key themes of landlord submissions were: clarifying the operation of the legislation to promote certainty; removing unnecessary regulation; and confining the legislation to the principle of protecting only small business as against large businesses which are capable of safeguarding their own interests. These submissions were supportive of the recommendations in the 2008 PC Report for:

- reducing the level of prescription in retail shop lease legislation to increase the flexibility of landlords and tenants in lease negotiations and improve the economic efficiency of business decisions; and
- reducing inconsistencies in the regulation of retail and commercial tenancies, and in the regulation of tenancies across jurisdictions, to reduce compliance costs to businesses.

1.2 Purpose of this Options Paper

This Options Paper details options for legislative amendment, and related views and issues raised by stakeholders through the review consultation to date.

The purpose of this paper is to provide opportunity for interested stakeholders to be apprised of and respond to submissions made by other stakeholders during the consultation, including on issues which were not canvassed in the discussion paper. Submissions in response to this Options Paper will also assist the Government in deciding its position on appropriate amendments to the Act.

The options and views contained in this paper and the discussion of possible actions or alternatives does not represent Government policy.

Your comment is invited on this paper (see pages 18 to 19 below for detail on how to make a submission).

1.3 Structure of this paper

An overview of key issues from the consultation and matters considered beyond the scope of this review are set out below.

The table attached to this paper (the Attachment) details options for legislative amendment and associated issues raised by stakeholders under the following broad topics:

- review of the objectives of the Act;
- opportunities for deregulation through the exclusion of certain categories of leases from the operation of the Act;
- clarification of defined terms in the Act;
- operation of the Act and former Act (including determining which law historically applies to a lease);
- disclosures by landlords and tenants about leases (including for lease assignments and franchises);
- minimum lease standards – clarification of current implied lease terms and possible new terms, including for franchises;
- dispute resolution and administration; and
- miscellaneous provisions (including offence provisions).

The Attachment also details stakeholder views for and against each option, together with the position in other States and Territories where relevant.

1.4 Next steps

Given the substantial nature of the issues raised in this Options Paper; their technical and legal complexity; and the need to strike an appropriate balance in safeguarding the interests of retail shop lease tenants and the ordinary commercial considerations, a reference group comprising key tenant, landlord, valuation and legal stakeholder representatives (the reference group) will be formed to assist the review.

Submissions in response to this paper will be provided to the reference group.

The input and recommendations of the reference group will be considered by Government in deciding the outcomes of the review. It is proposed that the reference group would provide its recommendations to Government by September 2013, with preparation of draft amending legislation for introduction into the Parliament in late 2014.

Proposals for legislation arising from this review may be subject to regulatory impact statement (RIS) analysis in due course. This will include establishing for each proposal that a case for action by government exists. The provision of data that substantiates comments or submissions in response to this paper will assist in the preparation of an informed consultation RIS.

2. Overview of key issues in this paper

The issues raised through consultation to date and detailed in the Attachment are extensive, ranging from technical amendments and requests for clarification of the Act to issues where there are fundamental differences of opinion on the respective rights and obligations of landlords and tenants.

Key policy and technical issues from the consultation are summarised below under general headings. This summary is not exhaustive and the index to the Attachment references each issue detailed in the body of the table.

2.1 Coverage, interpretation and application of the Act

The Attachment sets out options and issues regarding whether the Act should continue to apply to the certain types of retail shop lease, including: leases with a floor area greater than 1000m^2; leases by a publicly listed corporation/subsidiary as tenant; leases in shopping centres that are not for retail purposes; and leases where the State or local government is tenant.

Options for clarifying: when a lease is taken to be entered into for the purposes of the Act; whether successive leases entitling a tenant to uninterrupted possession for more than one year are covered by the Act; and what constitutes 'renewal' of a lease for the purposes of the Act are also outlined.

2.2 Franchise (and other licence/sub-lease) arrangements

Clarification is required about the extent to which the Act applies to franchise arrangements where the franchisor (who is the tenant under the lease) grants the franchisee a sub-lease or licence to occupy the leased shop from which the franchised business is conducted.

Particular areas of the Act of concern for franchising stakeholders are disclosure, relocation and demolition. Options and issues in this paper in relation to franchising arrangements would also be relevant to other licence arrangements and sub-leases.

2.3 Disclosure

The Attachment sets out options and issues raised by stakeholders for streamlining and clarifying the disclosure requirements under the Act. These include: waiver of disclosure periods; whether the requirement for tenants to obtain legal and financial advice reports should be mandatory; simplifying landlord disclosure to an assignee; landlord disclosure on lease renewal; and pre-lease representations made to tenants by landlords or their agents.

Options regarding franchisor/sublessor and landlord disclosure to franchisees/sub-lessees are also canvassed for consideration.

2.4 Turnover rent/ information

Concerns about turnover leases, in particular provision of turnover information to shopping centre landlords, were raised by some retail stakeholders. Issues raised include: removing the requirement to

provide turnover statements to the landlord where turnover is not the sole basis for rent determination; whether turnover rent formulas should be required to be industry appropriate; and landlord disclosure of shopping centre turnover data.

2.5 Timing and bases for rent reviews

While general stakeholder feedback is that the current provisions in the Act are appropriate, options or issues raised for consideration include: flexibility for tenants and landlords to agree a different rent review mechanism while safeguarding the tenant's interests; simplifying the existing opt out provision for major tenants; and whether the Act should be amended to limit rent reviews to a single basis that is not formed by a combination of two or more review methods (for example, CPI plus a fixed percentage).

2.6 Current market rent determinations

Options or issues raised by stakeholders include whether: the current provision entitling a tenant to seek an early determination of current market rent (CMR) is necessary; there should be prescribed timeframes for landlords and tenants to give their submissions to the specialist retail valuer (SRV); the formula in the Act for determining CMR should be clarified; and the Act should allow a SRV to require the tenant to provide their trading details to assist in making the determination.

Other matters canvassed in the Attachment are: whether an implied confidentiality provision between landlord and tenant for information obtained during the valuation process is necessary; and the appointment of, and statutory immunity for, SRVs.

2.7 Landlord's outgoings/ recoverable costs

The Attachment canvasses various options and differing views regarding a landlord's apportionable outgoings. These include: whether there should be a statutory prohibition on a landlord recovering management fees or any excess under the landlord's insurance policy for the building/centre; whether shopping centre common areas (such as parking or seating) should be excluded in calculating tenants' share of outgoings for the centre; whether kiosk footprint areas should be increased for apportionment purposes; and clarifying that a tenant cannot be required to make up for any shortfall in outgoings that is attributable to vacant shops or concessions allowed to other tenants.

Another area of concern to retail stakeholders is whether the Act should provide for a tenant to be liable for the landlord's costs/expenses associated with: obtaining mortgagee consent or lease registration (which it currently does); and preparing draft lease and disclosure documentation where the tenant does not proceed with the lease.

2.8 Sinking fund and advertising/promotion contributions

A sinking fund is a fund set up by the shopping centre body corporate to cover the cost of major maintenance or repairs to the buildings, plant and equipment in the centre. A retail shop lease may require the tenant to contribute amounts to the sinking fund. The Attachment canvasses differing views about: whether the existing limits for tenant contributions to a sinking fund are necessary; and

whether the Act should provide for fund distribution where the centre/building in which the shop is located is destroyed or ceases to operate.

For advertising or promotion, the main issues are whether the Act should regulate unspent promotion amounts; and new requirements for shopping centre landlords to make available to tenants marketing plans and promotion/ advertising expenditure reports.

2.9 Compensation by landlord for business disturbance

Section 43 of the Act provides that the landlord is liable to pay to the tenant reasonable compensation for various stated business disturbances (such as restricting access to the leased shop) and failures such as not fixing broken-down plant and equipment (the implied compensation provisions).

Landlord submitters seek clarification and/or narrowing of the implied compensation provisions. The Attachment canvasses options and differing views in this regard, including: whether a landlord's liability should be subject to the tenant having given the landlord written notice to rectify the disturbance or failure; whether a landlord is only liable where the landlord has acted unreasonably; and whether a landlord should be liable to a franchisee or sublessee under the implied compensation provisions.

Other options are whether a lease may include a provision preventing/limiting a tenant's claim or entitlement for compensation in certain circumstances; and a new provision exempting a landlord from liability under the implied compensation provisions where he/she has acted in response to an emergency or legal requirement.

Section 43(1)(f) of the Act requires a landlord to pay reasonable compensation where a tenant is required to vacate the leased shop before end of lease because of the extension/refurbishment/ demolition of the shopping centre or building. Clarification of the interaction between this provision and the stand-alone relocation and demolition compensation provisions under the Act is a significant issue for retail and landlord stakeholders.

It has also been suggested that consideration be given to extending the implied compensation provisions so that a body corporate for a community titles scheme is liable to compensate a retail tenant for business losses as a result of authorised body corporate works (for example, where scaffolding prevents or restricts access to the leased shop).

2.10 Compensation for false/ misleading statements or misrepresentation

For section 43(2) of the Act, the Attachment canvasses differing views on whether a landlord should be liable to a franchisee/sublessee (who is not the tenant under the lease) for loss/damage suffered by the franchisee/sublessee because of a false/misleading statement or misrepresentation made by the landlord to the franchisor/sublessor before the lease was entered into; or where the shop was not available for trade when specified.

The Attachment also sets out differing views on whether the existing provision about a tenant/assignor/assignee's liability to pay compensation for false/misleading statements made by them in their disclosure statements (section 43A) should be retained.

2.11 Relocation and demolition provisions

For relocation, the Attachment sets out differing views on: clarifying the application of the stand-alone relocation provisions to a lease and what would constitute a reasonably comparable alternative shop; broadening the bases for compensation payable by a landlord to a relocated tenant; and strengthening landlord disclosure obligations regarding proposed timeframes for relocation.

For demolition, the options and issues raised relate to clarifying the extent of a landlord's liability to compensate a tenant where the centre or building is demolished; and extending the timeframe within which a tenant's termination notice must be given to the landlord from seven days to one month.

The Attachment also canvasses differing views on whether the relocation and demolition provisions should apply to franchisees/licensees/sublessees (in particular, the notice and compensation provisions).

2.12 Fit out/refurbishment

The Attachment sets out differing views on: whether a landlord's obligation to disclose any requirement for fit out/refurbishment by the tenant should be strengthened; and whether the Act should place certain restrictions on a landlord's requirements for fit out/ refurbishment by a tenant (for example, that fit out must not be required to be undertaken by a designated contractor who is a related entity of the landlord).

There are also differing views on whether a landlord should be prohibited from commencing any alteration/refurbishment likely to adversely affect the business of an existing tenant unless the landlord has given the tenant prior notice of proposed alterations or refurbishment.

2.13 End of lease issues

The Attachment canvasses differing views about whether the existing requirements in the Act for a landlord to notify the tenant in advance of the last date for exercise of an option to renew the lease; and whether the existing end of lease provisions in section 46AA (that apply where there is no option to renew under lease, or other agreement for renewal), should be retained.

Various options suggested to assist or strengthen the position of a sitting tenant (who is holding over following expiry of the initial lease) in a major shopping centre in negotiating the renewal or extension of lease are also canvassed. Relevant issues include whether the Act should prohibit a landlord charging the tenant other than market rent during the negotiation or another period; and whether there should be detailed conduct rules directed to fair dealings between shopping centre landlords and tenants.

Whether the Act should include an implied provision for the landlord to compensate an outgoing tenant for fit-out where the fit out is to remain for benefit of incoming tenant is also discussed.

2.14 Lease dealings – security and assignments

The Attachment canvasses differing views in relation to whether: the Act should provide for release of the assignor's guarantor(s) from future liability under the lease; whether section 45 of the Act (which regulates a tenant's right to deal with the lease/business assets as security) should be retained; and whether section 50 (which categorises as a retail tenancy dispute certain actions/omissions by a landlord in relation to a request for consent to assignment of lease) may be omitted.

2.15 Unconscionable conduct

The Attachment canvasses differing views about whether the existing unconscionable conduct provisions in the Act should be amended or replaced with a lower threshold test (such as unfair conduct); and sets out options for expanding QCAT's powers to deal with unconscionable conduct.

2.16 Suggestions for additional implied lease terms

The Attachment sets out differing views on whether the Act should require the mandatory registration of leases (including lease incentives) and statutory minimum lease terms.

The Attachment also canvasses whether the Act should contain new implied lease conditions for damaged premises (such as rent abatement or termination by tenant where repair unreasonably delayed); and rent abatement where a landlord closes a shopping centre as precaution. Options regarding whether the Act should regulate provisions in a lease about tenant insurances and indemnities; and tenant contributions to a landlord's works are also outlined.

2.17 Dispute resolution – QCAT

Key process issues from the consultation are: broad stakeholder support for compulsory mediation or conferences; the appointment of QCAT assessors on a case by case basis where specific expertise or industry input is required; and clarifying whether the timeframe for commencing proceedings under the Act can be extended for leases that have ended more than one year before the dispute notice is lodged.

The Attachment sets out various options raised by legal stakeholders to clarify or expand QCAT's jurisdiction and power to make orders for retail tenancy disputes. These include clarifying QCAT's powers where urgent injunctive relief is sought; whether QCAT should deal with claims for rent arrears; and removing existing restrictions on the number and type of orders that QCAT may make on a finding of unconscionable conduct.

Whether the parties to a retail shop lease dispute should be entitled to legal representation for mediation and before QCAT will be considered as part of the statutory review of the QCAT Act.

2.18 Penalties

Comment is invited on whether each offence should be retained, or if it would be sufficient to remove the offence and: retain or provide for a tenant's right to compensation in respect of the act/omission giving rise to the breach; provide for a relevant breach to be a retail shop lease dispute; or replace the offence with an implied lease term.

3. Matters beyond the scope of this review

While recognising their importance to retail business and interested stakeholders, it is not proposed to progress suggestions regarding the following matters (or related issues) raised during the consultation as they are beyond the scope of this review:

- land tax – recovery by landlord from tenant;
- deregulation of allowable trading hours for shopping centres. The Queensland Competition Authority, in its February 2013 final report 'Measuring and Reducing the Burden of Regulation', recommended that trading hour restrictions are a key area for fast track reform. The Queensland Government will provide its response to this report in due course;
- matters under the statutory review of the QCAT Act (for example, legal representation of parties to a retail shop lease dispute);
- sustainability measures for retail shopping centres (for example, environmental upgrade charges enabling landlords to pass on sustainability related expenditure to tenants);
- electricity on-supply by landlords to tenants in shopping centres. Electricity on-supply is regulated under the *Electricity Act 1994* administered by the Department of Energy and Water Supply (DEWS). DEWS has recently conducted public consultation on its discussion paper 'Electricity On-Supply in Queensland' to inform Queensland Government initiatives currently underway in the electricity sector;
- retail business valuation standards and the registration/qualifications of specialist retail valuers under the *Valuers Registration Act 1992*, including the quality of current market rent determinations;
- establishing a Small Business Commissioner for enforcement, advisory services and market information in relation to shopping centre turnover, essential lease provisions (including incentives) and landlord and tenant disclosure statements;
- developing guidelines to assist retail business in understanding the legal concept of unconscionable conduct;
- planning and zoning regulation (for example, matters contained in the Productivity Commission's November 2011 inquiry report *Economic Structure and Performance of the Australian Retail Industry*);
- development and prescription of relevant industry-based codes under the Commonwealth Consumer Law - an example is the *Casual Mall Licensing Code of Practice* which is endorsed by the Shopping Centre Council of Australia, the Australian Retailers Association and the Property Law Council; authorised by the Australian Competition and Consumer Commission; and applies in all States/Territories, except South Australia;
- minimum standards for landlord's maintenance of retail shopping centres or buildings;

- minimum standards for landlord insurances for retail shopping centres or buildings;
- differential requirements or provisions for: 'low risk' agreements (for example, a lease for a stand-alone suburban shop from an individual landlord, as against leases in major shopping centres from institutional landlords); or particular categories of retail business, such as pharmacies and newsagencies;
- uniform reporting of sales and occupancy costs for shopping centres;
- overvaluation of retail shopping centre leases through inflated/unsustainable rents, including issues relating to real estate investment trust business/economic models and processes; and
- a proposal that commercial and industrial leases should also be captured by the Act.

It is considered that these matters: are more appropriate for commercial negotiation and agreement between landlord and tenant; may be more appropriately addressed through education, or industry-driven initiatives; and/or have broader policy or legislative implications than the regulation of retail shop leases in Queensland in accord with the objectives of the Act.

4. How to make a submission

Interested stakeholders are invited to comment on this Options Paper, in particular all (or any) of the options, issues and commentary set out in the Attachment.

General instructions for making a submission are as follows:

- all comments or submissions must be in writing;
- stakeholders are encouraged to provide reasons for their views and preferences and (where available) supporting quantitative and qualitative evidence/ information, including relevant experience under the laws of other States and Territories;
- stakeholders who have already commented on an issue need not comment again unless they wish to do so; and
- stakeholders are welcome to comment on any retail shop leasing issues not addressed in this paper.

Additional instructions for responding to matters in the Attachment are as follows:

- please reference the corresponding table item in your submission (for example: item 2.2 if your submission is about whether the Act should apply to publicly listed corporations); and
- where a particular response or information is sought to assist the Government's consideration of an issue, this is indicated under the 'For comment' heading for the relevant table item.

The closing date for submissions is **3 July 2013**. Late submissions may not be considered.

5. Where to send your submission

You may lodge your submission by email or post to:

Email: RetailShopLeases@justice.qld.gov.au

Mail: Department of Justice and Attorney-General
Retail Shop Leases Act Review
Strategic Policy
GPO Box 149
BRISBANE QLD 4001

6. Privacy statement

Any personal information you include in your submission will be collected by the Department of Justice and Attorney-General for the purpose of undertaking the statutory review under section 122 of the Act. The Department of Justice and Attorney-General may contact you regarding your submission. Your submission may also be released to other Government agencies as part of the consultation process and will be provided to the reference group for the review.

Your submission (or information as to its content) may also be provided in due course to any parliamentary committee that considers any legislation resulting from this review.

Submissions provided to Department of Justice and Attorney-General in relation to this paper will be treated as public documents. This means that they may be published on the Department of Justice and Attorney-General website, together with the name and suburb of each person or entity making a submission. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly. Please note however that all submissions may be subject to disclosure under the *Right to Information Act 2009*, and access applications for submissions, including those marked confidential, will be determined in accordance with that Act.

Glossary of Terms

References to terms:

- ‘assignment’, ‘assignor’ and ‘assignee’ take their meanings from an assignment of the lease where a new tenant (the ‘assignee’), with the landlord’s consent, agrees to take over the rights and obligations of the original tenant (the ‘assignor’) by accepting all the terms and conditions of the lease
- ‘ACCC’ means the Australian Competition and Consumer Commission
- ‘ATO’ means the Australian Taxation Office
- ‘CMR’ means current market rent, and ‘CMR determination’ means a current market rent determination under part 6, division 4 , subdivision 2 of the Act
- ‘discussion paper’ means the discussion paper for the review of the *Retail Shop Leases Act 1994* (Qld) released by the Department of Justice and Attorney-General for public consultation in November 2011
- ‘dispute resolution process’ means the dispute resolution process under part 8 of the Act
- FCC means the Franchising Code of Conduct under the *Competition and Consumer Act 2010* (Cwlth)
- ‘landlord’ means (and is interchangeable with) lessor
- ‘lease’ is a retail shop lease
- ‘major tenant’ means a major lessee (ie. a tenant with five or more retail shops in Australia)
- ‘PC’ means the Productivity Commission and ‘2008 PC Report’ means the final report of the Productivity Commission report entitled *The Market for Retail Tenancy Leases in Australia*
- ‘QCAT’ means the Queensland Civil and Administrative Tribunal
- ‘QCAT Act review’ means the statutory review of the QCAT Act
- ‘reference group’ means the group of key tenant, landlord, valuation and legal stakeholder representatives to be appointed by the Attorney-General and Minister for Justice for the purposes of this review
- ‘SRV’ means specialist retail valuer within the meaning of the Act
- ‘stand-alone demolition provisions’ means the provisions in part 6, division 9, subdivision 2 of the Act about demolition of a building in which a tenant’s business is situated
- ‘stand-alone relocation provisions’ means the provisions in part 6, division 9, subdivision 1 of the Act about the relocation of a tenant’s business
- ‘tenant’ means (and is interchangeable with) lessee
- ‘transitional provisions’ means provisions in an Act that provide for the transition from the law applying before, to the law that applies after, an amendment to the Act
- ‘turnover lease’ means a retail shop lease under which the rent is calculated in whole or part as a percentage of the turnover of the tenant’s business carried on in or from the leased shop

References to Queensland retail shop lease legislation:

- 'the Act' or 'Qld Act' means the *Retail Shop Leases Act 1994* (Qld)
- 'the former Act' means the now repealed *Retail Shop Leases Act 1984* (Qld)
- 'the Regulation' means the *Retail Shop Leases Regulation 2006* (Qld),
- 'Schedule' means the Schedule to the *Retail Shop Leases Act 1994* (Qld)
- '2006 Act Amendments' means the *Retail Shop Leases Amendment Act 2006* (Qld)

References to other legislation:

- 'ACT Act' means the *Leases (Commercial and Retail) Act 2001* (ACT)
- 'Corporations Act' means the *Corporations Act 2001* (Cwlth)
- 'Franchising Code of Conduct' means the Schedule of the *Trade Practices (Industry Codes) Franchising Regulations 1998* (Cwlth)
- 'NSW Act' means the *Retail Leases Act 1994* (NSW)
- 'NT Act' means the *Business Tenancies (Fair Dealings) Act* 2003 (NT)
- 'QCAT Act' means the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)
- 'SA Act' means the *Retail and Commercial Leases Act 1995* (SA)
- 'Tas Act' means the *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas)
- 'Vic Act' means the *Retail Leases Act 2003* (Vic)
- 'WA Act' means the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA)
- 'WA 2011 Amendments' means the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 2011* (WA)

Abbreviations for jurisdictions:

- 'ACT' means the Australian Capital Territory
- 'NSW' means New South Wales
- 'NT' means the Northern Territory
- 'Qld' means Queensland
- 'SA' means South Australia
- 'Tas' means Tasmania
- 'Vic' means Victoria
- 'WA' means Western Australia

ATTACHMENT

TABLE OF OPTIONS FOR AMENDMENT - *RETAIL SHOP LEASES ACT 1994*

Index

Review of the *Retail Shop Leases Act 1994*

Options for legislative amendment raised through public consultation

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
1.0 – Object of the Act			
	Relevant provision: The object of the Act is to promote efficiency and equity in the conduct of certain retail businesses in Queensland: section 3. Section 4 provides that object is to be achieved through: (a) mandatory minimum standards for retail shop leases; and (b) a low cost dispute resolution process for retail tenancy disputes.	**Option:** The adequacy of the object statement will be considered having regard to the outcomes of this further stakeholder consultation and relevant recommendations of the reference group for the review.	Some retailer stakeholders submitted that the object should include "the creation of greater transparency in line with recommendations of the 2008 PC Report". This related to other measures sought by these stakeholders about the registration of lease information and the protection of retailers from landlords demanding turnover figures as a measure for rent setting. The alternative view is that related PC recommendations did not propose legislating for these matters but rather an industry based response and education.
2.0 – Leases excluded from operation of Act			
2.1 - Floor area exclusion			
	Relevant provision: Under paragraph (a) of the definition of *retail shop lease* (in Schedule) leases with a floor area of more than 1000m^2 are only excluded if the tenant is a listed corporation/subsidiary. Note: For an option and discussion regarding a definition of the term 'floor area', refer 3.1 below.	**Option:** Exclude all leases with floor area greater than 1000m$^{2.}$	**Supporting views:** The option: • is consistent with the principle of deregulation and retail leasing legislation protecting small retail businesses; and • aligns with the position in the majority of States and Territories.

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
			Opposing views: It would remove from the protection of the Act some independent retailers operating single family or individually owned businesses from leased premises with a floor area greater than 1000m^2 (for example, independent supermarkets). However, it has been submitted that: • these businesses are mainly located in shopping strips (ie a row of shops fronted by a public footpath and usually located at intersections of major streets in residential areas) or other retail formats (such as small neighbourhood centres) rather than in major shopping centres; and • there may not be an imbalance in bargaining power between these retailers and their landlords (as against major institutional shopping centre landlords).
For comment: Quantitative and/or qualitative evidence from stakeholders operating in, or with experience of, those jurisdictions in which the 1000m^2 exclusion applies, whether supporting or opposing this option, would assist in consideration of this issue.			
2.2 - Exclude leases by publicly listed corporation			
	Relevant provision: Under paragraph (a) of the definition of *retail shop lease* (in Schedule) leases where a listed corporation or a subsidiary of a listed corporation is the tenant are only excluded if the floor area is more than 1000m$^{2.}$	**Option:** Exclude <u>all</u> leases by: • a listed corporation (within the meaning of the Corporations Act) or subsidiary of such corporation; and • a body corporate the securities of which are listed on a stock exchange, outside Australia	**Supporting views:** Landlord submitters generally support this option stating that listed corporations should not be regulated because they are sophisticated tenants with considerable or at least adequate resources, business acumen and bargaining power. The Vic, WA, NT, and SA Acts currently do not apply to retail tenants that are listed corporations. The

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
	For related discussion and options regarding franchise arrangements under the Act, see items 3.2 (definition of *lease*); 5.4.1 (disclosure) and 6.8.6 (relocation and demolition).	and the external territories, that is member of the World Federation of Exchanges, or a subsidiary (within the meaning of the Corporations Act) of such corporation.	foreign corporation exclusion would align with the WA and NT Acts. **Opposing views:** **Franchise arrangements:** Franchisor submitters strongly oppose the exclusion because, under their lease/franchise structures, the majority of retail shop leases for specialty franchise outlets are held by listed corporations (or their subsidiary entities) which grant licences to occupy to their franchisees to operate the franchised business. If the option is adopted, franchise arrangements that are structured in this way will not be covered by the Act. Franchisors argue this would substantially disadvantage franchisors, their related leasing entities and their franchisees as it would result in: i) increased bargaining power for landlords (in particular national landlords) because: • they are generally unwilling to lease to franchisees directly as this does not afford them the security of the franchisor as tenant where the franchisor has a proven business record and financial backing; and • they will seek to exclude rights that would otherwise be afforded to the tenant under the Act (ie. restricted notice provisions for relocation or demolition; restricted dispute resolution provisions and access to compensation; and a lower level of disclosure);

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
			ii) imposition of additional financial burden on the franchisor/tenant and, by extension, franchisees who are small business operators through the passing on of additional outgoings (ie. land tax) and additional/excessive legal costs for preparation and negotiation of lease; iii) potential increased commercial risk for franchisor/tenant and franchisee given: reduced security of tenure; omission/dilution of compensatory rights otherwise available under the Act; and lower level pre-lease disclosure; iv) protracted/delayed finalisation of lease negotiations where tenant seeks lease amendments equivalent to protections under the Act; v) commercial disadvantage to franchise stakeholders because competitors who are not (or whose franchise structure does not involve) listed corporations/subsidiaries will continue to enjoy the protections of the Act (ie. pre-lease disclosure, reduced establishment and operating costs and decreased risk); vi) landlords will only agree to lease to a franchisee directly on less advantageous terms than they would to the franchisor, who is able to negotiate standard lease amendments necessary for the practical operation of the franchised business; and vii) in general, if listed corporation/subsidiary leases are excluded from the Act, franchisees

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			(which tend to be small retailers) will lose the benefit of the protections of the Act that are in place to rectify the power imbalance between large shopping centre landlords and small retail operators. These submissions are stated to be based on stakeholders' direct experiences with lease negotiations across jurisdictions, including those where the retail lease legislation does not apply to leases by listed corporations or subsidiaries. **Other stakeholders:** Other retail stakeholders generally oppose such exclusion on the basis it would result in differential treatment of retail tenancies in shopping centres, creating a two tiered system in retail leasing on the basis of whether the lease is a retail shop lease. The franchisor submissions at (ii) to (vii) indicate the basis for differential treatment. Also, the exclusion may operate as a barrier to market entry for small business if shopping centre landlords give preference to large corporate tenants over small/medium enterprises to avoid the minimum standards and disclosure obligations under the Act. Some valuation and retail stakeholders consider it preferable that the nature of the business determines coverage under the Act, rather than a particular class of tenant. On this reasoning, all retail businesses in premises of not more than 1000m² should be covered by the Act, regardless of whether or not the tenant is a listed corporation. It has been submitted that approach may

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			encourage: • similar lease structures for the same type of premises and increase efficiency; and • a more level field for market rents for comparable premises in major retail shopping centres. For example, the uniform treatment of all tenants of premises of not more than 1000^2would prevent a situation where an excluded tenancy lease for a particular retail use could include provisions that are prohibited in other retail leases that are covered by the Act (ie. ratchet rent clauses). The concern has been expressed that this may drive up centre rents for other comparative use tenancies.
For comment: Quantitative and/or qualitative evidence from stakeholders operating in, or with experience of, those jurisdictions in which the $1000m^2$ exclusion applies (ie Vic, WA, NT, SA) whether supporting or opposing this option, would assist in consideration of this issue.			
2.3 - Exclusions within common area of shopping centre			
	Relevant provision: Paragraph (f) of the definition of *retail shop lease* (in Schedule) excludes premises within a common area of a retail shopping centre if the premises are used for (amongst other things) 'information, entertainment, community or leisure facilities'.	**Option:** Exclude from the definition of *retail shop lease* automated teller machines (ATMs) and vending machines within a common area of a retail shopping centre	**Supporting views:** It is unclear from the current drafting of paragraph (f) whether both ATM kiosks and wall mounted ATMs are excluded from the Act. For clarity, vending machines should also be excluded as a separate item in paragraph (f).
For comment: Comment is invited on this option and whether any other uses require similar clarification.			

<table>
<tr><th>Item</th><th>Existing Provision or issue</th><th>Option(s) for amendment</th><th>Grounds for option/comments to date</th></tr>
<tr><td colspan="4">2.4 - Exclude leases by tenant operating business for landlord</td></tr>
<tr><td></td><td>Relevant provision:
Definition of retail shop lease (in Schedule)</td><td>Option:
Exclude from the definition of retail shop lease, leases where the business conducted from the premises is operated by the tenant on behalf of the landlord.</td><td>Supporting views
The majority of submitters commenting on this issue supported this amendment, which would align with NSW, Victoria, NT and Tas.
However, it has been submitted that the corresponding provision in other jurisdictions is ambiguous and needs to be clarified.</td></tr>
<tr><td colspan="4">For comment:
Comment is invited on the manner of excluding a retail business operated on a landlord’s behalf. For example, that the Act does not apply if:
• the tenant’s business is funded by the landlord (or a related entity of the landlord), or the profits of the business go to the landlord (or a related entity); and
• the lease contains a statement to the effect that the Act does not apply because the business is operated for the landlord (or a related entity).</td></tr>
<tr><td colspan="4">2.5 - Exclude non-retail leases in shopping centre</td></tr>
<tr><td></td><td>Relevant provisions:
A retail shopping centre must be a cluster of premises promoted or generally regarded as constituting a shopping centre, shopping mall, shopping court or shopping arcade. – section 8.
Paragraph (a) of the definition of retail shop (in Schedule) – means premises situated in retail shopping centre (ie. no distinction between those used for carrying on a retail business, or not).
Under the definition of retail shop lease (in Schedule) there is no exclusion for office, commercial or non-retail premises.
Issue:</td><td>Option A:
Insert a new exclusion in the definition of ‘retail shop lease’ for any premises in an office tower that is part of a retail shopping centre which are not used wholly/predominantly for carrying on a retail business.
Option B:
Amend the definition of ‘retail shopping centre’ so that, if the premises are in a building with two or more floor levels, the centre only includes those levels of the building where premises that are used wholly or predominantly for carrying on a retail business are situated.</td><td>It is unclear whether the Act currently applies to commercial/non-retail service office leases situated in a retail shopping centre (for example, real estate agents, lawyers, accountants and medical services).
Option A:
There is broad stakeholder support for this option, which would align with section 5 of the NSW Act. However, it is arguable that this option does not provide sufficient clarity as to whether particular tenancies are covered by the Act or not. Uncertainties under the NSW definition include:
• the term ‘office tower’ is not defined;</td></tr>
</table>

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	This issue is relevant as mixed development models comprising retail and commercial/office tenancies are increasingly common.	**Option C:** Exclude non-retail tenancies within identifiable "commercial" parts of land containing a retail shopping centre. **Option D:** Exclude all non-retail tenancies from the operation of the Act.	• there are instances where retail businesses (to which the protection of the Act is appropriate) are situated in an office tower - for example, bridal shops and restaurants; and • the office tower exclusion does not address the situation in smaller shopping centres where centres are only two or three levels, with the top level of the centre being the location for professional offices such as accountants, lawyers and medical services. **Option B:** This option is based on the recent amendments to the WA Act. It would appear to provide a greater level of certainty than option A. **Option C:** This option has been suggested by a legal stakeholder as an alternative to the current definition of *retail shopping centre* and also to the definition under the former Act. Details as to how this option would operate in practice were not provided. **Option D:** This option would make it clear that the Act applies only to leases of premises used wholly or predominantly for carrying on a retail business, irrespective of where they are located in a shopping centre. However, this option would result in differential treatment of tenants in a shopping centre on the basis of whether the lease is a retail shop lease or not. It is arguable that a commercial or professional office tenant located in a shopping

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			centre (that is not located in an office tower) should have the same protections as adjacent retail shop lease tenancies. They may not have the bargaining power to independently negotiate these protections. For example, an office tenant may be equally prejudiced by: • not receiving landlord disclosure (for example, about prospective centre renovation or redevelopment; legal proceedings on foot in relation to lawful use or landlord/landlord's agent's representations); and • not being able to rely on the implied compensation provisions or the low cost QCAT dispute resolution process, when other tenancies in the centre are entitled to the benefit of these provisions. Provisions of the Act, such as apportionable outgoings, sinking fund and centre promotions/ advertising, are also premised on the consistent treatment of shopping centre leases.
For comment: For option C, suggestions are invited on what would constitute an objective and certain definition or basis for ascertaining "identifiable commercial land".			
2.6 - Exclude leases by State			
	Relevant provision: Definition of *retail shop lease* (in Schedule) Examples of State government leases located in retail shopping centres include Police Beat shopfronts and Skilling Solutions offices.	**Option A:** Exclude lease where State is a tenant. **Option B** Exclude lease where the State is a tenant from particular requirements under the Act (for	**Supporting views:** **Option A:** This option is based on the proposition that the State does not require the protections under the Act because it is a sophisticated tenant with considerable resources, business acumen and

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	Note: Many State tenancies are not 'wholly or predominantly for the carrying on of a retail business' within the meaning of the Act and Regulation. They are currently covered by the Act because the definition of *retail shop* extends to 'premises situated in a retail shopping centre'. See item 2.5 above for options and discussion regarding exclusion of non-retail tenancies from the Act.	example, the requirement for a tenant to give disclosure to the landlord, including financial and legal advice reports).	bargaining power. Option A would reduce the regulatory burden for landlords because, for example, the landlord would not be required to provide disclosure to a State government tenant and the lease negotiations would not be constrained by the rent review provisions. **Option B:** The Act will continue to apply to retail shop leases by the State (refer opposing views below) but those requirements of the Act which are unnecessary would be removed. **Opposing views** A State tenancy in a shopping centre (i.e. a Police Beat shopfront) is not a typical retail outlet and the basic protections under the Act are not inappropriate as the State is not operating in a competitive commercial context and there is no detriment to other shopping centre tenants if the Act applies to the State. As the State is a tenant of many small tenancies in large shopping centre complexes (ie. 70m² - 100m²), it is appropriate that it have no less rights/protections as other tenants, in particular: • landlord disclosure (including proposed alteration works; current legal proceedings regarding lawful use and right to terminate lease) and compensation where disclosure is incomplete/defective (section 22); • audited annual statement of outgoings (section 37);

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			• landlord notice regarding option to renew/extend (section 46) [subject to the retention of this provision – see item 6.11.1 below]; • relocation provisions (part 6, division 9, subdivision 1) - process and relocation costs; • demolition provisions (part 6, division 9, subdivision 2) – process and compensation; • prohibition on ratchet rent clauses (section 36A). Although the State is a sophisticated tenant, it may not (particularly for small tenancies) be able to negotiate lease terms equivalent to the implied protections in the Act, if it is excluded from the operation of the Act.
2.7 - Exclude leases by local government			
	Relevant provision: Definition of *retail shop lease* (in Schedule)	**Option A:** Exclude leases where local government is tenant. **Option B**: Exclude leases where local government is a tenant from particular requirements under the Act (for example, the requirement for a lessee to give disclosure to the landlord, including financial and legal advice reports).	Supporting and opposing views are the same/similar to, those for State leases (item 2.6 above).

