Department of Justice and Attorney-General

Report on statutory review of the *Retail Shop Leases Act 1994*

November 2014

1 INTRODUCTION

The *Retail Shop Leases Act 1994* (the Act) provides a framework for addressing imbalance in negotiating power and access to information between major shopping centre landlords and small retail tenants through mandatory minimum standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.

Section 122 of the Act requires the Minister to carry out a review of the operation of the Act every seven years to decide whether its provisions remain appropriate, and to prepare and table a report on each review in the Legislative Assembly as soon as practicable after the report is prepared.

The last statutory review of the Act, undertaken by the then Department of State Development, concluded in 2005 and culminated in the *Retail Shop Leases Amendment Act 2006*.

A further statutory review of the Act, including comprehensive stakeholder consultation, commenced in 2011. This report documents the process for and outcomes of that review, including proposals for legislative amendment which are incorporated in the Retail Shop Lease Amendment Bill 2014. This report has been prepared for tabling in the Legislative Assembly in compliance with section 122 of the Act.

2 REVIEW OBJECTIVES AND PUBLIC CONSULTATION

The purpose of the review was to decide whether the provisions of the Act remain appropriate for the Queensland retail sector.

Key objectives of the review were to identify opportunities to:

- improve the efficiency and effectiveness of the Act;
- reduce red tape and compliance costs for retail tenants and landlords, while leaving appropriate matters to commercial negotiation or education rather than legislating;
- continue to address imbalance in negotiating power/information access between major landlords and small retail tenants, without unduly interfering with commercial arrangements or outcomes;
- to the extent appropriate for Queensland, align with key eastern seaboard states to enhance operational efficiency and legal certainty for stakeholders operating across jurisdictions; and
- clarify and simplify the Act as appropriate.

For the initial phase of the review, DJAG conducted public and targeted stakeholder consultation on a discussion paper released in November 2011. Written submissions in response to the discussion paper were received from 33 retail sector and associated professional stakeholders.

In May 2013, the Attorney-General released a comprehensive paper for public consultation setting out issues and options for changes to the Act raised by stakeholders through the earlier consultation (options paper). Written submissions in response to the options paper were received from more than 25 stakeholders.

A list of the submitters to the options paper is at **Attachment 1**. The principal submitters were the key industry and professional representative bodies. There were also submissions from landlords, tenants, valuers and legal practitioners.

Key underlying themes of tenant submissions to the review were security of tenure, occupancy costs, market transparency, disclosure and compensation.

Key areas of landlord concern were clarifying the operation of the legislation to promote certainty, removing unnecessary regulation and reducing compliance costs, and confining the legislation to the principle of protecting small business operators (as against larger or sophisticated business operators who are capable of safeguarding their own interests).

Many tenant and landlord submitters also sought clarification and simplification of the disclosure requirements and legislative consistency across retail leasing jurisdictions, in particular key eastern seaboard states.

3 REFERENCE GROUP

In June 2013, the Attorney-General established a reference group comprising key retail sector and professional stakeholders to consider the options paper and make recommendations to assist the Government in deciding the outcomes of the review (the Reference Group).

The Reference Group included representatives from the National Retail Association, the Australian Retailers Association, the Australian Property Institute, Lease 1, the Property Council of Australia (Qld), the Shopping Centre Council of Australia, the Queensland Newsagents Federation, the Pharmacy Guild of Australia (Qld), the Queensland Law Society, the Large Law Firm Group and the Chamber of Commerce & Industry Queensland.

Under its terms of reference, the Reference Group was tasked with identifying areas of stakeholder consensus, difference and compromise. The Reference Group also provided industry and technical input, including from the perspective of retail businesses operating in Queensland and nationally.

Formal submissions from stakeholders on the options paper (to the extent that they were within the scope of the review) were considered as part of the reference group process.

Key guiding considerations for the Reference Group were the need for balance between safeguarding retail tenant interests and ensuring government regulation does not unnecessarily interfere with commercial dealings/relationships; and opportunities for reducing the regulatory and compliance burden on the Queensland retail sector.

The Reference Group also had regard to key findings and recommendations of the Productivity Commission in its 2008 Report, *The Market for Retail Tenancy Leases in Australia*. These included that States and Territories should introduce greater self-regulation in the retail tenancies market; remove unnecessarily prescriptive elements of retail tenancy legislation that unduly restrict commercial negotiations; and move towards a more consistent national framework for regulation of retail tenancies.

The Reference Group's final report (Reference Group Report) detailing the recommendations and outcomes from the Reference Group process is at **Attachment 2**. The recommendation or outcome for each of the 127 options paper items is set out in the table to the Reference Group Report. There was a relatively high level of Reference Group consensus as to the legislative amendments which would be appropriate, and also on matters where legislative amendment was considered not necessary or appropriate.

4 OUTCOMES OF THE STATUTORY REVIEW

Amendments resulting from the review of the Act are contained in the Retail Shop Leases Bill 2014 (the Bill).

Generally, where the Reference Group has reached consensus on whether or not legislative change is desirable, the Government has accepted the Reference Group's recommendations.

For issues on which there is not Reference Group consensus, both the predominant and competing views of group members and the considerations on which these views were based needed to be balanced in deciding whether or not to propose legislative change.

For some issues the Government has decided to maintain a watching brief.

4.1 No legislative change

The Reference Group reached consensus on no legislative change for over 80 of the options paper items. These are summarised at Part 1 of **Attachment 3** to this report.

The Reference Group did not support legislative change for these matters on one or more of the following bases:

- the Act is currently working well and no change is required;
- the proposal would increase the compliance burden on the retail tenants or landlords;
- increased regulatory requirements could not be justified or were impractical; and
- an alternative to regulation is appropriate - for example, the matter could be appropriately addressed through: commercial negotiation between the lease parties; an industry-driven initiative such as an agreed code of practice; or education measures.

Consistent with these recommendations, the Bill makes no change in relation to these matters.

4.2 Amendments with Reference Group consensus support

The amendments to the Act recommended by reference group consensus and contained or reflected in the Bill are set out at Part 2 of **Attachment 3** to this report (the consensus-based amendments).

The key consensus based amendments in the Bill:

- exclude from the operation of the Act: non-retail leases in certain non-retail areas of a shopping centre; and retail shop leases where the tenant operates the business on behalf of the landlord;
- allow for waiver of the landlord disclosure period by a tenant who is not a major lessee;
- clarify and enhance the requirement for franchisor disclosure to a franchisee and for sub-lessor disclosure to a sub-lessee;
- enhance general tenant protection by:
    - ensuring that a tenant is only liable to refurbish the leased shop during the lease term where the lease gives sufficient details of the nature, extent and timing of the required refurbishment;
    - requiring the landlord to make available to the tenant a marketing plan detailing the landlord's proposed advertising/promotion expenditure;
    - providing for the release of the assignor tenant by the landlord to include the assignor tenant's guarantors; and
    - making the landlord liable for mortgagee consent costs;
- clarify matters that may be included in a landlord's outgoings (including a breakdown of management fees) and excluded uses for the purposes of apportioning those outgoings; and
- provide that a landlord's liability for compensation for business disruption does not apply where the landlord's action is a reasonable response to an emergency; and allow some flexibility for a lease to limit a tenant's compensation claim for specific business disturbances notified by the landlord.

Some of these amendments in the Bill reflect changes considered necessary or appropriate by Government in response to legal, technical and fundamental legislative principle issues raised during drafting that were not considered in the Reference Group Report.

The Bill also includes various consensus-based technical amendments to clarify and improve the operational efficiency and effectiveness of the Act. These include

amendments to: ensure the reasonableness of required timeframes under the Act; clarify the operation of various provisions; clarify and improve the efficiency of the current market rent determination process; and remove unnecessary offences.

4.3 Amendments in the Bill not based on Reference Group consensus

Generally, the amendments contained in the Bill that are not consensus-based are premised on (at least in-principle) predominant reference group support. These amendments are overviewed in Part 1 of **Attachment 4** to this report. Some of the amendments respond to legal, technical and fundamental legislative principle issues raised during drafting that were not considered in the Reference Group Report.

Key amendments in Part 1 include:

- excluding from the Act leases with a floor area greater than 1000m^2;
- excluding the application of procedural requirements in the Act that are unnecessary where a State, the Commonwealth or a local government is tenant of premises situated in a retail shopping centre;
- requiring landlord disclosure on renewal of an existing lease under an option;
- amending the timeframe for assignor disclosure to assignee to provide a safeguard for the assignee where the lease assignment is associated with a business sale contract;
- technical amendments to clarify the meaning of certain terms in the Act (such as when a lease is taken to be entered into), and to clarify technical compliance with the landlord disclosure requirement;
- simplifying and clarifying waiver of the implied rent provisions by a lessee with five or more retail shops in Australia (major lessee);
- clarifying landlord recovery of lease preparation costs where the tenant has negotiated, but does not proceed with, the lease; and
- removing the requirement for mandatory statutory review of the Act (see below).

Removal of requirement for regular statutory reviews:

The Bill provides for the removal of the requirement for mandatory statutory reviews of the Act. It is instead proposed to monitor retail shop leasing developments and progress targeted policy reviews and associated legislative amendments on an as needs basis identified by, and in consultation with, relevant retail sector stakeholders. This will include consultation with existing reference group members, as appropriate.

Removing the requirement for mandatory review would facilitate a more flexible and effective policy and legislative response to emerging issues impacting the Queensland retail sector and is consistent with the Government's response to recommendation 5.5.1 of the Office of Best Practice Regulation's 2013 Final Report,

Measuring and Reducing the Burden of Regulation. Ongoing monitoring and targeted reviews will achieve more effective and timely outcomes for retail sector stakeholders. There would also be reduced burden and costs for key landlord and tenant representatives who contribute to various legislative review processes impacting the retail sector across State/Territory jurisdictions on a regular, if not revolving, basis.

4.4 Matters without Reference Group consensus and not progressed in the Bill

These matters are set out a Part 2 of **Attachment 4** to this report (also see watching brief issues below).

4.5 Key issues on which a watching brief is to be maintained

For the following more complex issues on which the Reference Group could not reach consensus, a watching brief will be maintained as to future legislative and policy developments in other State/Territory jurisdictions and nationally, including with regard to relevant retail sector developments and requests from industry for a uniform national approach:

- whether all leases to listed corporations or their subsidiaries should be excluded from the Act;
- whether all tenants should be free to opt out of the implied rent review provisions in the Act
- whether the existing entitlement of a franchisee/sublessee to claim compensation from the landlord for business disruption should be modified to facilitate streamlining of the claims process to a single claim, as between the franchisor and franchisee; and
- whether a specialist retail valuer should be exempted, as currently in NSW, from liability for anything done or omitted to be done in good faith for the purposes of a determination of a current market rent determination under the Act.

It is also noted that on 25 June 2014, the Senate referred an inquiry into the need for a national approach to retail leasing arrangements to the Senate Economics References Committee for inquiry and the Committee is to report by the 8th sitting day in 2015. The terms of reference for the inquiry are:

> The need for a national approach to retail leasing arrangements to create a fairer system and reduce the burden on small to medium businesses with associated benefits to landlords, with particular reference to:
>
> a. the first right of refusal for tenants to renew their lease;
>
> b. affordable, effective and timely dispute resolution processes;
>
> c. a fair form of rent adjustment;
>
> d. implications of statutory rent thresholds;

e. bank guarantees;

f. a need for a national lease register;

g. full disclosure of incentives;

h. provision of sales results;

i. contractual obligations relating to store fit-outs and refits; and

j. any related matters.

The findings of that inquiry will also be monitored.

4.6 Matters – beyond scope of review

The following issues raised in submissions to the discussion paper and options paper were beyond the scope of this review:

- matters under the statutory review of the QCAT Act;
- mandatory lease registration;
- establishment of a public register or other forum to provide retail sector stakeholders with market information (i.e. shopping centre turnover, essential lease provisions and details of other contractual information such as landlord incentives);
- development of industry codes of practice;
- regulating the collection, use or reporting of tenant turnover information by shopping centre landlords;
- the insurance market for retail businesses;
- the registration/qualifications of specialist retail valuers under the *Valuers Registration Act 1992* and valuation standards;
- issues relating to real estate investment trust business/economic models and processes;
- business disruption compensation for body corporate works;
- landlord recovery of land tax from retail tenants;
- deregulation of allowable trading hours for shopping centres;
- electricity on-supply by landlords to tenants in shopping centres ;and
- environmental sustainability measures for retail shopping centres.

While recognising the importance of these matters to retail sector stakeholders, they were considered beyond scope on the basis that they:

- can (or should) be appropriately addressed through commercial negotiation between the lease parties, or by industry-driven initiatives or education measures; and/or

- raise policy or legislative considerations that extend beyond the regulation of retail shop leases in Queensland in accordance with the objectives of the Act.

4.7 Amendments to the *Retail Shop Leases Regulation 2006*

Related amendments to the *Retail Shop Leases Regulation 2006* (the Regulation) are proposed following passage of the Bill.

These amendments include the following consensus recommendations by the Reference Group to increase tenant protection:

- amend section 8 of the Regulation (which prescribes the particulars for a legal advice report under section 22D of the Act) so that the report must include a statement about the tenant's insurance and indemnity obligations under the proposed lease (see item 5.5.3 of Reference Group Report); and

- amend section 5 of the Regulation (which prescribes the particulars for the assignor's disclosure statement under section 22B of the Act) to require disclosure to the assignee of any arrears or breaches for which the landlord has not issued notice; and any rent abatement in favour of the assignor (see item 5.5.3 of Reference Group Report).

The Regulation may also need to address the outcomes of an industry review of the lessor disclosure statement. Many stakeholder submissions to the review sought a simplified and standardised lessor disclosure statement. The Reference Group has noted that a standardised lessor disclosure statement would be a key red tape reduction measure and has recommended further consideration of this issue by industry (see below).

4.8 Red tape reduction

The amendments in the Bill are directed to streamlining the Act, enhancing commercial flexibility and reducing the regulatory burden for the Queensland retail sector, while continuing to safeguard retail tenant interests. Some amendments also align with the position in other key eastern seaboard States to enhance operational efficiency and legal certainty for landlords and tenants operating across those jurisdictions.

In accord with the terms of reference, identifying opportunities for reducing the regulatory burden on the Queensland retail sector was a key focus for the Reference Group in making recommendations to the Government on the review.

Part A of Attachment 4 to the Reference Group Report sets out the Reference Group recommendations and outcomes that would reduce red tape. Recommended red

tape reduction measures in the Bill include: narrowing the coverage of the Act by excluding certain categories of leases; streamlining procedural requirements; allowing flexibility for waiver of the lessor disclosure period; providing for reasonable exclusions from compensation requirements; removing unnecessary offences; and removing the existing requirement for mandatory statutory review of the Act every seven years.

The review has also had regard to the objective of red tape minimisation as a factor in resolving not to support various changes to the Act which would have the effect of increasing the regulatory/compliance burden on retail tenants and/or landlords. For example, the review did not support: requiring trading details to be provided to specialist retail valuers for the purpose of current market rent determinations; financial adjustments for unspent advertising and promotion contributions; or extending the disclosure requirements or the implied minimum lease conditions to short term leases.

The Reference Group considered that a landlord disclosure statement that is standard in substance, form and terminology for use at least in Queensland, New South Wales and Victoria (standardised lessor disclosure statement) would achieve significant red tape reduction and costs savings to the industry. The Reference Group recommended further consideration of this issue by industry, with supporting legislation in due course.

Part B of Attachment 4 to the Reference Group Report sets out Reference Group recommendations or outcomes which would impose additional administrative or compliance requirements/ obligations, and may arguably increase red tape - for example, requiring the lessee/ franchisor to give disclosure to the franchisee; and requiring the legal advice report to also include a statement about the tenant's insurance and indemnity obligations under the lease. However, the Reference Group considered that, on balance, any associated increase in the regulatory burden for landlords and/or tenants for these measures would be justified.

5 CONCLUSIONS

The outcome of this review is the finding that generally the provisions of the Act remain appropriate in providing a framework for addressing imbalance in negotiating power and access to information between major shopping centre 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 review has identified areas for clarification, improvement and red tape reduction.

The Government thanks those who made submissions to the discussion and options papers. Special thanks are extended to members of the Reference Group for contributing their valuable time, knowledge and expertise to the review and for their co-operative approach to resolving issues, as demonstrated through the high level of consensus in the Reference Group Report.

As acknowledged in this report, there are a number of issues where, based on the information provided through the review process, the Government has not been

persuaded to change the current Act but will instead maintain a watching brief, particularly where a change would remove existing protections from retail tenants.

The Bill has been drafted to reflect the outcomes of the review. Where current provisions are working well and are commonly understood by industry, they have generally been maintained in their current form.

The Government wishes to ensure that Queensland's retail shop lease legislation is fair appropriate in the commercial context and welcomes further comment while the Bill is before the House and parliamentary committee.

Non-government stakeholder submitters
Retail Shop Leases Act Review (Qld)

Retail sector stakeholders:

Australian Retailers Association

National Retail Association

Lease 1 (submissions on behalf of Franchising Council of Australia, Pharmacy Guild of Australia Qld and Restaurant and Catering Qld)

Queensland Newsagents Federation

Chamber of Commerce & Industry Qld

Shopping Centre Council of Australia

Property Council of Australia

Queensland Investment Corporation

AMP Capital Shopping Centres Pty Ltd

Colonial First State Global Asset Management

North Queensland Airports

Urbis

Leasing Information Services (independent national retail lease data provider)

Michael Thomas Lloyd (publisher, Shopping Centre News)

Retail Food Group

Viktor Jakupec (Aldi Stores, Stapylton region)

Prouds Jewellers

Australian Sporting Goods Association Inc

Australian Property Institute

Real Estate Institute of Queensland

Royal Institute of Chartered Surveyors

Donald Gilbert (Australian Lease & Property Consultants, specialist retail valuer)

Malcolm Macrae (specialist retail valuer and former member of Retail Shop Leases Tribunal)

Two individual small business retail tenants

One individual small business landlord

Legal stakeholders:

Queensland Law Society (QLS)

McCullough Robertson Lawyers

MacDonnells Law Cairns

Arthur Comino Solicitors

Stephanie Hicks (Herbert Geer)

Haney Lawyers

Broadley Rees Hogan Lawyers

Dr Jenny Buchan (Australian School of Business, UNSW)

Derek Sutherland (HWL Ebsworth)

Simon Young

Other:

Local Government Association of Queensland

Statutory review of the *Retail Shop Leases Act 1994* (Qld)

Reference Group Report

December 2013

This is the report of the Reference Group, formed by the Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice (the Attorney-General), to assist the Queensland Government in deciding the outcomes of the statutory review of the *Retail Shop Leases Act 1994* (the Act).

Background

The purpose of the statutory review of the Act is to decide whether its provisions remain appropriate for the Queensland retail sector.

Key objectives of the current review are to identify opportunities to:

- improve the efficiency and effectiveness of the Act;
- reduce red tape and compliance costs for retail tenants and landlords;
- continue to address imbalance in negotiating power/information access, without unduly interfering with commercial arrangements or outcomes; and
- to the extent appropriate for Queensland, align with key eastern seaboard states to enhance operational efficiency and legal certainty for stakeholders operating across jurisdictions.

For the initial phase of the review, the Department of Justice and Attorney-General released, and conducted public and targeted consultation on, a discussion paper.

In May 2013, the Attorney-General released for public consultation a comprehensive paper setting out issues and options for changes to the Act raised by stakeholders through the earlier consultation Options Paper).

Written submissions were received from 21 stakeholders - the Australian Property Institute, the Australian Retailers' Association, retail shop lease specialist Lease 1, the National Retail Association, the Property Council of Australia (QLD Division), the Queensland Law Society, the Shopping Centre Council of Australia, small business tenants, individual landlords, retail leasing information providers, institutional landlord interests, a major independent retailer, a specialist retail valuer, a national industry association, legal practitioners and an academic.

Reference Group

Members

In May 2013, the Attorney-General invited nominations from key retail sector industry and professional bodies to participate on a Reference Group to assist the Government in deciding the outcomes of the review.

The Reference Group members were, as follows:

Philip Willington	Australian Property Institute (API)
Russell Zimmerman	Australian Retailers Association (ARA)
Greg Hassall	Large Law Firm Group (LLFG)
Phillip Chapman	Lease 1 (L1)
Trevor Evans/ Michael Lonie	National Retail Association (NRA)
Tim Logan	Pharmacy Guild of Australia (PGA)
Jennifer Williams	Property Council of Australia (QLD Div) (PCA)
Matthew Dunn	Queensland Law Society (QLS)
Ann Nugent	Queensland Newsagents Federation (QNF)
Milton Cockburn	Shopping Centre Council of Australia (SCCA)
Nick Behrens	Chamber of Commerce & Industry Queensland (observer only)

Participation by the CCIQ in the reference group process was on an observer only basis (except as indicated in this report).

Terms of reference

The Reference Group was tasked with considering the Options Paper and related submissions and making recommendations to Government on appropriate amendments to the Act.

In so doing, the Reference Group was asked to identify/clarify key areas of consensus and difference; and facilitate necessary industry and technical input to the review, including the perspective of those operating both locally and nationally.

Key guiding considerations for the Reference Group were the need for balance between safeguarding retail tenant interests and ensuring government regulation does not unnecessarily interfere with commercial dealings/relationships; and opportunities for reducing the regulatory and compliance burden on business. The terms of reference for the Reference Group are **Attachment 1.**

Process

The Reference Group met in Brisbane on five occasions between 11 July and 29 August 2013. The Reference Group process was conducted pursuant to the terms of reference through round table individual member input, discussion and information sharing. Meetings were chaired, and secretariat services provided, by officers of the Department of Justice and Attorney-General.

Reference Group outcomes:

The recommendations and outcomes of the Reference Group's review are set out, with relevant considerations, in the table at **Attachment 2**. For ease of reference, the items and numbering in the table correspond with those in the Options Paper.

There were many issues/options on which the Reference Group agrees either that: the Act is currently working well and no change is required; or amendment to the Act would be desirable. These are recorded in the table as Reference Group recommendations.

Some recommendations for change include:

- clarifying the operation of various definitions and provisions;
- ensuring the reasonableness of required timeframes under the Act;
- enhancing disclosure to tenants and franchisees;
- enhancing tenant protection by:
    - ensuring that a tenant is only liable to refurbish/refit the leased shop during the lease term if the lease gives sufficient details of the nature, extent and timing of the required refurbishment/refitting;
    - requiring the landlord to make available to the tenant a marketing plan detailing the landlord's proposed advertising/promotion expenditure for a relevant accounting period; and
    - providing for the release of the assignor tenant by the landlord to include the assignor tenant's guarantor(s);
- clarifying matters that may be included in a landlord's outgoings and excluded uses for the purposes of apportioning those outgoings;
- clarifying that unspent promotion amounts can be carried forward for application to future advertising/promotion of a centre;
- providing that a landlord's liability for compensation for business disruption does not apply where action is a reasonable response to an emergency;

- clarifying and improving the efficiency of current market rent determination processes;
- clarifying and streamlining the jurisdiction of QCAT in retail shop lease matters; and
- removing unnecessary offences.

Technical amendments recommended for clarifying and streamlining the operation of the Act are set out in **Attachment 3**.

Where members' views differed on an issue/ option, those views are noted as Reference Group outcomes. These issues / options include:

- whether leases with a floor area greater than 1000m^2 should be excluded from the Act;
- whether leases with listed corporations/their subsidiaries as tenant should be excluded from the Act;
- whether certain disclosure/ notice requirements could be removed or strengthened;
- whether tenants should be free to opt out of certain current requirements;
- whether specialist retail valuers should have immunity in current market rent determinations;
- whether gross leases should be mandated;
- how the Act should operate in relation to franchisees' rights to notices and compensation;
- the timeframe for various notice requirements;
- whether the unconscionable conduct test should be replaced with an unfair conduct test;
- whether liquidated damages clauses in retail shop leases should be prohibited or regulated; and
- for retail shop lease disputes, whether mediation requirements should be compulsory.

Red tape reduction:

In accord with the terms of reference, identifying opportunities for reducing the regulatory burden on the Queensland retail sector was a key focus for the Reference Group. The red tape and related considerations for the issues/options considered by the Reference Group are set out in **Attachment 2**.

Potential key red tape reduction outcomes identified through the Reference Group process are summarised in part A of **Attachment 4**. They include: narrowing the coverage of the Act by excluding certain categories of leases; streamlining procedural requirements; allowing for opt out from certain current obligations/requirements; providing for reasonable exclusions from compensation requirements; and removing unnecessary offences.

In addition, the Reference Group considers that a uniform landlord disclosure statement for use at least in Queensland, New South Wales and Victoria would achieve significant red tape reduction and costs savings to the industry. The Reference Group recommends further consideration of this issue by industry, with supporting legislation in due course.

Part B of **Attachment 4** sets out recommendations for various legislative amendments which would impose additional administrative or compliance requirements/ obligations, and may arguably increase red tape. However, the Reference Group

considers that, on balance, any associated increase in the regulatory burden for landlords and/or tenants for these measures would be justified.

For example, the Reference Group has recommended that a tenant's legal advice report include a statement about the tenant's insurance and indemnity obligations under the lease to ensure they are professionally informed in these matters.

The Reference Group also had regard to the objective of red tape minimisation as a factor in resolving not to support various changes to the Act which would have the effect of increasing the regulatory/compliance burden on retail tenants and/or landlords. For example, the Reference Group has not recommended extending disclosure requirements to short term leases.

Attachment E

Terms of Reference for Retail Shop Leases Review Reference Group Process

June – September 2013

The operation of the *Retail Shop Leases Act 1994* (Qld) (the Act) is under statutory review by the Attorney-General to decide whether its provisions remain appropriate.

The objectives of the review are to identify opportunities for:

- improving the Act's efficiency and effectiveness;
- reducing red tape for retail 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 between retail shopping centre tenants and landlords, while not interfering with commercial arrangements or outcomes;
- to the extent appropriate for the Queensland retail sector, harmonising the Act with the laws of other States/Territories for enhanced operational efficiency and legal certainty for retail businesses operating across jurisdictions; and
- clarifying and simplifying the Act, as appropriate (the review objectives).

The reference group is requested, having regard to the review objectives, to:

- consider the options and issues set out in the Attachment to the options paper released on 22 May 2013 (options paper), together with stakeholder submissions in response to that paper;
- identify key areas of stakeholder difference, consensus or scope for compromise;
- provide targeted practical, commercial and technical input to the review, including identifying and/or clarifying the basis for and extent of key stakeholder support and opposition to various options; and
- make recommendations to the Attorney-General on the options and issues set out in the options paper.

The reference group should have regard to:

- the need to maintain an appropriate balance between safeguarding the interests of retail tenants and ensuring that government regulation does not unnecessarily intrude into commercial dealings or relations;
- opportunities for reducing the regulatory and compliance burden on business, and for improved business and economic outcomes;
- relevant evidence, statistical data and cost benefit analysis; and
- the position in other States/Territories.

Attachment 2

Statutory Review: *Retail Shop Leases Act 1994* Queensland

Reference Group Report

Table of Recommendations and Outcomes

December 2013

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Statutory review of the *Retail Shop Leases Act 1994* (Qld)

Reference Group Review

Table of Recommendations and Outcomes

December 2013

Item	Option or Issue	Reference Group recommendation/outcome
1.0 - Object of the Act		
	Whether the object statements in section 3 and 4 of the Act remain appropriate.	**Reference group recommendation:** No change - the object statements remain appropriate for the Queensland retail sector.
2.0 - Leases excluded from operation of Act		
2.1 - Floor area exclusion		
	Current position: 1000m^2 plus retail tenancies are excluded under the Act only if the tenant is a listed corporation/subsidiary. (ie. the Act does not cover leases by major supermarkets, department stores or leading 'mini-major' camping/ outdoor/sporting goods retailers). **Option:** Exclude from the operation of the Act all leases with a floor area greater than 1000m^2 (1000m^2 plus retail tenancies). **Note**: The reference group noted that: • a 1000m^2 floor area limit would not affect most small to medium businesses (ie. the average floor area of a specialty store in a shopping centre is 100m^2 - 200m^2); • 1000m^2 plus retail tenancies currently covered by the Act are generally either: large format/bulky goods retailers (ie. bedding, furniture, electrical) with a significant corporate structure or independent supermarkets located in smaller neighbourhood centres.	**Reference group outcome:** No agreement and divided views on option: • support amendment per option: SCCA/PCA/ NRA/ QLS/LLFG • prefer no change but no objection having regard to objectives of Act/harmonisation with other States/Territories: L1 • oppose - maintain status quo: ARA/CCIQ/ API • no view - QNF/PGA (not an issue for newsagency/ pharmacy sectors) **Red tape reduction:** If implemented, the option would: • significantly reduce regulation of the Qld retail sector; and • align with NSW, WA, ACT and the NT.