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3.0 - Clarification of defined terms			
3.1 - Definition of 'floor area'			
	Issue: Currently, the Act does not define the term *floor area*. For the purposes of the Act, the floor area of a retail shop is relevant to: • determining whether the lease is regulated by the Act (refer item 2.1 above); and • the apportionment of the landlord's outgoings for the centre or leased building under section 38 of the Act. Refer item 6.4.4 for related discussion/options re apportionment of outgoings. **Issue:** Stakeholder feedback reflects that the calculation of floor area of the retail shop and what is referred to in the industry as 'gross lettable area' is of particular concern in the context of apportionment of landlord outgoings in shopping centres	**Option:** Insert new definition for *floor area* along the following lines: (a) the floor area of a retail shop means so much of the surface area of the premises as is designed and available for use in carrying on the business that is, or will be, carried on in the shop; (b) the following areas are <u>not</u> part of the floor area: - areas covered by awnings or similar coverings; balconies; areas under planter boxes; terraces; verandas; - public spaces provided the areas are not for exclusive use of a particular tenant; - thoroughfares or access ways for use of service vehicles or delivery of goods where those areas are not for the exclusive use of a particular tenant; and - all other areas of the retail shop which are not reasonably capable of being used in carrying on the business that is/will be carried on at the shop.	**Supporting views:** Some legal stakeholders submitted the term *floor area* is uncertain and 'needs to be defined in the absence of any standard or accepted judicial or industry meaning in Queensland'. A submission of a retail stakeholder proposed that the Act define 'gross lettable area' to resolve differences in practice among landlords as to what is included or excluded for apportionment of outgoings. **Issues:** The Property Council of Australia's *Method of Measurement for Lettable Area* (PCA Guidelines) provide clear and extensive guidelines for measuring floor area/gross lettable area and are generally considered by industry stakeholders to be an accepted national industry standard for retail shopping centres. However, there is some uncertainty about the calculation of floor area for pad sites and certain shopping strip developments. A pad site is a free standing lot situated in front of or adjacent to the core shopping centre complex building(s) – for example, a fast food restaurant with a drive-through service. Pad sites are commonly leased by shopping centre landlords on a "whole of lot" basis comprising a stand-alone sole tenanted building (which has

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			internal floor area of less than 1000m^2) and an external area involving parts of the lot that are not used for carrying on the business (where the total of internal and external areas exceeds 1000m^2). It is currently unclear whether any parts of the external areas are excluded from "floor area" in determining whether the Act applies. There is also some uncertainty for the apportionment of landlord's outgoings – ie. whether these pad site areas have been included in the calculation of outgoings, especially for statutory charges. Some retail stakeholders submitted that difficulties can arise where there are commercial/residential premises above retail shops and the landlord seeks to fully recover all outgoings charges from the retail tenants. The issue is whether it should be applied instead across all tenants or the landlord should meet the non-retail shop tenant component. This has been submitted to be a particular issue for shopping strips (ie a row of shops fronted by a public footpath usually located at intersections of major streets in residential areas).

For comment:

Comment is sought on this matter, including;

(a) whether reliance on industry standards, or an alternative approach, is favoured;

(b) in relation to the option, on the following issues:

(i) whether the proposed definition is consistent with the PCA Guidelines;

(ii) whether the proposed definition will adequately address the uncertainty regarding the calculation of floor area for pad sites; and

(c) whether the shopping strip issue is addressed by the current provisions of section 38(2) of the Act (which sets out how the landlord's outgoings for a

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shopping centre or building are to be apportioned – see item 6.4.4 below).

3.2 - Definition of 'lease' - implications for franchise arrangements

Meaning of the terms *lease*, *lessor* and *lessee* under the Act:

The Schedule defines the terms:

- *lease* to include an agreement which gives a person a right to occupy premises, regardless of whether that right is exclusive or not, or for a term or by way of a periodic tenancy or tenancy at will;
- *lessor* as the person who, under a lease, is or would be entitled to the rent payable for the leased premises, regardless of the person's interest in the premises; and
- *lessee* to *include*, for part 6 division 7 of the Act (implied compensation for business disruption), a sublessee or franchisee entitled to occupy the shop under the lease or with landlord consent. This extended definition of *lessee* was inserted in the 2006 Act Amendments.

The definition of *lessor* by reference to receipt of rent under the lease has carried over from the former Act and is embodied in the current definition of *landlord* in the Vic Act. This definition will be considered as part of the review.

Clarification required about how Act applies to franchise arrangements:

It is not clear from the Act, including the above definitions, what provisions of the Act (other than the implied compensation provisions for business disruption) apply to franchise arrangements where the franchisor grants the franchisee a sub-lease or licence to occupy, or other licence/sub-lease arrangements.

Refer relevant discussion and options regarding disclosure (item E.4.1) and the relocation and demolition provisions (item 6.8.6) below.

Other States/Territories:

Under the Vic Act, a *lease* means a lease, sub-lease, or an agreement for a lease or sub-lease, whether or not in writing. The definition of *lease* in the other States/Territories is similar to that in Qld - ie. it is broadly defined to include any agreement where a person agrees to grant another person for value a right to occupy, whether or not the right is exclusive.

However, the definitions of *landlord* and *tenant* in the other States/Territories are different to the relevant Qld definitions. Broadly, the other jurisdictions essentially define:

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• *landlord*/*lessor* as the person who grants the right to occupy under a lease, including a sublessor (except Vic); • *tenant*/*lessee* as the person who has the right to occupy under a lease, including a subtenant/sublessee. These definitions detail with the broad definition of *lease*, and with each other, by reference to the grant of a right to occupy the shop premises. The effect of these definitions with regard to the application of the disclosure; relocation; demolition and unconscionable conduct provisions for franchise arrangements is not clear. Arguably, they apply as between the franchisor and the franchisee, but not as between the landlord and the franchisee.			
	Relevant provision: Definition of *lease* in Schedule – see above **Issue:** It is arguable that the effect of the current definition of *lease* is that where a franchisor who is the tenant under a retail shop lease grants a franchisee a licence to occupy premises to carry out the franchised business, the licence to occupy granted by the franchisor is a *lease* for the purposes of the Act. The issue is whether the definition of *lease* should be amended to exclude rights to occupy that are not a lease or sub-lease (ie. a licence to occupy). Refer also related discussion/options regarding the definition of *lessee* and application of the relocation and demolition provisions to franchisees at item 6.8.6 below.	**Option:** Amend definition of *lease* to mean a lease/sublease, or agreement for either. This narrower definition has the effect of excluding from the operation of the Act a right or licence to occupy premises. In general, this would mean that a franchisee/licensee would not be entitled to the protections for retail tenants under the Act and the landlord would not have any procedural or other obligations in relation to the franchisee.	Feedback from retail franchising industry and legal stakeholders is that the current definition of *lease* in the Act is problematic or at least uncertain in the context of franchising arrangements and requires clarification. **Supporting views:** The option would align with the Vic Act with effect that, as a licence to occupy retail premises would not be a *lease*, the Act would not apply to licences to occupy (except to the extent that there is an express provision extending a right or obligation under the Act to franchise arrangements). An example of an express provision is the extended definition of *lessee* in the Act, which provides that a sublessee or franchisee entitled to occupy the retail shop under the lease or with landlord consent is a lessee for the purposes of the implied compensation provisions for business interference caused by the landlord under part 6, division 7 of the Act. A retail stakeholder submitted that it would be appropriate to amend in line with the Vic Act to: • remove inconsistencies between the common

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			law and the Act as to what constitutes a lease; • relieve licensors of onerous burdens currently falling to them under the Act (ie. disclosure) "as a consequence of being deemed a lessor" and promote efficiencies in conduct of retail businesses, in particular franchised businesses. **Opposing view:** The current broad definition of *lease* that extends to a licence to occupy aligns generally with all States/Territories, except Vic.
For comment: Comment is invited on this option. In particular: (a) whether it is appropriate for the definition of lease to be narrowed in terms of the option (or in some other way) – to exclude a right to occupy that is not a lease or sub-lease within the meaning of the general law? (i) if so, how and why? (ii) if not - should the existing definition of *lease* be retained or clarified; is there another alternative; and would there be any detriment if a right to occupy is excluded? (b) the proportion of franchise arrangements involving a sub-lease by the franchisor to the franchisee, as opposed to a licence to occupy; (c) quantitative and/ or qualitative information about the proportion of Qld retail businesses (franchised or not) that operate from premises under a licence to occupy arrangement.			
3.3 - Definition of 'lessee' to include short term lessees			
	Relevant provision: *Short term retail lease* means a retail lease for not more than 6 months (being the combined period of the original term and any periods for which the tenant has a right to extend the lease) – section13(9).	**Option A:** Expand definition of *lessee* to include, a lessee under a short term lease for purposes of part 6, division 7 (implied compensation provisions); division 8 (lease dealings); division 8A (unconscionable conduct); and division 9 (about	Currently, short term leases are not covered by the substantive provisions of the Act. This is consistent with the retail lease legislation in all other States and Territories. There are commercial benefits for both landlords and tenants in short term leases not being

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	See discussion at 3.4 for new provision regarding **successive or continuing short term leases** entitling a tenant to uninterrupted possession for more than one year.	relocation and demolition). **Option B:** Retain status quo – ie. short term leases not covered by the Act (except parts 1 to 3 and part 7 – interpretation and core trading hours provisions).	regulated under the Act. These include: • reduced complexity and compliance costs of lease negotiations; and • short term business opportunities such as 'pop-up shops' or sale outlets in response to new products or changes in consumer demands; and/or in periods prior to/during renovation of a centre or low demand.
For comment: Comments are invited in relation to these options. If option A is supported, please advise: • why it is necessary or appropriate for the implied compensation; lease dealings; unconscionable conduct; and relocation and demolition provisions to apply to short term leases; and • the evidential basis on which additional regulation is justified in the Queensland retail leasing market. If you have available to you (by way of formal statistics or through your experience in the retail leasing sector) quantitative details or qualitative information about the proportion of Qld retail businesses that operate from premises under a licence to occupy arrangement, this information would be appreciated.			
3.4 - Successive short term leases			
	Issue: Whether to amend the Act to clarify that successive/ continuing leases which entitle a tenant to uninterrupted possession for more than one year are covered by the Act**.** **Relevant provisions*:*** Section 13(8) provides that the Act does not apply to short term leases (except parts 1 to 3 and part 7 – interpretation and core trading hour provisions).	**Option:** Insert provision that, if a tenant has been in possession or entitled to possession of the retail shop without interruption for more than 1 year (whether by means of a series of 2 or more leases, or extended/renewed lease(s) or a combination of those means), the Act applies to: (a) the lease on and from the day on which the tenant has been in possession/entitled to possession for more than 1 year; and (b) any succeeding lease(s) of the shop to the	**Supporting views:** The current definition of *short term retail shop lease* does not address instances where a landlord only offers a tenant a six month lease, without an option to renew/extend, and then grants the tenant a new lease on expiry of the six month term where the tenant has remained in occupation of the premises. Retail stakeholders submit that there are instances where a tenant has been granted up to six successive leases and that landlords do this to circumvent their liabilities or obligations under the Act.

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	Short term retail lease means a retail lease for not more than six months (being the combined period of the original term and any periods for which the tenant has a right to extend the lease) – section 13(9). *Right to extend* does not include a holding over right of the tenant, if the right operates at the landlord's discretion – section 13(9).	tenant where possession is not interrupted.	This option would align with NSW. The Vic Act makes similar provision for where the tenant is continuously in possession of premises for one year or more because of renewal(s) or continuation of the lease.
For comment: Comment is sought on this option, including: • the nature/details of any interruptions in a tenant's possession which should be disregarded for the purposes of the provision; and • whether it is necessary or appropriate that the provision should have effect on an assignment of lease – ie. if assigned, the period of possession or entitlement to possession by the assignee is taken to include any period of possession by the assignor and any previous assignor.			
3.5 - Definition of 'turnover'– online sales			
	Issue: Whether the definition of *turnover* should be amended to address online sales. For the purposes of the Act, this is relevant to the requirement in section 25(3) that a turnover lease tenant must give the landlord monthly and annual turnover statements. Refer item F.1.1 below for related discussion/options. **Relevant provision:** *Turnover* of a business carried on in a leased shop is the gross sales of the business for any particular period – section 9(1). Section 9(2) excludes certain amounts from the definition of turnover. There is no reference to	**Option:** Amend extended definition of 'turnover' to clarify whether or not online sales are included as turnover for the purposes of the Act.	**Supporting views** The amendment is needed to clarify the issue. **Opposing views**: The amendment is not necessary as the reference to 'business carried on in a leased shop' at section 9(1) is sufficiently broad to cover online sales if the leased shop is involved in some way in the sale (ie. the shop is the point from where goods are collected, delivered, or provided) then the online sale is a 'business carried on in a leased shop'. Any clarification or particular treatment of online sales is a matter for commercial negotiation. Attempting to be more precise in the definition in

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	online sales in section 9 or elsewhere in the Act.		the Act could be too limiting, particularly given the pace of change in the areas of e-commerce and m-commerce. The 2008 PC Report recommended that retail leasing legislation should not be unnecessarily prescriptive. There is no specific provision regarding online sales in the other State/Territories' retail leasing legislation.
For comment: If this option is favoured, please provide details as to whether online sales should be included in turnover.			
3.6 - Definition of 'turnover' – special provision for pharmacies			
	Relevant provision: Section 9(2) excludes certain amounts from the definition of turnover. Note: Under section 139I of the *Pharmacies Registration Act 2001* (Qld) (PRA), a landlord is prevented from charging/recovering rent calculated as percentage of turnover: "A lease etc for pharmacy business is void to extent that it gives to a person other than the owner of the business the right to receive any consideration that varies according to the profits/takings of business".	**Option:** Amend definition of *turnover* in section 9(2) of the Act to exclude: amounts received from sales of prescription pharmaceuticals and professional fees including co-payments associated with the practice of pharmacy dispensing under the *Health Act 1953* (Cwlth). The result sought is that the landlord will only be privy to front of shop sales and that way a common calculation of occupancy cost ratios will be consistent and relevant.	**Supporting views:** The basis for proposing this option is that there are discrepancies in sales reporting by pharmacies to shopping centre landlords on activities/functions relating to dispensary activities under *Health Act 1953*, in particular for the Pharmaceutical Benefits Scheme (PBS). Reporting by pharmacies to landlords may include not only retail (front of shop sales) but also PBS fees, PBS sales, government subsidies and sometimes GST. Including dispensing incomes, particularly income derived from PBS as a program where prices and policies are set by government is likely to lead to unfair outcomes – ie. provides landlords with inaccurate indicators to drive rents higher at renewal/new lease/market rent review.

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			Opposing views: If there is a sales reporting issue for pharmacies situated in shopping centre complexes, it should be addressed at industry level. Legislative intervention is not appropriate, including because: • regulation should not be used, and it is not within the object of the Act, to provide specific protections for "specialty" retail trades/professions; • the definition of *turnover* in the Act is not relevant to pharmacy leases as any provision for turnover rent in those leases is void under the PRA; and • *turnover* is not defined in the Act for the purposes of reporting as between shopping centre tenants and institutional or other landlords.
3.7 - Definition for 'renewal' of lease			
	Issue: The Act does not define what constitutes 'renewal' of a lease for the purposes of the Act. What constitutes 'renewal' of a retail shop lease is relevant for the following matters regulated under the Act: • landlord disclosure (section 22); • the implied compensation provisions in part 6, division 7; and • the implied provisions regarding renewal	**Option A:** Insert provision: A lease is renewed if the landlord and tenant under the existing lease enter into a new lease for the shop to which the current lease relates (whether or not on the same terms as the current lease). **Option B:** Provide that a lease may be renewed under an option on the tenant's part to renew/extend lease for a further term; or by agreement by all parties to the lease.	To clarify what constitutes 'renewal' of a retail shop lease for the purposes of Act. **Option A:** This option would align with the equivalent provision in the NSW and SA Acts. **Option B:** This option would align with the equivalent provision in the Vic and NT Acts. **Option C:**

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	where there is no option or other agreement for renewal/extension of the lease (section 46AA).	However, if: • after the existing lease expires, there is a break in tenant's possession; and • the tenant resumes possession for a further term (whether or not on same terms and conditions as under expired lease), the resumption of possession is not a renewal, rather it is taken to be the entering into of a new lease. **Option C:** Insert provision: A lease is taken to be a renewal of another lease if the new lease is between the same parties as the existing lease; relates to same premises; and the premises are to be put to same/similar use.	This option would align with the equivalent provision in the ACT Act.
3.8 - Definition of 'core trading hours'			
	Relevant provision: Sub-section 51(b)(ii) defines *core trading hours* for the purposes of part 7 as hours not outside the allowable trading hours that the lessees of the centre are required by the lessor to keep the retail shops open for trading. *Core trading hours* are relevant for determining how the shopping centre landlord's additional outgoings are apportioned under section 53(5) of the Act. A tenant is not liable for additional outgoings of the landlord for shops trading outside core trading hours when the tenant is not open for trading.	**Option:** Amend definition of 'core trading hours' at section 51(b)(ii) to clarify that the core trading hours for the definition are the hours not outside the allowable trading hours that the majority of tenants of the centre are required by the landlord to keep their premises open for trading (whether the tenants' businesses are retail businesses or not).	**Supporting view:** The current definition of 'core trading hours' for leases covered by section 51(b)(ii) is not practicable on a literal reading as it appears to assume that all retail shopping centre tenants are required to trade at the same time, which is rarely the case in modern complexes. Restaurants, 24 hour gyms, supermarkets, banks and kiosks within a centre have different trading hours. The common view in practice is that core trading hours are the hours that most of the tenants of the centre are required to trade (cf. the literal view that it is only the hours of required trading

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	Note: the definition applies for leases entered into after 10 May 1994 (the commencement date for the *Trading (Allowable Hours) Amendment Act 1994*) where a resolution of eligible lessees (as to core trading hours) has not been passed.		common to all tenants). The proposed amendment would clarify the matter and reflect modern retail shopping centre tenant mix and practice. Please note that submissions or issues regarding the deregulation of allowable trading hours for Queensland shopping centres are outside the scope of the review.
4.0 - Operation of the Act and the former Act			
4.1 - Date lease entered into			
	Relevant provision: Under section 11 of the Act, a retail shop lease is entered into on the date which is the earlier of when: (a) the lease becomes binding on the parties; or (b) the tenant enters into possession of the shop. **Issue:** Clarification as to the effect of section 11 has been requested for the situation where a sitting tenant in a retail shopping centre remains in possession of the shop after lease expiry while negotiating a renewal/extension of lease with the landlord. **Other jurisdictions:** The provision for when a lease is taken to be entered into in other States/Territories is worded in similar, but not the same - with arguably differing interpretations in certain circumstances. For example, section 8 of the	**Option A:** Provide in section 11 that the lease is taken to be entered into on the earlier of the following: (a) the date the lease becomes binding on the landlord and the tenant; or (b) the date the tenant enters into possession of the leased shop as lessee under the lease; or (c) the date the tenant begins to pay rent under the terms of the lease. **Option B:** Provide that a lease taken to be entered into on earlier of following: (a) the date the parties agree that the lease becomes binding on landlord and tenant; (b) the date that the tenant enters into possession of the leased shop as tenant under the terms of the relevant lease and commences paying rent in accordance with terms of lease.	**Supporting views:** **Option A:** This amendment has been proposed by a landlord stakeholder and is directed to eliminating ambiguity in the current wording of section 11 and achieving certainty about when a lease becomes binding on the parties for the purposes of the Act. The stakeholder submits that: • section 11 was intended to be a layman's interpretation of the common law provisions - that is, a lease becomes binding when it is signed by both parties or, alternatively, if there has been part performance (ie. tenant enters into possession and pays rent based on the new lease terms); • it is sometimes the case that, when lease documentation has not been formalised and executed by the parties prior to the lessee taking possession of the premises, there can be lengthy and costly arguments as to whether the lease has been 'entered into';

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	NSW Act and section 7 of the Vic Act.		• when the tenant is taken to have entered into possession under section 11(b) of the Act can be ambiguous in situations where the parties have negotiated renewal of the lease. There can be disputes about whether the tenant has entered into possession under the new lease or whether the tenant is simply holding over under the previous lease. The addition of the reference to the date on which the tenant begins to pay rent under the terms of the lease (which is in line with the Vic and NSW legislation) provides a clear trigger as to whether the new lease has actually commenced. The payment of rent under the terms of the lease is, generally speaking, an act that indicates that the lease has commenced by way of part performance. **Option B:** This amendment has been proposed by another landlord stakeholder and is directed to providing certainty as to when a new lease is taken to be entered into where a sitting tenant remains in possession of the shop after lease expiry. The stakeholder submits that there is uncertainty in this regard following the decision of the Retail Leases Division of the NSW Administrative Decisions Tribunal (ADT) *Helou v Bong Bong P/L* [2006] NSWADT 128, where the ADT adopted a very wide view of when a retail shop lease (under the NSW Act) is entered into. In *Helou*, the lease was deemed to be entered into on a date which was prior to what the parties had agreed in correspondence. The ADT concluded that:

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			• it is possible for a sitting tenant (without vacating and re-entering the shop) to notionally enter into possession for the purposes of section 8(1) of the NSW Act; • the commencement of a lease by virtue of the tenant entering into possession/paying rent can occur even though no formal deed or agreement of lease is ever executed so long as the parties have reached 'consensus' on the terms of the lease; and • in order to reach this consensus so as to give rise to the requisite lease relationship, it is not necessary that the parties reach agreement on all the terms of the right of occupation.
For comment: Please comment also on the associated issue as to whether money paid in advance as a deposit to secure premises for a proposed lease should constitute rent paid as the tenant under the lease for this purpose.			
4.2 - Application of the Act to particular leases			
	Relevant provisions: Section 13 (Application of Act to leases—general). Section 14 (Continued application of certain provisions of former Act to existing retail shop leases). Section 15 (Application of Act—if premises become or cease to be retail shop after commencement of lease). Sections 123 to 135 include transitional provisions for *Retail Shop Lease 1984*	**Option:** To redraft these provisions so that their application to individual leases is clear. Alternative approaches to redrafting would include: (a) chronological table in endnotes showing, at benchmark dates, provisions applying before or after those dates; (b) individual sections of Act affected by intervening amendments to be noted so it is clear what leases the provision does not	**Supporting views:** General stakeholder feedback is that, while the application provisions remain relevant, they are not "user-friendly" in their present form. How the Act, former Act and related legislative amendments apply to individual leases (in particular older leases) needs to be ascertainable readily and with certainty. This would benefit both landlords and tenants by reducing legal costs and timeframes for legal and associated advice on leases.

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	references, *Retail Shop Leases Amendment Act 2000, Retail Shop Leases Amendment Act 2006* and *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* - Part 12 of Act.	apply to; (c) the Department of Justice and Attorney-General to publish a guide outlining relevant information to assist the lease parties and their legal representatives. For sections 13 and 14, notations could be included to clarify the intent regarding application of the provisions, in particular, that: (a) the Act does not apply retrospectively for substantive provisions; and (b) the current processes for dispute resolution and administration apply to all retail lease disputes, notwithstanding when the lease the subject of the dispute was entered into or renewed. One stakeholder has submitted that new tenancy laws should come into operation by mutual agreement or on renewal/extension of lease.	
4.3 - Repeal section 16 – exempt enterprise leases			
	Relevant provision: Section 16 provides that the Act does not apply to certain leases entered into before the commencement of this section between the owner of an exempt enterprise under the former Act and a tenant of premises in the enterprise.	**Option** Repeal section 16.	**Supporting view** The repeal of this section is appropriate as there were no entities registered as exempt enterprises under section 5A of the *Retail Shop Leases Act 1984* (the former Act).

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4.4 - Prohibition on contracting out of Act			
	Relevant provision: Section 19 states that a provision of a retail shop lease is void if it purports to exclude the application of a provision of the Act that applies to the lease.	**Option:** Amend section 19 so that a provision in any agreement or other document relating to a retail shop lease is also void if it purports to exclude the application of a provision of the Act.	**Supporting view:** This submission was made on the basis of an assertion that landlords are, amongst other things, including in agreements for assignments of leases provision that the tenant agrees not to seek compensation.
5.0 - Preliminary disclosures about leases			
5.1 - Landlord disclosure to tenant			
5.1.1 - Sufficient compliance by landlord			
	Relevant provision: Section 22(1) requires landlord to give a disclosure statement to a prospective tenant. The term *disclosure statement* (in Schedule) means a statement in the approved form containing the particulars required under a regulation. Section 3 of the Regulation sets out the details that must be included in the landlord's disclosure statement. Section 49 of the *Acts Interpretation Act 1954* (Qld) provides in relation to the completion of prescribed and approved forms, including that strict compliance with the form is not necessary and substantial compliance is	**Option A:** Amend section 22(1) to provide that the landlord is required to complete the disclosure statement *only to the extent that is relevant to the lease concerned.* **and** **Option B:** Insert a notation that, for the purposes of section 22(2), strict compliance with the approved form is not necessary and substantial compliance is sufficient. For substantial compliance, each of the prescribed particulars in section 3 of the Regulation would need to be addressed in the statement to the extent relevant under the lease.	**Supporting views:** Landlord stakeholders submitted that landlords should have the flexibility to tailor the disclosure statement according to the lease (ie. to omit statements in relation to matters that is not relevant to the particular lease). This would be practicable and reduce the regulatory burden on business. **Option A:** Would align with the NSW provision for landlord disclosure. However, NSW is the only jurisdiction that states this proviso. **Option B:** In NT and Vic, the layout need not comply with the prescribed form.

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	sufficient.	Under this option, provided the landlord has substantially complied with the approved form, the layout may be different to that of the approved form.	
5.1.2 - Timeframe for landlord disclosure			
	Relevant provision: Landlord must give the disclosure statement to prospective tenant at least seven days before the tenant enters into the lease – section 22(1). This timeframe aligns with all other States/Territories (except SA and the ACT).	**Option:** Provide that the landlord disclosure period is at least 14 days before the tenant enters into the lease. Note related discussion and options at items 5.1.3 and 5.1.4 below regarding waiver of the landlord disclosure period.	**Supporting view:** A submission was made that seven days is inadequate time for a new tenant to obtain legal/financial advice in relation to the disclosure statement and lease. This period is shorter than the usual turn around period in professional legal and accounting practices. The option would align with the ACT.
5.1.3 - Simplify waiver of landlord disclosure period by major lessee			
	Relevant provision: A landlord is taken to have given the disclosure statement to a major lessee (including an assignee) if: • major lessee gives landlord written notice that they have received appropriate financial and legal advice about the lease and waive the entitlement to receive disclosure within the disclosure period; and • landlord gives disclosure statement to major lessee before they enter into the lease: section 22(6) for entry into lease and section 22C(2) for assignment.	**Option:** Amend section 22(6) and section 22C(2) to remove the requirement for a major lessee's waiver notice to the landlord to state that the lessee has received appropriate financial and legal advice about the lease/assignment.	**Supporting view:** The majority of submitters commenting on this issue supported this option on the basis that the current requirement is an unnecessary administrative burden and major tenants have the business acumen and resources to address their own interests in opting to waive the disclosure period. **Opposing view:** Some tenant stakeholders do not support waiver of landlord disclosure by major lessees on the basis it would promote uninformed and hasty decisions.

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	It is a commercial matter for the major lessee as to what financial and legal advice is appropriate to safeguard its interests in the circumstances.		**Other jurisdictions:** The legislation in the other States/Territories does not provide differently for major lessees (including as to disclosure).
5.1.4 - Waiver provision for all tenants			
	Relevant provision: The landlord is currently required to give a disclosure statement to a prospective tenant within seven days before the tenant enters into a lease (the disclosure period): section 22(1). . **Other jurisdictions:** There is currently no provision in the NSW, Vic and WA Acts for waiver or variation of the disclosure period. The ACT and SA Acts provide that the disclosure period does not apply, or can be varied, if the tenant gives the landlord a lawyer's certification to the effect that the disclosure period and waiver has been explained to tenant.	**Option:** Provide that a tenant (who is not a major lessee) may waive or shorten the disclosure period by giving the landlord: (a) written notice of the waiver; and (b) both the legal and financial advice certificates in the form approved under the Act. (*see further option below*). The landlord would still be required to give the disclosure statement to the tenant before tenant enters into the lease. **Further Option:** Waiver/shortening of the disclosure period by a tenant (who is not a major lessee) to only be permitted if tenant has <u>not</u> entered into possession of the leased premises. Term 'possession' could be defined for these purposes to exclude any period of access by the tenant not including the undertaking fit-out works or storage of goods/materials on behalf of tenant. Note: The outcome of item 4.1 as to when a lease is entered into (in particular as regards the	**Supporting views:** The majority of submitters commenting on this issue supported this option on the basis that the fixed disclosure period often causes practical/ commercial difficulties because it cannot be waived or shortened. A mechanism to shorten or waive the seven day period will permit retail shop leases to be more flexible in their commencement. This will reduce regulation for landlords and tenants and reflect the commercial realities of lease negotiation. There is precedent for this approach in Qld for residential property conveyances (ie. buyer can waive the mandatory statutory cooling off period for a contract by giving seller a lawyer's certificate) – refer sections 369A & 369B of the *Property Agents and Motor Dealers Act 2000*. **Opposing views:** There should be no waiver of disclosure period by tenants as the provision is intended for protection of landlords as well as tenants. **<u>Further Option</u>:** **Supporting view:**

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		tenant entering into possession) will have implications for both above options.	This further option may be intended to recognise the imbalance of power (and whether the waiver is freely given) if the tenant has entered into possession. **Opposing view:** If the tenant has received appropriate legal and financial advice, this pre-condition may unnecessarily impede a mutual commercial agreement between the parties.
5.1.5 - Landlord disclosure on renewal/ extension of lease			
	Relevant provision: Section 21(1)(b) provides that part 5 in relation to preliminary disclosures about leases does not apply to a retail shop lease entered into or renewed under an option. Refer related discussion and options at item 3.7 above regarding what constitutes renewal for purposes of the Act. **Issue:** Clarification is required about whether disclosure is required on renewal other than under an option. **Other jurisdictions:** All States/Territories (except Qld and WA) require landlord disclosure on renewal of a lease. Only the Vic Act expressly differentiates between renewal under an option, or otherwise by agreement. In both cases, the disclosure statement must include information current from	**Option A:** Amend section 21(1)(b) with the effect that a landlord is <u>not</u> required to give a disclosure statement and draft lease on the renewal of an existing lease, whether the renewal/extension is by way of exercise of an option *or otherwise by agreement.* **or** **Option B**: Amend part 5 so that landlord disclosure <u>is</u> required on the renewal or extension of an existing lease, whether the renewal/extension is by way of exercise of an option or otherwise by agreement. A tenant would have the option to waive the disclosure requirement per item 5.1.4 above. **or** **Option C:**	**Supporting views** **Option A:** Landlord stakeholders submit that disclosure to an existing/sitting tenant on renewal/extension of lease is an unnecessary administrative burden as the tenant already has, or has access to, the relevant information (including any proposals for redevelopment or refurbishment) through their established relationship with the landlord/centre management and working knowledge of the premises. Generally, the cost to the landlord of having to prepare a disclosure statement outweighs any benefit to tenant. **Option B:** Retail stakeholders submit that the landlord should be required to provide a current disclosure statement on any renewal or extension of lease. This is because the statement includes important information about the centre to which the tenant is not necessarily privy, including: the expiry of

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	a specified date within three months before it is given. Where there is an option, the landlord must give disclosure 21 days before end of current term. If there is agreement to renew lease, disclosure is required within 14 days after the new agreement entered into – section 26. Section 9(3) of the Vic Act states that the renewal of a lease is not to be taken to be the entering into of a retail shop lease for the purposes of section 17 (landlord's disclosure statement).	Amend Act so that, if lease contains an option to renew: • the landlord is only obliged to give tenant a disclosure statement if tenant requires it; • the tenant may request disclosure not earlier than three months before the option exercise date; and • the landlord must give the disclosure statement to the tenant within 14 days of the tenant's written request.	major leases; the landlord's representations in relation to other businesses; refurbishment/refit requirements for the leased premises on renewal; change in the landlord's intentions regarding centre redevelopment or refurbishment; and the introduction and placement of competing businesses. Also, the terms of the renewed lease should be disclosed to ensure transparency with regard to meeting minimum lease standards as these can be difficult to collate from the lease instrument or schedule. Issues to be considered for this option include: (i) the extent of landlord disclosure required – ie. in full; or an updated disclosure to be considered in conjunction with the initial disclosure (see proposal about Updated disclosure below); (ii) appropriate timeframes for the landlord to give disclosure to the tenant (for example, as for section 26 of the Vic Act mentioned opposite under 'Other jurisdictions'); (iii) whether the tenant's rights to terminate and seek compensation from the landlord for non-compliance or a defective statement should apply to disclosure on renewal (refer item 5.1.6 below for outline of relevant provisions). **Option C:** This would align with the ACT Act. Issues (i) to (iii) for option B above are also relevant to this option.