Item	Option or Issue	Reference Group recommendation/outcome
	Reference group considerations: ***Opposing views:*** • There is no linear relationship between the size of business premises and the sophistication of the tenant. • The option would remove from the protection of the Act independent retailers operating family or individually owned businesses from leased premises with a 1000m^2 plus floor area (for example: independent supermarkets, nurseries, furniture/carpet stores). ***Supporting views:*** • A strict 1000m^2 threshold (applicable in NSW since 1994) is: – a permanent and objective measure broadly indicative of sophisticated tenancies; – consistent with the underlying principle that the Act should protect only small to medium sized retail businesses (rather than sophisticated tenants). • The majority of 1000m^2 plus retail tenants are either: listed corporations their subsidiaries (already excluded under the Act - see item 2.2 below); large proprietary limited companies with a national corporate structure and/or significant business network; or proprietary companies associated with a major international group/corporate structure. • Small to medium size retailers with a 1000m^2 plus floor area are generally located outside of major shopping centres (ie. in smaller neighbourhood centres; high street; shopping strip or stand alone sites), where an imbalance in bargaining power between landlord and tenant is less likely (ie. independent landlord cf. major institutional landlord). • If the option is implemented, special provision to enable particular types of business/premises with a 1000m^2 plus floor area to be considered for protection under the Act would not be necessary/appropriate as: – there are relatively few examples of small businesses that would lose protection under the Act, and these businesses are unlikely to be located in major shopping centres; – there is no evidence that excluded small business tenancies in NSW (or other jurisdictions where the exclusion has applied for many years) are worse off than their counterparts in Qld; and – it is not possible/practicable to legislate for every scenario.	

<table>
<tr><th>Item</th><th>Option or Issue</th><th>Reference Group recommendation/outcome</th></tr>
<tr><td colspan="3">2.2 - Exclude leases by publicly listed corporation</td></tr>
<tr><td></td><td>Current position:
Leases by a publicly listed corporation are only excluded under the Act where the floor area is 1000m^2 or more.
Option:
Exclude from coverage by the Act <u>all</u> leases where the tenant is:
• a listed corporation/subsidiary (within the meaning of the Corporations Act); or
• a body corporate with securities listed on a foreign stock exchange/its subsidiary (within the meaning of the Corporations Act)</td><td>Reference group outcome:
No agreement and divided views on option:
• support: SCCA/ PCA /LLFG
• oppose (maintain status quo): NRA/ L1/ ARA/ CCIQ/ QLS - particular concern re impact on franchisee’s entitlement to statutory compensation from landlord for business disturbance
(API/ QNF/ PGA no particular view)
Red tape reduction:
Amendment in terms of the option would:
• significantly reduce regulation of the Qld retail sector; and
• align with Vic, WA, SA and NT.</td></tr>
<tr><td></td><td colspan="2">Reference group considerations:
Opposing views:
An outright listed corporation exclusion (i.e. the option) would operate to deprive a significant proportion of Qld retail franchisee businesses of the benefits of statutory protection under the Act. This is because the majority of franchise networks are based on a structure where the franchisor (which is a listed corporation/subsidiary) leases the premises from the landlord and grants the franchisee a license to occupy the premises in conjunction with the franchise agreement.
The exclusion would significantly disadvantage franchisees (as the ‘end users’ operating the business from the leased premises) because it would:
i) result in franchisees losing their existing entitlement to compensation from the landlord for business disruption under section 43 of the Act;
ii) be open to landlords to exclude minimum lease standards which would otherwise flow from the franchisor to the franchisee as the ‘end user’ under the license to occupy arrangement (ie. notices and compensation for relocation/demolition; rent reviews, end of lease provisions, dispute resolution);
iii) impose additional financial burden on franchise networks (and ultimately franchisees) through landlords passing on outgoings prohibited under the Act (ie. land tax, capital costs); or additional/excessive legal costs for lease preparation/negotiation of lease;
iv) potential increased commercial risk (and associated competitive disadvantage) for the franchisor and franchisee due to (i) to (iii) above;
v) give landlords leverage to agree to lease to franchisees directly on less advantageous terms than they would to the franchisor, who has greater</td></tr>
</table>

Item	Option or Issue	Reference Group recommendation/outcome
	bargaining power to negotiate standard lease amendments necessary for the practical operation of the franchised business. L1/NRA/ARA members hold these views based on their direct involvement with retail lease negotiations/disputes across jurisdictions, and general industry experience. They are also concerned that a listed corporation exclusion may: • create a two-tiered system in major shopping centres. For example, an excluded tenancy lease for a particular retail use could include provisions that are prohibited in leases subject to the Act (ie. ratchet rent clauses; or rent review timeframes/formulas that do not comply with section 27 of the Act). This may distort competition and drive up centre rents for other comparative use tenancies; • operate as a barrier to market entry for small/medium business (ie. encourage landlords to preference listed corporations in order to circumvent the Act). In addition to the disadvantages listed above, the QLS is concerned that where a listed corporation's lease is assigned to a non-listed entity, the incoming assignee would not have the protection of the Act. ***Supporting views:*** Listed public corporations do not need protection under the Act as they are sophisticated tenants with significant bargaining power and extensive financial/professional resources. The original intent of the Act was to protect small to medium sized retail tenants who have insufficient bargaining power/resources/business acumen to make informed business decisions and protect their own interests in negotiations with major shopping centre landlords. Supporting members noted that: • there is no evidence from Vic/SA/WA (where the listed public corporation exclusion applies) that: franchisees are worse off than their Qld/NSW counterparts; or that the exclusion has created a two-tiered system or barrier to entry for small/medium business in major shopping centres; • individual/family owned franchise businesses are generally part of a national or broader corporate structure; and/or have the franchisor's support and franchise brand/network to bolster their bargaining power; and • if the option was adopted, the Act would not apply where a listed corporation assigns to a non-listed entity because of existing section 15(1). Section 15(1) is necessary to provide legal certainty where retail businesses change hands and also it is open to an incoming tenant to exercise due diligence and negotiate a lease on terms/conditions acceptable to them before taking the assignment.	
2.3 - Exclusions within common area of shopping centre		
	Option: Exclude from the definition of *retail shop lease* automated teller machines (ATMs) and vending machines within common areas of a retail shopping centre. (See also item 6.4.4 - apportionment of landlord's outgoings)	**Reference group recommendation**: amend per option. Technical amendment to clarify that commercial arrangements for the operation of ATMs (kiosk and wall mounted) and vending machines situated in common areas of a shopping centre are not subject to the Act.

Item	Option or Issue	Reference Group recommendation/outcome
2.4 - Exclude leases by tenant operating business for landlord		
	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	**Reference group recommendation:** amend per option. **Red tape reduction:** The option would: • remove unnecessary regulatory burden for relevant businesses; and • align with NSW, Vic, NT and Tas.
	Reference group consideration: The exclusion operates effectively in NSW and would cover retail outlets (such as food outlets and clothing/ equipment stores) which are: • located within non-retail premises or facilities (ie. cinemas, bowling alleys, golf courses, fitness centres); and • managed/operated on behalf of the landlord (ie. the cinema operator or fitness centre owner).	
2.5 - Exclude non-retail leases in shopping centre		
	Current position: The Act currently applies to premises situated in a retail shopping centre, whether or not a retail business is conducted from those premises. Stakeholders have sought clarification on whether, or the extent to which, the Act covers commercial offices or non-retail service tenancies (ie. medical, legal or accounting practices, real estate agents) located in a retail shopping centre, or certain parts of the centre. **Option A:** Exclude from the definition of *retail shop lease* premises that are: • situated in an office tower that is part of a retail shopping centre; and • not used wholly/predominantly for carrying on a retail business. **Option B**: Amend definition of *retail shopping centre* so that, if the premises are in a building with two or more floor levels, the centre excludes those levels of	**Reference group outcome:** Members agreed in principle that the Act should not apply to non-retail leases in an area of a shopping centre generally regarded/identified as commercial or for non-retail service providers. However, there were divided views on an appropriate form of exclusion: • Option A: supported by SCCA/ PCA/ CCIQ/ LLFG • Option B: supported by L1/ NRA/API • Option C: in principle support by QLS PGA/QNF - no particular view on this issue. **Red tape reduction:** Each option is directed to providing greater certainty for retail sector stakeholders and removing unnecessary regulatory burden for both landlords and non-retail tenants.

Item	Option or Issue	Reference Group recommendation/outcome
	the building for which the predominant use is non-retail. (see definition of *retail shopping centre* below*)* **Option C:** Exclude non-retail tenancies within identifiable "commercial" parts of land containing a retail shopping centre.	
	Reference group considerations: A *retail shopping centre* for the purposes of the Act is a cluster of premises where: • five or more of the premises are used for retail business; • all of the premises have the same owner/landlord, or comprise a single community titles scheme; • all the premises are located in one building; or two or more buildings separated by common areas, other areas owned by the owner or a road; and • the cluster of premises is promoted/generally regarded as a shopping centre, mall, court or arcade. The reference group noted the issue of non-retail leases in centres is of increasing relevance as planning authorities preference mixed use shopping centre developments with retail premises on the ground/lower floor(s) and office premises above. ***Supporting views - option A:*** This option would align with the NSW Act and clarify that all non-retail leases in an office tower that is part of a shopping centre are not covered by the Act. Any premises in the tower that are leased wholly/predominantly for carrying on a retail business would still be covered by the Act. The term 'office tower' does not need to be defined in the Act as it is readily understood and there have not been difficulties/uncertainties with its interpretation in NSW. ***Supporting views - option B:*** This option is preferred by the retail members on the basis it would also apply to smaller mixed use shopping centre developments. For example, the office tower exclusion (option A) would not apply to a centre comprising only two or three levels, with the top level leased for non-retail purposes (ie. financial services, legal or medical tenancies). LLFG and SCCA: • noted that option B is not dissimilar to the former definition of *retail shopping centre* in the Qld Act (ie. prior to the 2006 amendments), which distinguished between floor levels within a centre; and • raised concern that option B may also result in technical and practical uncertainties/difficulties associated with changes in patterns of use or tenancy	

Item	Option or Issue	Reference Group recommendation/outcome
	mix over time, including increased complexity for centre lease administration/ management. **Option C:** QLS suggests that the definition of *retail shopping centre* may be amended to exclude part of a building or cluster of premises which: • would generally be regarded as a separate or discrete part of the shopping centre, shopping mall, shopping court or shopping arcade; and • contains less than 5 premises used wholly or predominantly for carrying on retail businesses. Examples: 1. a level of a building above a retail shopping centre used as a commercial office. 2. a commercial office tower within a retail shopping centre (even if the primary means of access to the tower is through the shopping centre) 3. a stand-alone medical centre or child care centre within the car park of a retail shopping centre.	
2.6/2.7 - Exclude leases by Commonwealth, State and local governments		
	Whether the Act should continue to apply to Commonwealth/State/local government tenancies situated in retail shopping centres. State government tenancies include Police Beat shopfronts. Local government tenancies include libraries and community service centres. **Option A:** Exclude from the coverage of the Act leases where the Commonwealth, State or a local government is the tenant. **Option B** The Act continues to apply to Commonwealth, State and local government tenancies located in retail shopping centres, while excluding unnecessary procedural requirements such as: lessee disclosure and provision of financial/legal advice reports to the landlord; landlord's obligation to give notice of option to renew/extend.	**Reference group outcome:** Divided views: • Option A: supported by SCCA/ PCA/ QLS/ LLFG/ PGA/ API • Option B: supported by NRA/ L1 (QNF/ARA - no particular view on this issue) **Red tape reduction:** Option A would remove unnecessary regulatory burden for landlords. Option B would streamline the Act by removing unnecessary procedural requirements in respect of government tenancies. These include: • lessee disclosure and provision of financial /legal advice reports to the landlord; • landlord's obligation to give notice of option to renew/extend lease.

Item	Option or Issue	Reference Group recommendation/outcome
	Reference group considerations: Members supporting option A consider that Commonwealth, State and local governments do not require the protections of the Act as they are sophisticated /well resourced tenants with superior (or at least sufficient) bargaining power. Members supporting option B are of the view that government tenancies situated in a retail shopping centre (other than an office tower or other predominantly commercial part of the centre) should be covered by the Act in line with other retail and non-retail tenancies in the centre. In particular, the following minimum standards are premised on the consistent treatment of shopping centre leases to promote fair and equitable leasing practices: • landlord disclosure (incl. proposed alteration works; current legal proceedings; right to terminate lease); • audited outgoings statement/outgoings apportionment; • relocation/demolition provisions; • implied rent provisions (incl. ratchet rent prohibition).	
3.0 - Clarification of defined terms		
3.1 - Definition of 'floor area'		
	Whether the term *floor area* needs to be defined for the purposes of the Act.	**Reference group recommendation:** No definition required.
	Reference group considerations: The Property Council of Australia's *Method of Measurement for Lettable Area* (PCA Guideline) is the accepted national industry standard and provides extensive guidelines for determining lettable areas in retail shopping centres or leased buildings. **NRA note:** NRA notes that the issues it raised in earlier consultation regarding uncertainty for the calculation of floor area for pad sites; and apportionment of outgoings for pad sites and shopping strip formats with commercial/ residential premises above retail areas are sufficiently addressed under the PCA Guideline and section 38(2) of the Act respectively.	
3.2 - Definition of 'lease' - implications for franchise arrangements		
	Issue: A *lease* for the purposes of the Act is currently broadly defined and extends to a licence to occupy the shop. This broad definition aligns with other States/Territories, except Vic.	**Reference group outcome:** Resolved to retain current definition of *lease* - subject to appropriate amendment to clarify that, as between the franchisor/franchisee, there can only be one claim against the landlord for compensation under section 43

Item	Option or Issue	Reference Group recommendation/outcome
	The existing definition arguably captures a significant proportion of franchise arrangements, which provide a licence to occupy. Stakeholders have sought clarification about the extent to which the Act applies as between franchisor and franchisee. **Option:** Amend definition of *lease* to mean a lease/sublease, or agreement for either. This narrower definition is consistent with the position in Vic and would have the effect of excluding from the operation of the Act a right/licence to occupy premises.	(1) of the Act (business disruption compensation); or compensation under the relocation/demolition provisions - ie. landlords should not be subject to double compensation claims by franchisor and franchisee. For business disruption compensation - see item 6.7.7 below. For relocation/demolition compensation - see item 6.8.6 below.
	Reference group considerations: Members noted that the majority of retail franchise systems/networks are based on licence to occupy, rather than sublease. There is no contractual relationship between landlord and franchisee. Rather, the licence to occupy between the franchisor/franchisee binds the franchisee to the terms of the lease between the franchisor/landlord. On one view, the objective of the Act is to regulate the landlord/tenant relationship - not to extend protection to the franchisee. A franchisee's rights/interests under the licence to occupy are a matter between franchisor/franchisee, whose relationship is regulated by the Franchising Code of Conduct under the *Competition and Consumer Act 2010* (Cth). The Act should not attempt to regulate or remedy franchising issues. Another view is that franchisees should be protected under the Act as the 'end user' operating the retail business from the leased premises.	
3.3/3.4 - Regulation of short term leases		
	Current position; Leases for a term of not more than 6 months, including any option period (*short term leases*) are not currently regulated under the Act. The disclosure requirements, minimum lease standards and dispute resolution provisions do not apply. **Option A:** Amend so that the following minimum lease standards under the Act apply to short term leases - Part 6, division 7 (implied compensation);	**Reference group recommendation:** Consensus - option A and/or option B not supported. Recommend: retain status quo (ie. short term leases, including rolling leases, are not regulated under the Act). **Red tape considerations:** Amending the Act in terms of option A and/or option B would significantly increase the regulatory burden on, and costs of doing business for, both retail landlords and tenants. In particular:

<table>
<tr><th>Item</th><th>Option or Issue</th><th>Reference Group recommendation/outcome</th></tr>
<tr><td></td><td>division 8 (lease dealings); division 8A (unconscionable conduct); and division 9 (relocation/ demolition).

Option B:

Amend so that successive or continuing short term leases entitling a tenant to uninterrupted possession for more than one year (rolling leases) are covered by the Act. This would align with NSW/Vic.</td><td>• the proportion of short term retail leasing (including casual mall licensing) is growing across the retail sector as the industry responds to cyclical/structural challenges, including sustained periods of low economic growth and increasing online/international competition; and

• extending government regulation to short term leases would be counter-productive and a disincentive for an increasing number of retail business models based on, or benefitting from, the low capital risk and flexibility inherent in short term leases (cf. the commitment of a standard fixed term retail shopping centre lease - ie. 5 years).</td></tr>
<tr><td></td><td colspan="2">Reference group considerations:
The reference group considers that the ongoing exclusion of short term leases from regulation under the Act is appropriate for the Queensland retail sector. The benefits (for retail businesses and landlords) include:
• reduced complexity of lease negotiations and minimal red tape/compliance costs;
• flexibility for short term business opportunities - such as ‘pop-up shops’ or kiosks in common areas of the centre (casual mall licenses), or other casual tenancy agreements for the occupation of vacant stores. This includes periods prior to or during centre renovation/redevelopment; and of low economic activity/demand;
• opportunity for start-up businesses to test the market for their products and learn/assess the feasibility of the business without the capital expense and long term commitment of a standard term lease.

Casual licensing in shopping centres:

Licenses to occupy common areas of a shopping centre (casual mall licenses) and other casual tenancy agreements are a common feature in most (if not all) major shopping centres. While the majority of these licenses are for short periods (ie. generally 1or 2 weeks), successive extensions by mutual agreement are not uncommon. These agreements are in simple form and by their nature not generally compatible with provisions of the Act, including the implied minimum terms for relocation/demolition, business interruption and lease renewal. Also, the majority of retail businesses operating under these licenses do not seek standard term leases as they prefer the flexibility and lower cost/capital risk of short term arrangements.

The reference group considers that, if option A and/or B were progressed, the increase in red tape for landlords and casual licensees would outweigh the protections that may accrue to the relative minority of retail tenants who prefer security of tenure but are offered only rolling short term leases due to centre redevelopment, or otherwise at the landlord’s insistence.

Members also noted that:

• it is generally not in a landlord’s interest to have tenants on short term leases. Major landlords usually only insist on rolling short term leases where the centre is being redeveloped as planning/development approval processes may take up to 2 to 4 years;</td></tr>
</table>

Item	Option or Issue	Reference Group recommendation/outcome
	• while some independent landlords (ie. in strip formats/small suburban centres) may insist on successive short term leases to circumvent their obligations/liabilities under the Act, this practice is not widespread. The SCCA also noted that rolling lease provisions were introduced in NSW/Vic due to concerns about landlords using successive short term leases to evade the statutory minimum 5 year lease term that applies in those states. A statutory minimum term does not apply in Qld.	
3.5/ 3.6 - Definition of 'turnover'- online sales; pharmacies		
	Section 9(2) of the Act excludes certain amounts from the definition of *turnover*. **Option A (online sales):** Amend the definition of *turnover* for the purposes of the Act to clarify whether online sales are, or are not, included. **Option B (special provision for pharmacies):** Amend definition of *turnover* in section 9(2) of the Act to exclude: amounts received in relation to and associated with the *Health Act 1953* (Cth), in particular the pharmaceutical benefits scheme (PBS). **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 a 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". There are similar provisions in the NSW and Vic pharmacy legislation.	**Reference group outcome:** Option A: not supported - recommend no change. Option B – division of views: • support: PGA/ L1 • no change: SCCA/ PCA/ QLS • API: lack of consistency in pharmacy sales reporting can cause difficulties for valuers in rent review process. Clarification in Act may assist.
	Reference group considerations: **Option A (online sales)**: Consensus that no amendment required as the words 'business carried on in a leased shop' in section 9(1) are sufficiently broad to cover online sales where the leased shop is used in any way for the sale (ie. the shop is the point from where goods are collected/delivered). Amending in terms of option A would unnecessarily increase red tape for landlords and tenants.	

Item	Option or Issue	Reference Group recommendation/outcome
	Option B (special provision for pharmacies): ***Supporting views:*** Although turnover rent is effectively prohibited in Qld pharmacy leases under the PRA, there is no provision in the PRA preventing a landlord from requiring the pharmacy owners to supply turnover figures (ie. monthly sales results) under the lease. As a result, pharmacy leases in Qld commonly require provision of turnover figures to the landlord despite the fact that the lease does not have a turnover rent provision. This provides an opportunity for landlords to refer to turnover figures when calculating pharmacy rents (ie. on renewal/new lease/market rent review). In particular, the inclusion of dispensing incomes (ie. income derived from the PBS where the service is delivered for, and prices/policies are set by, government) in turnover figures/reporting leads to unfair outcomes for pharmacy businesses by providing landlords with inaccurate indicators to drive rents. While the SCCA Sales Reporting Guidelines introduce the process of only reporting retail front of shop sales (which exclude PBS amounts), landlords generally ignore the guidelines and insist on pharmacies reporting total sales, including PBS amounts. This has caused the market for pharmacy leases to become overly distorted through landlords manipulating data to drive higher than market rental outcomes. For this view, the SCCA (which opposes the option) notes that the Urbis Retail Averages, which record sales and occupancy cost data for shopping centres across Australia, only records pharmacy sales exclusive of the PBS amount. The retail shop lease legislation in WA/SA/Tas/ACT provides that landlords can only require turnover figures if the lease contains a turnover rent provision. As pharmacy legislation in these States also prohibits turnover rent, landlords cannot insist on provision in a lease requiring the supply of turnover figures. The NSW/Vic pharmacy legislation voids a lease provision which gives the landlord access to the books of account for a pharmacy business unless it is for the purpose of determining whether or not the tenant is complying with the terms of the lease. Option B is required to provide transparency, consistency and equity for shopping centre pharmacy rents in Qld. ***Opposing views:*** Option B is not necessary or appropriate because *turnover* is defined in the Act for the purposes of the turnover rent provisions in Part 6 division 2 of the Act. As the PRA voids any turnover rent provision in a Qld pharmacy lease, the definition of turnover in the Act is irrelevant to these leases. Sales reporting by pharmacy tenants to shopping centre landlords, including differences in the way sales are reported, are commercial/industry matters.	
3.7 - Definition for 'renewal' of lease		
	Issue: Whether the Act should prescribe what constitutes *renewal* of a lease for the purposes of the Act. (It does not currently do so). The definition of renewal is relevant to the issue of whether a landlord disclosure statement should be given to a sitting tenant (see item 5.1.5 below)	**Reference group outcome:** In principle support for an amendment to clarify what constitutes *renewal* of a lease. However, no agreement as to appropriate definition: • Option A: supported by API/ QNF • Option B: supported by LLFG/ SCCA/ PCA/ L1/ARA/ PGA

Item	Option or Issue	Reference Group recommendation/outcome
	Option A: 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:** A lease may be renewed under an option on the tenant's part to renew/ extend lease for a further term; or under an agreement (entered into by all parties to the lease) to renew the lease on substantially the same terms and conditions, except as to rent, for a further term. However, if there is a break in the tenant's possession after expiry of the existing lease; and the tenant resumes possession for a further term (whether or not on same terms/conditions as under expired lease), the resumption of possession is taken to be entry into a new lease, rather than a renewal. **Option C:** 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.	• Option C: NRA supports QLS does not expressly support any of these options but considers (in the context of landlord disclosure to a sitting tenant) that the underlying objectives of the Act require a limited definition of renewal - ie. limited to a lease entered into upon exercise of an option (see item 5.1.5 below). **Notes:** This would be a technical amendment to clarify the application of the Act. Option A: aligns with NSW/SA Option B: aligns with Vic/NT
3.8 - Definition of 'core trading hours'		
	Option: Amend the definition of *core trading hours* at section 51(b)(ii) for the purposes of the Act to clarify that it refers to the hours the *majority* of centre tenants are required by the landlord to keep their premises open for trading.	**Reference group outcome:** Consensus - recommend no change (except QLS) QLS: legal interpretation of the definition in section 51 does not reflect the industry view - Act should be amended to ensure it accords with the common understanding and application.
	Reference group considerations: The QLS proposed this option to address existing uncertainty on the legal interpretation of the definition in light of differing trading hours across the tenancy mix of modern major shopping centres (ie. 24 hour gyms, restaurants, supermarkets, specialty stores). Industry reference group members are of the view that clarification not required as section 51(b)(ii): • only applies where a resolution on core trading hours for the centre has not been passed under section 52 of the Act; and	

Item	Option or Issue	Reference Group recommendation/outcome
	• is widely understood/accepted by the retail sector to mean the core trading hours for the centre decided by the landlord in the absence of a resolution. The core trading provisions in Part 7 of the Act are intended to protect tenants who trade only within core hours from being liable to contribute to centre outgoings attributable to centre trade outside those hours. An amendment in terms of the option would have no impact on this protection.	
4.0 - Operation of the Act and the former Act		
4.1 - Date lease entered into		
	Technical amendment to clarify when a lease is entered into for the purposes of the Act **Option:** Amend section11 of the Act - by inserting a new sub-paragraph (c) - so that 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; or (c) the tenant begins to pay rent under the terms of the lease.	**Reference group outcome:** Consensus - amend per option (other than QLS, which supports no change).
	Reference group considerations: The addition of the reference to the date on which the tenant begins to pay rent under the terms of the lease would: • align with Vic/NSW; and • clarify when a new lease is taken to be entered into where a sitting tenant remains in possession after expiry of the original lease while negotiating a renewal/extension with the landlord. Currently, there can be disputes about whether the tenant has entered into possession under the new lease or is simply holding over under the previous lease. The payment of rent under the terms of the lease indicates that the lease has commenced by way of part performance. **QLS view:** no change to section11 necessary. Option does not overcome the practical difficulty of dealing with a sitting tenant where some lease terms may still be being negotiated after commencement of new lease (QLS proposal at item 5.1.5 below more appropriate solution)	
4.2 - Application of the Act to particular leases		
	Streamline/clarify current application and transitional provisions as appropriate	Reference group to be consulted on drafting of these technical amendments.

Item	Option or Issue	Reference Group recommendation/outcome
4.3 - Repeal section 16 - exempt enterprise leases		
	Option: repeal section16 as unnecessary.	Consensus - recommend repeal. There were no entities registered as exempt enterprises under section 5A of the *Retail Shop Leases Act 1984* (the former Act).
4.4 - Prohibition on contracting out of Act		
	Option: Amend section 19 of the Act to clarify that a provision in any agreement/other document relating to a retail shop lease is void to the extent it purports to contract out of a provision of the Act.	Consensus - recommend amend per option Technical amendment only.
5.0 - Preliminary disclosures about leases		
5.1 - Landlord disclosure to tenant		
5.1.1 - Landlord compliance with disclosure obligation		
	Option A: Amend section 22(1) of the Act so 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.	**Reference group outcome:** Division of views: • SCCA/ PCA/ LLFG / NRA/ PGA/ QNF: support (options A and B) • QLS/ L1: oppose both options (ie. no change) No view: ARA **Note:** legislative amendments as an outcome of the review need to be consistent with achieving uniformity for the landlord disclosure statement (see item 5.1.8 below).
	Red tape reduction: This amendment would remove red tape for landlords and minimise unnecessary information received by tenants, without prejudicing the tenant's entitlement to full disclosure in respect of those matters relevant to the particular lease proposed to be entered into. **Reference group considerations:** Supporting view: landlords should have the flexibility to tailor the disclosure statement according to the lease (ie. to omit unnecessary information that	

Item	Option or Issue	Reference Group recommendation/outcome
	is not relevant to the particular lease). Amendment in terms of options A and B would align with NSW. This would contribute toward achieving a single uniform disclosure statement to be applied in Qld and NSW. Opposing view - no change required as section 49 of the *Acts Interpretation Act 1954* (AIA) applies and promotes certainty. Where an item in approved form of disclosure statement is not relevant to the particular lease, the landlord can simply note 'not applicable'.	
5.1.2 - 5.1.4 Timeframe for landlord disclosure (including waiver)		
	Option A (increase disclosure period): Amend section 22(1) to increase the minimum period within which the landlord must give the disclosure statement to the tenant (the disclosure period) from seven to 14 days before the tenant enters into the lease. **Option B (general waiver***):* Insert a new provision enabling a tenant (who is not a major lessee) to waive/shorten the disclosure period by giving the landlord: (a) written notice of the waiver; and (b) a legal advice report and a financial advice certificate. The landlord would need to give the disclosure statement to the tenant before the tenant obtains legal/financial advice. **Option C (simplify major lessee waiver):** Amend section 22(6) and section 22C(2) to remove the existing requirement for a major lessee who elects to waive the landlord disclosure period to give the landlord written notice stating they have received appropriate financial and legal advice about the lease/assignment (professional advice notification).	Items 5.1.2 to 5.1.4 were considered as a package. **Reference group recommendations:** Option A: not supported - consensus recommend no change to landlord disclosure period Option B: consensus - recommend amendment **Reference group outcome:** Option C: consensus support for amendment (except QLS). **Red tape reduction**: Option B would reduce the regulatory burden for landlords and tenants and reflect the commercial reality of lease negotiation. Option C would reduce red tape by simplifying the existing waiver provision for major lessees, which was inserted by the 2006 Act.
	Reference group considerations **Option A:** The current landlord disclosure period is adequate and aligns with most other States/Territories (including NSW and Vic). **Option B:** A fixed landlord disclosure period can result in practical/commercial difficulties. Option B would permit retail shop leases to be more flexible in their commencement by agreement between the parties.	