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			Updated disclosure: If updated rather than fresh disclosure is required, the earlier landlord disclosure statement would need to be updated to the extent that there are new or material changes to any of the items set out in section 3 of the Regulation. The update would include details of any new or material proposals for refurbishment/ relocation/ demolition/ road works impacting the centre/building/leased premises; fit out requirements; changes to exclusive use; legal proceedings regarding lawful use of the shop/building/centre; and any assurances given to tenant about the nature of other businesses operating in the centre at the time of renewal or during the renewed lease term.
For comment: In commenting on options B and C, please address the issues set out at (i) to (iii) under option B.			

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5.1.6 - Tenant's right to terminate for non-disclosure			
	Relevant provisions: Tenant can terminate lease by written notice to landlord within six months after the tenant enters into the lease on basis that landlord disclosure statement is not given or is defective – section 22(3). *Defective statement* means a disclosure statement that is incomplete or contains information that is false or misleading in a material way – section 22(8). Section 22(4) of the Act (the compensation provision) provides that the landlord is liable to pay tenant reasonable compensation for loss or damage suffered by tenant because landlord did not give tenant the disclosure statement, or the statement is defective. Compensation is decided by way of the QCAT dispute resolution process under the Act.	**Option:** Amend section 22(3) to extend the timeframe within which a tenant may terminate the lease from six months to 12 months after the tenant enters into the lease.	**Supporting views:** Some retail stakeholders submit that the current six month timeframe is too short for a tenant to recognise that certain representations or inducements relied on when entering into the lease may have been false or misleading. Examples of such representations include those regarding the number and type of shops which will open in a centre within a specified timeframe; particular improvements or renovations to a centre; or a particular prospective anchor or other significant tenant. The compensation provision may not be sufficient where, for example, the tenant can not afford legal or other costs associated with proceedings before QCAT, or the prospects of the tenant recovering compensation are uncertain because of the landlord's financial position. **Opposing views**: The current six month timeframe is the same as in NSW, WA (2011 amendments) and the NT. Other jurisdictions allow the tenant a shorter timeframe within which to terminate the lease on this basis – ie. only 28 days in Victoria and three months in the ACT and Tas.

For comment:

If you support this option, please provide:

- statistical or quantitative evidence demonstrating that allowing tenants an additional six month period within which to terminate the lease is justified; and
- detail as to why the compensation provision in section 22(4) is inadequate to address the situation where it becomes apparent that a landlord's disclosure

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	statement is false or misleading at a time which is more than six months after the lease was entered into. To justify this option, submissions should also have regard to the relevant (equivalent or shorter timeframes) in the other State/Territory jurisdictions.		
5.1.7 - Certified copy of lease			
	Relevant provision: The landlord must give certified copy of a lease to a tenant within 30 days after the lease is signed by both parties – section 23.	**Option:** Remove requirement for landlord to give tenant certified copy of lease and instead require landlord to give the tenant an original signed copy within 30 days after the lease is signed by both parties.	**Supporting views:** Current leasing practice is for the lease to be signed in triplicate – one copy for lodgement on the Land Titles Register (if the landlord requires registration); and an original signed copy for each of the parties. The existing requirement for landlord to give tenant a certified copy is an unnecessary additional step. This option would reduce red tape for landlords and accord with commercial practice.
5.1.8 - Uniform landlord disclosure statement			
	Relevant provisions: Section 22(1) requires the landlord to give a disclosure statement to a prospective tenant. The term *disclosure statement* (in Schedule) means a statement in the approved form containing the particulars required under a regulation. Section 3 of the Regulation sets out the details that must be included in the landlord's disclosure statement.	**Option:** Amend the content and/or form of the uniform landlord disclosure statement, including to: (a) require the landlord to disclose whether negotiating with direct competitor of the tenant(in terms of permitted usage) for other premises within centre; (b) require the landlord to disclose any plans/intentions for increasing competition within or altering mix of the centre; (c) require the landlord to disclose any plan/intention to create new retail space within existing common areas (ie. creation of new kiosks);	**Uniformity issue:** The current Qld landlord disclosure statement has been agreed to be uniformly adopted with NSW and Vic. Victoria has recently revised its landlord disclosure requirements: see Retail Leases Regulation 2013. These changes include requiring landlords/assignors to inform a tenant/assignee of any alteration or demolition works, planned or known to the landlord/assignor, to the premises or building/centre, including surrounding roads, or to land adjacent, or in close proximity, to the premises or building/centre, during the term or any further term(s) of the lease. These changes are intended to strengthen landlord and assignor

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		(d) require landlord to disclose the basis on which a liquidated damages clause in a lease is formulated (see item 6.14.11 below); (e) revise in recognition of difficulty in disclosing the number of car parks in some instances; (f) require the landlord to disclose reservation of right to charge visitors for car parking; (g) expand regarding the obligations or expectations for fit out/ refurbishment and use of landlord's nominated contractor; (h) review/clarify meaning of core trading hours "relevant to the lessee"; (i) revise requirements for disclosure of outgoings to better suit factual circumstances; and (j) revise to better provide for application when there is agreement to lease with no set commencement date.	disclosure requirements to further protect tenants from interruptions to their business caused by planned works which were known by the landlord when a lease agreement was signed but which were not revealed to the tenant. (See item 5.3.2 below for assignor disclosure). The reference group will consider whether changes to the content and/or form of the Qld landlord disclosure statement should be made.
For comment: In commenting in relation to these options, please indicate your view regarding the uniformity issue above. Your views are also sought regarding the changes to the Victorian landlord disclosure requirements under the Retail Leases Regulation 2013 (Vic).			
5.2 - Tenant disclosure to landlord			
5.2.1 - Timeframe for lessee disclosure			
	Relevant provision: A prospective tenant must give the landlord a disclosure statement before entry into lease - but	**Option**: Amend section 22A to require a tenant to give disclosure to the landlord at least seven days	**Supporting view:** Landlord stakeholders request this amendment to dovetail with the timeframe within which the

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	no specific timeframe for the tenant to do so is given: section 22A.	before entering into the lease (ie. mirror period for landlord statement to be given).	landlord must disclose to the tenant. **Other jurisdictions:** The NSW and NT Acts each require a prospective tenant to give disclosure to the landlord within seven days after receiving the landlord's disclosure statement; or (in NSW) within a further agreed period. In effect, the timeframe for tenant disclosure in these jurisdictions is the same as Qld – ie. before entry into lease. The other States/Territories do not require a prospective tenant to give disclosure to the landlord.
For comment: In commenting on this item, please consider any implications for the detail and declaration required from the tenant regarding any pre-lease statements and representations made to the tenant by or on behalf of the landlord (see item 5.2.2 below).			
5.2.2 - Tenant declaration about pre-lease representations			
	Relevant provision: Under the Regulation, a tenant must in their disclosure statement: • set out details of any statements/ representations made by or for the landlord during lease negotiation that tenant is relying on: section 4(g); and • declare that no other promises/ representations/ warranties/undertakings have been made by or for the landlord regarding lease or business to be carried out at premises: section 4(h). The tenant's declaration for the purposes of	**Option:** Tenant disclosure statement should include declaration that no landlord statements, representations etc have been relied on by the tenant, other than those contained in the lease.	**Supporting view:** Landlord stakeholders have proposed this option to minimise tenants' frivolous claims as to pre-lease representations by or for the landlord. The majority of claims by tenants against landlords relate to pre-lease representations. **Opposing view:** This would be inequitable, including having regard to the bargaining power and business acumen and experience of large shopping centre landlords relative to small business tenants. The tenant's declaration in the current lessee disclosure form is appropriate. However, some

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	section 4(h) is framed on the basis that the only relevant representations/statements etc made and relied on by the tenant are those set out by tenant in the lessee disclosure form.		retail stakeholders noted that in large shopping centres tenants may not fully state promises or representations made by/ for landlord for fear of jeopardising landlord acceptance of the lease.
5.3 - Disclosure on assignments of lease			
5.3.1 - Timeframe for assignor disclosure to assignee			
	Relevant provision: Assignor must give disclosure to assignee at least seven days before asking for the landlord's consent to assign – section 22B. **Other jurisdictions:** The Vic Act requires the assignor to give the landlord and the proposed assignee a disclosure statement in the form prescribed by the regulations where the lease assignment relates to premises that will continue to be used for an ongoing business. No timeframe is specified: section 61(5A). There is no requirement for assignor/assignee disclosure in the other States/Territories. See related discussion for landlord disclosure to assignee below at 5.3.3.	**Option:** Amend to require assignor disclosure at least seven days before assignee is unconditionally bound to accept an assignment of the retail shop lease.	**Supporting views:** The current timeframe for assignor disclosure (which includes details of payments made under the lease and the assignor's sales figures and trading performance details) is linked to the date on which the assignor seeks the landlord's consent to assignment. However, it has been submitted that: • it is customary for prospective assignees to enter into contracts for the purchase of the business, or an agreement to enter into assignment of lease, well in advance of the request for assignment; and • business contracts are often negotiated with haste and usually contain provisions amounting to conditions subsequent for the buyer/assignees' protection. The option would give the assignee the protection of being able to not proceed with the lease transaction if the assignee is not happy with the content of the disclosure.

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5.3.2 - Additional detail for disclosure by assignor to assignee			
	Relevant provision: Section 5 of the Regulation sets out the matters that the assignor must disclose. These include details of: any outstanding notices from the landlord under the lease; and any rent concessions applicable to balance of lease term: sections 5(i) and 5(l) Regulation.	**Option:** Amend sections 3 and 5 of the Regulation to require the assignor and landlord to disclose to the assignee details of any current or previous: • arrears/breaches for which the landlord has not issued notice to the assignor; and • rent abatement in favour of the assignor.	**Supporting view:** This option was proposed by some tenant stakeholders to increase transparency for and assist assignees in their assessment of business potential/risk. It was noted that it is not uncommon for a distressed tenant to sell a business with agreement of the landlord to settle arrears from sale proceeds. This option would be subject to considerations set out at items 5.3.3 (limit landlord disclosure to assignee) and 5.1.8 (uniform landlord disclosure statement).

Victoria's new assignor disclosure statement (given to both the prospective assignee and the landlord where the lease assignment relates to premises that will continue to be used for an ongoing business) requires disclosure of various matters not currently specified in section 5 of the Qld Regulation. These additional matters include details of any:

- material variations to the lease since first granted/last renewed;
- current disputes between landlord and tenant under/ in relation to the lease;
- matters not connected to the lease agreement, planned or known to the tenant at this point in time that may materially affect the viability of the ongoing business over the remaining lease period;
- alteration or demolition works, planned/known to the tenant at this point in time: to the premises or building/centre, including surrounding roads; or land adjacent / in close proximity to premises or building/centre, during the term or any further term or terms.

The Vic assignor disclosure statement also requires the assignor to sign an acknowledgement that the statement contains all representations in relation to the proposed lease and ongoing business by the tenant and the tenant's agents as at the date of this disclosure statement; and that the tenant has not knowingly withheld information that may materially affect the proposed assignee's ongoing business: see schedule 4 *Retail Leases Regulation 2013* (Vic).

For comment: In addition to the option above, your views are sought as to whether the Qld assignor disclosure requirements should be strengthened in line with those now applicable in Victoria.

Note item 5.1.8 above regarding uniformity issues.

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5.3.3 - Limit requirement for landlord disclosure to assignee			
Other States/ Territories: Qld is the only jurisdiction that requires the landlord to disclose directly to the assignee. In most other jurisdictions (Vic, NSW, NT, SA and ACT) the assignor is required, as part of the procedure for obtaining consent to assignment, to give the assignee a copy of the landlord's original disclosure statement and information about any material changes since that statement was given to the assignor of which the assignor is, or could reasonably be expected to be, aware. The landlord is only required to provide a copy of the original disclosure statement or (in Vic) a current disclosure statement at the assignor's request to enable the assignor to comply with its disclosure obligation. In WA and Tas, there is no requirement for any party to give disclosure in relation to an assignment of lease.			
	Relevant provisions: The ***landlord*** must give a disclosure statement (ie full disclosure) and a copy of the lease to an assignee at least seven days before the assignee enters into the lease (unless the assignee is a 'major lessee'): section 22C(1). The ***assignor*** must also give the prospective assignee a disclosure statement: (section 22B). Statement must contain certain details about the lease and a declaration that the assignor has given the assignee a copy of the disclosure statement given to the assignor by the landlord before the assignor entered into the lease; and details of any changes in the information contained in the landlord's statement that have happened since the statement was given: section 5(n) Regulation. The assignor disclosure statement does not contain the same level of detail as the landlord's disclosure statement, in particular matters in respect of which only the landlord has knowledge. For example: assurances about	**Option A:** Amend so that the landlord is only required to provide an updated disclosure statement to the assignor if the assignor requests the updated disclosure to enable the assignor to comply with its disclosure obligation under section 22B. The landlord's disclosure for this purpose would be current from a specified date that is within three months before the statement is given. **Option B:** Amend so that the landlord is not required to give a disclosure statement to a prospective assignee at all.	**Supporting view:** **Option A**: It is reasonable for the landlord to be required to update information previously provided to the assignor. This option would align broadly with the majority of other jurisdictions. However, the failure by the landlord to give the updated disclosure to the assignor would need to be considered. Currently, if the landlord fails to give disclosure to the assignee, a retail tenancy dispute exists and the assignee may (within 2 months of the assignment) make application to QCAT for disclosure. The benefit of post assignment disclosure without other remedies may be limited. In NSW and Vic, if the landlord does not give the updated disclosure to the assignor within 14 days of assignor's request, the assignor is relieved of the obligation to give disclosure in terms of section 5(n) of the Regulation. **Opposing view:**

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	nature of other businesses operating in the shopping centre; details of fit out works required to be carried out by tenant (including as to quality and standards); any alteration works that the landlord knows are to be carried out to the shop/building/shopping centre or surrounding roads; and details of any current legal proceedings in relation to shop/building/centre.		**Option B**: Without landlord disclosure, an assignee will not have access to relevant information that is within the knowledge of the landlord only. In the absence of effective legislation for securing disclosure, a prospective assignee would need to consider drafting the assignment to not take effect if disclosure not provided.
For comment: For option A, comment is sought as to an appropriate timeframe for the landlord to give the updated disclosure; and also the issue of landlord non-compliance.			
5.3.4 - Assignee waiver of landlord disclosure period			
	This would be relevant if the existing requirements for landlord disclosure to the assignee in section 22C are retained. See discussion at 5.3.3 above.	**Option A:** Assignee may waive landlord disclosure by giving the landlord both the legal and financial advice certificates in the form approved under the Act. **Option B:** Assignee may waive landlord disclosure by written notice to the landlord only (ie. no requirement to provide legal and financial advice certificates).	Refer supporting views for waiver by tenant at 5.1.4 above and whether there should be consistency for entry into lease and assignment.
5.3.5 - Assignee disclosure to landlord			
	Relevant provision: A prospective assignee must give landlord a disclosure statement before entry into the assignment - but no specific timeframe for the assignee to do so is given: section 22C(3).	**Option**: Amend section 22C(3) to require tenant to give disclosure to landlord at least seven days before the assignment is entered into (ie. mirror period for the landlord's statement to be given).	**Supporting view:** Landlord stakeholders request this amendment to dovetail with the timeframe within which the landlord must disclose to the assignee.

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	There is no equivalent requirement in the other States and Territories.		Similar issue to 5.2.1 in relation to lessee disclosure.
5.4 - Disclosure for franchise arrangements under Act			
5.4.1 - Franchisor disclosure to franchisee			
	Primary issue: There is uncertainty about what disclosure requirements under the Act apply to franchise arrangements where the franchisor/licensor (who is the tenant under the lease) has granted a licence to occupy to the franchisee/ licensee for the leased shop from which the franchised or other retail business is conducted (in particular, as to a landlord disclosure). Refer related option and discussion at 3.2 above regarding narrowing the definition of lease to exclude licence to occupy arrangements. **Issues for consideration on options:** Issues to be considered for these options include: (i) should there be provision for waiver by the franchisee/licensee?; (ii) the scenario where the lease area is more extensive than the premises the subject of the licence to occupy granted by the franchisor/ licensor to the franchisee/licensee; (iii) appropriate remedies for the franchisee/ licensee if the licensor/franchisor and/or landlord fail to comply with their disclosure obligations under options A and/or B, including where:	**Option A:** Within seven days before giving a license to occupy under a franchise (or other licence arrangement, the licensor/franchisor must give the licensee/franchisee: • a copy of any disclosure statement provided to the licensor/franchisor by the landlord for the retail shop; and • details of any changes which the licensor/ franchisor is, or could reasonably be expected to be, aware that affects the information in the landlord disclosure statement. and **Option B:** To comply with its obligation under option A: • the licensor/franchisor may request the landlord to provide an updated disclosure statement for provision by the licensor/ franchisor to the franchisee; and • the landlord must comply with the request within 14 days. For an outline of what is required for updated disclosure, see item 5.1.5.	**Supporting view:** **Option A**: This option was proposed by a franchisor stakeholder to address confusion regarding what disclosure is required for franchise arrangements under the Act. In particular, the extent of a franchisor's obligation to effect disclosure when the franchisor does not have direct knowledge of many of the matters required for a landlord's disclosure statement (ie. plans for centre redevelopment). Option A mirrors section 96 of the Vic Act and is proposed by the submitter in conjunction with the option at 3.2 above (amending the definition of *lease* to exclude licences to occupy). If both these options were adopted (in line with the Vic Act): the landlord/ tenant reciprocal disclosure (sections 22 and 22A); and financial and legal advice report provisions (section 22D), would not apply between a franchisee/ licensee and landlord; or between the franchisee/licensee and the franchisor/licensor. **Option B:** Other franchisee stakeholders were of the view that it is problematic that franchisees do not receive a disclosure statement directly from the

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	• the franchisor did not receive a landlord disclosure statement on entry into the lease; • the landlord does not provide an updated disclosure statement on the franchisor/ licensor's request; • the licensor/landlord disclosure is misleading/deceptive or incomplete and the franchisee/licensee suffers resulting loss or damage. (iv) the extent to which franchisee/licensee should be required to give disclosure to the franchisor and/or landlord under the Act.		landlord and have to rely on information the franchisor provides but are required to meet all obligations in the lease. Despite the contractual relationship being between the franchisor and the franchisee, the landlord benefits through receipt of rent from the franchisee's business and it is reasonable for an incoming franchisee to be informed to the same extent as would a new tenant. Option B is directed to enabling the franchisor/ licensor to provide meaningful and sufficient disclosure to the franchisee/licensee.
For comment: In commenting, you are invited to address the 'Issues for consideration on options' numbered (i) to (iv) above.			
5.4.2 - Disclosure to sublessee			
	Issue: Whether the issues and options at 5.4.1 above are also relevant for a sublease arrangement – ie. whether the Act should make specific provision for disclosure to a sublessee.	**Options:** Refer options A and B at 5.4.1 above.	
For comment: In commenting, you are invited to also address the issues (i) to (iv) in 5.4.1 above to the extent that they may be relevant in a sublease.			

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
5.5 - Financial and legal advice reports			
5.5.1 - Mandatory financial and legal advice reports?			
	Relevant provision: Under section 22D, only major lessees are exempt from the requirement to provide a financial and a legal advice report to the landlord before entry into the lease or assignment.	**Option A:** Remove current requirement for prospective tenant/assignee who is not a major lessee (tenant/assignee) to give the landlord a financial advice report and a legal advice report before entering into the lease/assignment. **Option B:** Not amend – all tenants/ assignees must give landlord financial and legal advice reports. **Option C:** Amend to <u>allow any tenant/assignee to opt out</u> by notice to landlord in writing before entry into the lease that they have received appropriate financial and legal advice about the lease.	**Supporting views:** **Option A:** Reasons in support are: (i) would align with other States and Territories - Qld is currently the only jurisdiction which requires these reports; (ii) obtaining independent legal and/or financial advice is a commercial decision for tenant/assignee and should be part of due diligence conducted in determining whether to enter into the lease/assignment; (iii) would reduce regulatory burden and costs for tenant/assignee/licensees where some solicitors charge upwards of $1500 for the review of a lease and provision of a certificate; (iv) if landlord requires a tenant/assignee to obtain independent professional advice, that can be addressed as part of the commercial negotiation process/agreement for the lease/assignment; v) it would reduce regulatory burden/inefficiencies for landlords and franchisors operating across jurisdictions (ie. application of processes/procedures and documentation unique to Qld);

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			vi) the landlord disclosure statement contains a notation at tenant's signature block that it is important for tenant to seek independent legal and financial advice before entering into lease. The lessee, assignor and assignee disclosure statements also contain a recommendation that tenant/assignee seek both legal and financial advice about the terms and conditions of the lease and the operation and viability of the proposed business. This could be supplemented by also including a prominent warning to tenants at the top of the document; vii) some franchisor stakeholders submit that option A would also alleviate franchisees' confusion about differing requirements under the Act and the FCC. Under the FCC, the franchisee can elect not to seek independent legal or financial advice. **Option B:** Reasons in support of maintaining the status quo are: (i) it assists small or unsophisticated tenant/assignee to make informed business decision(s) and minimise business risk - for example, to determine if likely cash flow of business will be sufficient to meet financial obligations under lease, or (for an assignee) if the purchase price for the business is appropriate; (ii) it minimises business risk for landlord as it is a useful tool for tenant to assess viability of

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
			the business; (iii) it reduces prospect for dispute/litigation between tenant and landlord during/after lease term; (iv) the cost of obtaining the certificates is outweighed by benefits to tenant for their own business and it reduces the likelihood (and financial and personal costs) of litigation. **Option C:** This option would reduce the regulatory burden on business by enabling sophisticated tenants or assignees to opt out. A sophisticated tenant is not necessarily a major lessee under the Act. Reasons (ii) to (v) for option A above are also relevant.
For comment: In commenting on option B – stakeholders operating across jurisdictions are invited to provide any available quantitative or qualitative evidence which demonstrates that Qld retail tenants and landlords are in a better position than in other States/Territories since the requirement for financial and legal advice reports commenced on 1 July 2000 (for example, demonstrated lower rates of retail tenancy dispute or retail business closure/failure).			
5.5.2 - Financial advice report - sales projections/occupancy cost ratios			
	Relevant provision: A financial advice report must contain a statement that the accountant has advised the prospective tenant/assignee: (i) about their financial rights and obligations under the lease, including: rent and outgoings; potential financial impact of rent review; and that the operation of the business is restricted by the lease term:	**Option:** Financial advice certificate should be expanded to include advice about the sales projections, occupancy cost ratios and other industry benchmarks acceptable for the proposed permitted use.	**Supporting view**: It has been submitted that sub-sections 7(e) and (f) of the Regulation are not sufficient to ensure that a retailer has sought independent advice about acceptable industry benchmarks with respect to the performance of the business under the lease. In the submitter's experience, it is not uncommon for an inexperienced or under-resourced retailer to enter into a lease without knowledge of these

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	(section 7(e) Regulation); and (ii) to obtain further professional advice, including about volume of sales required to meet all costs of carrying on business; appropriate accounting/financial reporting systems; cash flow forecasting; sales budget forecasting; and taxation requirements : section 7(f) Regulation.		matters and it is widely prevalent that advisors such as accountants and lawyers "are even further removed from providing this advice". **Opposing views:** Opposing views are that red-tape should be reduced (this proposal would increase regulation); and government regulation should not be a substitute for due diligence and the appropriate use of professional/commercial lease advisory services in making the commercial decision to enter into a lease. Prospective tenants' may also seek assistance from retail industry stakeholder bodies. Qld is the only jurisdiction that requires a tenant/assignee to obtain a financial advice certificate. No other State/Territory regulates these matters.

For comment:

Stakeholder comment is sought on this option, including:

- specific detail about how objective reference to relevant industry benchmarks might be framed for the purposes of section 7 of the Regulation;
- whether this additional regulation is practicable and justified, including with regard to the availability and cost of such advice for tenants/assignees;
- detail about costs estimates for the provision of relevant financial advice to prospective retailers would be useful to support further consideration of this option.

5.5.3 – Legal advice report – insurances and indemnities			
	Issue: Whether the legal advice report should include a statement that the lawyer has given advice about any requirements in the lease regarding the	**Option:** Insert a new provision in section 8(e) and/or (f) of the Regulation so that the legal advice report must contain a statement that the lawyer has:	**Supporting view:** This may assist in addressing the matters set out at 6.14.2 and 6.14.3 below.

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	tenant's insurances or indemnity in favour of the landlord.	• given the tenant advice about any requirements to insure and/or indemnify the landlord; and/or • advised the tenant to obtain appropriate specialist advice.	
5.6 – Failure to comply with disclosure requirements			
	Relevant provision: Section 22E states - if person who is required to give disclosure under sections 22A to 22D of the Act fails to give the receiving person the required disclosure document and the lease or assignment is entered into, a retail tenancy dispute exists and the receiving person may apply to QCAT within the relevant period for an order that the disclosing person give the document to the receiving person. The relevant period is: • for sections 22A (tenant disclosure to landlord) or 22D(1) (tenant to give landlord legal and financial reports) – within two months after the lease is entered into; • for section 22B (assignor/ assignee's reciprocal disclosure obligation), 22C (landlord/assignee's reciprocal disclosure obligation) or 22D(2) (assignee to give landlord legal and financial reports) – within two months after the assignment is entered into. **Note:** section 22E does <u>not</u> apply to a landlord's obligation to disclose to a prospective tenant under	**Option:** Omit section 22E.	**Supporting view:** Omit as this provision is unnecessary, or of limited practical benefit given that the lease or assignment has already been entered into. It is incumbent on the receiving parties (being the landlord, assignor or assignee) to ensure that the appropriate disclosure is given to them before they enter into the lease.

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	section 22 of the Act (see item 5.1.6 above for tenant's remedies where a landlord give proper disclosure)		
6.0 – Minimum lease standards			
6.1 – Turnover rent and information			

2008 PC Report:

The issue of landlord access to the turnover information of individual tenants is of long-standing concern for retail tenants in major shopping centres and was considered in the 2008 PC Report. The report found that the provision of turnover data and its use by landlords is a matter for commercial negotiation and that prohibiting reporting of turnover would be unlikely to lower average occupancy costs. In general, these findings and the associated consideration/reasoning are supported by the major landlord submitters. However a number of retail tenant submitters have made submissions that are not reflective of support/acceptance of the PC's findings.

Turnover leases:

A 'turnover lease' is a lease where the rent is determined wholly or partly by reference to the turnover of the tenant's business. It has been submitted to the review that, in Qld:

- a large proportion of leases in large retail shopping centres are turnover leases – ie. the rent is a fixed annual base rent plus a percentage of the tenant's turnover;
- approximately 50% of stand alone fast food leases are turnover leases;
- approximately 10% of retail shop leases in small centres or strip/high street formats are turnover leases.

General tenant submissions:

The reporting of individual retailer's turnover data to shopping centre management disadvantages retailers in subsequent lease negotiations with landlords as landlords use shopping centre turnover data (to which tenants do not have access – refer 6.1.6 below) to set base rents at non-market levels (ie. at what tenant can afford to pay rather than market rent), particularly on renewal.

Retailers submit that: turnover rent is rarely payable under standard large centre leases where a base rent is set because the base turnover thresholds are set at high levels that will not realistically be reached; and a turnover component is included in the lease by the landlord to enable landlord to collect turnover figures and use them to extract additional rent from the tenant on lease renewal.

Retail tenant stakeholders also oppose provision of turnover information to landlords on the basis that action for breach of confidentiality is difficult and tenants

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are normally reluctant to commence legal action against landlord. However, the primary concern is landlord's use of turnover information to tenants' detriment. **General landlord perspective:** Shopping centre retail leases typically include provisions for the centre manager to collect turnover information from the tenant for centre management purposes. This is because turnover is a pivotal management tool for large landlords to assess performance of the centre overall. Tenant turnover reporting enables (within and between) centre benchmarking to maximise the centre income and the value of the asset (ie. by altering tenancy mix; not renewing leases of poor performing tenants and replacing them with tenants that generate greater turnover; or for developing targeted marketing/promotion strategies or assessing future development of centre). These measures arguably also benefit retailers and consumers. **Turnover rent provisions in Act:** Section 25 of the Act sets out two requirements for turnover leases – that the formula for calculation of the rent is to be set out in the lease (refer 6.1.3 below) and a requirement for tenants to provide monthly and annual turnover statements to the landlord (refer 6.1.1 below). Section 9 of the Act defines 'turnover' for these purposes. Section 26 prohibits the landlord from directly or indirectly disclosing to anyone else information obtained by the landlord (under section 25 or otherwise under the lease) about the turnover of the tenant's business, without the tenant's agreement. There are various qualifications on the prohibition on disclosure and a tenant is entitled to reasonable compensation for any loss/damage occasioned by them because of the disclosure. Feedback from some retail tenant stakeholders during the review is that these provisions are not observed in practice by shopping centre landlords, while acknowledging that it is difficult or impossible to legislate for compliance/enforcement of confidentiality provisions.			
6.1.1 – Regulation of turnover statements given to landlord			
	Relevant provision: Under section 25(3) , for a turnover lease, the tenant must give the landlord: • at end of each month or other times agreed by parties – a certificate specifying with reasonable accuracy the turnover of the business of turnover (monthly certificate); and • at end of each year or other times agreed by parties – a statement of turnover prepared by a registered auditor (audited statement) – section 25(3).	**Option A:** Prohibit a clause in a lease requiring rent to be calculated by reference to turnover (and the landlord from requiring tenant to provide turnover figures) where landlord and tenant have negotiated a base rent. **Option B:** Amend section 25 to remove the obligation on tenants to provide monthly certificates and annual statements of turnover to landlord, except where turnover is the sole basis for	**Supporting views:** **Options A and B:** Option A was proposed on behalf of some retail tenant stakeholders to address the issues at 'General tenant submissions' above. Option B was proposed on behalf of another retail stakeholder group. No detail was provided. **Option C:** This option is supported by the finding in the 2008 PC Report that turnover data and its use by landlords is a matter for commercial negotiation

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	If the tenant complies with the above requirements, the tenant is taken to have fully complied with any obligation under the lease to give the landlord the turnover of their business: section 25(4). **Other jurisdictions:** The Vic and WA Acts contain a similar requirement to section 25(3), except the timeframes for the statements to be given to the landlord by the tenant are different – see 6.1.2 below. The other States/Territories do not regulate what/how turnover data is provided by tenants to landlords at all (other than confidentiality provisions prohibiting the disclosure of tenant turnover data by centre landlords).	determination of rent under the lease. **Option C:** Omit sections 25(3) and 25(4).	(cf. legislative intervention). It would also align with the position in NSW, NT, SA, ACT and Tas. **Opposing views:** **Option A:** For option A, the 2008 PC Report found that the mix of pre-determined and turnover rent is a matter for commercial negotiation between the lease parties and government intervention would reduce the flexibility of retail tenants and landlords to negotiate a mutually beneficial lease under prevailing commercial conditions.
6.1.2 – Timeframes for tenant turnover statements			
	Relevant provision: Unless otherwise agreed by the parties: • monthly statement to be given by tenant to landlord at end of each month; and • audited statement to be given by tenant to landlord at end year and in any event on termination of lease – section 25(3).	**Option**: Amend section 25(3) to provide that: • monthly certificates are to be given to the landlord within seven days after the end of each month; • audited statements are to be given to the landlord within 60 days after the end of each year, and after the date the lease terminates; and • other times for provision of these documents to the landlord may be agreed in	Large landlord submitters propose this option on the basis that it will provide certainty and align with industry practice. However, the proposed timeframes for tenant to give landlord the statements after the end of the month/year do not align with Vic and WA, which require monthly statements to be given within 14 days after end of month; and the annual audited statement within 28 /42 days of end of rent year respectively.