Item	Option or Issue	Reference Group recommendation/outcome
	Option C: The professional advice notification is an unnecessary administrative burden as major lessees have sufficient commercial knowledge/ experience to safeguard their own interests. Note: the landlord would still be required to give the disclosure statement to the major lessee before they enter into the lease/assignment. **QLS view*:*** It seems from the 2006 explanatory notes that the major lessee waiver provisions were directed to expediting site entry processes, rather than reducing lessee protections/cutting costs. The current provisions achieve this and balance protections. Also, waiver of legal rights usually requires informed consent. In the absence of an avenue to facilitate obtaining proper advice with respect to their position and obligations, it is difficult to argue that a lessee, even a major lessee, is making a fully informed decision with respect to waiving disclosure from the lessor.	
5.1.5 - Landlord disclosure to sitting tenant on renewal/extension of lease		
	Current provision: The Act currently provides that the disclosure provisions in Part 5 of the Act do not apply to a retail shop lease 'entered into or renewed under an option': section 21(1)(b) Whether a landlord should be required to give disclosure to a sitting tenant on renewal/extension of lease. **Option A:** Amend section 21 to clarify that the disclosure requirements in Part 5 of the Act (including landlord disclosure) do not apply to a retail shop lease entered into/renewed under an option, or otherwise by agreement. **Option B**: Amend so that landlord disclosure is required on renewal/ extension of an existing lease (whether under an option, or otherwise by agreement).	**Reference group outcomes:** Divided views on this issue: • Option A: supported by SCCA/PCA • Option B: supported by QLS/LLFG/NRA/L1/PGA/ARA/QNF/API **Red tape consideration:** Option B would increase red tape for landlords but may be justified on the basis that the disclosure statement provides information beneficial to the tenant's decision to renew/extend (and not otherwise within the tenant's knowledge).
	Reference group considerations **Option A:** Requiring landlord disclosure on renewal/extension of lease would unnecessarily increase the regulatory burden for landlords. A sitting tenant has working knowledge of the centre and access to relevant information through their existing relationship with the landlord or centre management. **Option B:** This amendment is necessary to ensure, so far as possible, that a sitting tenant makes a fully informed decision about whether to renew/extend the lease. In particular, the tenant should be given details of any material issues/changes regarding the centre and possible future actions of the landlord that may impact the future viability of the tenant's business. For example: the expiry of major/anchor tenancies; landlord representations about tenancy mix;	

Item	Option or Issue	Reference Group recommendation/outcome
	landlord's intentions regarding centre redevelopment/ refurbishment. It does not follow from the fact that a tenant has previously signed a lease in the centre that they will necessarily/ reasonably be aware of these fundamental matters, or that they are in a better position to comprehend the complexities of a new lease which may be on substantially different terms. Option B also aligns with the position in the other States/Territories (except WA). ***Timeframes for landlord disclosure under option B:*** The reference group (including SCCA/PCA if option A is not accepted) agreed that: • for renewal under an option - landlord to give disclosure to tenant at least 21 days before end of the current lease term (except QLS, which supports disclosure to be given prior to the time for exercise of the option); • for renewal by agreement - at least 7 days before the new agreement is entered into (except QLS which supports disclosure before tenant signs the lease to overcome the practical problem that it is often not possible to give the statement before the tenant takes possession of the premises as parties are still negotiating lease terms); • in either case above, the tenant may elect to waive the disclosure period. ***Extent of landlord disclosure under option B:*** Broadly, retail representative members consider that full landlord disclosure is necessary/ appropriate to adequately protect the tenant's investment/ livelihood. Landlord and legal stakeholders generally supported more flexible or limited disclosure. The SCCA and PCA noted support for alignment with NSW (ie. landlord option to provide current or updated disclosure). QLS view: for renewal under option (ie, the limited definition of renewal proposed at item 3.7 above) - limited disclosure including: alteration works; shopping centre details; annual centre turnover; major/anchor tenants; floor plan/tenancy mix; customer traffic flow; casual mall licensing and 'other disclosures' at item 27 of current landlord disclosure statement. For renewal by agreement - full disclosure should be required.	
5.1.6 - Tenant's right to terminate for non-compliance/defective disclosure statement		
	Currently, a tenant may terminate the lease within six months if the landlord does not give a disclosure statement, or where the statement is incomplete or false/misleading (defective disclosure): section 22(3) **Option:** Extend the termination period from six months to12 months after the tenant enters into the lease.	**Reference group recommendation:** Consensus - recommend no change
	Reference group considerations: The current six month timeframe within which a tenant is entitled to terminate: • represents a reasonable balance between tenant protection and the landlord having the security/business certainty of a lease;	

Item	Option or Issue	Reference Group recommendation/outcome
	• is a sufficient period for the tenant to come to understand their obligations under the lease and identify issues attributable to defective disclosure, including the trading circumstances of the centre; • aligns with NSW, WA and the NT. The relevant timeframes in Vic and ACT/ Tas are significantly shorter (28 days and 3 months respectively). The reference group also noted that an affected tenant would have: • a statutory entitlement to compensation for loss/damage suffered due to defective disclosure under section 22(4); and • an alternative legal remedy against the landlord for defective disclosure that becomes apparent after 6 months (ie. action for false/misleading conduct, misrepresentation).	
5.1.7 - Tenant's copy of signed lease		
	Option: Amend section 23 of the Act so that, within 30 days after the lease is signed by both parties, the landlord must give the tenant either an original or certified copy of the signed lease (currently).	**Reference group recommendation:** amend per option. **Red tape reduction:** This would reduce red tape for landlords and accord with current leasing practice.
5.1.8 - Uniform landlord disclosure statement		
	Issue: There needs to be a single standardised landlord disclosure statement for (if not nationally) at least Qld, NSW and Vic. While the current landlord disclosure statements in Qld and NSW are effectively aligned in content, and similar in form, they are not identical (see below for Vic). As a result, landlords operating across jurisdictions need to tailor their disclosure statements on a state by state basis to meet differing legislative requirements. The variances in form stem from differing terminology/ references in the respective State Acts and are not substantive. **Context:** The current Qld landlord disclosure statement was agreed to be uniformly adopted with NSW and Vic, and implemented from January 2011 (the	**Reference group outcome:** SCCA/ PCA/ L1/ NRA/ARA/ LLFG/ QLS agreed that: • achieving a single standardised landlord disclosure statement (in both form and content) for at least Qld, NSW and Victoria would be a key measure to reduce regulatory burden; • legislative amendments as an outcome of this review should be consistent with achieving a uniform landlord disclosure statement; • effective implementation of a uniform and commercially appropriate landlord disclosure statement will necessarily involve a two stage process. *Stage1*: industry stakeholders to revise and agree on the form/content for the disclosure statement. *Stage 2*: Government (in consultation with key industry stakeholders and NSW/Vic governments) to consider and implement appropriate legislative/procedural changes to support the industry-agreed uniform disclosure statement (the uniform disclosure process). See also item

Item	Option or Issue	Reference Group recommendation/outcome
	agreed disclosure statement). The agreed disclosure statement was developed in consultation with industry stakeholders as part of a Council of Australian Governments initiative for a national harmonised landlord disclosure statement following the 2008 PC Report. Vic has, earlier this year, unilaterally replaced the agreed disclosure statement with four separate statements according to whether the lease is: a new lease for premises located in/outside of a retail shopping centre; a renewal; or an assignment: *Retail Leases Regulation 2013.*	5.1.1 above. API/ QNF/ PGA: in the absence of industry-specific input, generally support or do not oppose the above. **Red tape reduction:** Achieving agreement on, and an appropriate and consistent legislative framework for, a genuinely uniform landlord disclosure statement for the eastern seaboard would be a major red tape reduction reform. It would significantly reduce unnecessary administrative burden and compliance costs for national landlords. National and Qld-based retailers trading across jurisdictions would also benefit from the consistency/certainty of a streamlined single document, including reduced legal/administrative costs. **Note:** suggestions for changes to the current disclosure statement raised in the review consultation to date to be considered as part of the uniform disclosure process to the extent practicable/appropriate.
5.2.1/ 5.2.2 - Tenant disclosure to landlord (lessee disclosure)		
	Option A: Amend section 22A to require a prospective tenant to give disclosure to the landlord at least seven days before entering into the lease. **Option B:** The lessee disclosure statement should include a declaration by the tenant that they have not relied on any statements/ representations etc by/for the landlord (pre-lease representations), other than those contained in the lease. (Currently, the tenant is required to detail in the statement the pre-lease representations they are relying on: and declare that no other such representations have been made by/for the landlord regarding the lease or business to be carried out at the premises: section 4(g) & (h) Regulation).	Items 5.2.1 and 5.2.2 of the options paper were considered together. **Reference group outcomes** General consensus to retain the requirement for lessee disclosure as it: • is beneficial for both prospective tenants (in particular new/inexperienced small business owners) and landlords; and • assists generally in reducing retail shop please disputes. Option A: consensus - amend per option (except QLS) Option B: consensus - no change (except SCCA/ PCA)
	Reference group considerations: **Option A:** this amendment would dovetail with the timeframe for landlord disclosure (streamlining provision only).	

Item	Option or Issue	Reference Group recommendation/outcome
	QLS: retain status quo - ie. lessee disclosure must be given 'before entry into the lease'. **Option B:** the current tenant declaration regarding pre-lease representations is appropriate and should be maintained. SCCA/PCA: consider option B would minimise frivolous claims by tenants against landlords.	
5.3 - Disclosure on assignments of lease		
5.3.1 - Timeframe for assignor disclosure to assignee		
	Issue: The Act currently requires assignor disclosure to be given to the assignee at least seven days before the assignor requests landlord consent: section 22B. However, it is common for prospective assignees to have entered into a contract for purchase of the business carried on from the leased premises (business sale contract), or an agreement to enter into assignment of lease, well in advance of the assignor requesting landlord consent to assign. Currently, in these circumstances, it is up to the prospective assignee to ensure that their interests are protected by negotiating effective contractual conditions regarding their receipt of suitable disclosure. For example, a right to terminate the business sale contract, or provision that the assignment will not take effect, in the event that disclosure is not provided when required/or is not suitable when received. **Option A:** Amend section 22B to require assignor disclosure to be given to the assignee at least seven days before the assignee is unconditionally bound to accept an assignment of the retail shop lease. **Option B:** Amend so assignor is required to give landlord and assignor disclosure to the assignee/buyer prior to entry into the business sale contract; and to give the assignee a right of termination for the sale contract if there is a	**Reference group outcome:** In principle support for option A on the basis it would assist to address situation where a sitting tenant is acting unconscionably trying to sell the business (except QLS/NRA, which support option B). **Reference group considerations:** Members' stated views on the issue/options: • QLS: the timing of disclosure obligations on assignment needs to accord with the underlying business sale transaction, rather than deal with the assignment of lease as a stand-alone transaction. Little benefit in having disclosure regime for an assignee already legally bound to seek landlord approval and take an assignment of the lease. • LLFG: if disclosure is given prior to the assignment becoming unconditional and there are any misrepresentations between those involved at the contract stage vis a vis those in the disclosure statement, the purchaser has appropriate rights and time to obtain legal advice on any proposed course of action. • SCCA/PCA: seeking to make a business sale contract terminable or to provide for some other relief under the business sale contract is outside the scope of the Act. • The assignor giving proper disclosure on time affects whether the assignor receives the benefit of the statutory release from liability

Item	Option or Issue	Reference Group recommendation/outcome
	failure to provide the disclosure documents at that time.	under section 50A of the Act. This is the critical practical consideration for most assignors and will usually be sufficient motivation for the assignor to ensure it meets its disclosure obligations.
5.3.2 - Additional detail for assignor disclosure		
	Option: Amend section 5 of the Regulation to require the assignor to also 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.	**Reference group recommendation:** consensus to amend per option. **Red tape consideration:** The additional disclosure is justified as it would increase transparency for assignees in regard to their assessment of business potential/risk - and, in turn, facilitate reduction in disputes and the financial/personal costs associated with distressed business sales.
5.3.3/ 5.3.5 - Landlord/ assignee disclosure		
	Landlord disclosure to assignee: Currently, the landlord must give a prospective assignee (who is not a major lessee) a disclosure statement at least 7 days before the assignment is entered into: section 22C(1) ***Option:*** amend so that landlord is not required to give full disclosure to an assignee. Instead, either an abridged form of disclosure given directly to the assignee; or updated disclosure given to the assignor for the purposes of the assignor's disclosure obligation to the assignee. **Major lessee waiver:** Currently, an assignee who is a major lessee may waive the landlord disclosure period by written notice to the landlord. The notice must state that the assignee has received appropriate financial/legal advice about the assignment (professional advice notification). The waiver is taken to be effective only if the landlord gives disclosure before the assignee enters into the assignment: section 22C(2).	**Reference group outcomes:** Consensus to recommend: 1) maintain status quo for full landlord disclosure to assignee; 2) simplify major lessee waiver by removing the professional advice notification (except QLS); 3) amend to allow assignee (who is not a major lessee) to waive/ shorten the disclosure period by giving the landlord: written notice of the waiver; and both legal and financial advice reports; 4) amend to require assignee disclosure to landlord at least 7 days before the assignment is entered into the assignment (except QLS) **Red tape reduction:** Recommendations 2 and 3 would remove unnecessary red tape associated with lease assignments. Recommendation 4 is intended as a streamlining provision only.

Item	Option or Issue	Reference Group recommendation/outcome
	Assignee disclosure to landlord: Currently, the assignee must give disclosure to the landlord 'before the assignment is entered into': section 22C(3). ***Option**:* amend to require assignee disclosure at least 7 days before the assignment is entered into.	
	Reference group considerations: ***Recommendation 1:*** The current requirement for full landlord disclosure directly to the assignee provides transparency and certainty to the assignee regarding its obligations under the lease. In particular, it gives the assignee material information within the landlord's knowledge only. For example, changes to the centre gross lettable area; proposed refurbishment/ redevelopment/ alterations to the shop/ building/ centre/surrounding roads; or current legal proceedings impacting the shop/ building/centre. The current provision is working effectively and is less open to potential uncertainty/confusion for (and as between) the landlord and assignment parties where only an abridged/ updated form of disclosure is given. ***Recommendation 2:*** The professional advice notification is an unnecessary administrative burden as major lessees have sufficient commercial knowledge/experience to safeguard their own interests. This is consistent with the recommendation to simplify the existing provision for major lessee waiver of the landlord disclosure period. ***Recommendation 3:*** Option B corresponds with the recommended general waiver provision and would reduce the regulatory burden for landlords and tenants and reflect the commercial realities of lease negotiation. ***Recommendation 4:*** This would dovetail with the timeframe within which the landlord is required to disclose to the assignee. QLS (which does not support the recommendation) considers assignee disclosure needs only to be given prior to landlord giving consent to assign.	
5.4 - Disclosure to franchisee under the Act		
	Issue: Clarification is required regarding disclosure under the Act where a franchisor/licensor (who is the tenant under the lease) grants the	**Reference group recommendation:** Consensus - recommend amend per options A and B, subject to: • landlord to comply with request for updated disclosure within 28 (cf.

Item	Option or Issue	Reference Group recommendation/outcome
	franchisee a licence to occupy the leased shop to carry out the franchised business. **Option A:** Insert new provision: 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. **Option B:** Insert new provision: to comply with the 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.	14) days; • franchisor to pay landlord's reasonable costs of providing updated disclosure; • waiver of disclosure period to apply between franchisor and franchisee. The reference group also recommend amendment as above for sublease arrangements.
	Reference group considerations: Option A clarifies that it is the responsibility of the franchisor/licensor to give disclosure to the franchisee/licensee (rather than the landlord, who has no contractual relationship with the franchisee). Option B is directed to enabling the franchisor/licensor to provide current/sufficient disclosure to an incoming franchisee/licensee, including for matters in respect of which the franchisor does/may not have direct knowledge (ie. plans for centre redevelopment). **Notes:** • the franchisor's disclosure obligation under the Act is separate/in addition to franchisor disclosure required under the Franchising Code of Conduct. • landlord/agent entitled to reasonable administrative costs for providing updated disclosure to franchisor - part of a franchisor's cost of doing business. • landlord only required to provide disclosure for whole of the leased premises (ie. not required to break down disclosure where franchisor/tenant grants a third party licence to occupy part of the premises only). • where franchisor fails to give disclosure to franchisee; or landlord fails to provide updated disclosure to franchisor on request, there would be a dispute under the Act and the receiving party may make application to QCAT for an order that the relevant disclosure be given.	

Item	Option or Issue	Reference Group recommendation/outcome
	• if the landlord's disclosure is incomplete or materially false /misleading, there can be only one claim against the landlord as between franchisor and franchisee for any resulting loss or damage.	
5.5 - Financial and legal advice reports		
5.5.1 - Mandatory financial and legal advice reports		
	Issue: Whether financial advice reports and legal advice reports should continue to be mandated for all tenants (including assignees) who are not major lessees. A *major lessee* is a lessee of 5 or more retail premises in Australia. Queensland is the only jurisdiction that requires these reports to be given to the landlord before the tenant enters into the lease. **Option A:** Remove requirements for legal and financial advice reports altogether. **Option B:** Maintain status quo - ie. a tenant (who is not a major lessees) must give the landlord both a financial advice report and a legal advice report before entering into the lease. **Option C:** Amend to enable a tenant (who is not a major lessee) to opt out by written notice to the landlord before entry into the lease that they have received appropriate financial and legal advice (general opt out).	**Reference group outcome:** Option A: no support Option B: consensus support (except SCCA/PCA, who support option C) **Red tape reduction**: Option C would remove red tape and compliance costs for sophisticated lessees who are not major lessees
	Reference group considerations: Members agreed in principle that the legal and financial advice requirements should be retained. These reports are beneficial for tenants (in particular inexperienced/unsophisticated retailers) and landlords by providing a framework for the tenant to exercise appropriate due diligence, obtain appropriate professional advice and assess their business and personal risk before entering into the lease. Tenants who have made an informed decision to enter into the lease are less likely to be met with financial distress/business failure. This in turn reduces the likelihood of disputes (including the financial and personal cost of litigation) between tenant and landlord during or after the lease term. Members supporting retention of the status quo (option B) do not support a general opt out (option C) on basis that:	

Item	Option or Issue	Reference Group recommendation/outcome
	• retail representative members consider the reports have improved informed decision making by tenants generally (ie. tenants getting good advice in terms of the letter of offer and far more aware of the P&Ls on their existing business) • a tenant who is a lessee of multiple retail stores is not necessarily a sophisticated commercial operator (ie. mandatory reports trigger tenants to assess each proposed retail venture on a case by case basis, minimising likelihood of over-extending/business failure); • the benefits outweigh the upfront costs for tenants - ie. $3,000/$4,000 in professional fees upfront is minimal in the context of fit-out costs, ongoing financial obligations under the lease (rent/outgoings/promotion fees etc) and potential risk exposure (ie. losing business investment/ personal assets in the event of business failure); • if there is an available opt out, first-time/ inexperienced/unsophisticated tenants are likely to take it as they are often keen to start trading without fully appreciating the obligations/risks. **SCCA/PCA**: support option C as it would reduce the regulatory burden on business by enabling sophisticated tenants (who are not major lessees) to opt out. Opt out necessary/appropriate as the existing major lessee definition is very generous - operator of 3 + stores should be considered a major lessee.	
5.5.2 - Financial advice report - sales projections/occupancy cost ratios		
	Option: Expand financial advice report to include advice about sales projections, occupancy cost ratios and other industry benchmarks acceptable for the proposed permitted use.	**Reference group outcome:** Consensus - recommend no change (except QNF)
	Reference group consideration: Not practicable to regulate -difficult/excessive to meaningfully prescribe and implementation would be an issue. Members noted that there are problems in the retail sector in relation to accountants giving financial advice reports without appropriate knowledge/ understanding of retail sector/business. This is a matter for the accountancy profession/education, rather than regulation under the Act.	
5.5.3 - Legal advice report: insurances and indemnities		
	Option: Amend Regulation so that the legal advice report includes statement to the effect that the lawyer has: • given legal advice about any requirements in the lease for indemnification of the landlord by the tenant and/or explained to the tenant the need to obtain such advice from an appropriately qualified	**Reference group recommendation:** Consensus - amend per option. Note: This recommendation is made in response, and in the alternative to, the options at items 6.14.2 to 6.14.5 below. These later options (which would significantly increase the level of regulation for retail shop leases) are not supported by the reference group.

Item	Option or Issue	Reference Group recommendation/outcome
	lawyer; and • brought to the tenant's attention the need to obtain advice from an insurance broker (or appropriate industry specialist) about the tenant's insurance obligations under the lease.	**Reference group/red tape considerations:** While the amendment arguably increases the compliance burden for tenants (ie. additional matters for which tenant must get legal advice/direction) the reference group considers it would be beneficial for both tenants and landlords as insurance/indemnity issues are complex/technical and often the most difficult part of lease. In particular, amendment in terms of the option would: • promote tenants being informed (or at least on notice that appropriate advice should be sought) in relation to the landlord's indemnity/insurance requirements under the lease, including appropriate identification and allocation of risk; • be consistent with the reference group's view that the insurance and indemnity provisions in a lease are a matter for commercial negotiation between the parties on a case by case basis.
5.6 - Failure to comply with disclosure requirements		
	If a disclosure requirement under the Act (other than landlord disclosure to tenant under section 22) is not given and the lease/assignment is entered into, a retail tenancy dispute exists and the receiving person may (within two months after lease/ assignment is entered into) apply to QCAT, for an order that the relevant disclosure be given: section 22E. **Option:** Omit section 22E	**Reference group recommendation:** Consensus - recommend no change (ie. retain section 22E) **Red tape consideration:** The two month period is useful as it ensures that matters are dealt with promptly. It is also a red tape avoidance measure so that the possibility of parties being indefinitely engaged in the disclosure process is avoided. If a party wants to enforce its disclosure rights, then it should do so in a timely manner.

6.0 - Minimum lease standards		
6.1 - Turnover rent and information		
6.1.1 - Regulation of turnover statements given to landlord		
	Current provision: Under section 25(3), for a turnover lease, the tenant must give the landlord: • at end of each month (or as agreed) - a certificate specifying with reasonable accuracy the turnover of the business (monthly certificate); and • at end of each year (or as agreed) - a statement of turnover prepared by a registered auditor (audited statement). 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). **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 determination of rent under the lease. **Option C:** Omit section 25(3) and 25(4).	**Reference group outcome:** Support for option C - ie. remove section 25(3) and (4) - (except NRA and ARA, which support option B and option A respectively). Consensus (incl. NRA and ARA) for industry stakeholder discussion with a view to developing agreed industry practice, including possibly an industry code for the collection, supply and use of retail turnover in shopping centres. Agreed that this is an industry matter, not for government regulation under the Act.

	Reference group considerations: • Shopping centre leases often include provision for the collection of tenant turnover data. • The requirements in section 25(3) & (4) are unique to the Qld Act (the provisions). • Repeal of the provisions (ie. option C) will not mean tenants no longer have to provide turnover information to landlords where they are required to do so under the lease. Rather, repeal would reflect that collection/supply/use of retail turnover information are matters for industry resolution/ commercial negotiation. • Reference group members do not consider that the provisions operate to protect tenants, although SCCA noted some benefit in retaining as they do justify/regulate how the tenant is required to provide the information. *Landlord representative member views:* • Turnover information is vital for centre landlords to assess/manage centre performance (ie. market share analysis, getting the tenant mix right, assessing redevelopments, strategic marketing/promotion etc). These benefits flow to tenants through increased sales etc. • Turnover information is also a valuable tool for retailers - major landlords routinely make available aggregated centre turnover information to major retailers, without charge. Retailers seek and rely heavily on this information to analyse/maximise their business performance (ie. benchmark store performance within/across centres and make informed decisions on lease renewal). • Disconnect between retail associations and their members on this issue. Also not feasible/cost effective for independent third party to deal with turnover information. *Retailer representative member views:* • Landlords include turnover component in lease to enable collection of turnover figures but base thresholds structured so that turnover rent rarely payable. • Benefits to retailers from collation of centre turnover are outweighed by landlords abusing access to tenants' turnover - ie collecting/ collating/manipulating turnover information to lever unsustainable rent increases (and, in turn, report/deliver increased centre performance/investor returns). • Problem extends beyond major institutional shopping centres - ie. increasing level of sophistication of independent landlords in smaller centres. • Turnover information needs to be transparent (ie. in format tenants understand) and available to all tenants (ie. major retailers and small business tenants). • Shopping centre turnover information should be collected/collated by an independent third party (cf. centre landlord) and available to both the landlord and tenants on a user pays basis (L1/ARA).

<table>
<tr><th colspan="3">6.1.2 - Timeframes for tenant turnover statements</th></tr>
<tr><td></td><td>Option A:
Amend section 25(3) to provide that (unless otherwise agreed by lease parties):
• 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.
Option B: No change to section 25(3)</td><td>Not applicable if item 6.1.1 outcome accepted (ie. if section 25(3) omitted).
Reference group views - if section 25(3) retained:
• Option A: not supported (except NRA, which supports amendment so that audited statement to be given within 60 days after end year)
• Option B: SCCA/PCA support
(No other specific member views were given for the purposes of the report)</td></tr>
<tr><td colspan="3">NRA: Tenant should be only required to supply turnover figures twice a year at the end of each six months. This would allow the landlord to have the figures for their six monthly reports to the investment market. Amend so that annual statement to be given to the landlord within 60 days after the end of each year (or as otherwise agreed). Should be certified (cf. audited) annual statement as majority of retail tenants are not in a position to audit sales.
SCCA/PCA: Strongly oppose NRA proposal for six monthly tenant turnover reporting under section 25(3). Section 25 only regulates the timing for provision of turnover figures, not the provision of turnover figures. Shopping centre rents payable monthly and tenant’s monthly turnover required to calculate percentage rents. Tenant monthly turnover figures are also necessary (and mutually beneficial) for centre marketing campaigns and reporting /benchmarking centre performance.
See also considerations and agreement for industry stakeholder discussion at item 6.1.1 above.</td></tr>
<tr><th colspan="3">6.1.3 - 6.1.6 - Other turnover-related proposals</th></tr>
<tr><td></td><td>Option A: Turnover rent formula should be industry appropriate
Option B: Lease can only provide for turnover rent where there is agreement to this effect between landlord and tenant.
Option C: Prohibit provision in lease that permits termination of lease on basis that tenant’s business failed to achieve specified sales/turnover performance.
Option D: requiring landlord to disclose aggregated centre turnover to prospective tenants.</td><td>Reference group outcomes:
Option A: not supported. Matter for commercial negotiation - not possible/appropriate to regulate.
Option B: not supported. Unnecessary/would increase red tape for no benefit - legal/financial advice certificates safeguard tenant.
Option C: not supported - not an issue in practice Qld.
Option D: matter for industry - industry discussion towards agreed practice/code.</td></tr>
</table>

6.2 - Rent review provisions		
6.2.1 - Implied rent review provisions		
	General consensus that no changes required re timing/basis for rent review - current provisions appropriate/working.	
6.2.2 - Single basis for rent review formed by combination of review methods		
	Current provisions: Section 27 of the Act sets out implied provisions for the timing and bases of rent review, including that a review must be made using only one basis. A single basis for this purpose can be a single basis formed by a combination of two or more stated bases: section 27(5)(g**)** **Option:** omit section 27(5)(g) so that rent reviews are limited to one review basis only.	**Reference group recommendation:** Consensus: option not supported - no change. The current provisions are appropriate/ working; and it is accepted in the industry that a rent review formula can comprise two or more of the prescribed bases. The formula/bases for rent review are a matter for commercial negotiation.
6.2.3 - Mechanism for general opt out of implied rent review provisions		
	Status quo: Currently**,** only major lessees (ie. those with five or more retail shops in Australia) may opt out of the implied rent review provisions: section 27(8). **Option:** Amend to allow tenants (who are not major lessees) to opt out. Opt out to apply where: • before entering into lease, tenant to give landlord written notice of opt out; plus financial and legal advice reports; and • lease provides for timing/basis for each review.	**Reference group outcome:** Division of views on this option: • SCCA/PCA/NRA/LLFG: support option • L1/ARA/QLS/API/QNF: maintain status quo PGA - no particular view. **Red tape reduction:** Amendment per option would reduce red tape and increase flexibility for retail businesses.
Reference group considerations: **QLS**: maintain status quo - makes sense to have protection for smaller lessees **SCCA/PCA:** strongly support option - would give additional flexibility; requirement for financial/legal advice reports are safeguards to ensure tenants informed; also		

opt out usually initiated by a tenant cf. landlord; commercial decision for tenant if they wish to opt out **L1**: no opt out (general or major lessee) in relation to rent review. **NRA:** support option - red tape reduction measure and there are safeguards in place for tenant. **QNF:** no opt out - especially first time lessees.		
6.2.4 - Simplify opt out by major lessees		
	Status quo: Major lessee can opt out of implied rent review provisions if lease sets out timing/basis for each review; and lessee gives written notice to landlord stating receipt of appropriate financial/legal advice about the lease (professional advice notification): section 27(8) **Option A:** Amend section 27(8) to remove requirement for professional advice notification in major lessee's opt out notice **Option B:** Omit section 27(8) so major lessees are bound by rent review provisions.	**Reference group outcome:** Divided views on this issue as follows: • SCCA/PCA/NRA/LLFG: support option A • L1/QNF: support option B - major lessee opt out creates a two tier rental market (refer also item 2.2 considerations) • QLS - maintain status quo PGA/API - no particular view
Red tape considerations: **Option A:** would streamline major lessee opt out by removing an unnecessary administrative burden **Option B:** would significantly increase the regulatory burden by removing the existing flexibility for major lessees (who are sophisticated tenants) to negotiate mutually acceptable rent review provisions with their landlords. Queensland's introduction of opt out for major lessees in 2006 was a substantial contribution to regulatory reduction and should not be reversed.		
6.2.5 - Conflict between opt out provisions and section 36 of Act		
	Technical amendment to clarify that the rent review clause prohibitions in section 36 (d) and (e) do not apply where a major lessee has opted out of the implied rent review provisions.	Consensus support for this clarification, if existing provision enabling major lessees to opt out of the rent review provisions is retained - see item 6.2.4 above.
6.3 - Current market rent determinations		
6.3.1 - Tenant request for early CMR determination		
	Section 27A sets out the procedural requirements for a tenant (who has an	**Reference group recommendation:**