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		the lease, or otherwise between the parties.	
6.1.3 – Turnover rent formula			
	Relevant provision: A turnover lease must specify the formula to be used to calculate the rent: section 25(2).	**Option**: The turnover rent formula should be appropriate for the particular industry – industry accepted formulas should be used.	**Supporting view:** This option was proposed on behalf of some retail tenants. **Opposing view:** An opposing view is that this is a matter for commercial negotiation between the parties (cf. legislative intervention) and/or for resolution at an industry level.
6.1.4 – Proposed additional requirement for turnover leases – prior agreement			
	Issue: The WA Act contains a provision to the effect that any turnover provision in a lease is not valid if: • the tenant did not give the landlord a separate written notice before the lease was entered into stating that the tenant elects for rent to be determined on a turnover basis; and • the tenant subsequently objects to the turnover provision in the lease (WA provision).	**Option:** Provide that a lease can only provide for turnover rent where there is an agreement to this effect between landlord and tenant.	**Supporting view:** This option was raised in principle on behalf of retail stakeholders. No supporting detail was given. **Opposing view:** An alternate view is that section 25(2) is sufficient protection for the tenant (ie. the tenant should not sign the lease if they do not agree to the turnover provision and relevant formula). Additional protections for the tenant are that the landlord disclosure statement and the financial and legal advice reports are each required to address how the rent is calculated (and in the case of landlord disclosure – the turnover rent formula specifically). A provision similar to the WA provision was removed from the former Qld Act and there is no

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
			equivalent provision in the other States/ Territories.
6.1.5 – Termination on basis of inadequate sales/turnover			
	Issue: Whether the Act should provide that a clause in a lease that permits or otherwise provides for termination of lease on basis that tenant's business has failed to achieve specified sales or turnover performance is void. A provision in these terms would align with most other States/Territories, including NSW and Vic.	**Option:** That a provision in these terms **not** be inserted in the Act.	**Supporting views:** There is no issue in practice about landlords seeking to terminate leases early on this ground, including because turnover rents only form the basis of rental determination for a small percentage of Qld retail shop leases (and these are outside of major shopping centres). Also, landlords prefer to address inadequate turnover by not renewing the lease (cf. early termination). Another view is that it is a commercial matter for negotiation and agreement between the parties to the lease (cf. government regulation). Amendment would increase regulation for no discernible overriding benefit.
6.1.6 – Disclosure of aggregated shopping centre turnover information			
	Issue: Tenant stakeholders assert that there is an information imbalance between large shopping centre landlords and tenants as the tenants can not access (or do not have reasonably cost effective access to) turnover data for the centre in which the shop is located or more generally. See also related 'General tenant submissions' at 6.1 above.	**Option A:** Insert new provision in Act requiring landlord to disclose turnover information for the centre to existing and prospective tenants. **Option B:** Amend section 3 of Regulation to require the landlord disclosure statement to contain aggregated tenant turnover information for the centre in which the leased shop is located (ie. in terms of item 22 of the landlord disclosure statement).	**Supporting views:** **Option A:** This option was proposed by some tenant stakeholders to address the issue. **Option B:** Item 22 of the current landlord disclosure statement requires a shopping centre landlord to detail the annual estimated turnover of the shopping centre, and the annual estimated turnover by specialty shops (food/non-food and service categories) per m^2 (the shopping centre turnover details). Section 3 of the Regulation (which prescribes the

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			details that must be included in the landlord's disclosure statement) does not currently include the shopping centre turnover details. Note that a landlord is not required to disclose shopping centre turnover details if they are not collected for the centre.
6.2 – Rent review provisions			
6.2.1 – Implied rent review provisions			
Most landlord and tenant submitters expressed the view that (subject to allowing flexibility for a landlord and tenant to contract out of the implied rent review provisions while safeguarding the tenant's interests – see items 6.2.3 and 6.2.4) the implied provisions for the timing and bases of rent reviews in section 27 of the Act are appropriate. However, a few tenant submitters suggested that new parameters for rent reviews and annual adjustments and new methodologies should be considered with a view to ensuring better outcomes for tenants in a difficult retail climate and generally. The following in principle proposals were made: • an implied lease term enabling fixed annual increases to be suspended if particular conditions are satisfied – ie. general economic downturn; a significant reduction in retail trade; • an implied condition for market rent reviews at tenant request on basis that the near total exclusion of market rent reviews by major landlords increases tenant business risk over a lease term because there is no process for adjustments for change in trading/market conditions/tenancy mix of centre over periods that would otherwise be adequate to recover business establishment costs and operate profitable business; • if rent reviews are based on CPI, the index used should be that relevant to the category of the tenant's business and not the All groups CPI basket. The All groups CPI basket comprises eleven major groups each representing a broad set of commodities. In the current retail climate, groups such as clothing and footwear may have a significantly lower index figure than the overall All groups basket. For example, for the June to September 2012 quarter, the percentage change for the All groups CPI was +1.4%, while that for the clothing and footwear category rose only 0.2%. This has a significant cumulative impact on rent increases where the index for a particular group would have resulted in a rent decrease; and • linking site productivity to rent. Proposals of in the nature of the above would necessitate an increased level of regulation for the retail industry in Qld and be counter to various recommendations/findings of the PC, including that these are matters for commercial negotiation and retail tenancy regulation should not be used to compensate for variations in the level of general economic activity.			

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
For comment: Comment is invited in relation to any specific changes sought to the existing provisions for timing and bases of rent review to enhance flexibility or ensure better outcomes for tenants or landlords without unduly interfering in ordinary commercial arrangements.			
6.2.2 – Single basis for rent review formed by combination of review methods			
	Relevant provision: Under section 27, rent may: • not be reviewed more than once in each year of the lease; and • be reviewed using different bases during the term of the lease, but each review must be made using only one basis. Section 27(5)(g**)** provides that a single basis for this purpose can be a single basis formed by a combination of two or more of the following bases: • the current market rent of the leased shop; • an independently published index of prices, costs or wages; • a fixed percentage of the base rent; • a fixed actual amount; • if the rent is determined as a base rent plus an amount equal to a percentage of the turnover of the tenant's business – the average rental paid over the previous year/years of the lease; • another basis prescribed by regulation (*none currently prescribed*).	**Option:** Omit sub-section 27(5)(g) of the Act so that rent reviews are limited to one review basis only.	**Supporting views:** The submitter states that it is becoming increasingly frequent for the base rent review provisions contained in shopping centre leases to represent a combination of review methods – for example CPI + 2%. In circumstances where inflation exceeds the Reserve Bank and Treasury inflation rate target for monetary policy, this review method places an unreasonable financial burden on the tenant. This is particularly the case during challenging retail conditions such as those persisting at present. The combination of review methods allowed under section 27(5)(g) has the potential effect of imposing unsustainable rental increases upon tenant which will exceed turnover growth for the same period. This has a multiplier effect which renders a retail business unviable during the later part of the lease term. **Other jurisdictions:** Only the Qld Act contains a provision in terms of section 27(5)(g). The Qld rent review provision is otherwise aligned with Vic and the NT. The NSW and SA Acts do not prescribe allowable methods of calculating a change to base rent at all.

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			The WA Act simply states that a provision in a lease for review of the amount of rent payable during the currency of the lease is void unless the lease specifies, in respect of each occasion on which the review is to be made, a single basis on which the review is to be made. The Tas Act appears to address the submitter's concern by providing that rent may only be reviewed on the basis of one of: a) a fixed percentage in accordance with CPI or other agreed CPI; b) a fixed amount; c) current market value; d) an agreed formula <u>but not a formula that involves a combination of any two or more of fixed percentage, CPI or current market value.</u>
6.2.3 – Mechanism for opt out of the implied rent review provisions generally			
	Relevant provision: Section 27 sets out the minimum standards that apply when the rent under a retail shop lease is to be reviewed during the lease term or under an option to renew/extend the lease (implied rent review provisions). Only major lessees may opt out of the implied rent review provisions by giving the landlord (before entry into the lease) a written notice stating that appropriate financial and legal advice has been received – section 27(8) *Major lessee* means a tenant of five or more retail shops in Australia.	**Option:** Provide that the opt out provision in section 27(8) applies to <u>any tenant who is not a major lessee</u> provided the tenant, before entering into the lease, gives the landlord written: • notice opting out of the implied provisions, together with a financial advice report and legal advice report; **or** • if the requirement to provide the landlord with financial and legal advice reports is not retained – notice stating that tenant has received appropriate financial and legal advice about the lease. The requirement in section 27(8)I that the lease	**Supporting views:** This would provide flexibility for a landlord and tenant to contract out of the implied rent review provisions (ie. agree on, as part of the commercial negotiation for the lease, a different rent review mechanism than that implied under the Act). The safeguards that the tenant must have received relevant financial and legal advice and that the lease must provide for the timing and basis for each agreed rent review would be retained for the protection of both the tenant and the landlord.

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		sets out the timing and basis for each review would be retained for all tenants.	
6.2.4 - Simplify opt out by major lessees			
	Relevant provision: Section 27(8) – see above. This was one of the 2006 Act Amendments. There is no equivalent provision in the other States/Territories.	**Option A:** Amend section 27(8) so that a major lessee may opt out of the implied rent review provisions by written notice to the landlord to that effect before entering into the lease. The notice would not be required to state that the lessee has received appropriate financial and legal advice about the lease. **Option B:** Omit section 27(8) so major lessees are bound by rent review provisions.	**Supporting view:** **Option A:** This would reduce the regulatory burden for business. Major tenants should be able to opt out without obtaining prior legal and financial advice as they should be fully conversant with commercial negotiations and should have flexibility to enter into agreement regarding rent structure on commercial basis. The requirement in 27(8)(c) for the lease to set out the timing and basis for each review would continue to apply. **Option B:** Some tenant stakeholders submitted that section 27 is essential in providing efficiencies and transparencies in the market and that major tenant's should not be able to opt out of the implied rent review provisions because the effect of them doing so may adversely impact small tenants. That is, major tenants may use their opt out exemption to offer more favourable commercial terms to landlords in relation to rent reviews, with which smaller tenants can not compete; or a major tenant may opt out of the rent review provisions to the detriment of its franchisee. An alternative view is that removing the opt out provision would be an additional and unnecessary

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			regulatory imposition on the business of major tenants and the landlords with whom they deal. Major tenants are sophisticated operators and should not be restricted by the rent review provisions.
For comment: Any available information or evidence by way of comparison to other jurisdictions where leases by listed corporations are not covered by retail leasing legislation would be useful for further consideration of option B in particular.			
6.2.5 - Conflict between opt out provisions and section 36 of Act			
	Relevant provision: Section 36 makes certain rent review clauses in leases void to the extent that they are not in accordance with the provisions of section 27(4) & (5) of the Act – sections 36(d) & (e). A provision of a lease is also void to the extent that it requires the tenant to appoint someone to determine the CMR/pay for the determination, or a CMR determination to be made, other than in accordance with the Act – sections 36(a)-(c).	**Option:** Amend section 36 to clarify that the prohibitions do not apply where a major lessee has opted out of the general rent review provisions under section 27(8), or an early determination of current market rent under section 27A(1A). This proposal would also apply if section 27 is amended to enable <u>any</u> tenant to opt out of the rent review provisions and the requirements for that tenant to do so have been met (see item 6.2.3 above).	As currently drafted, paragraphs (–) - (c) of section 36 do not apply if a major lessee has opted out an early determination of current market rent under section 27A(1A). However, the position is not presently clear for paragraphs (d) & (e) of section 36 (ie. where a major lessee has opted out of the rent review provisions under section 27(8)) and this requires clarification. **Supporting views:** Various stakeholders have sought this clarification.
6.3 - CMR determinations			
6.3.1 - Tenant request for early CMR determination			
	Relevant provision: Section 27A permits a tenant (who has an option to extend or renew the lease at CMR) to serve notice on the landlord within a specified time	**Option A:** Amend to make the period within which a tenant may give landlord written notice for an early determination of CMR the same for all	The purpose of the early determination provisions is to enable the tenant to know the proposed new rent before deciding whether to exercise the option and commit to a further term.

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	period requesting an early determination of CMR (the early determination period). The current timeframes for the early determination period under section 27A(7) are: • for leases more than one year: not earlier than six months and not later than one month before option expiry date; • for leases less than one year: not earlier than three months and not later than one month before option expiry date.	leases with an option to renew at CMR. The period proposed is not earlier than four months and not later than one month before the option expiry date. **Option B:** Omit section 27A. **Option C:** Do not amend.	**Supporting views**: **Option A:** No basis or rationale was given for this proposal. The NSW and SA early determination provisions do not distinguish between longer and shorter term leases. The relevant early determination period is not more than 6 months and not less than 3 months before option exercise date. **Option B:** The submitter noted that section 27A does not sit well with the concept of market rent or align with commercial reality. For example, if the option expiry date is between six and nine months before end of lease, the landlord must be making decisions about market rent well before the relevant date, which can be difficult in a volatile market. Commercial tenants understand that market rent will be what the market determines. Various stakeholder's have submitted that section 27A is not widely used, in particular because the leases generally offered by large shopping centre landlords do not provide for an option on the tenant's part to renew/extend the lease at CMR. This option would align with the position in Vic, WA and the ACT (ie. no early determination provision in the Act, although the parties may agree an early determination at the tenant's election in the lease). **Option C:** This aligns with the position in the NT only.

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For comment: Comment is sought on these options, or any alternative, including: • the extent to which (in your experience/to your knowledge) the early determination provision is utilised in practice in Queensland. In particular: (i) the proportion of leases that contain an option exercisable by the tenant to renew/extend at CMR; and (ii) of those leases in category (i), the proportion that is the subject of tenant request for early determination. • if option A is supported, why is it that the current early determination periods in section 27A(7) are not appropriate?			
6.3.2 - Simplify major lessee opt out for CMR provisions			
	Relevant provision: The early determination of CMR provision does not apply if: the tenant is a major lessee; the lease provides for the timing and basis for each rent review; and the tenant has given the landlord written notice prior to entering into the lease stating that they have received appropriate financial and legal advice about the lease – section 27A(1A).	**Option:** Amend section 27A(1A)(b) so that a major lessee may opt out of the CMR provisions by written notice to landlord before entering into lease. The notice would not be required to state that the lessee has received appropriate financial and legal advice about the lease. The safeguard that the lease must set out the timing and bases for each review would remain.	**Supporting views:** A major lessee should be able to opt out without obtaining prior legal and financial advice as they should be fully conversant with commercial negotiations. .
6.3.3 - Parties' submissions to SRV			
	Relevant provision: Section 28A currently provides for: • the tenant and landlord (the parties) to give their initial submissions to the valuer; • an exchange of initial submissions directly	**Options:** Amend section 28A to**:** (a) set a specific timeframe (from appointment confirmation date) within which the parties' initial submissions must be provided to the SRV - submitters have suggested a period of	Stakeholders expressed mixed views as to whether greater prescription in respect of the valuation process is required under the Act. **Supporting views:** Options (a) to (d) were generally supported/ proposed by tenant and valuation stakeholders

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	between the parties; • an opportunity for each party to give a written response to the other's initial submission to the valuer (the right of reply); and • the valuer to decide the timeframes for the parties initial submissions and responses (with the caveat that the timeframe decided must be a reasonable period).	seven days, 14 days, a minimum of 10 business days and a maximum of one month); (b) clarify that the exchange of parties' submissions is to be made through the SRV; (c) for the right of reply, set a specific timeframe by which the parties must provide their responses to the SRV (refer timeframes at (a) above); (d) provide for any request for an extension of time for making/ responding to a submission to be agreed between both parties in writing and notified to SRV, with SRV to determine a reasonable period for the extension in the circumstances; (e) provide that the SRV is only required to consider submissions received within the legislated timeframe, or any agreed extension.	with the objective of providing greater certainty regarding the timeframe for a CMR determination to be given. **Opposing views:** Generally, landlord submitters were of the view that the SRV provisions are appropriate and no are changes are required, other than to set a specific timeframe for party submissions to be provided to the SRV. Landlord submitters noted that: • the timeframes for the valuation process are not an issue for lease expiry and option to renew. Any well drawn lease deals with payment of rent pending determination and generally the tenant continues to pay existing rent pending determination, with an adjustment post determination; • the right of reply is not necessary for CMR determinations - an SRV should be able to make informed decision using their expertise and taking into account the initial submissions. **Other jurisdictions:** Most other States/Territories have a less prescriptive approach to the valuation process than under the Qld Act – ie. the timeframe within which the valuer must make the determination is generally one month from appointment/receipt of information from landlord about centre leases and it is a matter for the valuer to determine and manage the process on a case by case basis. This allows flexibility and reduces red tape.

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			Only the ACT prescribes a timeframe within which parties' submissions are to be provided to valuer (14 days). Also, the retail leasing legislation in the other States/Territories do not: • provide for an extension of time to be agreed between the parties for provision of their submissions to the valuer; • have a provision in terms of option (e); • require an exchange of submissions between the parties.
For comment: In particular, for options (a) and (c) what would be an appropriate timeframe?			
6.3.4 - Formula for CMR determination			
	Relevant provision: CMR must be determined *on the basis of the rent that would reasonably be expected to be paid for the retail shop if it were unoccupied and offered for leasing* for the same use as the permitted use under the lease *or a substantially similar use* – section 29(a)(i). **General comment:** As the valuation process is a specialist one involving the professional judgment and experience of expert retail valuers, further detailed consultation (including with valuation specialists and those with experience in other States/Territories) may be required.	**Option A:** Amend 29(a)(i) to narrow the formula for determining CMR by: (i) deleting the words *or a substantially similar use*; (ii) inserting a clarifying note to the following effect: "While the determined CMR must reflect the permitted use under the lease, the evidence utilised by the SRV is not limited to that use. However, valuation practice dictates that the SRV should strive to obtain evidence as near as possible, in all respects, to the shop which is the subject of the determination. The greater the variation the greater the adjustments required and hence the greater the level of risk in the accuracy of determined rental".	**Supporting views:** **Option A:** Some valuation stakeholders have proposed that the words *or a substantially similar use* in section 29(a)(i) should be deleted as they are the cause of a great deal of confusion, including scope for overvaluation of current market rent for retail shop leases through determinations based on highest and best legal use. These stakeholders have indicated that, while there is no limitation on the evidence that should be considered by a SRV in determining CMR under the Act, it is the permitted use under the lease that is material and will achieve the desirable result. Another stakeholder noted that, while it is

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		Option B: No amendment - retain status quo.	intended to remove semantic differences in "permitted use", the provision is sometimes used by SRVs to substantially expand the valuation comparison criteria into unrelated uses, producing irrelevant and "sometimes ruinous" financial outcomes. **Option B:** The formula in section 29(1)(a), including *same or similar use*, is appropriate and a core standard in assessing CMR in the other jurisdictions – including NSW, Victoria, WA and the NT (the analogous jurisdictions). A valuation stakeholder has noted that a CMR determination is recognised by the courts as a complex and extremely difficult exercise and the same or substantially similar use formula affords protection to all parties (landlord, tenant and SRV) in relation to the CMR determination, including minimising SRV exposure to professional indemnity claims.
6.3.5 - Provision of trading details to SRV on confidential basis			
	Issue: The Act does <u>not</u> require the tenant to provide its trading details to the SRV. Rather, the tenant may (at their discretion) provide trading details as part of their submission to the SRV and that information is subject to the confidentiality provision in section 35. **Other jurisdictions:**	**Option:** Insert new provision enabling SRV to require tenant to provide details of the sales/financial information for the business conducted by the tenant from the premises (and any similar businesses operated by the tenant). This information would be separate to the tenant's submission and received by the SRV on a confidential basis for the purpose of the determination only.	Stakeholders expressed differing views on this proposal, in particular whether a tenant's trading details (for the business conducted from the premises, or other related businesses of the tenant) are required for the purposes of a CMR determination. **Opposing views (majority of stakeholders):** Disclosure of sales information by tenants to landlord is general practice in large shopping centres, so SRV can usually access required

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	There is relative uniformity across all States/Territories (including Qld) in that: • valuer may require landlord to provide any relevant information about leases in the centre; • no requirement for tenant to provide its trading details to the valuer; • no restriction on tenant electing to provide their trading details to valuer.		information through the landlord. Section 29 is specific in defining the SRV's task in making a CMR determination. In particular, the SRV must determine rent (amongst other considerations) "on the basis of the rent that would be reasonably expected to be paid for the retail shop <u>if it were unoccupied</u> and offered for leasing for the use for which the shop may be used under the lease or a substantially similar use". Taking into account the tenant's trading details in determining CMR would be inconsistent with the requirement to determine the rent as if the premises were unoccupied. Other reasoning was that: • the purpose of the determination is to determine rent for a particular retail shop – trading details of similar businesses operated by tenant are not relevant; • section 29(b) states that SRV must not have regard to value of goodwill of tenant's business in determining CMR; • the landlord should not benefit from/be penalised by, the tenant's success/failure. Regardless of turnover of an individual tenant, there is a market value for the rental of a given retail space. **Supporting views:** This option was proposed by some valuation stakeholders on the basis that the rent determined should bear relationship to the turnover of the tenant's business. These submitters argue that:

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			• Sales information is important, if not essential, to a CMR determination. Sales are the sole purpose of lease and generally reflect all factors of permitted use, area, location and compensation relevant to the determination. Refusal by the tenant to disclose to the SRV on a confidential basis may result in an unreasonable outcome for tenant (ie. a determination above that which the business, conducted by the average competent operator could afford) or the landlord. • The business potential of the premises is a critical factor in determining CMR and the SRV needs as much assistance as possible to understand the dynamics of the business potential of the premises. The trading figures are not necessarily adopted by the SRV, but assist him/her. • "Knowledge of trading does not result in tenant's goodwill being included in the rental. It simply serves to identify the business potential of the premises under current management, which naturally does include any good will that may exist. Part of the valuer's role is to decide whether the current management satisfies average competent management. It is up to the valuer to decide whether the business is being conducted by such an operator and the extent to which goodwill is inherent in the turnover".

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6.3.6 - New confidentiality obligation between landlord and tenant			
	Relevant provision: The confidentiality provision in section 35 of the Act applies only to the SRV and the material that he/she has obtained from the parties and/or the landlord under sections 28A and 30. Section 28A(3) requires each party who makes a submission to the SRV to give a copy of it to the other party to facilitate the other party's right of reply under section 28A(4).	**Option**: Insert confidentiality provision governing the landlord's and tenant's use and disclosure of any information provided to them as required under section 28A(3), or otherwise during the CMR determination process.	**Supporting view:** A new confidentiality provision imposing confidentiality obligations between the landlord and tenant would provide parties with 'peace of mind' and assurance that the information contained in their respective submissions to the SRV will not be shared with other parties. **Opposing view:** There is no equivalent or comparable provision in other States/Territories. Only the Qld Act provides for an exchange of submissions between the parties.
For comment: Comments are sought regarding this option, in particular: (a) any empirical or other evidence that such a provision is necessary for the effective determination of CMR under the Act, including: (i) for what proportion of CMR determinations are landlord/tenant parties withholding information from their submissions to the valuer on the basis of confidentiality concerns; and (ii) the proportion of cases in (i) above relate to a tenant's concerns about landlord's access to turnover details; (b) any considerations relevant to framing appropriate provision(s) for both landlord and tenant confidentiality, including any allowable use/disclosure and the extent to which the provisions in section 26 (confidentiality of turnover information) are relevant/appropriate; and (c) any entitlement to compensation where a party suffers loss or damage resulting from improper use/disclosure by the other party (or their advisors etc).			
6.3.7 - Effect of CMR determination under the Act			
	Relevant provision: The CMR determined by the SRV is the rent payable under the lease for the rental period under review –section 33.	**Option:** Clarify that a retail tenancy dispute exists if a party to the lease refuses to accept a CMR determination under the Act.	Some stakeholders have requested clarification.

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		This means that the dispute resolution process under the Act applies – ie. the affected party may lodge a notice of dispute with the QCAT registry.	
6.3.8 - Process for appointment of SRVs			
	Relevant provision and issues: CMR is to be determined by a SRV agreed by landlord and tenant, or failing agreement, nominated by the chief executive – section 28(2). In practice, SRV appointments are made by the Principal Registrar of QCAT under delegation by the chief executive. The Act does not set out any process or requirements for the appointment of SRVs, other than that a SRV means a person whose name is recorded on the list of SRVs under the *Valuers Registration Act–1992* - Schedule.	**Options:** To be determined.	**Other jurisdictions:** Under the NSW Act, if the landlord and tenant can not agree on a valuer to carry out the determination, a party to the lease may make application to the Administrative Decisions Tribunal (ADT) to appoint a SRV. Section 72AB of the NSW Act sets out the powers of the Tribunal relating to appointment of SRVs, including that: • the appointment is to be made from separate lists of nominees prepared by the President of the Australian Property Institute (NSW) and the President of the Real Estate Institute (NSW); • the ADT may attach such conditions, as it considers appropriate to the appointment of a SRV, including conditions about the fees that may be charged by the valuer. In all other States/Territories, where the parties can not agree on a valuer, the SRV is appointed administratively (except the ACT, where the appointment is by the Magistrates Court). In Vic, WA and the NT the appointment is made by the State/Territory Small Business Commissioner. The retail leasing legislation does not prescribe any relevant process or requirements for the

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			appointment. In SA, the appointment is made by the President of the Australian Property Institute (SA), formerly the Australian Institute of Valuers and Land Economists (SA Division) Inc.
For comment: Comment is sought regarding the process for appointment of SRVs in Qld, including alternatives and related issues.			
6.3.9 - Statutory protection for SRVs			
	Issue: Whether SRV's should be given statutory immunity from liability in making a CMR determination under the Act. There is precedent in Qld for the extension of immunity beyond quasi-judicial roles. For example, section 107 of the *Building and Construction Industry Payments Act 2004* (BCIPA) grants immunity to adjudicators for anything done/ omitted to be done in good faith in performing their functions under the Act, or which the adjudicator reasonably believed was done in the performance of such functions. Immunity is also granted to 'authorised nominating authorities', whose role is to select adjudicators for the parties. The BCIPA provides for a system of rapid adjudication, by appropriately qualified private adjudicators, of progress payment disputes under construction contracts. The adjudication process culminates in a binding order by the adjudicator as to the amount (if any) which the respondent is to pay	**Option:** Insert new provision: a SRV is not liable for anything done or omitted to be done in good faith for the purposes of a determination of CMR under the Act. This option is based on section 72AB(5) of the NSW Act, which gives statutory protection to SRVs appointed by the ADT on application by a party to a lease where the parties have not been able to agree on a valuer. NSW is the only jurisdiction that provides statutory protection for SRVs and this protection is limited to SRVs appointed by the ADT (ie. it does not extend to a valuer appointed by agreement of the parties). **Note:** This is a stakeholder proposal and would be subject to further consultation and consideration by Government. This option would **not** give protection for negligence.	**Supporting views:** The following submissions are made by valuation stakeholders in support: • general practice for SRVs is to require the landlord and tenant to agree to an indemnity in favour of the SRV as a condition of the appointment (ie. the indemnity clause is contained in the contract of engagement). However, a submitter alleges it is not infrequent for a party to refuse to accept the indemnity as a means of avoiding the determination (ie. a landlord has a substantial interest in not having rent determined at a lower level). A statutory indemnity would eliminate this avenue for parties in a rental dispute to frustrate the process for commercial leverage. • SRVs price into their fee structure allowance for further correspondence where there is a negative reaction by parties to the terms of engagement and for instances where instructions do not eventuate because a

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	the claimant.		party/the parties are unwilling to accept the indemnity. This is an unnecessary cost imposed on parties who conform. There is significant work for the SRV to prepare the terms of appointment and this cost is forfeited if the parties do not proceed; • SRVs require statutory protection because they are making an expert determination in circumstances where the parties in dispute have polarized views about what rent should be paid and it is common for either one or both parties to be unhappy with the determination. If the SRV receives written notice querying the determination by or on behalf of a party, the valuer must notify their professional indemnity insurer of a potential claim. The insurer often appoints a lawyer to investigate the matter and the valuer has to pay the legal fees under the provisions of the insurance policy. In most instances, the legal fee is greater than the fee earned by the valuer for making the determination of CMR; • for the reasons above, the absence of a statutory indemnity is a deterrent to valuers who may otherwise seek qualification as an SRV; • there is a small and declining pool of SRVs i–Qld - approximately 22 currently practising, with eight of those in the Brisbane region. It is submitted that this pool is further reduced by commercial conflicts of interests (ie. practising valuers have to decline approximately half of the jobs offered to them on this basis). Many valuers have given up

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			their registration as SRVs because it is not commercially worthwhile given the litigation risk and insurance costs. **Opposing views:** SRVs should not be singled out (within the valuing profession or more broadly against other professions) as being immune from legal challenge on the grounds that they have acted incompetently or without regard for the provisions of the Act, or the requirements of their profession.
For comment: In particular, comment is sought regarding: (a) whether, if a statutory indemnity is given, it should apply where the parties agree to the appointment of the SRV as well as where the SRV is appointed by a third party?; (b) relevant professional indemnity issues for the industry; (c) sufficiency of the pool of SRVs to undertake CMR determinations in Qld, including in regional areas and having regard to conflicts of interest; and (d) the utility/effectiveness of the inclusion of a release and indemnity provision in the terms of engagement, including the proportion of cases in which a party refuses to accept an indemnity in the SRV's terms of engagement/contract and the bases for that refusal.			
6.4 - Landlord's outgoings and other payments			
6.4.1 - Management fees			
	Issue: The Act and Regulation do not define or refer specifically to management fees. The definition of landlord's *outgoings* for a retail shopping centre or leased building includes; "reasonable expenses directly attributable to operation, maintenance or repair	**Option A:** Insert a new provision in part 6, division 5 of the Act (which deals with landlord's recoverable outgoings) to clarify the type/nature of management fees which a tenant is required to pay under a lease in a retail shopping centre along the following lines:	**Supporting views:** Various retail tenant stakeholders have raised concerns about management fees as an outgoing recoverable by the landlord, particularly in a retail shopping centre context. Retail tenants and their representatives have raised the following concerns/matters (in no

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	of the centre or building" and areas used in association with those – 7(1)(a) Act. Section 3(j) of the Regulation requires the landlord disclosure statement to contain 'details of any payments to be made by the tenant under the lease for the lessor's outgoings'. The approved form for the landlord's Audited Statement of Outgoings includes 'management' as an outgoings item but does not require landlord to give a specific breakdown of what comprises management fees.	"If the shop is in a retail shopping centre, the annual estimate of outgoings and audited statement are to include a statement of management fees/total management fees, broken down into the fees to be paid by the tenant towards the administration costs of running the centre and other fees paid to the management company." **Option B:** Insert a new provision in part 6, division 5 prohibiting landlord recovery of management fees: "If there is a provision in a lease to the effect that the tenant is obliged to make payment for the benefit of the landlord for management fees, the landlord is not entitled to recover and the tenant is not obliged to make, that payment. The term *management fees* should be defined to cover: fees in respect of costs for/incidental to collection of rent or other moneys (other than costs associated with debt recovery) or the management of premises including, but not limited to costs in respect of: management offices; plant and equipment and staff.	particular order) regarding management fees: • management fees are at the sole discretion of landlord and have no immediate relevance to market rates or available types of service levels (ie. cannot be tested as being "reasonable", as opposed to operating costs of centre such as cleaning/security where landlord can go to market to seek quotes/tenders for services for which tenants receive a direct benefit); • as the landlord's business is the management of the centre as an asset, it is inequitable for tenants to be responsible for landlord's corporate overheads – ie. management costs relating to managing asset; collecting income; reporting and leasing on behalf of landlord should not be recoverable; • charging tenants for the administration/ management costs of running the centre is an unfair cost burden on tenant businesses; • charging tenants for direct operational costs for the efficient running of the complex (such as cleaning, security) is reasonable; • management fees should not be recoverable by landlord as outgoings, but rather should be factored into the rent so that there is a direct incentive for the landlord to ensure that the centre manager does not overcharge; • a statutory prohibition on recovery of management fees would address scenarios occurring in practice where centre management fees are excessive, including on change of manager or where the manager is related/not at arms length to the centre owner.

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			Option A: This option would align with the current provisions in NSW for outgoings estimates and statements, which specifically address the breakdown of management fees to distinguish between those expenses: • directly and reasonably attributable to the administration of the centre –ie. the operation, maintenance or repair of the building/centre in which the shop is located and associated use areas; and • that are the landlord's costs of managing its asset (ie. fees paid to a management company) – sections 27(c)(i) and 28(1)(b)(i). The NSW Act does not define the term *management fees*. **Option B:** This option largely aligns with WA.
6.4.2 - Landlord's insurance excess			
	Issue: Whether landlords should be able to recover from tenants all or part of any excess payable by the landlord under the landlord's insurance policy for the centre or building.	**Option:** Amend section 7(3) of the Act to exclude recoverable landlord's outgoings any amount paid by a landlord relating to an excess under the landlord's insurance policy for the building/centre.	This issue was raised by a retail stakeholder on basis that it is inequitable for a landlord to recover such an amount.