	option to renew at market rent) to trigger an early determination of current market rent (CMR). An early determination enables the tenant to make an informed decision whether to exercise the option. **Issue:** Reference group considered whether section 27A of the Act should be retained and, if so, whether any changes to the relevant notice periods are necessary.	Consensus: recommend no change to section 27A notice periods, other than: i) Omit section 27A(6)(b) so last date for exercise of option will be 21 days after lessee receives CMR determination; and ii) per recommendation for item 6.3.2 below.
	Reference group considerations: Members noted and agreed: • Retain provision for early determinations of market rent - while major shopping centre landlords have eliminated options in their leases, a large proportion (approx 80%) of retail shop leases are outside of major shopping centres. • The current (differentiated) early determination periods for leases under one year, and those for one year/more are appropriate. • Section 27A(6) not practicable as currently drafted because lease may end before the CMR determination is available (ie. if determination disputed). Last date for tenant to exercise option should be 21 days after tenant receives determination. • Where the lease ends, tenant holds over under the terms of the original lease until receives the determination. Effective date of the determination is from the commencement date of the option. For hold over period, tenant pays rent under original lease, with adjustment once determination made.	
6.3.2 - Simplify major lessee opt out for CMR provisions		
	Relevant provision: The early determination provision does not apply if: the tenant is a major lessee; the lease provides for the timing/basis for each rent review; and the tenant has given landlord written notice prior to entering into the lease stating that they have received appropriate financial and legal advice about the lease (professional advice notification) - section 27A(1A). **Option:** remove requirement for professional advice notification in major lessee's opt out notice (i.e. 27A(1A)(b)).	**Reference group outcome:** Consensus - recommend amend per option (except QLS) **Red tape reduction:** This would streamline major lessee opt out by removing an unnecessary administrative burden. The safeguard that the lease must set out the timing/bases for each review would remain.
6.3.3 - Parties' submissions to Specialist Retail Valuer (SRV)		
	Current provision: Section 28A of the Act sets out a basic procedural framework for the provision of submissions by the landlord and tenant to the valuer for the	**Reference group recommendation:** Consensus - recommend no change to section 28A, other than insert deeming provision to effect that:

	purposes of a CMR determination, including exchange of submissions and a right of reply. It is up to the valuer to decide reasonable timeframes for and manage this process on a case by case basis. **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; (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; (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.	• if a party does not make a submission within the timeframe determined by the valuer, that party is taken not to have made a submission for the purposes of the determination.
	Reference group considerations: Members considered the following views on the options: **Options (a) & (e)** • Would assist process for valuer to be able to make demand based on Act as often one party is not co-operative (ie. parties usually in dispute about other matters as well as rent). If timeframe not legislated, parties have no obligation to meet requirement. Not practicable to have timeframes less than 14 days. • Different matters have different levels of complexity - ie. set period for one may not be appropriate for another. When appointed a valuer should send a letter to parties setting dates/timeframes - ie case by case basis. • It is not mandatory for parties to make submissions. Valuer should set period for submissions to be provided and if parties do not make it by set date they should be deemed not to have made a submission - valuer can then go ahead and make the determination. Would provide certainty on a case by case basis and prevent undue delay/frustration of determination process by an uncooperative party. • Discretion for valuer to accept submission out of time not supported as would leave process open to delay/frustration. API noted SRV not heavily reliant on parties' submissions in making determination - most material available from landlord (ie. under section 30) and other public sources.	

	Option (b): • No change - valuer doesn't need to control exchange, delays process. • Appropriate to retain provision for mandatory exchange of submissions - increases transparency of determination process/minimises ambit claims. **Option (c):** • No change to section 28A(4) - matter for valuer to determine timeframe on case by case basis. • Appropriate to retain provision for right of reply. Allows for clarification of facts, particularly when valuation parties are not the original parties to lease; minimises ambit claims. **Option (d):** No change - provision to extend would give party that wants to frustrate/delay the process opportunity to do so.	
6.3.4 - Formula for CMR determination		
	Current formula: 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). **Option:** 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".	**Reference group outcome**: Option not supported - no material change to the existing provision. Minor change to existing wording to align with NSW/Vic equivalent: - ie. for section 29(a)(i): • omit the words '*use for which the shop may be used under the lease or a substantially similar use*'; and • insert the words '*same or a substantially similar use to which the shop may be put under the lease*'
	API note: Not aware of any significant problems in recent years with the interpretation of section 29(a)(i) - can be differences between valuers for determinations where the permitted use is rare/unusual (ie. no/limited tenancies with same use, or no recent evidence of tenancies in the centre with a similar use). In these circumstances valuer may have to seek evidence from other centres in substantially different locations/with substantially different trading	

	characteristics; and/or comparable evidence of tenancies with other permitted uses within the same centre as the subject tenancy. Valuer then makes necessary adjustments from available evidence in making determination. Differences in the degree of subjectivity associated with these adjustments is a matter to be addressed through ongoing education of SRVs by the API under its Continuing Professional Development (CPD) program (which is supported by the VRB) to ensure that rental determinations are completed in accordance with the provisions of the Act and the API's own Guidance Notes and Practice Standards.	
6.3.5 - Provision of trading details to SRV on confidential basis		
	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.	**Reference group outcome:** On balance - agreed no change. **Red tape consideration:** Amending in terms of option would increase red tape for retail tenants and this information is not essential for SRV to determine CMR.
	Reference group consideration: Members considered the following views on the option: • turnover information, although not essential for a determination, shows a trend. Mandating its provision to valuer would provide an alternative consideration /support valuation/ increase transparency. • currently, SRV requests trading details from tenant if thinks required. Most tenants have no problem giving it to SRV and to their detriment if they don't give it - mandating not necessary. • more red tape from a small retailer perspective - if it is in their favour they will do it. If not, making it mandatory will impose additional costs/administrative burden. • tenant may choose not to provide it and then complain when they get an unreasonable rent. • would only go to the SRV, not landlord - confidential information and independent determination. Landlord only privy to outcome of determination. Another protection for tenant is that tenant's goodwill is to be disregarded in making CMR determination: section 29(b) Act. • indemnity issue for valuer - they have less information to work with, exposing them to costly/protracted insurance claims (see item 6.3.9 below).	
6.3.6 - New confidentiality obligation between landlord and tenant		
	Option: Insert confidentiality provision governing the landlord/tenant use or disclosure of information provided to them through exchange of	**Reference group outcome:** Consensus - option not supported.

	submissions, or otherwise during the CMR determination process.	
	Reference group consideration: • not aware of any examples of loss/damage to party for confidentiality breach in this context - hypothetical issue only. • confidentiality as between landlord/tenant can be distinguished from valuer's confidentiality obligation in section 35 - legislating confidentiality obligation for person acting in professional capacity different to commercial parties. Section 35 intended as disincentive for SRV misuse of information obtained from parties through process (ie. not to use for another valuation or database).	
6.3.7 - Effect of CMR determination under the Act		
	Option: Clarify that a retail tenancy dispute exists if a party to the lease refuses to accept a CMR determination under the Act.	Consensus support for clarification in terms of option Note: QCAT only has jurisdiction regarding methodology applied.
6.3.8 - Process for appointment of SRVs		
	Current provision: 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 Act1992*. **Option:** Amend section 28 of Act to provide that (where the parties can not agree) nomination of a valuer could be made either by the chief executive, or the body nominated in the lease.	**Reference group recommendation:** Consensus - no change to section 28 nomination provision (ie. SRVs to be appointed by QCAT registry). **Reference group considerations:** • Currently some confusion/lack of knowledge about where parties go for CMR determination. Sometimes unclear whether lease is a retail shop lease ; or lease provides President of API to appoint SRV • QCAT and API can not provide advice to parties on status of lease • API charges administration fee ($550 approx) to make appointment of valuer • Preferable for Act to override lease - retain status quo. • Matter for information/education for parties re process.

<table>
<tr><th colspan="3">6.3.9 - Statutory protection for SRVs</th></tr>
<tr><td></td><td>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.
The option is based on section 72AB(5) of the NSW Act, which gives statutory protection to SRVs appointed by the Administrative Decisions Tribunal (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).</td><td>Reference group outcome:

Divided views on option as follows:
• API/NRA/L1/QLS/LLFG/QNF: support option
• SCCA/PCA: oppose option

API/NRA - also support provision for review of CMR determinations in terms of section 32A of NSW Act.

Generally agreed that there is no systemic problem with the quality of CMR determinations in Qld. However, there is a shortage of SRVs, particularly in regional areas.</td></tr>
<tr><td></td><td colspan="2">Reference group considerations:

• API/NRA/L1: based on NSW experience, statutory protection would increase the available pool of SRVs in Qld, including in regional areas.
• PCA/SCCA: statutory indemnity for SRVs not appropriate - lack of valuers should not prevent lease parties from pursuing their legal rights.
• API/NRA: if there is a statutory indemnity, should be an appeals process per section 32A NSW Act - reviewing valuers look at determination from first principles and can affirm/vary the original determination.

Members considered the following views:
• Pool of practising SRVs in Qld too small/shrinking, particularly availability in regional areas (ie. Townsville, Rockhampton) ie. Valuers Registration Board (VRB) estimates the number of registrations has decreased over last ten years from approx 140 to 28 currently.
• SRV is not a commercially viable practice - parties often dispute/query determination because they are usually also in dispute about other issues when valuer appointed; valuer must notify their insurer, which leads to legal costs of investigation and increases in insurance premiums.
• NRA/API - in NSW:
- pool of valuers increased significantly once they got the indemnity - broadened depth of panel; more experienced valuers;
- contractual indemnities carry no legal weight, so most valuers prefer to be appointed through ADT so that they have immunity.
• If immunity, for protection of the parties there should be some avenue of appeal (dispute about quantum not just process).
• NSW position extraordinary in that valuers have indemnity most other professions do not have.
• Valuers Registration Act sets out requirements for registration, accredited courses, CPD etc. Quality of determinations is matter for Valuers Registration Board and also API as part of its responsibility/role re professional practice standards/education. Application of valuation methodologies is not a matter for the Act.</td></tr>
</table>

6.4 - Landlord's outgoings and other payments		
6.4.1 - Management fees		
	Issue: Retail stakeholders seek clarification and greater transparency for management fees apportioned to shopping centre tenants as landlord's outgoings. **Option A:** Amend section 37 of Act to insert provision in following terms (align with NSW): 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: section 27(c)(i), section 28(b1) NSW Act. **Option B:** Prohibit landlord recovery of management fees in following terms (align with WA): 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. For this provision, *management fees* means: 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.	**Reference group outcome:** Consensus support for option A: NRA/SCCA/PCA/ARA/L1/QLS/LLFG/ QNF (No particular view: API/LLFG/PGA) Note: current landlord disclosure statement separates administration fees/audit fees/management fees - approved outgoings and audit statements do not. Review/revise approved forms as appropriate. **Red tape consideration:** While option A may impose some additional red tape for landlords, this is justified on the basis it would provide improved transparency for tenants regarding the nature of management fees apportioned as outgoings. SCCA members currently operate on this basis in NSW.

	Reference group considerations: Members considered the following views: • Only fair/reasonable costs of operating centre should be recoverable. • Multiple overlay of management for large centres is increasing and tenants paying for it all in outgoings: head office services; regional managers/ centre managers/operations managers/asset manager/retail manager/casual mall licensing manager etc. • Should be no change in management fees during term of lease (ie. on sale of shopping centre/change of management/) - (cf.) new centre owners often have higher standard/ level of management. • SCCA/PCA - shift to semi-gross leases in WA since provision in terms of option B introduced in 1999 • Most retailers prefer gross leases so they have certainty on the total amount payable under the lease - (cf.) management fees will come out in gross rent over time - tenants effectively still paying for it but less transparency. • Much easier for landlord to change budget without explanation with gross lease (ie. spend less on cleaning, security etc) - ultimately to disadvantage of centre. Net leases are audited and tenant knows what they are paying for. • Prescribed cap on management fees not appropriate as different centres have different operating costs - ie. small centre's percentage of outgoing costs will be much greater. • SCCA: Vic Act limits recovery/adjustment of management fees; based on range of formulas - unnecessarily prescriptive/regulatory nightmare. • API: provision in the current rent review mechanism in Act (section 29(a)(ii)) that allows adjustment of base rent downwards where management fees disproportionate - while doesn't provide transparency for tenant, is another balance/protection.	
6.4.2 - Landlord's insurance excess		
	Option: Amend section 7(3) of the Act to exclude from recoverable landlord's outgoings any amount paid by a landlord relating to an excess under the landlord's insurance policy for the building/centre.	Consensus - amend per option. Capital cost and should not be recoverable. Also agreed that landlord under-insurance not a matter for regulation - matter for industry education.

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 outgoings estimate and an audited outgoings statement for each accounting period. 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:** Remove 5% itemisation provision (itemisation provision). **Option B:** Require landlord to make available to tenant any documentation required by the auditor for preparation of the audited annual statement. **Option C:** Insert a new provision - the auditor must: • 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 • take into account any tenant submission received.	**Reference group recommendation:** Consensus: • recommend retain itemisation provision; • do not support options B and C. **Reference group consideration:** • Options B and C would increase red tape, including audit timeframes/costs - retention of itemisation provision preferred as provides transparency and cost neutral. • Itemisation provision in place for 13 years - effective in maintaining transparency and minimising outgoings disputes. • NRA: prefer 'certified' cf 'audited' annual outgoings statement.
6.4.4 - Apportionment of landlord's outgoings		
	Option A: Insert a new 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), vending machines or leisure facilities located within common areas;	**Reference group recommendations:** Consensus as follows: • option A: amend per option • option B: not supported (no change required) • option C: not supported (no change required)

	• 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.	**Red tape reduction:** Option A would be a technical amendment to reduce the administrative burden for landlords in relation to outgoings apportionment. While the in principle position of retail members is that arrangements from which the landlord derives income should not be excluded, option A was agreed: • to align with corresponding existing common area exclusions at item 2.3 above; and • having regard to the minimal floor areas affected in the context of a large shopping centre.
6.4.5 - Code of conduct on outgoings		
	Option: Adopt 2002 Australian Retailers Association Tenancy Committee 'Shopping Centre Code of Conduct on Outgoings' (Code) as binding.	Consensus - option not supported. Outgoings are sufficiently regulated under the Act. **Red tape consideration:** The option would add an additional layer of unnecessary regulation and impose additional cost/complexity on business.
	Reference group considerations: • Code directed to major retailers not covered by retail legislation and not a live issue since 2004 as existing framework working (ie. if specialty tenant negotiates outgoings out of their lease, landlord bears that cost under section 38 of Act). • Code no longer ARA policy; Administration of it would have been almost impossible; plus compliance/dispute resolution issues. • Voluntary code of conduct for outgoings also unnecessary outgoings already regulated under Act - conflict/confusion etc.	