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6.4.3 - Landlord's annual estimate and audited statement of outgoings			
	Relevant provision*:* Section 37(2) of the Act requires the landlord to give to each tenant both an annual estimate and an audited statement of outgoings in the approved form for each accounting period. For these statements, the amount shown for each item is to be not more than 5% of the total outgoings, except where the item relates to a charge, levy, rate or tax payable under an Act; or a particular outgoing cannot be broken up to comply with the 5% itemisation cap: section 37(3) & (4).	**Option A:** Omit sub-sections 37(3) and (4) to remove the requirement for itemisation. **Option B:** The Act should require the landlord to make available to a tenant any documentation required by the auditor for preparation of the audited annual statement of outgoings. **Option C:** Insert a new provision to effect that an auditor preparing an audited annual statement under section must: (i) ensure that the tenant is given a reasonable opportunity to make a written submission to the auditor on the accuracy of the landlord's outgoings statement; and (ii) take into account any tenant submission received in preparing the report .	**Supporting views:** **Option A:** The requirement in section 37(3) is peculiar to the Qld Act. Some landlord stakeholders are of the view that the requirement is unnecessarily prescriptive, places an unnecessary administrative burden on the landlord and does not provide any useful information for the tenant. **Option B:** This option was suggested by a retail tenant who has experienced difficulty in obtaining detail or substantiation about outgoings charges. **Option C** This would align with the position in NSW. The Vic Act also has a provision in terms of item (i) of the option**.** **Opposing views:** **Option A:** Tenant stakeholder feedback indicates that section 37(3) is beneficial to tenants and should be retained as it: enables tenants to benchmark outgoings payable by reference to the market; and constitutes a transparency mechanism for a tenant's enquiry in respect of the nature and extent of landlord outgoings.
For comment:			

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• If opposing option A, any qualitative or quantitative evidence that Qld tenants are better positioned to benchmark/query landlord outgoings than tenants in other States/Territories would be helpful; and • Comment is invited in relation to option C, including whether the equivalent NSW and Vic provisions are effective in practice.			
6.4.4 - Apportionment of landlord's outgoings			
	Relevant provision: The ***apportionable outgoings*** of a landlord are the outgoings for the centre other than those attributable to a specific tenant because of that tenant's direct use of the services/facilities incurring the outgoing. Section 38 limits the amount that a landlord can charge a tenant for apportionable outgoings (including sinking fund contributions and centre lighting, air conditioning and cleaning). The share of these outgoings paid by each tenant must not be more than the proportion of the floor area that the tenant's shop occupies compared with the total area of all premises in the building (ie. retail and non-retail leases) that are leased or available for lease and which enjoy/share the benefit resulting from the outgoing. **Other jurisdictions:** The NSW Act defines *lettable area* of a retail shop to not include car parking spaces or storage areas not attached to shop premises where business of shop is carried on.	**Option A:** Insert a new sub-section 38(3) to exclude the following areas for the purpose of calculating the total area of all premises in centre/building that are leased/occupied by tenants or available for lease/occupation by tenants: • information, entertainment, community facilities (eg. ATMs, phones etc) or leisure facilities located within common areas; • telecommunications equipment; • seating & tables; • display advertisements; and • storage and parking. **Option B:** Include the following notation for section 38 to clarify how it operates regarding landlord concessions and vacant shops: 'This section prevents a lessee being required to make up for any shortfall in outgoings recouped by landlord that is attributable to vacant shops or concessions allowed to other tenants'. **Option C:** Kiosk footprint areas should be increased by 20% – 50 % for the purposes of outgoings apportionment under section 38.	**Supporting views:** **Option A:** Major landlord stakeholders submit that section 38 requires clarification to avoid unintended consequences and reflect commercial practice in relation to areas which are not considered to be part of the lettable area of a shopping centre. The excluded areas set out in the option (such as parking or common area seating) should not be included in the denominator when calculating the contribution of specialty shop tenants to outgoings as it leads to a substantial shortfall in outgoings recovery for landlord. There are numerous examples where areas in centres are leased or licensed but commercially the industry does not take these areas into account for the purposes of s.38 apportionment. These areas are generally located in common areas and largely mirror the areas currently excluded from the definition of 'retail shop lease' at paragraph (e) of Schedule. A relevant example is a lease/licence to car park operator. As parking areas comprise a substantial area of the entire centre (more than the total lettable area in some circumstances), a shortfall in recovery of outgoings of 50% or more may result on a strict interpretation of section 38 in its

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			current form. **Option B:** This option is in response to a retail stakeholder concern that in some centres there can be a number of gross lettable areas, especially where redevelopments have been undertaken and a number of tenants (especially major tenants) are not liable to pay certain outgoings. This option would align with NSW. **Option C:** A submitter proposes this option as the number of kiosks in retail shopping centres has increased markedly over an extended period. Kiosks only pay outgoings on a proportionate area basis, which does not include the common area surrounding the kiosk from which their tenants are serviced. Other specialty tenants have to provide adequate space to service their customers within their leased area and pay a higher share of outgoings for the common area. **Opposing view:** **Option C:** An alternate view is that these operational policy issues within shopping centres are more appropriately addressed by industry, rather than increased government regulation. Section 8 of the Casual Mall Licensing Code of Practice deals with adjustment of outgoings by the landlord taking into account casual mall licenses. A casual mall licence is a short term license (not exceeding 180 days) granted to a temporary retailer to use part of the common area of a

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			shopping centre for the sale of goods or services (ie. kiosks). The Qld landlord disclosure statement requires a shopping centre landlord to disclose whether the Casual Mall Licensing Code of Practice is adhered to and, if so, for a copy of the casual mall licensing policy for the centre to be attached. See also item 6.4.5 below regarding voluntary industry based codes generally.
6.4.5 - Code of conduct on outgoings			
Voluntary industry based codes of conduct: The 2008 PC Report included recommendation/findings that. (i) that State/Territory governments, in conjunction with the Commonwealth, should facilitate the introduction by landlord and tenant industry associations of a voluntary national code of conduct for shopping centre leases directed to and enforceable by the Australian Competition and Consumer Commission (ACCC) or, alternatively, administered and enforced by the retail sector; (ii) a voluntary code should: • include standards of conduct at all stages of lease negotiation, operation and termination; measures to improve transparency and accountability of tenancy management within centres, including the provision of effective rent figures and lodgement/registration of leases; and conduct of dispute resolution prior to a dispute proceeding to a mediator, tribunal or court; • avoid intrusions on normal commercial negotiations and decision making in matters such as minimum lease terms, rent levels and the availability of a new lease; • be an alternative to further government regulation to address commercial difficulties between landlords and tenants in shopping centres, and as a means of enabling the more prescriptive aspects of the State/Territory retail leasing legislation to become redundant and be repealed. An alternate view to (i) above is that the development of and adherence to industry codes of conduct, and the extent to which they align with the retail leasing legislation and/or general law are beyond the scope of this review and are matters for industry generally and individual participating stakeholders. An example of a voluntary industry code of practice for the retail industry is the Casual Mall Licensing Code of Practice which is endorsed by the Australian Retailers Association, the Shopping Centre Council of Australia and the Property Law Council and authorised by the ACCC. This code applies in all		

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States/Territories (except SA which has its own legislated code upon which the voluntary code is based).			
	Relevant document: August 2002 Australian Retailers Association Tenancy Committee "Shopping Centre Code of Conduct on Outgoings" (Outgoings Code) which can be accessed on the PC website. **Note:** the Outgoings Code was not submitted by or on behalf of the Australian Retailers Association for the purposes of this review.	**Option:** That the Outgoings Code be adopted under the Act as binding on the parties to retail shop leases.	**Supporting view:** This option was proposed by a valuation stakeholder on the basis that it would eliminate a significant amount of inconsistent reporting of outgoings, management, administration and utility charges in shopping centres and "add value back into the assets". **Opposing views:** The Outgoings Code is framed as a voluntary code of conduct intended to complement State/Territory retail tenancy legislation and its stated objects are to: promote equitable and transparent cost recovery practices; provide a simple dispute resolution mechanism for industry participants and to establish a uniform reporting standard for outgoings. Refer PC's recommendations and related matters above.

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6.4.6 – Gross and semi-gross leases			
	Relevant provision: The Act does not regulate the type of lease that the parties to a lease are to enter into. This is consistent with other States/Territories. In simple terms a *gross lease* is where the tenant pays a gross amount of rent, which the landlord uses to pay the outgoings and expenses for the centre/building (ie. insurance, marketing/ promotion, security, rates, electricity, water, cleaning, management fees, maintenance and repairs), or in any other way the landlord sees fit. In simple terms a *semi-gross lease* is where (in addition to a gross rent component) the tenant pays the escalation in certain outgoings for each year of the lease term - ie. the difference between the outgoings amount for the nominated base year and the increase in the relevant outgoings for each subsequent year of the lease term. 'Net' leases require the tenant to pay (in addition to rent) some or all of the landlord's outgoings. See item 6.4.4 above for how landlord's outgoings are apportioned under the Act between shopping centre tenants.	**Option A:** Act should require that all retail shop leases be gross leases. **Option B:** For semi-gross leases with a base year measure for outgoings, the Act should require: • "all reasonable outgoings costs"; and • "a reasonable amortised repairs and maintenance cost" to be included in the base year outgoings figure.	**Supporting view:** **Option A:** One retail industry stakeholder submitted that consideration should be given to this option to reduce the regulatory burden on the basis that it would: • reduce landlord's compliance costs associated with providing outgoings budgets and annual statements to tenant under section 37 of the Act; • enable outgoings and management fees to be negotiated/capped (cf. landlord profiting from them in absence of transparency/ accountability mechanisms); • address the retail tenant concerns about provision of turnover/sales figures in item 6.1.1 above. **Option B:** This option was suggested by a retail tenant to address a situation where there is a change of ownership of the building/centre on which the shop is located and the new landlord requires the tenant to pay an increased proportion of outgoings (ie. increased level of insurance cover; greater security gardening and cleaning costs and repairs and maintenance not accounted for or proposed by the original landlord). **Opposing view:**

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			Options A and B: Legislation should not prescribe the type of lease to be entered into or regulate outgoings payable under particular categories of leases. These are matters for commercial negotiation between landlord and tenant and regulation in terms of these options would unduly restrict commercial decision making. There is also no such regulation for commercial leases.
6.5 - Sinking fund and promotion/advertising contributions			
6.5.1 - Sinking fund contributions recoverable as outgoings			
	Relevant provision: Section 7(3)(c) states that 'contributions to a depreciation or sinking fund' are not included in landlord's outgoings. However, *outgoings* for the purposes of sections 37 and 38 of the Act include *maintenance amounts* – sections 37(1) and 38(1). *Maintenance amounts* are amounts that a tenant is required under the lease to pay into a sinking fund for major maintenance or repairs to the centre or building as set out in section 40(1).	**Option** Amend section 7(3)(c) to clarify that the landlord's contributions to a depreciation or sinking fund are not included in the definition of *outgoings*.	**Supporting view:** This option clarifies that, if the lease requires the tenant to pay maintenance amounts, those amounts are recoverable by the landlord as outgoings under the lease.
6.5.2 – Limitations on tenant contributions to sinking fund			
Section 40 of the Act provides for how the landlord is to maintain and manage the contributions that are required under the lease to be made by tenants to the sinking fund (maintenance amounts). It is beyond the scope of the Act to regulate maintenance standards for the building or centre.			

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Stakeholder feedback to the review is that sinking funds are rare in major shopping centres and are often not in place in smaller retail shopping centres. Section 40(6) provides that the total payments into the sinking fund by all tenants of the retail shops to which the fund relates for any year must not be more than 5% of the total of the landlord's estimated outgoings for the retail shops for the year. This limitation aligns with the equivalent provisions in NSW and the NT. Section 40(7) provides that the landlord must not seek /accept payments of maintenance amounts from tenant of retail shop that would result in the amount standing to credit of sinking fund being more than $100,000 (maximum credit cap). The equivalent amount in NSW and the NT is $250,000. These provisions seem to be directed to ensuring that tenants are not required to contribute amounts towards capital expenditure that are excessive having regard to their lease term and ordinary depreciation principles. One industry stakeholder submitted that the Act should include an obligation on the landlord to maintain an adequate sinking fund to enable requisite maintenance to be performed. Details in support of this submission were not provided.			
For comment: Stakeholder views are invited on whether: it is necessary or appropriate to retain section 40(6); and the amount of the maximum credit cap in section 40(7) remains appropriate. Please provide supporting reasons.			
6.5.3 - Distribution of sinking fund if shopping centre demolished/ceases operation			
	Issue: The Act is silent about what happens to the moneys in a sinking fund if the centre or building in which the retail shop is located is demolished, destroyed or ceases to operate.	**Option A:** Insert a new provision: in each of the circumstances in issue, the landlord must repay to tenant the proportion of the total amount credited to the fund that the lettable area of the tenant's shop bears to the total lettable area of all the shops required to contribute to the fund. The landlord and tenant for these purposes would be the landlord and tenant under the lease immediately before the destruction, demolition or cessation of operation. **Option B:** The balance of the sinking fund should be distributed to the tenants based proportionately on their contributions.	**Supporting views:** **Option A:** This option would align with NSW. While sinking funds may not often be in place, section 40 is important to address situations where a complex is operated under a body corporate or other arrangement – usually arising in smaller properties with multiple uses (ie. retail with office/residential premises located above). **Opposing views - Options A and B:** Preferable not to legislate for what happens when building/centre in which shop located is destroyed/damaged/ceases to operate as the situation rarely arises and, where it does, the lease

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		Further clarification: A provision for tenants to receive a credit or refund from a sinking fund should only apply where the centre has ceased to operate on a permanent basis.	will deal with the issue. The sinking fund is in effect part of operating expenses and a well drawn lease will deal with adjustment of operating expenses at the end each accounting period. For both options, there would need to be clarity about how long a centre must effectively have ceased to operate before a refund obligation arises. For example, in the recent Qld floods one centre was inundated and had to be entirely rebuilt. It is unlikely that a significant centre can be rebuilt within 12 months, and arguably not appropriate for a sinking fund to be distributed to tenants where a centre becomes operational within a reasonable period after the damage occurs. The NSW provision does not address these matters.
6.5.4 - Unspent advertising/promotion contributions			
	Relevant provision: Section 41 regulates promotion amounts for a retail shopping centre. *Promotion amounts* are the amounts for promotion and advertising of the retail shopping centre in which the shop is situated that the tenant is required to pay to, or at the direction of, the landlord under the lease – section 41((1)(a). **Issue:** Section 41 does not regulate how the landlord deals with or accounts for unspent promotion amounts to tenants of the centre.	**Option A:** Insert provision for unspent promotion amounts to be carried forward for application to future advertising or promotion of the centre. **Option B:** Insert new provision for an adjustment, within four months of the end of lease, between landlord and tenant for term of lease to take account of any underpayment or overpayment by tenant of promotion amounts. **Option C:** Do not amend – ie. no regulation.	**Supporting views:** **Option A:** Would align with NSW and Vic and reflect common industry practice (see option C below). **Option C:** Both landlord and tenant submitters noted that it is commonly accepted in the industry that there are varying scenarios regarding promotion/ advertising expenditure and, in almost every case, a “swings and roundabouts” philosophy is adopted (ie. if there are unspent promotional funds at end given period/end lease, new tenants will receive benefit of credit in the fund to which they have not contributed, while those whose leases have ended will not). On this basis, the

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			majority of submitters (landlord and tenant) preferred option C. **Opposing views:** **Option B:** Generally landlord, tenant and valuation submitters did not support, option B on the basis that a requirement for the landlord to reconcile and account to each tenant at end of lease would be an unwarranted administrative burden and result in additional management charges recovered from tenant as outgoings. Refer also reasons at option C above. Major landlord submitters also state that, in practice, there are usually no unspent promotional monies at the end of the financial/ calendar year and promotional funds are normally administered on a fiscal/calendar year basis (with which leases do not align).
6.5.5 - Landlord to make available to tenant marketing plan and promotion/advertising expenditure report			
	Issue: Qld is also the only jurisdiction that does not require a landlord to provide a marketing plan to tenants. **Accounting requirement:** Section 37(2) of the Act requires the landlord to give to each tenant both an annual estimate and an audited statement of outgoings in the approved form for each accounting period (landlord's outgoing statement). *Outgoings* for the purposes of section 37 include	**Option A:** Insert a new provision in section 41 (which deals with promotion and advertising) that the landlord is required to ***make available*** to tenant (ie. by uploading onto central website accessible to tenants) a marketing plan which contains details of the landlord's proposed advertising/promotion expenditure during the relevant accounting period. The marketing plan would be required to be made available to tenant at least one month before the start of each accounting period.	**Supporting views** **Option A**: Tenant and landlord submitters generally supported this option. It would align with the approach in other States/Territories and is consistent with current industry practice (ie. centre landlords upload marketing plans and estimates of outgoings onto electronic website). The amendments would reduce the regulatory and administrative burden on landlords (ie. by enabling relevant expenditure amounts to be

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	promotion amounts. See item 6.5.4 above for definition of *promotion amounts.*	**Option B:** Insert new provision that landlord must make available to tenant a written half yearly and/or yearly report of promotion/advertising expenditure for the building/centre in which the leased shop is located. This statement would include unspent amounts carried forward to the next accounting period.	uploaded onto accessible website, rather than having to provide the details to each tenant individually in the landlord's outgoings statements). **Opposing view:** **Option B:** Is unnecessary as the existing requirement in section 37 for expenditure amounts for advertising/promotion of a centre to be included in the landlord's estimated and audited outgoings statements is sufficient. **Issues to be considered:** (i) what is an appropriate accounting period for the purposes of options A and/or B? (ii) whether the Act should make provision for where the landlord does not comply with the requirements in Option A and/or B? For example, the NSW Act provides that the tenant may withhold contributions if landlord has failed to make a marketing plan or expenditure statement available to tenant; and landlord has failed to do so within 10 business days of tenant's written request.
For comment: Comment is sought on this option and any alternatives or associated issues, including the issues at (i) and (ii) above.			

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6.6 - Tenant's liability for landlord's legal and other costs			
6.6.1 - Costs associated with preparation/renewal/extension of lease			

Relevant Qld provision:

Section 48 of the Act states that a tenant is not liable to pay any amount for the landlord's legal or other expenses in relation to preparing, renewing or extending the lease. However, this does not prevent a tenant under a retail shop lease from being required to pay for one or more of the following:

- lease registration costs, including associated survey fees; and
- the landlord's reasonable expenses incurred in obtaining mortgagee consent.

Other States/Territories:

While the specific provisions vary across jurisdictions, the underlying premise is that each party pays their own costs/expenses associated with preparation of the lease.

The Vic and WA (2011 Amendment) Acts are generally aligned and provide that a landlord is not able to claim from any person (including the tenant) the landlord's legal/other expenses relating to:

- the negotiation, preparation or execution of the lease (and, in WA, also a renewal/extension of lease); or
- obtaining consent of landlord's mortgagee to the lease; or
- the landlord's compliance with the Act.

In NSW, a landlord is prohibited from seeking/accepting payment of 'lease preparation expenses' in connection with the grant or renewal/extension of lease. 'Lease preparation expenses' mean legal/other expenses incurred by landlord in connection with preparing/entering into lease, except registration fees. Contravention of this provision is an offence (max 100 penalty units) and tenant is entitled to recover any payment as debt from landlord.

The ACT and Tas Acts state that each party must pay their own costs in relation to lease preparation, with specific provision for mortgagee consent and registration. The Tas Act states that the parties are to negotiate disbursements such as mortgagee consent, while the ACT Act specifies that the landlord's costs include those of/incidental to obtaining mortgagee consent; and that if a party requires registration of the lease they are to pay the fee.

In the NT, a tenant is not liable for landlord's legal/other expenses incurred in connection with preparation of lease unless: the landlord gives the tenant a copy of the relevant accounts; the amount of the expenses/ method of calculation is included in landlord's disclosure statement; and the amount claimed by the landlord is reasonable.

Under the SA Act, a tenant is liable to pay half of the landlord's 'preparatory costs' and the full amount of any government registration fees, but only when provided with a copy of any account given to the landlord for the expenses. 'Preparatory costs' include mortgagee production/ consent fees and costs of

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attendances on tenant by the landlord or their lawyer/conveyancer. The NSW Act (with certain exceptions) and Tas Act allow a landlord to recover costs of lease amendments requested by the tenant. In NSW, the tenant is not required to pay these amounts unless the landlord has given the relevant account.			
	Relevant provision: Section 48(2) allows a landlord to include a provision in the lease requiring the tenant to pay for one or more of the following: • lease registration costs, including associated survey fees; and • the landlord's reasonable expenses incurred in obtaining mortgagee consent.	**Option:** Amend section 48 so that a tenant is not liable to pay for lease registration, associated survey fees or any expenses incurred by the landlord in obtaining mortgagee's consent to the lease.	**Supporting view:** Some retail stakeholders submitted that tenants should not be liable for these amounts as they are a landlord's cost of doing business. **Opposing view:** Liability for these costs/expenses is a matter for commercial negotiation between the lease parties.
6.6.2 – Landlord's costs where tenant does not proceed with lease			
	Issue: The Act is currently silent about whether a landlord is entitled to recover his/her reasonable expenses in connection with preparation of a lease where the tenant withdraws/ does not proceed with the lease. **Other States/Territories:** The SA and NT Acts include express provision that a landlord's right to recover legal/other expenses incurred in connection with lease preparation from a person who enters into and then withdraws from negotiations with the landlord is not limited/precluded. The Vic and WA (2011 Amendment) Acts state that a landlord is not able to claim from the	**Option:** Amend section 48(1) to clarify that a tenant who withdraws from the lease negotiation is not liable for the landlord's legal/other expenses relating to the preparation of any draft lease and disclosure documentation provided by the landlord to the tenant.	**Supporting views:** This option is proposed by a legal stakeholder to address instances where the landlord signs a letter of intent or heads of agreement with, and delivers a draft lease and disclosure to, the tenant but the tenant does not proceed. In these cases, landlords usually seek to retain a deduction to cover their solicitor's costs in preparing the draft documentation. Clarification about the tenant's liability in these circumstances is sought. There is no specific provision in terms of the option in the other States/Territories.

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	tenant the landlord's legal/other expenses relating to: lease negotiation (in addition to preparation/execution etc); or the landlord's compliance with the Act (this would include disclosure).		
6.6.3 - Costs relating to assignment or consent to sublease/license			
	Relevant provisions: Landlord can require tenant to pay: • costs reasonably incurred in investigating a proposed assignee and reasonable costs of /incidental to the assignment and any necessary consents; and • reasonable legal and other expenses in responding to tenant's request for consent to sublease/licence. Sections 39(2)(a) and (b) and 24(1)(c). **Other States/Territories:** A landlord's entitlement to recover these costs is consistent across all jurisdictions. The SA, ACT, NT and Tas Acts also entitle the tenant to have the landlord substantiate the relevant costs/ expenses before making payment.	**Option:** Landlord's recoverable costs and expenses in relation to lease assignment and consent to a sublease or license should be capped.	**Supporting view:** A franchise stakeholder submitted that there can be difficulties in practice in determining (or reaching agreement on) what are "reasonable costs and expenses" of the landlord for consent to a franchisee's occupation of premises, or in connection with consent to assignment. There are significant ranges in relation to these costs across the industry. It has been submitted that the option would afford certainty and reduce dispute. There is no provision in terms of this option in the other States/Territories.
For comment: Comment is sought as to whether there are any difficulties or issues in practice with regard to landlords seeking payment of legal /other expenses from tenants without having providing the tenant with sufficient substantiation of the amount(s) claimed (for example, itemised accounts).			

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6.7 - Compensation under the Act			
6.7.1 - Tenant notice to landlord pre-requisite to claim for compensation under section 43(1)			
	Relevant provision: Section 43(1) sets out the circumstances or events in respect of which a landlord is liable to pay to the tenant reasonable compensation for loss or damage suffered by tenant because of an action of landlord or person acting under landlord's authority. Currently, section 43(1) does not require the tenant to have given written notice to the landlord of the disruption or other matter giving rise to the implied compensation claim before the landlord is liable to pay compensation to the tenant.	**Option :** Amend section 43(1) so that a landlord's liability to pay compensation to a tenant for the matters set out at sub-sections 43(1)(a)-(e) triggers only if the tenant has requested landlord in writing to rectify the matter.	**Supporting view:** Landlord stakeholders support this option, which is directed to ensuring that the landlord is made aware of the defect/disturbance by the tenant, and to give the landlord opportunity to rectify within a reasonably practicable time. This would align with NSW, WA and the ACT. **Opposing view:** This contrasts with the Vic Act, which states that a tenant's failure to give landlord written notice of loss/damage as soon as practicable after it is suffered does not affect tenant's right to compensation.
6.7.2 - Compensation for restriction of access / disruption to trade			
	Relevant provision: Under section 43(1)(c), a landlord is liable to pay to tenant reasonable compensation for loss/damage suffered by tenant because landlord/landlord's agent causes significant disruption to tenant's trading; or does not take all reasonable steps to prevent/stop significant disruption within landlord's control. Section 43(1)(a) provides for the landlord to compensate the tenant for loss/damage suffered by tenant because the landlord/landlord's agent substantially restricts tenant's access to the leased shop.	**Option A:** Amend section 43(1)(c) to: • clarify that the landlord is only liable to compensate a tenant under that section where the landlord has acted unreasonably; and • provide that, in determining whether a landlord has acted unreasonably, due consideration is to be given to whether the landlord has acted in accordance with 'recognised shopping centre management practices'. **Option B:**	**Supporting views** **Option A:** Major landlord stakeholders have proposed this option on the basis that reference to recognised shopping centre practices is a common sense approach. They state that there are many well-established practices in the shopping centre industry which are not regulated under retail lease legislation but are widely recognised. Currently the NSW, ACT and SA Acts each contain a provision in terms of option A, but do not define the term 'recognised shopping centre practices'. Rather, these Acts contain a general

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		Amend section 43(1)(c) to omit the word 'significant'. Amend section 43(1)(a) to omit the word 'substantially'.	interpretation provision to the effect that regard is to be had to accepted practices and interpretations in the industry. There is no equivalent interpretation provision in the Qld Act. **Option B** A submitter proposed this option on the basis that the words 'substantially' and 'significant' create uncertainty/subjectivity and the tenant should be compensated by the landlord for any loss of trade reflected in the till. **Opposing views:** Option A: The majority of stakeholders do not support the proposal that recognised shopping centre practices should form part of the deliberations of QCAT in determining compensation provisions as: • this is a subjective term that is not readily capable of definition, which would introduce ambiguity and likely increase dispute rates; • shopping centre practices are historically geared to favour landlord interests and the profitability of the centre as an investment, and are often contrary to interests of individual tenants; and • whether the disruption/interference was material and due to causes beyond the reasonable control of the landlord is what should be considered. **Option B:** This option would be out of step with the equivalent provisions in the other

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			States/Territories, all of which qualify the landlord's liability in similar terms to the current provisions – ie. landlord is only liable to compensate tenant for substantial or significant disruptions, not those of a minor nature.
6.7.3 - Interaction between section 43(1)(f) and relocation and demolition compensation provisions			
	Issue : There is uncertainty regarding the interaction between section 43(1)(f) and the specific compensation provisions for relocation and demolition in part 6, division 9 subdivisions 1 and 2 of the Act (stand-alone relocation and demolition provisions). **Section 43(1)(f):** The landlord is liable to pay the tenant reasonable compensation for the tenant's loss/damage where the landlord causes the tenant to vacate shop before the end of lease or its renewal due to the extension, refurbishment or demolition of the centre or building containing the shop. **Section 46G(1) – relocation:** The tenant is entitled to payment by the landlord of reasonable relocation costs including, but not limited to: the costs of dismantling or reinstalling fixtures/fittings and modifying or replacing them to standard existing immediately before relocation; and legal costs. For when/ how the stand-alone relocation provisions apply, refer item 6.8.1 below. For related option/discussion regarding the scope of section	**Option A:** Retain section 43(1)(f) and clarify that the section: (a) operates in addition to section 46G(1) and section 46K(1); and (b) does not apply to the extent that the tenant is otherwise entitled to reasonable costs or compensation under sections 46G or 46K. **Option B:** Omit section 43(1)(f) because its retention in addition to the specific demolition compensation provision (section 46K) results in landlords facing a double compensation regime where a demolition clause applies.	**Supporting views:** **Option A:** Tenant submitters supported the retention of section 43(1)(f) on the following bases: (a) it may apply in circumstances other than those where the stand-alone relocation and demolition provisions do not; (b) landlord's liability to pay compensation under section 46G(1) is limited, while section 43(1)(f) would apply where the lease is terminated early because tenant does not accept landlord's offer to relocate in circumstances where tenant would suffer financial hardship as a result; (c) landlord's liability to pay compensation under section 46K(1) is limited (ie. in terms the italicised qualifications in the first column), while compensation under 43(1)(f) is not; and (d) if section 43(1)(f) were omitted, tenant risk profiles would be increased and leases devalued, impacting on tenant's capacity to finance fit-out/business establishment costs.

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	46G(1), refer item 6.8.5. **Section 46K - demolition:** Landlord is liable to pay to tenant reasonable compensation for loss/damage suffered by tenant • because of early termination of the lease *if the demolition is not carried out or is not carried out within a reasonably practicable time after the date the lease terminates* **and** the landlord does not prove that *when the termination notice was given there was a genuine proposal to demolish the building in a reasonably practicable time* after the termination date: 46K(1)(a) and 46K(2); and • for fit out that was not provided by the landlord, *whether or not the demolition is carried out*: section 46K(1)(b). For related discussion/option regarding the scope of section 46K, refer item 6.8.5. **Other States/Territories:** Only the Tas Act contains a provision in terms of section 43(1)(f). ***Relocation*** The Vic, NSW, NT and SA Acts contain specific relocation compensation provisions which are the same/similar to section 46G(1). The ACT and Tas Acts imply broader compensation provisions into relocation clauses in shopping centre leases – refer 6.8.5 below. The WA Act does not contain any specific provisions regarding process/ compensation for relocation.		Submitters gave the following examples for (a) above: • a lease may provide for the landlord to terminate the lease (without being required to offer tenant alternate premises) for the purposes of refurbishing the centre (cf.. demolishing the centre); • demolition of the building/centre in circumstances where the lease does not contain a specific demolition clause; • relocation of a tenant where the lease does not contain the requisite relocation clause (see item 6.8.1); • a tenant would have no right of compensation other than under section 43(1)(f) if a lease were to allow a landlord to terminate without cause at any time during the term of the lease; • it is possible for a lease to provide for relocation of tenant in circumstances where the right to compensation under the relocation provisions does not apply -for example where it would be possible to carry out the works without relocating the tenant but the landlord believes it would be preferable to relocate the tenant; or where landlord wishes to adjust the tenancy mix of the centre. Section 43(1)(f) should be retained as a 'catch all' to enable case to be made when demolition and relocation requirements not met – ie. expands compensation to tenant to include compensation for not only fit out but also likely costs to re-establish business.

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	Demolition:
	
	The Vic, NSW, SA and NT Acts contain specific demolition compensation provisions which are the same/similar to section 46K. The ACT Act contains a similar provision regarding compensation for early termination. The Tas Act provides a process for termination of the lease in the event of a proposed demolition but there is no specific provision for compensation other than the equivalent of section 43(1)(f). The WA Act has no specific provisions about demolition.
			For (b) above it was submitted that the relocation provisions limit compensation as they: oblige the landlord to pay compensation only where the tenant accepts relocation; and are restricted to 'reasonable relocation costs' in terms of section 46G(1). However, a right of compensation in the circumstances of relocation would usually include damages suffered by tenant as result of business being closed during relocation process and damages for loss of revenue if relocated to inferior premises. Another submitter noted that there should be adequate compensation for relocation – costs of relocation do not necessarily only involve fit out.
			
			For (d) above, it was also submitted that section 43(1)(f) clearly provides a right of compensation to tenant where lease terminated early as a result of landlord requirement for relocation. It is a fundamental and important right for tenant to protect lease interest and term and without it there is significant uncertainty when negotiating rights of tenant to ensure agreed term maintained. In addition, tenant incurs significant expenditure on due diligence, negotiations and fit out costs.
			
			Option B:
			
			Landlord stakeholders submit that section 43(1)(f) is redundant as the stand-alone relocation and demolition provisions 'cover the field' – ie. if the lease contains a relocation clause or a demolition clause, then the stand-alone provisions apply and there is no other statutory right to compensation.
			
			Further, there is currently a drafting anomaly as both section 46K(1) (the specific demolition

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			provision) and section 43(1)(f) deal with compensation in relation to the termination of a lease due to a landlord exercising its rights under a demolition clause. It is therefore impossible for tenants, landlords and their advisors to know the extent of their entitlements or obligations (ie. whether, or the extent to which, the italicised qualifications in section 46K(1) in the first column apply).
6.7.4 - Application of section 43(1)(f) where tenant relocated within centre			
	Relevant provision: Refer above.	**Option:** Amend section 43(1)(f) to clarify that it only applies where the landlord/landlord's agent causes the tenant to vacate the shop and the retail centre in which the shop is located.	**Supporting view:** No supporting reasons were given for this stakeholder proposal. **Opposing view:** This option would deny tenants compensation in circumstances where they are relocated to an undesirable location within the same centre.
6.7.5 - Limit on compensation claim for notified specific occurrences			
	Issue: Whether the Act should permit a provision in a lease preventing or limiting a claim by the tenant under the implied compensation provisions in section 43(1) to particular circumstances. Under section 44(2), an agreement under the lease about compensation payable under part 6, division 7 of the Act is void to the extent it limits the amount.	**Option A:** Insert new provision: a lease may include a clause preventing/limiting a claim for compensation under section 43(1) for a particular occurrence if the likelihood of the occurrence was specifically drawn to the attention of the tenant, in writing, before lease was entered into, and the notice included: • a specific description of the nature of the occurrence; • an assessment of the likelihood of the	**Supporting views:** **Option A:** This option was supported by landlord submitters and would be consistent with NSW, SA and the NT. It is directed to reducing the likelihood of disputes during the lease term. Some legal stakeholders acknowledged in principle the benefit of clauses that prevent/limit compensation claims but proposed that the following safeguards be included if option A is adopted (the **legal safeguards**):

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		occurrence, including an indication of basis on which assessment reached; and • details of the timing, duration and effect of the occurrence so far as can be predicted. A general statement to the effect that disturbances may occur without providing details of the above matters would not be sufficient for this section to apply. A landlord disclosure statement may be an appropriate means of specifically drawing the tenant's attention to the likelihood of an occurrence – provided the details set out above are given. For example at part 7 of the statement (which deals with alteration works, including renovations, extensions, redevelopment and demolition) and/or part 13 of the statement (additional attachments). **Option B:** Amend section 43(1) so that a landlord's liability to compensate a tenant under the implied compensation provisions would apply despite any provision contained in the lease. This option would be subject to the tenant having given the landlord written notice requiring rectification of the matter that falls within the implied compensation categories (refer item 6.7.1 above). **Option C:** Insert a new provision: a lease must not limit a landlord's liability under the implied compensation provisions unless –	(a) the landlord should bear the onus of proving that the occurrence was drawn to attention of tenant in the manner required; (b) the landlord must give tenant full details of the likely occurrence, including reasonable details as to the extent of works required, time of occurrence, scheduled duration, steps to be taken by landlord to mitigate loss/damage to tenant and reasonable particulars of nature and severity of disruption to the tenant as a result of the occurrence and the changes if any, that it makes to the building/centre; (c) the lease must provide for reasonable abatement of rent or other moneys due under the lease for the duration of the occurrence and any reasonable period following within which its effects may continue to impact on the tenant; or the rent otherwise structured to substantially ameliorate the impact (eg. discounted rent over the term); and (d) the tenant should also be entitled to abatement of rent or other payments under the lease if the occurrence is of a substantially greater impact/duration than might reasonable by inferred from the landlord's particulars or the amounts provided for in (c) are not reasonable in the circumstances. **Option B:** would align with WA. **Option C:** would align with Tas. The Tas Act also states that the enlargement of a shopping centre or a change in its tenancy is not, in itself, a ground for compensation.

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		• before execution of the lease, the landlord brings the specific disturbance to the tenant's attention; and • there is a clause in the lease that specifies a formula for compensation in the event of that specific disturbance occurring. **Option D:** No amendment - ie. the Act should remain silent on this issue. This would align with the findings in the 2008 PC Report that legislation should not impinge on commercial negotiations; and governments should refrain from pursuit of measures that increase the level of regulation in retail leasing legislation, including further differential treatment of retail tenancy leases compared with the broader market for commercial tenancies.	**Opposing views:** **Option A:** Some tenant stakeholders submitted that option A may be open to improper use – ie. may lead to sophisticated landlord's making wholesale representations in respect of potential future scenarios (ie. centre redevelopment) as a means of covering the field to limit landlord exposure to reasonable compensation. A legal stakeholder opposed option A on the basis that it would cause "significant and unreasonable hardship to retail tenants and (at very least) adversely impact on process of finalising lease documentation". The submitter noted that it is increasingly common for landlords (in particular large institutional landlords of major centres) to include broad statements in disclosure statements and draft lease documents with a view to preventing the tenant from claiming under the implied compensation provisions and so transferring the financial damages resulting from flexible leasing arrangements in shopping centres to tenants. Negotiations between the parties or their legal representatives regarding these provisions can significantly lengthen the process and expense of finalising lease documentation. It is also submitted that: • in practice, the landlord usually does not bring any specific details of disturbance to tenant's attention, so parties have not agreed their commercial terms (ie. rent) taking into account removal of the tenant's rights under the implied compensation provisions; and

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			• at the lease negotiation stage, it is impossible to determine nature/extent of any financial impact which tenant may subsequently suffer as result of a section 43(1) event. Whether a compensation claim can be fairly and reasonably limited requires detailed consideration of: all factors involved in the negotiation the lease; any detail specifically brought to tenant's attention prior to agreeing on commercial lease terms; the landlord's subsequent activity; and the extent of damage suffered by tenant.
For comment: Comment is sought on stakeholders' preferred option, with supporting reasons. For option A, please include comment on: • whether the landlord disclosure statement would be an appropriate means of specifically drawing the tenant's attention to the likelihood of an occurrence, or whether a separate notice or statement should be given by the landlord?; • the inclusion of the legal safeguards set out at (a) to (d) under 'Supporting views' for option A above.			
6.7.6 - Exemption for landlord's emergency response			
	Issue: Whether steps taken by a landlord in response to an emergency situation or to comply with a legislative duty, or requirement of a public or local authority, should be exempt from liability under section 43(1) – ie. landlord would not be liable to pay compensation to a tenant in these circumstances. Refer items 6.14.7 and 6.14.8 below for related discussion regarding rent abatement etc in favour of tenant where:	**Option:** Amend so that section 43(1) does not apply to an action taken by a landlord: (i) as a reasonable response to an emergency; or (ii) in compliance with any duty imposed by/under an Act or resulting from a requirement imposed by a body acting under legislative authority. Item (i) above would include actual or pending	**Supporting views:** An amendment in terms of this option was broadly supported by landlord, tenant and legal submitters, in particular in the context of occurrences such as the 2011 Qld floods. An affected tenant's business interruption insurance should deal with any losses flowing to tenant from the circumstances in items (i) or (ii) - ie. a tenant can obtain contingent/consequential business interruption insurance cover for loss of business income resulting from, amongst other

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	• the centre/building is closed due to an emergency situation that results in damage to the centre/building in which the leased shop is located; • the landlord deems it necessary to close the centre/building due to an emergency situation (but not under the direction of a public authority or to comply with a legislative duty) and the emergency situation does not eventuate, or there is no damage to the centre/leased building.	emergency situations, such as flood, and may also include security threats to persons or property in or near the shopping centre or building in which the leased shop is located.	things, prevention/restriction of access and closure under direction of a public authority. This cover would be in addition to the tenant's business interruption cover for where the leased premises or centre are damaged by an insurable event. The proposed amendment would align with the majority of State/Territories. **Opposing views:** A legal stakeholder submitted that the amendment is unnecessary (no reasons were given). Some retail tenants submitted that such amendment would result in further diminution of the rights of small business owners.
6.7.7 - Landlord's liability to franchisee/sublessee for compensation under section 43(1)			
	Relevant provision: The definition of *lessee* includes, for the purposes of part 6, division 7 of the Act: *a sublessee or franchisee entitled to occupy the shop under the lease* ***or*** *with the landlord's consent* – Schedule, paragraph (b)(ii) – inserted by the 2006 Amendments. The implied compensation provisions for business disruption in section 43(1) are contained in part 6, division 7 of the Act.	**Option A:** No amendment – ie. the landlord is liable to pay compensation to sublessee or franchisee entitled to occupy the shop under the lease or with the landlord's consent for the matters set out in section 43(1). **Option B:** Omit paragraph (b)(ii) of definition of *lessee* so that a landlord is not liable to pay compensation to a franchisee or sublessee for the matters set out in section 43(1). **Option C:** Amend paragraph (b)(ii) of definition of *lessee* so that it only applies to a sublessee/franchisee who has possession of the premises with	**Supporting views:** **Option A:** As the occupier of the leased shop and the party whose business is materially affected by the actions/events set out in section 43(1), a franchisee/sublessee should be entitled to compensation from the landlord directly. The provision was intended to promote efficiency and equity in conduct of retail businesses. It does so by giving a franchisee/sublessee a direct remedy against the landlord, rather than the franchisee/sublessee having to rely on the franchisor/tenant or sublessor to negotiate or (where possible) enforce compensation against the landlord. In practice, it is not uncommon for a franchisee to be left without a remedy in these

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		landlord consent.	situations because the franchisor's interests are not aligned with those of the franchisee. **Option B:** A landlord should only be required to pay compensation to the tenant (ie. franchisor/sub-lessor). How that compensation is to be allocated should be a matter between the tenant and their franchisee/sublessee. The extended definition of *lessee* to include franchisees and sublessees is not appropriate as it is contrary to the law of contract and gives franchisees/sublessees rights against the landlord when the landlord does not have any rights against the franchisee/sublessee. **Option C:** The major landlord submitters state that it is often the case in large retail shopping complexes that the landlord is not aware that the premises have been occupied by someone other than the tenant franchisor. These submitters propose option C as an improvement on option A, but prefer option B as it aligns with the general law of contract.
6.7.8 - Landlord's liability to franchisee/sublessee for compensation under section 43(2)			
	Relevant provision: The landlord is liable to pay to tenant reasonable compensation for loss/damage suffered by the tenant because: • the tenant entered into the lease on the basis of a false/misleading statement or misrepresentation by landlord/ landlord's agent – section 43(2)(a);	**Option A:** For section 43(2)(a) – amend to clarify that a landlord is liable to pay compensation to a franchisee or sublessee who entered into the licence/sub-lease on the basis of a false/ or misleading statement/ representation made by the landlord or a person acting under the landlord's authority where: • the landlord consented to the grant of the	Option A will be subject to the outcome of further consultation regarding new disclosure obligations for franchise/license and sublease arrangements at 5.4.1 and 5.4.2 above. **Supporting view:** **Option A:** A franchisee/sublessee should be entitled to compensation from the landlord directly in these

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	• the leased shop was not available to tenant for trade on the date specified in the landlord disclosure statement – section 43(2)(b). **Issue:** Paragraph (b)(ii) of the definition of *lessee* in the Schedule applies to section 43(2). This means that a landlord is liable to pay compensation to a franchisee or sublessee for loss/damage suffered by the franchisee/sublessee under either limb of section 43(2).	licence to occupy or sublease prior to the license or sublease agreement being entered into; and • the landlord has given an updated disclosure statement to the franchisor/ sublessor in relation to the grant of the license sublease and/or to the franchisee/ sublessee directly. and **Option B:** For section 43(2)(b) – clarify that this provision only applies between a landlord and a tenant – ie. franchisee/ licensee/sublessee would not be able to claim compensation from the landlord where the leased shop is not available for trade on the date specified in the landlord disclosure statement.	circumstances as it is their retail business that suffers the loss/damage. **Opposing view:** **Option A:** The rights and obligations under section 43(2)(a) should be limited to landlord/tenant relationship under the lease. This is in line with the views of landlord stakeholders at 6.7.7 above.
6.7.9 - Compensation payable by tenant for false or misleading statement			
	Relevant provision: Section 43A provides for liability of a lessee, assignor, or assignee to pay reasonable compensation for a false/misleading statement or misrepresentation made by them in their disclosure statement given under the Act. The application of 43A to a franchisee or sublessee depends on how the application of the disclosure provisions to these interest holders is interpreted. Refer items 5.4.1 and 5.4.2 above for options and discussion regarding relevant disclosure provisions.	**Option:** Omit section 43A.	**Supporting view:** Omit as not necessary. This would align with Vic, WA and SA. **Opposing view:** An alternative view is that section 43A should be retained as (in conjunction with a landlord's disclosure obligations for entry into a lease or assignment in sections 22 and 22C) it provides a reciprocal obligation on the parties to a lease or assignment of lease. The NSW, ACT and NT Acts contain a provision similar in effect to section 43A that applies only

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			between the lease parties (ie. landlord and tenant).
For comment: In addition to any comment on the option, any quantitative or qualitative evidence regarding how often section 43A is used in practice would be helpful.			
6.7.10 - Compensation where landlord introduces excessive competition			
	Relevant provision: Section 43(1). **Note:** refer to related option regarding landlord disclosure at item 5.1.8 above (options (a), (b) & (c)).	**Option:** Insert new implied compensation provision: landlord is liable to pay reasonable compensation to a tenant where the landlord introduces excessive competition to a retail shopping centre that has the effect of causing unreasonable damage to tenant's business.	**Supporting views:** This option is proposed by some tenant stakeholders who submit that the right of a shopping centre landlords (who are generally loath to grant exclusive use in connection with particular trading uses for retail premises) to retain control over centre operations, including tenant mix, should be regulated so that landlords "assume some form of culpability for damage done to the business of existing tenants where excessive competition is introduced into the centre".
6.7.11 - Liability of body corporate to compensate retail tenant for business interruption due to body corporate works			
	Issue: Whether the Act should require a body corporate for a community titles scheme to compensate a retail tenant for loss/damage caused to the tenant's business as a result of works authorised by the body corporate.	**Option:** Insert a new provision in part 6, division 7 of the Act that a body corporate for a community titles scheme under the *Body Corporate and Community Management Act 1997* is liable to pay the tenant reasonable compensation for loss/damage suffered by tenant due to significant business interference caused by: (i) works undertaken by the body corporate, or a person acting under the authority of the body corporate, in relation to the leased	**Supporting view:** This issue arises where there is a retail lease in strata premises and the body corporate undertakes work on building (ie. remedial work on upper levels of the building requiring scaffolding that substantially restricts access to leased premises by tenant and customers and impacting the tenant's trade). The submitter (a retail industry organisation) that: • this scenario is becoming more common given the increase in strata developments with

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		shop or the building in which the leased shop is situated; or (ii) the body corporate failing to take all reasonable steps to prevent or stop significant disruption to the tenant's trading caused by works in (i) above. The body corporate would not be liable for (i) or (ii) above where the works or failure to take relevant action is a reasonable response to an emergency; or in compliance with a legislative requirement (consistent with the exemption at item 6.7.6 above).	retail premises located on ground/lower floors of residential apartment blocks; • the retail tenant does not have a remedy for loss/damage caused by significant interference to their trade because the landlord is not liable to compensate the tenant where the work was undertaken or authorised by the body corporate; **Opposing view:** An alternative view is that it is not appropriate for the Act to regulate the liability of a body corporate under a community titles scheme. There is no equivalent or related provision in the other State/Territory retail leasing legislation.
6.8 - Relocation of tenant's business			
6.8.1 - When do the stand-alone relocation provisions apply?			
	Relevant provisions: Section 46C provides:: "A retail shop lease is taken to include sections 46D to 46G if the lease states that if: (a) the lessor proposes refurbishing, redeveloping or extending the building in which the leased shop is situated during the term of the lease or any renewal of it; and (b) the works can not be carried out practicably without vacant possession of the leased shop the lessor may take action requiring the lessee to relocate the lessee's business."	**Option:** Omit section 46C – replace with: "A retail shop lease is taken to include sections 46D to 46G if the lease contains a provision that enables the business of the lessee to be relocated during the term of the lease."	**Supporting views:** Legal stakeholders propose this option on the following bases: • if a lease does not contain the precise words in section 46C then the relocation provisions in sections 46D to 46G do not apply; • the current drafting enables a landlord to include a provision in a lease allowing the landlord to relocate tenants at will. The proposed amendment would clarify that the relocation provisions apply to <u>any</u> lease containing a relocation clause and is consistent

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	Section 46D sets out the requirements for the relocation notice to be given by the landlord to the tenant. Section 46E sets out implied terms regarding the tenant's termination of the lease or deemed acceptance of a new lease for alternative premises by the tenant (new lease). Section 46F sets out implied terms for the new lease. Section 46G sets out implied terms for the tenant's entitlement to relocation costs.		with other States/Territories.
6.8.2 - When landlord can require relocation			
	Relevant provision: The requirements for a relocation notice to be given to the tenant by the landlord are set out in section 46D. These are: (a) written relocation notice stating: • sufficient details of the proposed refurbishment, redevelopment or extension to indicate a genuine proposal that is to be carried out within a reasonably practicable time after the tenant's business is relocated and can not be carried out practicably without vacant possession; • details of the reasonably comparative retail shop to be made available to tenant; and • date by which tenant must vacate the	**Option:** Insert new provision: landlord can not require tenant's business to be relocated unless landlord has given tenant a relocation notice containing the details, and within the timeframe, set out in sub-sections 46D(2) and 46D(3).	**Supporting view:** Some stakeholders indicated that clarification is required regarding the landlord's ability to require relocation of the tenant's business under the stand-alone relocation provisions. The proposed amendment aligns with other jurisdictions (including NSW and Vic), which require the landlord to provide details of a genuine redevelopment proposal to be carried out within a reasonably practicable timeframe after relocation and which requires vacant possession of the leased shop. However, the other jurisdictions do not require the landlord to give the tenant sufficient details of the proposed redevelopment proposal in the relocation notice itself.

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	shop (relocation date) – section 46D(2); and (b) the relocation notice must be given at least 3 months before the relocation date – section 46D(3). **Issue:** It is unclear whether section 46C and 46D limit a landlord's ability to require a tenant to relocate its business to a genuine redevelopment proposal scenario, or whether it simply sets out a procedure to be followed where a lease contains such clause.		
For comment: Are there any practical or other issues regarding the current requirement for sufficient details to indicate a genuine redevelopment proposal as set out in 46D(2)(a) to be contained in the relocation notice itself (cf. provided either in the notice or at an earlier or later date)?			
6.8.3 - Timeframes for landlord's relocation notice and tenant's termination notice			
	Relevant provision: **Section 46D(3)** – landlord must give relocation notice to tenant at least three months before relocation date. **Section 46E(1)** – if tenant elects to terminate the lease on the basis of the relocation notice, tenant must give termination notice to landlord within one month of tenant's receipt of relocation notice.	**Option A:** Amend section 46D(3) to extend period within which landlord to give tenant a relocation notice to six months before the relocation day. **Option B:** Amend section 46E to extend period within which tenant may give termination notice to (two or three) months after receipt of relocation notice.	**Supporting view:** **Options A** and **B:** Various tenant stakeholders submitted that the current timeframes for both notices are insufficient for tenant to make appropriate assessments/arrangements regarding relocation/closure of business, including assessing alternative premises; obtain suitable design approval and fit out, trades quotations, reviewing and obtaining legal/financial advice regarding the new lease and negotiating fit out, compensation and other costs with the landlord. **Opposing view:** **Options A** and **B:** The current notice periods for

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			both sections align with the other States/Territories.
For comment: Comment is invited on whether there should be a corresponding extension of the timeframe within which a tenant may give the landlord notice to terminate under section 46E(1) and, if so, what is an appropriate period within which the tenant may give the notice.			
6.8.4 - Requirement for a 'reasonably comparable alternative shop'			
	Relevant provision: Section 46D – relocation notice must contain 'details of the reasonably comparable alternative retail shop to be made available' to the tenant. There is nothing in the Act which sets out or indicates what should be taken into account in determining, or would comprise, a 'reasonably comparable alternative shop'.	**Option:** Amend, or include a notation for, section 46D which provides a context for what would constitute a reasonably comparable alternative shop.	One submitter noted that if the relocation is permanent, the new shop should be in the same type of position as its original position (ie.located near a similar type and number of tenancies and with at least equivalent foot traffic). **Opposing view:** An alternative view is that it is not necessary or appropriate to detail these matters as what is a reasonably comparable alternative shop needs to be considered on a case by case basis having regard to the particular circumstances. **Other States/Territories:** The equivalent provisions in the other States/Territories do not detail any requirements regarding alternative premises, other than: • NSW and WA (2011 Amendments) require an alternative shop within the shopping centre in which the existing shop is located to be made available to the tenant; • WA 2011 Amendments stipulate that (for leases where the landlord requires relocation before expiry of the five year statutory lease term) the alternative retail shop must (unless

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			the parties agree otherwise): be located in a position with estimated trading potential similar to existing shop; have a similar floor configuration/lettable area; and meet all requirements of current health, safety, building, fire and other relevant legislation for the permitted use of the existing shop; • the ACT Act states that comparable premises include those not yet built; • the Tas Act requires a relocation clause in a lease to: - provide for tenant to remain at existing premises unless tenant is satisfied that the new premises are equivalent to existing premises, or that tenant will be returned to existing premises within a mutually agreed period; and - require the area and configuration of the new premises to be materially the same as the existing premises, unless otherwise agreed by tenant.

For comment:

Specific comment is invited on:

- whether, if the existing shop is located in a retail shopping centre, the Act should require an alternative retail shop to be made available in that centre (ie in line with NSW and WA provision);
- if the option is supported, please provide details of any relevant factors, considerations or other matters.

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6.8.5 - Compensation for relocation should not be restricted to relocation costs			
	Relevant provision: Under section 46G(1), a tenant is entitled to payment by the landlord of the tenant's reasonable relocation costs including, but not limited to: the costs of dismantling or reinstalling fixtures/fittings and modifying or replacing them to the standard existing immediately before relocation; and legal costs. Refer also related discussion at 6.7.3 – interaction with landlord's liability to pay compensation to tenant under section 43(1)(f).	**Option A:** Insert express provision that the landlord is liable to compensate the tenant for lost profits during period when the tenant is unable to trade due to relocation (in addition to relocation costs). **Option B:** Clarify that the requirement in section 46G(1) for landlord to pay tenant the costs of modifying or replacing fixtures/fittings in the alternate premises applies where it is not possible to do so to the standard immediately prior to relocation – ie. landlord is liable for relevant costs up to the amount that would be required to meet the former standard. **Option C:** Insert express provision that landlord liable to compensate tenant for any deficit and make good costs with respect to the existing premises.	**Supporting views:** **Option A:** This option was proposed by various retail stakeholders. In the ACT and Tas, relocation clauses in shopping centre leases must provide for landlord to pay tenant's reasonable relocation costs and: • reasonable compensation for any other loss/damage incurred by the tenant because of the relocation (ACT provision); • compensation to tenant for 'actual reduction in, or loss of, profit during relocation from the point of closure to the point of opening' (Tas provision). The WA 2011 Amendments provide that where the tenant lease is terminated before expiry of the 5 year minimum lease term due to relocation, the landlord is liable to pay the tenant reasonable compensation for loss/damage (including loss of goodwill) suffered by the tenant due to the termination of this lease, taking into account all relevant factors. However, landlord is only liable to pay the written down value of the costs of fitting out the retail shop as at the termination date, calculated in accordance with the current method used by the ATO for the depreciation of assets. **Options B** and **C:** These options were proposed by a retail submitter

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
			on the basis that relocation costs payable by landlord under section 46G(1) do not cover the entirety of tenant's relocation costs, particularly where existing fittings/fixtures are not capable of installation within alternative premises, or where modification/replacement to standard existing at time of relocation is impossible. The tenant should not bear the costs of the landlord's decision to relocate. **Opposing view:** **Options A** and **C:** An alternative view is that these are matters that should be the subject of commercial negotiation between landlord and tenant – as part of the lease negotiation and/or at the time of relocation. Section 46G currently aligns with NSW, Vic, SA and the NT. The discussion/options at 6.7.5 above regarding exclusion of implied compensation claims for specific disturbances disclosed prior to entry into lease may also be relevant to compensation for relocation.
For comment: Specific comment and any relevant quantitative and qualitative evidence in relation to the options; and/or the ACT provision and the Tas provision would assist consideration of whether legislative amendment is necessary/appropriate.			
6.8.6 - Application of the relocation and demolition provisions to franchisees			
	Relevant provisions: Definition of *lessee* in Schedule – refer item 3.2 above.	**Option:** Amend Act so that a franchisee or sublessee who is entitled to occupy the retail shop under	**Supporting views:** Various retail/franchise stakeholders proposed that the Act be amended so that the relocation and

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
	Relocation provisions: Sections 46D and 46G – see above. Demolition provisions – sections 46H to 46K. **Issue:** Under the relocation and demolition provisions (read in conjunction with the current definition of *lessee*), the landlord is only required to give the relevant notices to the franchisor (who is the tenant under the lease) and pay any relocation costs or compensation to the franchisor.	the lease or with landlord consent has the following rights under the relocation and demolition provisions: (i) landlord is required to give relocation/ demolition notice to the franchisee/licensee or, alternatively. the business premises; and (ii) franchisee/licensee are entitled to their reasonable costs or compensation; and (iii) franchisor/lessee and franchisee/licensee must agree to the amount of compensation and the division of compensation between them. The requirement at item (i) would be in addition to the existing requirement for landlord to give notice to the tenant/franchisor.	demolition provisions apply to franchisees. Currently, a franchisee: • must rely on the franchisor (as tenant) to act in the franchisee's interests regarding process-related rights or entitlements under these provisions – for example, passing on in a timely manner notifications by or to the landlord; • is not entitled to the statutory relocation costs or compensation for demolition from the landlord under sections 46G and 46K, despite the fact that it is the franchisee's business that is directly/materially impacted by the relocation or demolition, not the franchisor's. Any compensation right/entitlement of the franchisee in these circumstances is a matter for commercial agreement between the franchisee and franchisor, either in conjunction with entry into the franchise agreement or the relocation/demolition process. Franchisee stakeholders allege that it is not uncommon for a franchisor to not support or act in the franchisee's interests in relation to process and compensation matters. The franchisee may then have no, or limited, means of enforcing its rights and interests and may suffer resulting financial and personal detriment. **Opposing view:** Major landlord stakeholders submit that it is generally understood in Qld and other jurisdictions that the disclosure; relocation; demolition and unconscionable conduct

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
			provisions should and do apply only in respect of the landlord-tenant relationship in line with the basic law of contract. That is, there is no legal relationship between the landlord and a sub-lessee or franchisee. The exercise and enforcement of process and compensation rights, interests and obligations under the Act are matters for commercial negotiation and agreement between the franchisor and the franchisee or sub-lessee (ie. should be addressed in, or in association with, the relevant franchise/license or sub-lease agreements).
6.8.7 - Landlord to disclose possible timing of relocation			
	Relevant provisions: Under the Regulation, the landlord disclosure statement must: • identify any provision in a lease about relocating the tenant's business to different premises – section 3(m)(ii); • detail any 'alteration works' that the landlord knows are to be carried out by or for the landlord to the leased shop; the leased building; the retail shopping certain which the shop is situated and the surrounding roads – section 3(z). The term 'alteration works' is not defined in the Act or Regulation. However, Part 7 of the approved form for the landlord disclosure statement states that alteration works include renovations, extensions, redevelopment and demolition.	**Option A:** Amend section 3 of Regulation so that a landlord is required to disclose to the tenant before the tenant enters into the lease the proposed or possible timing of any alteration works that may require relocation of the tenant. The landlord's obligation would apply to the extent that the landlord is aware, or should reasonably be aware, of the matters at the time the disclosure statement is given (eg "not within 2 years"). **Option B** The Act should prescribe a minimum timeframe within which landlord can not relocate the tenant in the event that the landlord disclosure statement does not indicate that the landlord intends to relocate tenant.	**Supporting view:** A legal submitter proposed that consideration be given to options A and B as part of the review. Details were not provided. **Opposing views:** **Option A:** Issues to be considered would include the implications of the landlord's failure to disclose timing details. **Option B:** This option would be contrary to the recommendations in the 2008 PC Report regarding reducing the level of prescription in retail leasing legislation and the regulatory imposition on business. Issues to be considered would include: • what is an appropriate minimum timeframe

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	Note: The current Qld landlord disclosure form was agreed to be uniformly adopted with NSW and Vic. Refer uniformity issue at 5.1.8.		and any unintended consequences of legislating a timeframe that applies across all leases; • the implications for other tenants in the building/centre who may benefit from the proposed refurbishment/ redevelopment/ extension; and • the implications for the landlord's effective management of the centre. **Other States/Territories:** There are no equivalent/similar provisions in the other jurisdictions for options A or B.
6.9 - Demolition of building in which tenant's business situated			
6.9.1 - Timeframe for tenant's termination notice			
	Relevant provision: Under section 46J(2), a tenant who wishes to terminate the lease earlier than the date stated by the landlord in the demolition notice must give the landlord notice of termination at least seven days before the tenant's earlier termination date.	**Option:** Amend the timeframe in section 46J(2) for tenant's termination notice to be given to landlord at least one month before the date the tenant wants the lease to end.	**Supporting view:** This option was proposed by major landlord submitters and supported by various retail stakeholders on the basis that one month is a reasonable period of notice having regard to contemporary issues in relation to removal of shop fronts/hoardings; complexities of works and safety requirements.
6.9.2 - Compensation for demolition			
	Relevant provision: Under section 46K, landlord is liable to pay to tenant reasonable compensation for loss/damage suffered by tenant:	**Option A:** Amend section 46K(1)(b) to clarify that landlord only liable to compensate tenant for the written down value of fit out.	**Supporting views:** **Option A:** This option is proposed by major landlord submitters on the basis that what is 'reasonable

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	• because of early termination of the lease if the demolition is not carried out, or is not carried out within a reasonably practicable time after the date the lease terminates, **and** the landlord does not prove that when the termination notice was given there was a genuine proposal to demolish the building in a reasonably practicable time after the termination date: 46K(1)(a) and 46K(2); and • for fit out that was not provided by the landlord, whether or not the demolition is carried out: section 46K(1)(b). Refer generally related options/ discussion above at item 6.7.3.	**Option B:** Compensation payable by landlord under section 46K(1)(a) should extend to compensation for loss of business value. **Option C:** Omit the following criteria: • 46K(1)(a) - that landlord only liable for compensation 'if demolition not carried out or not carried out within reasonably practicable time after termination day; and • 46K(2) right to compensation does not apply where there is 'genuine proposal to demolish within a reasonably practicable time after termination day'.	compensation' for a tenant's fit out under section 46K(1)(b) is open to dispute and both landlords and tenants would benefit from an amendment in terms of option A (ie. reduced likelihood of litigation) as it would provide an objective basis to determine the value of fit out. The term 'written down' is clearly understood in the industry and is referable to ATO guidelines/ methodology. **Option B:** Some retail stakeholders proposed that tenant should also be compensated for loss of business value. **Option C:** A legal stakeholder proposed this option on the basis that the stated criteria are inconsistent with the overriding right to compensation in 43(1)(f) where a lease is terminated early as result of landlord's requirement to demolish. See also option A at item 6.7.3. **Opposing view:** **Option A**: Tenant submitters oppose this option on the basis that compensation should as a minimum take into account the *in situ* value of fit out (ie. the value of the fit out immediately before the date the lease is terminated under the demolition provisions). **Option B:** An alternative view is that these are matters that should be the subject of commercial negotiation between landlord and tenant – as part of the lease negotiation and/or in conjunction with the demolition procedure under the Act.

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			Refer also option B at item 6.7.3 above. **Option C:** See option B at item 6.7.3.
6.10 - Refurbishment/ refit of leased shop or building			
6.10.1 – Condition for requiring tenant to refurbish/refit shop			
	Relevant provision: The landlord disclosure statement must contain: • details of any fit out works to be carried out by the tenant; • any contribution by the landlord to the cost of the tenant's fit out; and • any requirements that the tenant must comply with relating to the quality/standard of shopfront or fit out Sections 3(w), (x) and (y) Regulation.	**Option A:** Insert new provision in Act: a provision in a lease that requires a tenant to refurbish/refit the leased shop is void unless it gives sufficient details to indicate generally the nature, extent and timing of the required refurbishment/ refitting. **Option B:** Insert new provision in Act: tenant may only be required to fit out or refurbish/refit the leased shop if: • the landlord's disclosure statement discloses the obligation; and • the statement contains sufficient details (as required under the Regulation) to enable the tenant to obtain an estimate of the likely cost to the tenant of complying with the obligation.	**Supporting views:** **Option A:** This would: • align with the protection afforded to tenants in the majority of State/Territory jurisdictions (other than Qld and SA); • ensure all parties aware of applicable requirements and can negotiate mutually agreeable terms at outset; and • otherwise reduce potential for further dispute. **Option B:** This option would generally align with SA. It would dovetail with the existing disclosure requirements regarding fit out in the Regulation (sections 3(w), (x) and (y)) and strengthen the tenant's position because the tenant could only be required to fit out or refit/refurbish to the extent that there has been sufficient disclosure about these matters by the landlord before the tenant entered into the lease. Option B may also address the 2008 PC Report finding that retailers find it difficult to assess fit

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			out costs and to challenge the basis of these costs incurred under their lease. **Opposing view:** An alternative view is that fit out and/or refurbishment/refitting are part of standard commercial negotiations for a lease and legislative intervention is not appropriate. **Option A:** Landlord submitters stated that this provision is not necessary because a landlord can not require a tenant to refurbish or refit unless the lease contains a provision imposing the obligation to do so. If the relevant provision is not clearly drafted, it would be void for lack of clarity under the general law.
For comment: Particular comment is sought as to how the provisions in terms of options A and B operate in practice in the other States/Territories.			
6.10.2 - Landlord to give tenant advance notice of proposed alteration/refurbishment			
	Issue: Whether the Act should require a landlord to give existing tenants prior notice of proposed alterations/refurbishment. **Other States/Territories:** A requirement in terms of the option (without exclusion for minor works) currently operates in all other State/Territory jurisdictions. SA requires the landlord to give a minimum of one month prior notice. NSW, Vic and WA require a	**Option:** Insert new provision: landlord must not commence any alteration or refurbishment likely to adversely affect a tenant's business unless the: (a) landlord has notified tenant in writing of the proposed alteration/refurbishment at least two months before it is commenced; or (b) alteration/refurbishment is necessitated by an emergency and landlord has given tenant	This option was generally supported by tenant submitters and opposed by landlord submitters. **Supporting views:** The option would align with the position in the other States and Territories and tenant needs to mitigate any losses to its business, including realise stock and adjust stock orders; and address employment issues. One stakeholder proposed a longer notice period of three months to allow affected tenants adequate

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
	minimum of two months and Tas six months. Each of the above Acts also require a landlord to pay reasonable compensation to a tenant for loss/damage to tenant's business caused by landlord or landlord's agent/contractor – ie. equivalent provisions to those in section 43(1) of the Qld Act. Refer generally 6.7 above. **Note**: see related issue at item 6.7.5 above (limit on compensation claim for notified specific occurrences).	the maximum period of notice reasonably practicable in the circumstances. Any alteration/refurbishment that is minor in nature would be excluded from the requirement in (a). For (a) in particular the landlord's notice should sufficiently detail the extent of the proposed works, including the timeframe for completion.	time to mitigate potential business losses, including informing customers; preparation of marketing strategies and/or seeking alternative arrangements such as casual mall leasing. **Opposing view:** Landlord submitters oppose an amendment in these terms on the following bases: • it imposes an unnecessary and significant administrative/cost burden on the landlord (ie. for a large regional centre, a landlord may be required to give in excess of 300 notices); • the risk of unreasonable delay to centre development in event of technical defect in any notice (ie. may be basis for tenant to seek an injunction to halt the progress of development); • as matter of good management, shopping centre landlords provide tenants with notice in relation to major development plans via newsletters and face to face meetings and there is little (if any) benefit to tenants in receiving two months formal notice; • in commercial practice, there generally is not two months lead time between board approval and commencement of works; and • the landlord currently obliged to pay compensation if tenant's business adversely affected irrespective of whether the tenant has been given notice (ie. under the implied compensation provisions for business disruption in section 43(1) of the Act).

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For comment: Particular comment is sought as to: • the appropriate notice period, including any available qualitative/ quantitative evidence as to why the period should differ from the two months prescribed in most jurisdictions; • the exclusion of minor alterations/refurbishment from the requirement for the landlord to provide written notice to tenant within a specified timeframe, including: an appropriate lower level notice provision for minor works (ie. reasonable notice made available to tenants by uploading onto central accessible website); examples of what would constitute minor alterations/refurbishment for these purposes; and • any issues which have arisen in commercial practice in the other States/Territories that should be taken into account.			
6.10.3 - Restrictions on landlord requirements for fit out/ refurbishment of shop			
2008 PC Report: Various issues associated with fit out requirements for retail leases in shopping centres were considered by the PC, which essentially found that fit out requirements should be determined by commercial negotiation between tenants and landlords. Relevant considerations/assessments of the PC include: • there are usually no landlord specified fit out requirements in retail strip leases, while shopping centre leases typically involve detailed fit out requirement; • while prohibiting landlords from stipulating who can provide a fit-out for a retailer, and under what conditions, is likely to introduce greater competition into fit out contracts and lower fit out costs for tenants, centre landlords have legitimate interests in mandating use of preferred contractors/suppliers; • fit out requirements of tenants in shopping centres represent a conditional aspect of trading in that type of retail concentration. Endeavouring to make a 'one-size-fits-all' regulatory solution for fit out costs would either be unworkable or require a range of exceptions which would make interventions largely ineffective; hamper commercial negotiation and impose compliance costs.			
	Relevant provision: The Act does not regulate a landlord's requirements under a lease for the fit out, or refurbishment of a leased shop by the tenant This is consistent with the position in the other States/Territories.	**Option A**: Insert provision that prevents the lease from requiring refurbishment/refit by tenant at less than five year intervals. **Option B:** Insert new provision in Act to the effect that a landlord must not require fit out to be	**Supporting views:** **Option A:** A legal stakeholder put forward this option on the basis that, given the substantial costs of establishing a retail business, refurbishment of retail premises (other than maintenance/repair) should be restricted to five year intervals so that the tenant is afforded every opportunity to

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
		undertaken by a designated contractor/supplier who is a related party/ entity of the landlord.	generate an appropriate return on their initial investment. **Option B:** While no details were provided in support by the submitter, it may be intended to address retailer concern about the prices charged by landlords' designated contractors for fit out of retail shops in major shopping centres and a lack of transparency in relation to the determination of such costs. **Opposing views:** **Option A:** It has been submitted to the review that retail shop leases (particularly in shopping centres and excluding leases to major/anchor tenants) are generally for a term of five years so the circumstances where this option applies would generally be where a landlord requires a new fit-out as a condition of a new lease (ie. on renewal). In any event: • the landlord is required to disclose details of any fit out works to be carried out by the tenant. (Note this would be strengthened if the options at 6.10.1 are adopted); • tenant is required to (or at a minimum should as a matter of due diligence) get independent legal and financial advice about the lease terms, including the tenant's obligations under the lease, and the implications for the tenant's business of those obligations. **Option B:** Refer generally the PC findings outlined above.

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			The PC also noted that there may be some scope for opening up competition for fit out contracts (particularly for non-centre wide systems to place downward pressure on fit out costs) and such matters could be individually or collectively negotiated by centre tenants with relevant landlords.
6.11 - End of lease issues (including options, renewal)			
6.11.1 - Landlord's obligation to notify tenant about option date			
	Relevant provision: Section 46 provides that if a lease contains an option for tenant to renew/extend, the landlord must give tenant written notice of the date by which the option must be exercised (option date). Landlord's notice must be given at least two months, but not more than six months, before option date. If the landlord's notice is not given within this timeframe, the Act provides for a maximum penalty of 40 units (offence provision) but is silent about what happens between the parties to the lease **Other States/Territories:** Vic and WA (2011 Amendments) align with Qld in that (for leases containing an option) the landlord must give the tenant written notice of the option date. However, the WA and Vic provisions: • specify a longer notice period -	**Option:** Omit section 46 so that onus is on tenant to exercise an option to renew/extend the lease within the period and in the manner specified in lease.	**Supporting view:** The option would align with NSW, the NT and also the general law. Landlord stakeholders submitted that as an option in a lease is for the tenant's benefit, it is incumbent on the tenant to safeguard their own commercial interests and exercise the option to renew/extend as required under terms of lease. There are already adequate safeguards in the Act for the tenant by virtue of the relevant disclosure requirements. The landlord disclosure statement must contain details of any option to renew, including the option exercise date and period. Also, the financial advice report must include statement that an accountant advised tenant about fact that operation of business restricted by lease term; and the legal advice report requires tenant to have obtained advice about whether lease contains an option or any right to extend: sections 3(f), 7(e)(iii) and 8(e)(vii) & (viii) of Regulation.). Section 46 imposes an administrative burden on landlords when there may be no benefit to

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
	landlord's notice to be given *at least 6 months and no more than 12 months* before option date, but not required if tenant purports to/exercises option before being notified; and • give the tenant a remedy where the landlord fails to notify within the notice period, namely: - the option date is extended until 6 months after landlord notifies tenant as required (extended date); - if the extended date is after lease term ends, lease continues on same terms until extended date; and - tenant may terminate from a specified day on/after lease term ends and before extended date. In NSW and the NT, a landlord's obligations to notify tenant at end lease <u>do not</u> apply to a lease containing option or that is subject of an agreement for renewal/extension of lease.		landlord in granting a tenant an option for a further term. **Opposing view:** Retain section 46 as it gives unsophisticated tenants a level of protection and is not an undue burden for landlords. This would align with Vic and WA in principle (however Qld tenants have a lower level of protection than in these states). Also refer item 8.1.7 below for related discussion regarding penalties and compliance.
6.11.2 - Timeframe for landlord to give notice of option date			
	Issue: Landlord's notice must be given at least two months, but not more than six months, before the option date. This is only relevant if section 46 is retained – see 6.11.1 above.	**Option:** Extend timeframe for landlord's notice to at least six months and not more than 12 months before option date.	**Supporting view:** This timeframe would align with Vic and WA.

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
6.11.3 - Landlord's obligation regarding renewal where no option under lease, or other agreement for renewal			
	Relevant provision: Section 46AA provides that where the lease does not give the tenant an option to renew/ extend, and there is no other agreement to renew/extend, landlord must give tenant written notice of an offer to renew/extend, or that such offer will not be made. Lease of 1 + years - landlord must give notice at least six months, but not longer than one year before end lease. Lease of less than one year - landlord must give notice at least three months, but not longer than six months before end lease. If landlord notice not given within the required timeframe, and the tenant notifies landlord before the lease expires that the tenant wishes to extend, the lease is extended for six months after landlord gives notice. Tenant can terminate during extended period on one month's written notice.	**Option:** Omit section 46AA.	**Supporting view:** A legal stakeholder proposed this option on the grounds that the section does not appear to work well, adds complexity and gives almost nothing to tenant. No detail was provided in support. This proposal would align with Vic, which is the only jurisdiction that does not regulate what happens between the parties where the lease does not contain an option to renew exercisable by the tenant. **Opposing view:** Section 46AA aligns with equivalent provisions in NSW and the NT and should be retained as it is important for the tenant to have formal legal notice whether a lease is to be continued.
For comment: Please comment on whether section 46AA operates effectively in practice.			
6.11.4 - Section 46AA – not retrospective			
	Refer above.	**Option:** Clarify that section 46AA does not operate retrospectively (ie. does not apply where the	There is some stakeholder confusion about whether this provision only applies in respect of leases entered into on or after 3 April 2006.

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
		original lease was entered into before 3 April 2006, being the date that the provision commenced).	
6.11.5 - Market rent where sitting tenant (without option) negotiating new lease			
	Issue: The Act is silent regarding the rent payable by a sitting tenant (who is holding over following expiry of the initial lease) during the negotiation period for renewal/extension of lease.	**Option:** Insert new provision: to effect that where landlord and tenant are negotiating a renewal/ extension of lease (other than under an option to renew): (i) the rent payable by tenant for the negotiation period is market rent; and (ii) the commencement of the new lease (and therefore tenant's liability for new rental) should be prospective (ie. from date new lease entered into cf. date of expiry of previous lease).	**Supporting view:** This option is proposed by a legal stakeholder to address a disadvantage for sitting tenants in negotiating a renewal/extension of lease, particularly in major shopping centres. The tenant is at a disadvantage in the negotiation as it is very expensive for them to move to alternative location/centre (including removal and reinstatement of fit out). Negotiations for a new lease are often lengthy and landlord usually insists that lease commencement be the day after previous lease expired (which is often more than a year previously). Tenant/franchisee must then pay difference between previous rent and new rent over the entire holding over period, which can be significant. This situation occurs frequently in shopping centres. For item (ii) of the option, refer related options/discussion regarding date when lease taken to be entered into (section 11) at 4.1 above.
For comment: Comment is invited for this option, including: • how the market rent would be determined for these purposes – ie. whether, or the extent to which, it would be appropriate for market rent to be determined under the provisions in Part 6, division 4, subdivision 2 of the Act, including the timeframe for a determination?; • item (ii) of the option in the context of section 11 of the Act.			

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6.11.6 - Proposal for adoption of ACT end of lease/renewal provisions for shopping centre leases			
Section 51 of the ACT Act prohibits the landlord from proposing that the rent to be charged initially under the renewed lease exceed the market rent for the premises. The section applies where the lease does not contain an option on the tenant's part to renew/extend and the tenant is given a preferential right to renew/extend under the conduct rules; or the landlord otherwise makes a renewal offer to the tenant within 12 months after end of lease. **End of lease conduct rules for shopping centres (ACT conduct rules):** These rules apply where the landlord proposes to re-lease the premises and the tenant wants to renew/extend. In summary: • the landlord must allow the tenant a preferential right to renew/extend the lease, subject to certain exceptions (including if: another tenant's offer for the premises will be substantially more advantageous to the landlord; the landlord reasonably wants to change tenancy mix; or the tenant has breached lease substantially/persistently); • if the tenant is given preferential right, the landlord must begin negotiations with the tenant for renewal within specified period before the end of lease and section 109 sets out a framework for conduct of the negotiations, including that before agreeing to enter into lease with a third party, the landlord must make the tenant a written offer to renew on terms no less favourable to the tenant than those proposed for the third party lease; • a lease may exclude the conduct rules if there is prior certification by an independent lawyer on certain terms; • if the landlord fails to comply with the conduct rules and the tenant is prejudiced by the failure, the tenant may apply to Magistrates Court. The court may make any order it considers appropriate, including that the landlord renew/extend/enter into new lease with tenant on terms approved by court or that landlord pay compensation of not more than six months rent under lease to tenant.			
	Issue: Whether section 51 of the ACT Act and the ACT conduct rules should apply in Qld.	**Option A:** Provide that for the renewal or extension of lease (other than under an option to renew) a landlord must not propose that the rent to be charged initially under the renewed lease exceed the market rent for the premises. and **Option B:** For shopping centre leases, replace section 46AA with the ACT conduct rules. **Option C:**	**Supporting views** **Options A** and **B:** These options are proposed by a valuation stakeholder on the basis that they are operating effectively in the ACT; provide a clear end of lease dispute mechanism; and would "avoid asset bubbles". Some retail stakeholders also proposed that the Act should include provision that a sitting tenant be afforded a right of first refusal with regard to re-leasing of their existing site following lease expiry (entry into lease requires considerable

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
		Provide that a sitting tenant should have the right to a CMR determination where the tenant deems that the proposed rent for the new lease exceeds market rent.	capital investment and sitting tenant should be given opportunity to realise investment via negotiation of new lease before all other parties). This is especially relevant if the landlord intends to keep premises as retail shop for same permitted use. **Option C:** was proposed by a retail stakeholder. **Opposing views** Relevant recommendation/findings in the 2008 PC Report include: • these are matters best left to commercial negotiations between lease parties. Government intervention would reduce the ability of both parties to negotiate a mutually beneficial outcome; • prescribing additional provisions in an attempt to enhance security of tenure provisions for retail tenants creates additional complexity, and if anything, frustrates lease negotiations; • limiting rent increases on a subsequent lease would reduce the efficient operation of the market by maintaining under-performing tenants longer than would otherwise be the case; and • such provisions would introduce inefficiencies to the market that would raise costs for landlords and tenants and lower benefits to consumers; and also constrain the efficient operation of the market through reduced flexibility in allocating retail space to its best possible use.

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
For comment: Comment is invited for these options, or any alternatives, including how the relevant provisions operate in practice in the ACT**.**			
6.11.7 - Landlord to compensate tenant for fit out at end of lease			
	Issue: Whether the Act should include an implied provision for landlord to compensate an outgoing tenant for fit-out where the fit out is to remain for benefit of incoming tenant.	**Option:** Insert new provision – a tenant who elects not to renew/ extend lease is entitled to reasonable compensation from landlord for any fit out left by the tenant for the benefit of the landlord and incoming tenant. If landlord and tenant can not agree on an amount to which tenant is entitled, the compensation amount is to be decided by the dispute resolution process.	**Supporting view:** A valuation submitter proposed this option on the basis that there is a need to address the situation where a tenant does not the renew lease and the tenant's fit out is left for the benefit of landlord and new tenant (and reflected in higher rent for the landlord), rather than the tenant incurring make good costs. The submitter states that compensation for the former tenant in this scenario would have the benefit of encouraging longer lease terms that are consistent with reasonable economic life of fit out. **Opposing view:** An alternative view is that any compensation to the tenant for remaining fit out at end of lease is a matter for commercial negotiation; that the tenant benefits from not incurring make good costs and that an amendment in terms of the option would increase the regulatory burden on business and potentially the number of disputes before QCAT.
6.12 - Lease dealings – security and assignments			
6.12.1 - Tenant's right to deal with lease and business assets by way of security			
	Relevant provision: Unless the lease contains a declaration under section 45(3) that section 45 does not apply,	**Option A:** Omit section 45 in its entirety.	**Supporting views:** **Option A:**

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	section 45 applies where tenant obtains finance and tenant's financier takes security over the business assets. The landlord must not obstruct/hinder tenant in dealing with lease/business assets by way of security. There must be an agreement between the landlord and secured creditor (creditor) about their respective rights to the security (ie. removal of fixtures and fittings or creditor's entry into possession if tenant defaults).	**Option B:** Omit section 45(3) so that the requirements of section 45 can not be contracted out of by agreement between landlord and tenant in the lease.	Legislative intervention is not appropriate as these matters should form part of the commercial negotiation for lease. This view is reflected by the fact the majority of major shopping centre leases contain a declaration under section 45(3). This option would align with the other States/ Territories. It would also be consistent with the PC's recommendation to remove elements of retail tenancy legislation that are unnecessarily prescriptive. There is no equivalent regulation of commercial leases in Qld. **Option B:** The ability to contract out of section 45 inhibits the availability of business finance for tenants due to uncertainty regarding lender security over high cost and immoveable fit out/fixtures/fittings. This issue is of particular significance when business credit is limited, including in the current economic climate.
6.12.2 - Landlord's consent to assignment of lease			
	Relevant provision: Section 50 provides that a retail tenancy dispute exists (but is not limited to) where: • the landlord has not given an answer to the tenant within one month after the tenant has given the landlord full details of the assignment and a written request for consent to assign; or • the landlord seeks to: impose a new obligation on the assignee; withdraw from	**Option:** Omit section 50.	**Supporting view**: A legal stakeholder proposed this option on the basis that there should be no restrictions on what a landlord may require from an assignee on assignment and that, in terms of seeking landlord's consent, adequate protection is provided under the *Property Law Act 1974* (PLA). Section 121(1)(a) of the PLA provides that where a lease contains a covenant by the tenant not to assign without landlord consent, the landlord's consent must not be unreasonably withheld.

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	the assignee an existing right under the lease; or impose an unreasonable condition. **Issue:** The issue is whether this provision is necessary.		**Opposing view:** The current provision is necessary for ensuring the landlord does not take action consistent with unreasonably withholding consent to the assignment. The starting point is that the tenant should be able to assign those legal entitlements to which the landlord has agreed under the lease. **Other States/Territories:** The retail leasing legislation in the other jurisdictions is more prescriptive than the Act regarding the process for obtaining landlord consent to an assignment of a lease. In particular: • most jurisdictions (NSW, Vic, SA, NT) limit the grounds on which the landlord may withhold consent The Vic Act expressly states that the equivalent provision of the *Property Law Act 1958* (Vic) does not apply to a retail shop lease; and • other jurisdictions (except Qld and Tas) provide that the landlord is taken to have consented to the assignment if he/she fails to respond to the tenant's request within the specified period (generally 28 days).
6.12.3 - Release of assignor's guarantor from future liability under lease			
	Relevant provision: Subject to certain disclosure obligations being met (see item 6.12.4 below), when the assignment is entered into the outgoing tenant (assignor) is released from future liability under	**Option:** The release of the assignor under section 50A includes the assignor's guarantor(s).	**Supporting views;** This option would align with the position in the majority of States/Territories. Where the tenant is a corporation, it is common for the landlord to require personal guarantees to

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	the lease: section 50A(2). However, personal guarantors of a corporate tenant's obligations under a lease are not released on assignment of the lease.		be given in support of tenant's obligations under the lease. In practice, the guarantors are typically the beneficial owners, shareholders or directors of tenants of proprietary limited companies. Given the prevalence of corporate ownership structures for large and small business for asset protection and fiscal reasons, the Act should reflect practice. As the landlord has opportunity to reject an assignee if that assignee does not provide the same covenant as in the original lease, the original guarantors should be released on landlord approval of the assignee. **Opposing views:** Landlord stakeholders submit that (as is the case for commercial property) guarantors should not be released as the landlord's position should not be weakened/prejudiced on assignment. The landlord enters into a lease for a fixed term with a particular tenant based on the commercial expertise and financial strength of that tenant. The landlord can not request new personal guarantees as of right on assignment - need to decline assignment on basis that prospective assignee does not have same financial standing but tenant may re-submit application with personal guarantee to secure consent. Landlord is being forced to contract with a third party through no desire of their own and should not be prejudiced by the assignment.

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6.12.4 - Criteria for release to apply on assignment of lease			
	Relevant provision: An assignor is released from future liability under the lease only if the following 'disclosure criteria' are met: • the landlord, assignor and assignee have each complied with their disclosure requirements under the Act; and • each of the above disclosure statements is not defective: section 50A(1).	**Option:** Amend section 50A to omit the disclosure criteria altogether so that the release is effective when the assignment is entered into with the landlord's consent.	**Supporting view:** This was proposed by a legal stakeholder on the basis that the disclosure criteria are not appropriate because they are dependant on things done by persons other than the assignor. However, see discussion and options at 5.3 above regarding the disclosure obligations of the assignor, landlord and assignee for a lease assignment.
6.12.5 - Monetary caps on personal guarantees			
	Relevant provision: The Act is silent on these matters. This is consistent with other States/Territories.	**Option:** Act should cap the amount(s) that can be sought by a landlord by way of personal guarantee in support of tenant's obligations under a retail shop lease.	**Supporting view:** This option was proposed on the basis that some landlords are seeking excessive personal guarantees from tenants. **Opposing view:** Regulation of commercial matters between landlord and tenant regarding the financial viability of tenant or the tenant's business, including monetary caps on personal guarantees, is not appropriate.

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6.13 - Unconscionable conduct			
6.13.1 - Replace unconscionable conduct test with unfair conduct test			
	Distinction between unconscionable and unfair conduct: The unconscionable conduct provisions in the Act (sections 46A and 46B – see below) are intended to protect retail tenants from harsh and oppressive conduct when dealing with larger or more sophisticated/powerful landlords. The provisions do not seek to prevent the ordinary hard bargaining that comes with commercial transactions. Conduct which is merely 'unfair' will generally not be sufficient to establish that unconscionable conduct has occurred. This distinction is generally reflected in the limited number of proceedings before QCAT in which unconscionable conduct has been found to exist (cf. the number of proceedings where unconscionable conduct is alleged). **Review submissions generally:** All landlord submitters, and the majority of tenant submitters, are of the view that no changes are required to the unconscionable conduct provisions in the Act as they are working well and have effected changes in industry behaviour, including because the breadth of the provisions are a deterrent for landlords and landlords manage the issue internally through measures such as educational/awareness programs for employees. Only two submitters raised concerns with the unconscionable conduct provisions, being in effect that the concept of unconscionable conduct is too difficult to establish (ie. the legal bar is too high) and should be replaced with a lower level unfair conduct test. **2008 PC Report:** The 2008 PC Report considered in detail the issue of unconscionable conduct in retail shop leases, including the relevant provisions in the State/Territory retail leasing legislation. Relevant findings/assessments of the PC included: • the current unconscionable conduct provisions are influencing the conduct of shopping centre landlords and reducing costs associated with unnecessary disputation; • extending the unconscionable conduct provisions, or relaxing the legal meaning of unconscionability in an attempt to regulate for 'fair' outcomes is likely to introduce inefficiencies and uncertainty into the market and increase industry costs, and there was no evidence to suggest that doing so would reduce tensions in the retail tenancy market; • while there is established case law to define what is meant by unconscionable conduct, it is evident that the concept is not widely understood (by both tenants and landlords) and there would be merit in ensuring that market participants are better informed about the parameters of the concept.		
	Relevant provision :	**Option A:**	**Supporting views:**

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	Section 46A provides that a landlord or tenant must not, in connection with a retail shop lease, engage in conduct that is, in all the circumstances, unconscionable. A person is not to be taken to engage in unconscionable conduct only because they: start legal proceedings relating to the lease; refer a lease dispute/claim to arbitration; or fail to issue/renew the lease. Section 46B sets out the factors that QCAT may, and must not, have regard to in deciding if a party to a retail tenancy dispute has engaged in unconscionable conduct. The factors that QCAT may have regard to are largely a draw down of the unconscionable conduct provisions in the former *Trade Practices Act 1974*, which are now contained in the Commonwealth's Australian Consumer Law, Chapter 2 Part 2-2 of the *Competition and Consumer Act 2010* (ACL). **Other States/Territories:** The unconscionable conduct provisions in the Qld Act align generally with the majority of States/Territories. In Vic and WA the following additional factors considered by the Tribunal/Court in determining unconscionable conduct: • unreasonable use of information about the turnover of the tenant's, or a previous tenant's, business to negotiate the rent by either the landlord or tenant; and • the reasonableness of refurbishment or fit out costs required or agreed to be incurred.	Replace unconscionable conduct test with unfair conduct test. **Option B**: Remove provision in recognition of Commonwealth coverage. **Option C** Consider whether any particular conduct falling short of the unconscionable conduct test warrants particular legislative attention.	**Option A:** Two submitters commented that the test of unconscionable conduct is too high and should be replaced by an 'unfair' test. The submitters are of the view that there has been no apparent change in landlord conduct following insertion of unconscionable conduct provisions into the Act in 2000. **Option B:** A legal submitter stated that the unconscionable conduct provisions in the Act are more of a disincentive/threat than a real benefit and made the general observation that the concept is not well understood and tenants often try to use it when they simply failed to read the landlord disclosure statement properly. Having a section in Act that refers to the ACL will overcome jurisdictional differences. **Opposing views:** **Options A:** See the summary of general stakeholder views and PC findings above.

Item	Existing Provision or issue	Option(s) for amendment	Grounds for option/comments to date
For comment: Comment is invited generally and on whether (for Option C) there is particular conduct that may not comprise unconscionable conduct which should be legislatively addressed (for example, through disclosure, stated relative rights, or right of action).			
6.13.2 - Expand QCAT powers to deal with unconscionable conduct			
	Relevant provision: Section 83(1) gives QCAT a broad power to make the orders, including declaratory orders, it considers just to resolve a retail tenancy dispute (the broad power). Section 83(2) sets out a range of orders QCAT may make, without limiting the broad power (full range of orders). However, the broad power and the full range of orders do not apply where QCAT makes a finding that a party has engaged in unconscionable conduct. QCAT may only make one of two specified orders for unconscionable conduct, being that the party who engaged in the conduct is: • required to pay an amount to a stated person; or • not required to pay any amount to any person – section 83(3).	**Option A:** There should not be a limit on the number or type of orders that QCAT may make on a finding of unconscionable conduct. **Option B:** The orders that QCAT may make where it makes a finding that a party engaged in unconscionable conduct should include: • that a particular clause in the lease is void; and • that a person who is the victim of unconscionable conduct is not required to pay any amount to any person. .	**Supporting view:** **Option A:** There is no reason why the full range of orders should not also be available to QCAT on making a finding that a party has engaged in unconscionable conduct. **Option B:** This option was proposed by a legal submitter who noted that lawyers representing tenants suffering from unconscionable conduct are less likely to commence proceedings where (as currently) QCAT has limited scope in remedying the consequences. **Note:** see also 7.1.6 below for discussion about QCAT jurisdiction for retail shop lease disputes generally.

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6.14 - Other implied lease terms			
6.14.1 - Mandatory registration of leases, including lease incentives			
2008 PC Report: The issue of mandatory registration of retail leases to improve market information was considered in detail by the PC. Relevant findings/assessment included: • additional requirements for mandatory registration of retail leases would increase compliance costs for parties and costs to government of regulation; • the fact that not all retail leases are registered across jurisdictions suggests that the value that some parties place on increased legal security is outweighed by other factors such as cost of registration (including survey plans) and commercial confidentiality; and • where lease information is available, there is scope for its wider use by market participants (ie. retail tenants and valuers can access the services of specialists who analyse and report on lease information at a reasonable cost).			
	Issues: In Qld, there is no requirement for a landlord under a retail shop lease (or any other type of lease) to register the lease on the Land Titles Register. This is consistent with the position in the other States/Territories. The Act does not specify a timeframe within which a landlord (who intends to register a retail shop lease) must lodge the lease for registration. Refer 5.1.7 above for requirement that landlord to give tenant copy of lease within 30 days after lease signed by both parties. **Other States/Territories:** The NSW and NT Acts provide that, <u>if the lease</u>	**Option A:** Mandatory registration of leases over one year (including renewals under an option), with: • lodgement required within three months of lease execution , except where centre being developed/ upgraded - in which case application for extension to be made administering body and this should be publicly available; and • penalty for landlord's failure to comply. **Option B:** All incentives on retail shop leases (ie. rent free periods, landlord contribution to fit out, cash) should also be required to be registered.	**Supporting views:** **Option A:** Various submissions were received from tenant, valuation and other industry stakeholders advocating compulsory registration of retail shop leases to overcome a lack of information available to shopping centre tenants in relation to effective rents (including costs and contributions/incentives by shopping centre landlords). Some submitters stated that landlords are withholding/delaying the registration of leases more than one year (sometimes up to two or three years) in order to mask leasing transactions completed in a retail shopping centre or strip – ie. so that rental comparisons can not readily be made by tenants. **Option B:** It was submitted that these incentives are common

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	is to be registered, the landlord must lodge it for registration within one month from payment of stamp duty on the lease. There are no stated exceptions or penalties for non-compliance. The other States/Territories do not regulate the timeframe within which a landlord is to lodge a lease for registration.		in retail leasing, almost always contained in confidential side deeds (ie. not part of the registered lease) and have the effect of distorting the retail leasing market. **Opposing views:** **Option A:** Under the *Land Titles Act 1994* (Qld) (LTA), it is not compulsory to register any interests in freehold land (with limited exception for certain aboriginal land interests). A person who acquires an interest in land (whether a lease, mortgage, transfer of the fee simple or other) and chooses to register it, does so in order to obtain the benefits of registration - including indefeasibility backed by a State guarantee and priority according to date of registration. Mandatory registration of retail shop leases (whether applying to leases for more than one year or otherwise) is not appropriate as it would be inconsistent with the treatment of other interests under the LTA and an attempt to use the freehold land register (the register) for an inappropriate purpose. The purpose of the register is to provide a searchable, accurate record of the particulars of each parcel of freehold land and all interests registered in respect of that parcel of land. The register is not intended to be a repository for comprehensive information about land dealings for commercial or other purposes. See also the position other States/Territories in adjacent column, and overview of relevant PC findings above. **Option B:**

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			Incentives provided to tenants that are not included in the lease are generally confidential ancillary agreements which would not be made available through registration of lease itself. It is not appropriate for the Act to override commercial confidentiality.
6.14.2 - Prohibitions regarding provisions in lease regulating tenant insurances			
	Issue: Whether the Act should regulate or prohibit certain provisions in a lease about tenant insurances. . Refer 5.5.3 above for related proposal regarding legal advice report.	**Option A:** Prohibit any provision in a lease that requires tenant to take out joint insurance covering the liabilities of landlord and tenant; <u>and</u> **Option B:** Prohibit any provision in a lease that regulates the tenant's insurances, except where landlord requires tenant to obtain insurance of the kind "ordinarily offered by a reputable insurer and for a reasonable amount".	**Supporting views:** **Option A:** It is common for retail shop leases to include provisions requiring the tenant to take out a public liability policy in the name of both landlord and tenant covering their respective liabilities (joint insurance). A legal stakeholder submitted as follows in support of option A: • it is either impossible (or possible only where an exorbitant insurance premium is paid by the tenant) for a tenant to obtain joint insurance. Usual tenant insurance practice is for the tenant to arrange insurance in its name, noting the interest of the landlord; • joint insurance provisions enable the landlord to transfer risk to the tenant by relying on the joint insurance policy where a claim is made against both parties. Any resulting increase in premium is borne by the tenant and the landlord's claims history on its policy for the building/centre is preserved; • joint insurance provisions effectively prevent a landlord being sued for its own negligence (ie. as the landlord is a co-insured, the policy

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			can not operate to enable the landlord to be sued for negligence); • these clauses also enable the landlord to 'double dip' - i.e. landlord relies on the joint policy rather than the landlord's policy for the centre/building. Landlord insurances for the building/centre are generally paid for by all tenants as recoverable outgoings under section 7(1) of the Act (ie. there is no cost to the landlord for these insurances). Related considerations include: • if a tenant fails to take out joint insurance in the specific terms required under the lease, the tenant is in breach of the lease and the landlord may claim from the tenant (by way of breach of contract) any damages which the tenant is liable to pay for the landlord's own negligence, even if the landlord has its own insurance to cover the loss. • while it may be appropriate for a retail lease to contain joint insurance and indemnity provisions in favour of the landlord where the tenant is a major or sophisticated tenant, small tenants in retail shopping centres are rarely in a position to negotiate with landlords on such matters, including because of the complexity of insurance law. **Option B:** This option was proposed by the submitter as a catch-all prohibition to safeguard retail tenants against unreasonable insurance requirements by landlords. An example given by the submitter is that retail lease insurance clauses often require

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			that the tenant's insurance contain a waiver of subrogation, when no tenant insurer would ever agree to that. **Opposing view:** An opposing view is that it is not appropriate for the Act to regulate insurance matters. Rather, these are matters for commercial negotiation between the parties to the lease. There are no such legislative prohibitions or restrictions in the retail leasing legislation in the other States/Territories, or for commercial lease arrangements.
6.14.3 - Regulation of indemnity provisions in lease:			
	Relevant provision: Under section 24(1)(b)(iii) of the Act, a lease can require tenant to indemnify landlord for loss/ damage suffered by landlord as result of actions or omissions of tenant or person acting for tenant **Other jurisdictions:** The Vic and Tas Acts contain a provision in terms of option B. The legislation in the other States/Territories is otherwise silent regarding indemnity provisions in retail shop leases. Refer 5.5.3 above for related proposal regarding legal advice report.	**Option A:** Amend section 24(1)(b)(iii) so that it applies only to the extent that: (i) the loss/damage suffered by the landlord results from a wilful or negligent act or omission by or on behalf of the tenant; and (ii) the act/omission occurs within the building or centre of which leased premises form part. and **Option B:** Insert new provision: a clause in a lease is void to the extent that it requires tenant to indemnify landlord against any liability, penalty, claim or demand for which landlord would otherwise be liable. and	**Supporting views:** **Option A:** There is some legal stakeholder concern that section 24(1)(b)(iii) enables liability to be imposed on a tenant for which the tenant can not insure. The submitter states this is because the usual indemnity provisions in retail shop leases extend to requiring the tenant to indemnify landlord where a loss has been caused to landlord and the loss has not been caused by any wilful or negligent act or omission of the tenant or any employee or agent of the tenant. These indemnities impose a liability on the tenant for which he/she can not obtain insurance, which is contrary to the principle that a business owner should be able to organise insurance against the usual risks of carrying on the business. Options **B, C** and **D** were also proposed by the submitter.

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		Option C: Insert new provision: a clause in a lease is void to extent that it requires tenant to indemnify landlord against all/any legal costs incurred by landlord as a result of any litigation concerning the premises, whether or not the tenant was at fault in relation to the litigation. and **Option D:** Insert new provision: a clause in a lease requiring the tenant to indemnify the landlord other than in accord with options A, B or C above is void.	**Opposing view:** It is not appropriate for the Act to regulate insurance matters. The allocation of risk as between the parties to a lease is a matter for commercial negotiation.
6.14.4 - Prohibition regarding tenant responsibility under lease			
	Issue: Whether the Act should prohibit a tenant being made responsible under a lease for the actions of any person other than the tenant or their employee/agent (for example, customers and repair contractors).	**Option:** Insert new provision: prohibit any clause in a lease that makes a tenant responsible for the actions of any person other than the tenant or the tenant's employee/agent.	**Supporting view:** The submitter asserts that: • retail leases usually seek to make the tenant responsible for the actions of persons other than the tenant or their employee/agent; • as it is not possible for a tenant to secure insurance cover in the above circumstances, the liability of tenant under a lease should be limited to the actions of the tenant or their employee/agent. **Opposing view:** See opposing view at item 6.14.3 above.

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6.14.5 - Provision in lease for release of landlord by tenant			
	Issue: Whether the Act should prohibit any release of landlord by tenant which does not exempt any negligent act or omission by or on behalf of landlord.	**Option:** Prohibit any provision in a lease that constitutes a release of the landlord by the tenant that does not exclude any negligent act or omission of landlord or landlord's employee/ agent.	**Supporting view:** The submitter states that if the release of the landlord does not exempt any negligent act or omission by/on behalf of the landlord, then the release would potentially invalidate the tenant's insurances. **Opposing view:** See opposing view at item 6.14.3 above.
6.14.6 - Security of tenure - statutory minimum lease term			
2008 PC Report: The PC concluded that lease terms are a matter for commercial negotiation between landlords and tenants; and legislated minimum terms can disadvantage some businesses and raise compliance and administrative lease costs. Other relevant findings included: (i) many tenants prefer to negotiate shorter lease terms, depending on variables such as: the circumstances of the retail shopping centre; the general economic climate and evolving retail consumer trends; the tenant's individual situation or assessment of the available market opportunities; (ii) tax provisions are known to both tenants and landlords prior to lease negotiation, so to avoid large unanticipated write-offs in the final year of a lease the lease term could be appropriately negotiated or financial models adjusted to reflect commercial realities.			
	Issue: All States/Territories, except Qld, require all retail shop leases to be for a minimum term of five years (comprising the initial lease term, and any further term obtained by tenant under option or other agreement). While varying in complexity and level of prescription, the other Acts generally either: • give the tenant a statutory option/right to extend the lease for a period up to five years	**Option:** Prescribe a mandatory minimum lease term in the Act. One submitter suggested that the Act should mandate 8+8 year minimum lease terms for shopping centre leases and minimum eight year term for leases in a shopping strip. Shorter period could be requested by tenant or offered by the land lord in genuine circumstances Also, requirement to refit to trigger a new eight year	Provision for an automatic option to extend the lease to a total of five years (subject to some limitations) was removed from the Act in 1994 on the basis that it was overly prescriptive and did not necessarily advantage all tenants (ie. large shopping centre tenants as opposed to small centre, retail strip or stand-alone tenants), or the retail leasing market generally. **Supporting views:** Two submitters expressly supported legislated

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	(ie. WA, ACT); or • provide for a statutory extension of the lease to five years. The tenant may opt out of the minimum term if he/she gives landlord a relevant legal or Small Business Commissioner certificate (ie. NSW, Vic).	term and restriction on landlord offering lease to a third party for same permitted use unless the parties have opportunity to sell goodwill on forward assumption of 8+8year terms at market value. The other proposal was for a minimum seven year terms, unless tenant consents to shorter period.	minimum lease terms for shopping centre leases. A third submitter (on behalf of various retail stakeholders) noted the below issues associated with amortisation of fit outs. The underlying basis for seeking prescribed minimum lease terms is that lease terms set by landlords do not match business cycles or economic life of fit out, which distorts relative negotiating power on lease expiry. Lease term needs to have regard for fit out depreciation and amortisation. It not uncommon for shopping centre tenants to have outstanding balances on their finance for fit out at end of a five year term (ie. where landlord has stipulated high end/costly fit out which when placed under current finance conditions cannot be realised within term of the lease). Presently many fit outs amortised over a six to seven year period. When coupled with a five year term the opportunity of the tenant to enter into new lease or otherwise is not necessarily an informed and prudent commercial decision based on an existing debt, the end of any business value and goodwill - ie tenant is "an economic captive". **Opposing views:** Landlord submitters oppose prescribed minimum lease terms, including on the basis of the relevant PC findings (summarised above). Some retail stakeholders also indicated to the review that flexible lease terms are preferred for the reasons identified by the PC at item (i) above.

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6.14.7 - Implied lease conditions for damaged premises			
	Issue: The Act is currently silent about what happens between the landlord and the tenant where the shop/building/centre is damaged (ie. by flooding). The main issues identified in these circumstances are: abatement/reduction in rent/outgoings; repairs; and termination of lease.	**Option:** Insert following new provisions: i) a tenant is not liable to pay rent/ outgoings/other charges to the landlord for any period that shop cannot be used under lease or is inaccessible due to the damage; ii) if the shop can still be used under the lease but the use is diminished, the tenant's liability for rent/outgoings is reduced proportionately; iii) if the landlord reasonably considers (and notifies the tenant in writing that) repair is impractical, the landlord or tenant may terminate lease on seven days notice and no compensation is payable in respect of the termination; (iv) if the landlord fails to repair within a reasonable time after the tenant's written request, tenant may terminate lease on seven days notice; v) these provisions do not affect the landlord's right to recover damages from the tenant for any damage to the shop/ building by tenant; vi) a lease must not contain a provision which has effect of limiting liability of the landlord to pay compensation to the tenant for the damage (and vice versa); vii) landlord and tenant can terminate lease by	**Supporting views:** This option would align with NSW and Vic and provide a safeguard for tenants regarding rent and outgoings abatement/reduction, repairs and unilateral termination of the lease where premises are damaged (including by flood) without impacting the right of: • either party to compensation in respect of the damage; or • the parties to terminate the lease by agreement. Some tenant stakeholders submitted that, where premises are damaged and the tenant cannot trade, the Act should provide for rent abatement because the landlord is insured (or can insure) for loss of rent in such situation. The submitters assert that there is double-dipping by landlords where they continue to take rent from the tenant in this situation and the tenant also contributes to the landlord's insurance costs through payment of outgoings. For item (iii) of the option, the NSW and Vic provisions allow the landlord to notify the tenant that the landlord considers that the extent of the damage makes repair impractical or undesirable. The term 'undesirable' has been omitted from the option because there is legal stakeholder concern that the term is subjective and may be used by landlords as a commercial opportunity to renegotiate the lease.

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		agreement if shop/building is damaged/destroyed. To terminate under (iii), the landlord would need to give the tenant sufficient details to demonstrate that the landlord, acting reasonably, had resolved not to restore the premises within a reasonably practicable time following the damage/destruction. For (i) and (ii) above, if the parties cannot agree on the amount of the reduction in rent or outgoings, the amount is to be decided through the dispute resolution process.	**Opposing view:** Landlord submitters consider that legislative intervention is not necessary or appropriate as it is impossible to legislate for a "one size fits all" solution and endeavouring to do so would in all likelihood lead to undesirable outcomes. These matters are for commercial negotiation between the parties, as part of the lease or after the event. Most leases do, and all leases should, contain relevant provisions addressing these matters.
For comment: Please provide detailed reasoning in support, including any available quantitative or qualitative evidence regarding the operation of the equivalent provision in other States/Territories (ie. NSW, Vic, SA, ACT, NT). For example, evidence or examples of the nature and extent of any undesirable outcomes which have arisen in practice under the legislative provision in NSW and/or Vic would be useful.			
6.14.8 - Rent abatement where landlord closes shopping centre as precaution			
	Issue: Whether the Act should provide for rent abatement where landlord deems it necessary or requires closure of the centre/building due to an emergency situation, and there is no physical damage to the centre/building resulting from the emergency situation, or the anticipated emergency situation does not eventuate. Note: see also related options and discussion above regarding: • exemption for landlord's liability to compensate tenant for a section 43(1) event	**Option:** Insert new provision: a tenant is entitled to a reasonable reduction in rent for any period that the leased shop can not be opened for trade due to closure of the retail shopping centre or building in which the leased shop is located where: • the landlord deems it necessary to close the centre/building but is not directed/ required to do so by a public authority to comply with a legislative duty; and • the emergency situation does not eventuate,	**Supporting view:** This submission was made by some tenant stakeholders on the basis that it is reasonable that closure of a shopping centre/building in these circumstances would be an insurable event for the landlord. The submitters noted that, where the closure is in response to public authority direction, or in compliance with a legislative duty, the Act should not provide for rent abatement because it is incumbent on the tenant to have the appropriate business interference insurance cover in place – see item 6.7.6 above.

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	where the landlord has acted in response to an emergency situation or in compliance with legislative authority (item 6.7.6); • rent abatement etc where centre/building are damaged (item 6.14.7).	or there is no damage to the centre/leased building.	**Opposing view:** An alternative view is that these matters are for commercial negotiation between the parties, as part of the lease or after the event.
For comment: Comment is invited for this option, including: • how frequently the circumstances at issue occur and examples of the duration of such closures in practice; • the proportion of retail leases that make provision for these circumstances.			
6.14.9 - Tenant contributions to cost of landlord's works			
	Issue: Whether the Act should prohibit a provision in a lease that requires the tenant to contribute to the cost of any landlord's works/ fixtures/ fittings/ equipment for the leased shop which the tenant is not entitled to remove from the premises at end of lease. This scenario is to be distinguished from where the lease requires the tenant to fit or refit the shop – refer 6.11.1 above for discussion/options in this regard. **Relevant provisions:** A landlord's disclosure statement must contain: • details of any structures, fittings, plant or equipment to be provided by landlord; • details of any works to be carried out by landlord before lease starts (ie. works that	**Option A:** Insert new provision in Act: a clause in a lease that requires tenant to pay/contribute towards the cost of any finishes, fixtures, fittings, equipment or services is void unless the liability to make the payment or contribution was disclosed in the landlord's disclosure statement. **Option B:** Insert new provision in Act to the following effect: If a tenant is liable under the lease to pay an amount for costs of or associated with specified landlord works, (see last column under Option B for examples of works) the following conditions apply: (a) the works must be carried out by person(s) with suitable skills /experience engaged or	One stakeholder submitted that landlords are requiring tenants to pay for the installation of fixtures such as air-conditioning, ceilings and light fittings and that if the tenant cannot remove fit-out items then the landlord should be prohibited from requiring the tenant to pay for them. **Supporting view:** **Option A:** would: • clarify and strengthen the tenant's position regarding the extent of any liability to pay for any of the landlord's works, or fixtures/fittings etc provided by the landlord; • align with the equivalent tenant protection in the NSW, Vic, ACT and NT Acts, and • strengthen the incentive for the landlord to give full and proper disclosure to the tenant about any payments/contributions required to

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	the landlord is required to carry out to enable the proposed fit out of the shop by the tenant) ('landlord's works'); and • an estimate of any contribution to be made by tenant to cost of landlord's works. Sections 3(u), (v) and (w) Regulation).	approved by the landlord; (b) the maximum cost of the works (or a basis/formula for those costs) is to be agreed in writing by landlord and tenant before works commence; (c) if parties can not agree on maximum cost or basis/formula, maximum cost to be determined by an independent quantity surveyor appointed by agreement between the landlord and the tenant [note that who would appoint the quantity surveyor if no agreement would need to be considered]; (d) the tenant is not liable to pay more in respect of works than agreed maximum cost or as determined by the quantity surveyor.	be made by the tenant to the landlord's works or fixtures, fittings, plant or equipment provided by the landlord without impinging on/ overriding the underlying commercial agreement between the parties reflected in the lease. **Option B:** Is based on the equivalent provision in the Vic Act, which: • applies only to leases of retail premises located in a retail shopping centre; • specifies the landlord's works to which the section applies as those which alter any of the following to enable the proposed fit out of the premises: the electrical reticulation/automatic sprinkler system/ power or gas supply at or to the premises; layout of air-conditioning ducts/registers; location of exhausts; telephone or electrical cabling; and such other things as prescribed by regulation.
For comment: Comment is sought regarding these options, or any alternatives. Any available quantitative/qualitative evidence in support would be helpful, including the extent to which the equivalent provisions are relied on and/or operating effectively in other jurisdictions.			
6.14.10 - Capital costs/expenditure not recoverable from tenant			
	Relevant provision: For the purposes of the Act, a landlord's outgoings do not include expenditure of a capital nature, including the amortisation of capital costs - section 7(3)(b).	**Option** Insert new provision in Act: a lease provision is void to the extent that it requires tenant to pay any amount in respect of the capital costs of: the building in which the retail shop is located; or	**Supporting view:** This amendment would clarify and strengthen the tenant's position regarding liability for capital costs/expenditure and align with the equivalent tenant protection in the NSW, Vic, ACT and NT

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	'Expenditure of a capital nature' means the costs and expenses of/ incidental to the building or extension of, or major structural improvement to, the centre/building or associated areas - including replacement costs of major plant/equipment items.	any building in the retail shopping centre in which the shop is located; or any areas used in association with the centre or building.	Acts.
6.14.11 - Liquidated damages clauses in leases			
	Issue The Act is silent on the issue of liquidated damages clauses. A liquidated damages clause is an agreed damages clause in a contract (ie. retail shop lease) that fixes the amount payable as damages for a party's breach of the contract. This is consistent with other States/Territories.	**Option:** Prohibit liquidated damages clauses in retail shop leases. Alternatively, the Act should require the landlord to engage in reasonable negotiation with the tenant regarding the terms/formulation of a liquidated damages clause – or at least that the landlord be obliged to clearly demonstrate the basis upon which the liquidated damages represents a genuine pre-estimate of the loss suffered by the landlord as a result of the tenant's breach of lease.	**Supporting view:** This option was proposed by a retail stakeholder on the basis of their experience that liquidated damages clauses in shopping centre leases are operating as penalties, rather than fair compensation for the landlord's loss resulting from tenant's breach of the lease (eg. failure to open for trade). Also, landlords are not prepared to discuss or disclose information regarding how liquidated damages clauses in leases are formulated. **Opposing view:** An alternative view is that the negotiation of a liquidated damages provision in a lease is a matter for ordinary commercial negotiation between landlord and tenant having regard to the general law and legislative intervention is not appropriate.

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7.0 - Dispute resolution and administration			
7.1 - Compulsory mediation			
	Issue: Under section 59 of the Act, a party to a retail tenancy dispute can not be compelled to attend a mediation conference. Also, the Act does not provide any costs orders or other sanction for where a party refuses to take part in, or withdraws from, mediation. **QCAT Act:** QCAT can direct the parties to a proceeding to attend one or more compulsory conferences with the purpose of: promoting settlement of the dispute; identifying/clarifying issues in dispute; and/or making necessary orders/ directions to resolve the dispute – sections 68 and 69. The directions QCAT can make include that a party attend the conference in person, or be represented by a person with authority to settle the dispute on the party's behalf. If a party does not attend a compulsory conference, QCAT may, with the agreement of the parties present: • make a decision adverse to the absent party and any appropriate orders, including costs; or • order that the absent party be removed from the proceeding and pay the other party's reasonable costs: section 72.	**Option A:** A retail shop lease dispute (except for proceedings in the nature of an injunction) should only be referred to QCAT following certification that the mediation process has failed and outstanding issues are unlikely to be resolved. This is based on the position in NSW and Vic which provide that a dispute may only be the subject of Tribunal/court proceedings if the Registrar of Retail Tenancy Disputes (NSW) or the Small Business Commissioner (Vic) have given written certification that the mediation has not resolved the dispute, and further mediation (or any alternative dispute resolution) is unlikely to. **Option B** Remove the mediation provisions under the Act so that where a retail tenancy dispute is lodged with QCAT, it will go straight to a compulsory conference under the QCAT Act – ie there would not be a separate mediation process.	**Option A:** Most tenant and landlord submitters expressed in-principle support for compulsory mediation. This option was proposed by major landlord stakeholders on the basis that it would encourage the parties to make the best use of mediation and align with NSW and Vic. Some landlord submitters expressed the view that the current approach in Qld (ie. referral by mediator under section 63) is preferable to that in NSW and Vic – ie. additional certification of Registrar may be another step to delay dispute resolution process. **Option B:** Currently, if a dispute is not resolved through mediation and the matter is referred to QCAT, the parties are generally directed to attend a compulsory conference under the QCAT Act. The compulsory conference provides a flexible and effective dispute resolution process. A QCAT member presides over the conference and the conference can be adjourned where appropriate and resumed when more information has been exchanged in response to directions. The QCAT member also has power to make costs and other orders against a party that does not attend the compulsory conference (provided the member is satisfied that the absent party received notice to attend the conference).

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	.		The QCAT member would have the same jurisdiction for the compulsory conference as a mediator does currently under section 97 of the Act (subject to any jurisdictional changes resulting from the outcomes of consultation on this review and on the QCAT Act statutory review). Some stakeholders expressed the view that the mediation process under the Act is not necessary and is an extra step and source of confusion for disputing parties as they may not understand why mediation (which they do not have to attend) is swiftly followed by a conference which they must attend. Option B would reduce administrative costs of the QCAT Registry associated with managing the mediator panel. Option B would streamline the dispute resolution process and reduce the regulatory burden on, and costs to, the disputing parties (tenant and landlord) and government, while: • providing a more flexible and coherent dispute resolution framework which is consistent with QCAT processes and procedures generally; and • strengthening the incentive for landlord and tenant to engage in the dispute resolution process towards early and effective resolution of retail tenancy disputes.

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7.2 - Timeframe for mediation			
	Relevant provisions: Under section 63 of the Act, a mediator must refer a retail tenancy dispute to QCAT <u>if the dispute is within jurisdiction and:</u> • the parties can not reach a mediated solution; or • a party to the dispute does not attend the mediation conference; or • the dispute <u>is not settled within four months</u> after the dispute notice is lodged. The circumstances under which a party may apply to QCAT for an order to resolve the dispute are prescribed in section 64, and do not extend to the ground of undue delay.	**Option:** A party to a dispute should be able to apply to QCAT where mediation is "unduly delayed". **Note:** this option would not be relevant if option B at item 7.1 above was adopted.	**Supporting view** This option was raised by some retail stakeholders and is intended to prevent mediation being used to delay the resolution of the dispute.
For comment: Comments is invited in this matter, including: • whether the current four month settlement period is appropriate; • whether the mediator has sufficient powers within the four month period to form the view that the parties can not reach a mediated solution (where delay tactics are being employed by a party to the mediation); • the practicality of determining what constitutes 'undue delay'; • any examples of undue delay in practice in mediation before QCAT (other than failure by a party to attend a mediation).			
7.3 - Legal representation			
	Relevant provisions: Under section 57 of the Act, at a mediation	**Option:** Legal representation should be allowed for	**Supporting view** Retail shop lease disputes are often complex and

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	conference, the parties to a retail tenancy dispute: • must conduct their own case; • may be represented by an agent approved by the mediator only if: they are a corporation; or the mediator is satisfied an agent should be permitted to represent the party. Under section 43 of the QCAT Act, the parties must represent themselves in a proceeding before QCAT unless the interests of justice require otherwise.	mediation and QCAT proceedings under the Act where claim is for more than $50,000.	involve significant amounts of money. **Note:** the matter of legal representation for retail shop lease disputes (both at mediation and in a proceeding before QCAT) will be considered as part of the QCAT Act review.
7.4 - Constitution of QCAT – industry representatives or assessors			
QCAT assessors: QCAT has the power to appoint an assessor under chapter 2, part 6, division 7 of the QCAT Act. Section 111 of the QCAT Act sets out how an appointed assessor may assist QCAT on request. The assessor's role may include: • providing expert evidence in a proceeding; • giving advice to QCAT, including conducting an inquiry or investigation into a matter and giving a written report of the assessor's findings to QCAT; • assisting QCAT to ensure that the parties understand QCAT practice and procedures; the nature of assertions made in the proceedings and the legal implications of those assertions and the relevant QCAT decision for the proceeding; • deciding a question of fact arising in a proceeding and reporting to QCAT stating the assessor's decision and reasons for decision. Under section 111(3) of the QCAT Act a copy of any assessor's report is given to each party to the proceeding and each party is given an opportunity to make written submissions to QCAT about the report before QCAT decides whether QCAT adopts or rejects the assessor's findings. QCAT may order a party to a proceeding to pay or contribute to the assessor's costs only if (before getting the assessor's assistance) QCAT has advised the party of the intention to get assistance from an assessor, the likely costs of the assessor and the likely amount of the payment or contribution. QCAT must also give the party an opportunity to be heard on the matter (section 112 of the QCAT Act). Section 113 of the QCAT Act provides for the disclosure of interests by an assessor where an assessor has or acquires an interest, financial or otherwise, that may		

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conflict with the proper performance of the assessor's functions.			
	Relevant provision: Currently under the Act, for a retail shop lease proceeding where the amount in dispute is: • $25,000 or more – QCAT must be constituted by a legally qualified member, a member representing tenants and a member representing landlords (industry representative members); • less than $25,000 – QCAT may be constituted by a legally qualified member or a QCAT adjudicator: section 102.	**Option:** Remove the requirement in section 102 for the constitution of QCAT to include industry representative members. This would mean that, for **all** retail shop lease disputes, if expertise of the kind currently provided by industry representative members is required, the presiding member may appoint a person or persons with the appropriate knowledge, expertise, or experience as assessors.	**Supporting view:** There is concern that the current requirement for QCAT to be constituted by representative members is not consistent with QCAT's role as an independent Tribunal which hears and determines retail tenancy disputes – ie. that representative members have an actual or discernable shared interest with the parties to the dispute. The option would address this concern without prejudice to the respective interests of the parties in dispute (ie. both tenant and landlord) because QCAT may, if necessary on a case by case basis, appoint a person or persons with relevant knowledge, expertise and experience as assessors to assist QCAT in the proceeding. There is an existing legislative framework in the QCAT Act for assessors, which sets out: the assessor's role; a process for the disputing parties to make submissions on any written report by the assessor; and costs and disclosure of interest requirements (see above). The option would also reduce costs to government associated with retail tenancy proceedings before QCAT (ie. remuneration of representative members for each retail shop lease proceeding, as opposed to remuneration of an assessor who is appointed on an as needs basis where particular knowledge/experience/ expertise is required to assist in resolution of the dispute). Various tenant and landlord submitters support in principle the appointment of expert panel

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			members on a case by case basis having regard to their particular field of expertise. Some submitters noted that appointing industry representatives does not necessarily mean they are experts in particular subject matter or aspect of a retail lease dispute (eg, the issue in question may relate to market value and the industry representative may be a town planner). Other submitters supported the option on the basis that it would avoid conflicts of interest and bias. **Opposing view:** Some tenant stakeholders oppose the option on the basis that having industry representative members gives comfort to tenants who may otherwise feel disenfranchised by QCAT proceedings.
7.5 - Jurisdiction of mediators and QCAT for retail shop lease disputes			
QCAT jurisdiction: Section 103 of the Act gives QCAT a broad jurisdiction to hear retail shop lease disputes, subject to certain qualifications/limitations. These qualifications/limitations include: • jurisdiction to hear disputes for claims up to $750,000 (monetary jurisdiction limit) – section 103(1)(c); and • QCAT has a qualified jurisdiction in relation to disputes about rent arrears and the rent/outgoings payable under a lease (the rent/outgoings jurisdiction limits) – sections 103(1)(b) and 103(2). **Mediator's jurisdiction:** The jurisdiction of a mediator under section 97 of the Act mirrors that of QCAT under section 103 (except for the issue at item 7.5.1 below). If the mediation provisions are retained (see option B item 7.1 above) there would need to be corresponding amendments to section 97 in relation to the options for amendment to section 103 set out below.			

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7.5.1	**Issue:** Currently, a landlord may bring a claim to QCAT for rent in arrears only as a counter-claim to a claim by the tenant for compensation – sections 103(b)(i) and 103(2)(d).	**Option** Amend section 103 so that QCAT has jurisdiction to hear and determine a landlord's claim for rent arrears up to the monetary jurisdiction limit.	**Supporting views** There is no identified compelling reason why a landlord is required to prosecute his/her claim for rent arrears in a court when QCAT has a monetary jurisdiction of up to $750,000 in retail shop lease disputes. The calculation of rent arrears is far less difficult than the analysis required of QCAT when assessing a compensation claim (ie. for trading losses). **Opposing view** The alternative view is that there was no intention to erode the jurisdiction of the courts, except for matters for which the Act specifically provides. Rent arrears as a debt should be pursued in the relevant court. QCAT only has jurisdiction for debts up to $25,000.
For comment: Comment is sought on this option and also more broadly as to any reasons why the rent/outgoings jurisdiction limits should not be removed so as to give QCAT jurisdiction in relation to the rent and outgoings payable under a retail shop lease generally (as well as rent arrears).			
7.5.2	**Issue:** The jurisdiction of QCAT under section 103 is constrained by the monetary jurisdiction limit, while a mediator's jurisdiction under section 97 is not.	**Option:** Amend section 97 so that the monetary jurisdiction limit of a mediator in relation to a retail shop lease dispute corresponds with that for QCAT (ie. up to $750,000).	This would be a clarificatory amendment to remove the inconsistency.
7.5.3	**Issue:** Various QCAT decisions indicate that section 103 and the following provisions of the Act affecting when and how a matter may come	**Option:** Amend to clarify the nature and extent of QCAT's jurisdiction in relation to retail tenancy disputes as required, including where urgent	For example, the reasons for decision of Justice Wilson in *McDonald's Australia P/L v Emaaas P/L* [2011] QCAT 293 indicate that, under the current legislative framework, there is uncertainty

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	before QCAT need to be reconsidered because the manner in which they are intended to operate together and in context of the QCAT Act are not clear: • section 55 (lodgement of retail tenancy disputes); • section 56 (chief executive must nominate mediator and notify mediation conference once dispute notice lodged) • section 63 (reference of retail tenancy dispute to QCAT by mediator), • section 64 (application to QCAT by a party); • section 83 (QCAT orders); • section 94 (exclusion of other jurisdictions).	injunctive relief is sought.	about whether a party to a retail shop lease dispute can seek urgent injunctive relief from QCAT under sections 58 and 59 of the QCAT Act if the parties have not been through the mediation process under the Act (or whether an application must be made to the Supreme Court or the District Court). In particular, Wilson J notes: • section 94 (which prevents a retail shop lease dispute being heard by a court after a dispute notice has been lodged with QCAT) provides an exception for an application for an order in the nature of an injunction being made to a court However, section 94 does not refer to QCAT's powers to grant an injunction under section 59 of the QCAT Act, and it does not state that ,if a party to a retail tenancy dispute is seeking an order in the nature of an injunction, it must and can apply only to a court; • it is not apparent that sections 63 and 64 are intended under the Act to be the only gateway to QCAT, including as these provisions do not expressly qualify the broad jurisdiction given to QCAT under section 103.
For comment: Comment is sought as to any amendments stakeholders' consider are necessary or appropriate to clarify the jurisdiction of QCAT.			
7.5.4	**Relevant provision:** QCAT has jurisdiction to hear a retail tenancy dispute about the procedure for determination of rent payable but not the actual amount of the	**Option:** QCAT should be able to consider the amount determined as an indicator that a SRV has not complied with section 29 in making a determination of CMR.	**Option C:** A valuation stakeholder proposed this option on the basis that there are significant inconsistencies in CMR determinations.

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	rent: section 103(2).		See also related discussion on CMR at 6.3.4.
7.6 - Clarification of the range of orders that QCAT can make			
	Relevant provision: Section 83 of the Act sets out the range of orders QCAT can make to resolve a retail tenancy dispute. See item 6.13.2 above for detail - including proposal that the full range of orders under section 83 of Act should be available to QCAT when it makes a finding of unconscionable conduct.	**Option:** Amend section 83(2)(i): to omit requirement for the parties to the dispute to consent for QCAT to make an order to rectify the lease .	This option was proposed by a legal stakeholder**.**
For comment: Comment is invited for this option and in relation to any other clarification required or issues regarding the orders that QCAT may make for a retail lease dispute.			
7.7 - Timeframe for commencement of proceedings			
	Relevant provision: Section 64 of Act only allows retail lease dispute proceedings to be initiated in QCAT where the lease has not ended more than one year before the dispute notice was lodged. Section 61 of the QCAT Act allows QCAT to make an order that a time limit fixed for the start of a proceeding be extended.	**Option** Clarify whether section 61 of the QCAT Act (which allows for extensions of time to commence a proceeding) applies for leases that have ended more than one year before the dispute notice is lodged.	Issues for consideration regarding this option include whether: • the one year period in section 64(1)(b) is a 'time limit' as contemplated by section 61 of the QCAT Act; • disputes about leases that have ended more than one year before the dispute notice is lodged should be resolved by QCAT or in the Courts. See item 1.0 above for object of the Act, including a low cost dispute resolution process.

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8.0 - Miscellaneous provisions			
8.1 - Penalties			
For comment: Comment is invited in relation to each offence outlined below as to whether the offence should be retained, or whether it is sufficient to remove the offence and: • retain or provide for the tenant's right to compensation; or • provide for the act/omission giving rise to the offence to be dealt with as a retail shop lease dispute under the Act; or • replace the offence with a statutory implied lease term if these obligations are breached (for example, amend the Act to provide that if a landlord does not provide a tenant with an estimate of outgoings within the required period, the tenant is not required to pay his/her share of the landlord's outgoings until the landlord complies with his/her obligation to give the tenant the statement of outgoings). **Other jurisdictions**: WA and ACT do not provide for offences, rather offending clauses and provisions in leases are void or an aggrieved person has a right to pursue compensation. Other jurisdictions have a range of offences which are enforced by the relevant Registrar/Commissioner.			
8.1.1	**Relevant provision:** **Section 23** – for landlord's failure to give tenant certified copy of lease. Maximum penalty: 40 penalty units **Section 26(1), (3) and (4)** – unauthorised disclosure of tenant's turnover information, by landlord/their professional advisor; prospective purchaser/mortgagee of the retail shopping centre and their professional advisers. Maximum penalty: 60 penalty units. **Section 35(1)** – maintaining confidentiality of lease information by SRV. Maximum penalty: 60 penalty units. **Option:** Remove offences but retain current compensation rights.		
8.1.2	**Relevant provision:** **Section 37** – if a tenant is required to pay all/part of landlord's outgoings, it is an offence if landlord fails to give tenant annual estimate of landlord's outgoings (within a required period) and an audited annual statement in the approved form of the outgoings within three months after end of period to which the outgoings relate. Maximum penalty: 60 penalty units. **Option A:** Remove offence and have failure dealt with as a dispute with QCAT to make appropriate orders. **Option B:** Remove offence but provide for obligation to pay outgoings to be suspended until complied with, or not to apply while not complied with. This option would align with other jurisdictions, including NSW, Vic and WA.		

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8.1.3	**Relevant provision:** **Section 39** – offence for landlord to seek/accept payment of key money or any amount for goodwill of tenant's business carried on in/from the leased shop, except in stated circumstances. Maximum penalty: 100 penalty units. **Option:** Remove as unnecessary.		
8.1.4	**Relevant provisions:** **Section 40(3)** – if tenant is required to pay maintenance amounts into sinking fund, it is an offence if landlord fails to pay those amounts into an interest bearing account kept by landlord for the credit of the sinking fund. Maximum penalty: 100 penalty units. **Section 40(4)** – it is an offence if a landlord fails to apply amounts standing to credit of sinking fund and interest earned for purpose of stated major maintenance/repairs. Maximum penalty: 100 penalty units. **Section 40(7)** – it is an offence for landlord to seek/accept payments of maintenance amounts from tenant that would result in the amount standing to the credit of the sinking fund being more than $100000. Maximum penalty: 100 penalty units. **Option A:** Remove. **Option B:** Remove and make requirement an implied term. Relevant to considering these options are whether: (a) compliance with sinking fund requirements in general is an issue in practice; (b) for section 40(4), misapplication of sinking fund moneys is an area of concern in practice and whether return of moneys used for other purposes would pose practical difficulties; and (c) the monetary limit in section 40(7) is appropriate. Also see discussion of sinking funds at item 6.5 above.		
8.1.5	**Relevant provision:** **Section 41(2)** – if tenant is required to pay promotion amounts for promotion/ advertising of centre in which leased shop is situated to landlord or an entity to which tenant is required under the lease to be a member, it is offence for landlord to apply the promotional amounts for any purpose other than promotion/adverting directly attributable to the centre, or in joint promotions and advertising with other retail shopping centres. Maximum penalty: 100 penalty units. **Option:** Remove. Also see discussion of promotional/advertising expenditure at 6.5.4.		

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8.1.6	**Relevant provision:** **Section 45(1):** offence for a landlord to obstruct/hinder tenant in dealing with lease or other assets of business carried on in the leased shop by way of security. Maximum penalty: 40 penalty units. **Option A:** Remove – refer also to item 6.12.1 above.		
8.1.7	**Relevant provision:** Section 46: if lease gives tenant option to renew/extend, it is an offence if landlord fails to give tenant written notice of the option date within specified timeframe. Maximum penalty: 40 penalty units. **Option:** Remove – refer also to item 6.11.1 above.		
8.1.8	**Relevant provision:** **Section 49**: offence for landlord to include in lease a provision preventing/ restricting tenant from: • joining any chamber of commerce, retail trade association or other commercial association; or • forming/ joining a tenant's association to promote a retail shopping centre for another purpose of mutual interest to tenants. Maximum penalty: 40 penalty units. **Option A**: Remove. **Option B:** Remove and provide for any such lease provision to be of no effect.		
8.1.9	**Relevant provision:** **Section 53:** Trading hours offence in relation to leases existing at the commencement of the *Trading (Allowable Hours) Amendment Act 1994*. Maximum penalty: 100 penalty units. **Option**: Remove – does this provision have current relevance?		
8.1.10	**Relevant provisions:** **Section 62**: offence for a person, other than the mediator, to make an official record of anything said at mediation conference. Maximum penalty: 40 penalty units. **Section 113**: offence for a mediator or former tribunal member to disclose information coming to their knowledge during the dispute resolution process or hearing. Maximum penalty: 100 penalty units.		

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	Option: Retain as standard for dispute resolution.		
8.2 - Provision for mandatory statutory review			
	Relevant provision: Section 122 requires a review of the Act every seven years.	**Option:** Repeal section 122.	**Supporting views:** Various stakeholders have submitted that ongoing periodic reviews of the Act are not necessary as the Act is generally working well. Amendments should only be made on an 'as needs basis' (ie. on basis of evidence that particular provisions are not working properly; or to align with national legislative or industry practice changes as appropriate for Qld).