<table>
<tr><td colspan="3">6.4.6 - Gross leases</td></tr>
<tr><td></td><td>Status quo:

The Act does not currently regulate the type of lease the parties may enter into. This is consistent with the other States/Territories.

Option:

Consider mandating gross leases under the Act.</td><td>Reference group outcome:

Divided views on this issue:

• NRA/QNF: in principle support for option
• SCCA/PCA/LLFG: strongly oppose option
• QLS/L1: do not support option

(No other particular member views)

Red tape consideration:

The NRA considers that mandating gross leases would provide a substantial reduction in red tape and compliance relating to budgets and outgoings/marketing fund statements.

However, opposing members are of the view that mandating gross leases is inappropriate and would significantly increase the regulatory burden on the retail sector by unduly restricting commercial negotiations and outcomes. The type of lease the parties want to use is not a matter for government regulation.</td></tr>
<tr><td></td><td colspan="2">Reference group views:

Supporting view - majority of retailers (in particular small retailers) prefer gross leases as just want to know the total occupancy cost to be paid to the landlord over the lease term.

Contrary view is that the type of lease is a matter for commercial negotiation between the parties on a case by case basis - not for government regulation. Those opposing also considered: there is no general/majority preference among retailers for gross leases; and that gross leases disadvantage tenants by removing transparency/accountability - i.e. outgoings estimates and, in particular, annual audited statements not provided by landlord.</td></tr>
<tr><td colspan="3">6.5 - Sinking fund and promotion/advertising contributions</td></tr>
<tr><td colspan="3">6.5.1 to 6.5.3 - Sinking fund provisions</td></tr>
<tr><td></td><td>Section 40 of the Act (which regulates payments to/keeping of sinking fund for major maintenance/repairs) was considered as a whole by the reference group.</td><td>Reference group recommendation:

Consensus - retain the existing sinking fund provisions with no change</td></tr>
</table>

	The reference group also considered whether the Act should regulate distribution of sinking fund where the centre/building in which shop is located is demolished/destroyed/ceases to operate.	Sinking funds are increasingly uncommon and the reference group was not aware of any examples of shopping centres in Qld where one remains in place. However, retain status quo for any that may remain (ie. small centres/regional).
6.5.4 - Unspent advertising/promotion contributions		
	Section 41 deals with tenant's promotion/advertising contributions **Option A:** Insert new provision - unspent promotion amounts to be carried forward for application to future advertising/promotion of the centre. **Option B:** Insert new provision for adjustment, within four months of end lease, between landlord/tenant to take account of any underpayment/ overpayment by tenant of promotion amounts over lease term.	**Reference group recommendation:** Consensus - amend per option A. **Reference group considerations:** Option A: Technical amendment only - reflects industry practice and would align with NSW/Vic. **Red tape consideration:** Option B not practicable and would substantially increase red tape for landlords with minimal (if any) benefit for tenant - ie. usually no unspent promotion funds at end of accounting year.
6.5.5 - Landlord to make available to tenant marketing plan and promotion/advertising expenditure report		
	Qld is currently the only jurisdiction that does not currently require a landlord to provide the marketing plan for the centre to the tenants. **Option:** Insert a new provision - landlord must *make available* to tenant (ie. by uploading onto central website accessible to tenants) a marketing plan detailing landlord's proposed advertising/promotion expenditure during the relevant accounting period. Marketing plan to be made available to tenant at least one month before the start of each accounting period under the lease.	**Reference group recommendation:** Consensus - amend per option, with landlord to also make a copy of the marketing plan available for inspection. Also agree consistency with NSW/Vic for opening promotions - reflects common practice. **Red tape consideration:** This amendment is justified as it increases transparency for tenants; aligns with other States/Territories (including NSW/Vic) and is consistent with current industry practice. The requirement for the landlord to also make a copy of the marketing plan available for inspection is intended as an alternative for those small tenants who do not have access to the web. This is not considered a compliance burden for the landlord as centre management could readily make the plan available for inspection.

		Note: some small landlords may not have a marketing budget and that the requirement would only trigger where a marketing contribution is required under the lease.
6.6 - Tenant's liability for landlord's legal and other costs		
6.6.1 - Costs associated with preparation/renewal/extension of lease		
	Current provision: Section 48(2) allows a landlord to include a provision in lease requiring the tenant to pay: lease registration costs (incl. survey fees); and landlord's reasonable expenses of obtaining mortgagee consent. **Option:** amend so tenant not liable to pay any of the above fees/expenses.	Consensus - recommend: • registration/survey fees payable by tenant; • landlord liable for costs of mortgagee consent (per Vic/WA/ACT)
6.6.2 - Landlord's costs where tenant does not proceed with lease		
	Current provision: Section 48(1)(a) provides 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. Stakeholder feedback to the review indicates that the silence in the Act about whether the landlord can recover these costs where the tenant does not proceed with the lease causes confusion and should be clarified. **Option:** Amend section 48(1) to clarify that a tenant who withdraws from the lease negotiation is <u>not</u> 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.	**Reference group outcome:** Option not supported. The reference group (except QLS) recommend an amendment to clarify that the landlord's reasonable legal costs/other expenses in relation to negotiation/ preparation of an engrossed/final lease are recoverable from the tenant where the tenant withdraws/does not proceed with the lease. The QLS strongly opposes this recommendation and supports no change to the current provision.

	Members considered the following views**:** • Usually heads of agreement signed by both parties detailing commercial terms of lease (outgoings/incentives etc) - so tenant has good idea about what commercial terms are before lease goes out. • Parties negotiate amendments to landlord's standard form draft lease - tenant should be liable for all reasonable costs associated with changes sought if withdraws at final/engrossed lease stage. • Tenant withdrawal usually based on finance - but landlord has incurred expenses in good faith. Expenses charged by landlord generally well within security bond. • Disclosure usually given with engrossed/final lease - there would otherwise be multiple disclosures through negotiation. **QLS view:** Strongly oppose a requirement that tenant pays the landlord's costs where it does not proceed to enter into a lease after indicating an intention to do so. Tenants are commonly asked to sign a non-binding letter of offer prior a lease being prepared. While this shows agreement as to the basic commercial terms such as term and rent, leases contain substantial liabilities and obligations on the tenant which are not dealt with in the letter of offer. Each party then proceeds to negotiate the terms of the lease until a mutually acceptable position is reached. If the parties are unable to reach agreement on the terms, they are free to walk away from the deal. The suggestion that a tenant should liable to pay a landlord's costs in these circumstances would seem to substantially reduce the tenant's bargaining power and run counter to the underlying principles of the Act and usual commercial practice.	
6.6.3 - Costs relating to assignment or consent to sublease/license		
	Issue: Whether to legislate a cap in relation to a landlord's existing entitlement under the Act to recover from the tenant their: • 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.	**Reference group recommendation:** Consensus - recommend retain existing provisions for landlord's recovery of costs/expenses in relation to lease assignment and consent to sublease/license. Tenant only liable for landlord's reasonable costs. The reference group is of the view that there are not widespread or significant problems in practice around landlords failing/ refusing to provide adequate substantiation of these amounts when requested to do so by tenants.

6.7 - Compensation under the Act		
6.7.1 - Tenant notice to landlord as pre-requisite to claim for compensation under section 43(1)		
	Issue: Section 43(1) sets out when a landlord is liable to pay to the tenant reasonable compensation for loss/damage suffered by the tenant because of an action of landlord or person acting under landlord's authority (implied compensation for business disruption). Currently, the tenant is not required to give notice to the landlord of the disruption giving rise to the implied compensation claim. **Option :** Amend section 43(1) so that landlord's liability to compensate tenant for the matters set out at section 43(1)(a)-(e) triggers only where the: • tenant has requested the landlord in writing to rectify the matter; and • landlord fails to rectify the matter as soon as reasonably practicable after receipt of the tenant's notice.	**Reference group outcome:** General support for option (except QLS) Option aligns with NSW - ie. landlord not liable to pay compensation where notice not given. QLS: prefers Vic position (ie. a tenant's failure to give notice to the landlord as soon as practicable does not affect the tenant's right to compensation). If the extended definition of lessee for the purposes of section 43 is maintained (see item 6.7.7/6.7.8 below), then a franchisee/licensee could give notice to the landlord under the proposed option to trigger their entitlement to compensation. **Red tape consideration:** The additional regulatory requirement for the tenant is justified on bases that: landlord should be given notice and opportunity to rectify concern/ mitigate their liability; written notice assists to prevent frivolous/vexatious claims; notice requirement operates well in NSW/not open to dispute where written notice.
6.7.2 - Compensation for restriction of access / disruption to trade		
	Current provision: Under section 43(1)(c), landlord liable to pay tenant reasonable compensation for loss/damage due to landlord/landlord's agent causing significant disruption to tenant's trading; or not taking all reasonable steps to prevent/stop significant disruption within landlord's control. **Option:** Amend section 43(1)(c) to: clarify that landlord only liable to compensate a tenant under that section where landlord has acted unreasonably. In determining whether a landlord has acted unreasonably, due consideration	**Reference group outcome:** Option not supported, no change to current provision (except SCCA/PCA) SCCA/PCA: prefer option, but agree to no change - no major issues with current provision; standard industry practice taken into account by court. **Reference group considerations:** Difficult/not possible to define 'shopping centre management practices'. Not appropriate that landlord only liable where matter that caused loss/damage to tenant's business was unreasonable. Landlord could make argument that acting reasonably but tenant's business has been

	to be given to whether landlord acted in accord with 'recognised shopping centre management practices'.	significantly disrupted.
6.7.3 - Interaction between section 43(1)(f) and relocation/demolition compensation provisions		
	Issue: Clarification is required regarding the interaction between section 43(1)(f) and the stand-alone relocation and demolition compensation provisions in Part 6 Div 9 of the Act. Section 43(1)(f) provides that the landlord is liable to pay tenant reasonable compensation for loss/damage where landlord causes tenant to vacate shop before end of lease/renewal due to extension/refurbishment/demolition of centre/ building. **Option A:** Retain section 43(1)(f) and clarify that the section: (i) operates in addition to section 46G(1) and section 46K(1); and (ii) 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).	**Reference group recommendation:** Consensus - recommend retain section 43(1)(f), subject to clarification (provision cf. note) that it does not apply to the extent that the tenant is otherwise entitled to reasonable costs or compensation for relocation/ demolition under section 46G or section 46K. **Notes:** Technical amendment to clarify that there is no double compensation regime under the Act. For relocation compensation - see item 6.8.5 below. For demolition compensation - see item 6.9.2 below.
6.7.4 - Application of section 43(1)(f) where tenant relocated within centre		
	Option: Amend section 43(1)(f) to clarify that it only applies where the landlord/landlord's agent causes tenant to vacate both the shop and centre where shop located.	Not an issue given outcome for item 6.7.3

6.7.5 - Limit on compensation claim for notified specific occurrences		
	Status quo: Currently, an agreement under a lease/assignment about compensation payable is void to the extent it limits the amount: section 44(2) **Option A:** Insert new provision: lease may include 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 occurrence, including an indication of basis on which assessment reached; and • details of the timing/duration/effect of the occurrence so far as can be predicted. **Option B:** Insert new provision: lease must not limit a landlord's liability under the implied compensation provisions unless landlord brings specific disturbance to tenant's attention before lease entered into; and there is a clause in lease that specifies a formula for compensation in the event of specific disturbance occurring.	**Reference group recommendation:** Consensus - amend per option A **Red tape reduction:** A new provision in terms of option A would reduce the regulatory burden on business by removing the existing prohibition on agreements limiting compensation. Reflects commercial reality that the landlord and tenant may come to an agreement on compensation that is mutually beneficial in certain circumstances. Tenant interests are adequately safeguarded by: the notification details under option A (which should be included in the landlord's disclosure statement); and the overarching requirement for a legal advice report before entering into the lease. **Reference group considerations:** Option A would align with section 34(3) and (3A) of the NSW Act. The provision has worked effectively in NSW and allows flexibility (see red tape reduction above). Noted that NSW provision has not result in landlords using cookie cutter clauses to limit compensation claims for proposed centre redevelopment/refurbishment.
6.7.6 - Exemption for landlord's emergency response		
	Option: Insert new provision - landlord's liability under section 43(1) does not apply where action taken by landlord: as a reasonable response to an emergency; or to comply with any legislative duty; or resulting from a requirement imposed by body acting under legislative authority.	**Reference group recommendation:** Consensus - amend per option.

6.7.7/6.7.8 - Landlord's liability to franchisee/sublessee for compensation under section 43		
	Extended definition of lessee: The implied compensation provisions for business disruption in section 43(1) are contained in part 6, division 7 of the Act. Currently, for the purposes of these provisions, the definition of *lessee* includes *a sublessee or franchisee entitled to occupy the shop under the lease or with the landlord's consent* (extended definition). This definition was inserted in 2006 as an outcome of the last statutory review of the Act. **Option A:** Retain the extended definition (which has the effect that a franchisee is entitled to compensation from the landlord for business disturbance under section 43 of the Act). **Option B:** Omit paragraph (b)(ii) of definition of *lessee* (the extended definition) so that a landlord is not liable to pay compensation to a franchisee/sublessee under section 43. **Option C:** Amend the extended definition so that it only applies to a sublessee/ franchisee in occupation of the premises with landlord consent.	**Reference group outcome:** The reference group (except LLFG/QLS) generally agreed to retain the extended definition of lessee, subject to amending to clarify that: • there can be only one claim against the landlord for compensation under section 43 of Act (ie. the landlord should not be exposed to competing or concurrent compensation claims by the franchisor/ licensor and the franchisee/licensee); and • franchisor/franchisee must agree between themselves the amount of the claim and division of compensation paid/awarded (the general outcome). LLFG: support retention of the extended definition of lessee, without amendment. **Red tape considerations:** The general outcome above would reduce regulatory burden for landlords as they would be required to deal with only one compensation claim for loss/damage under section 43(1) where a franchised business is conducted from the leased premises. A contrary view is that the overall benefit to landlords would likely be outweighed by: • difficulties in co-ordinating, or agreement on, a single combined claim by or between franchisor/franchisee; • detriment to franchisees who would no longer have an entitlement to claim compensation directly from the landlord under section 43(1), irrespective of the franchisor. See additional considerations below. **Notes:** • See also related item 6.7.1 above (tenant's notice to rectify matter causing business disruption). • The general outcome above (ie. only one compensation claim as

		between franchisor/franchisee) would also apply to landlord's liability under section 43(2) of the Act to pay compensation for false/misleading statement; misrepresentation; or delay in shop availability for trade.

Additional consideration: safeguard for franchisees' entitlement to compensation

The reference group was asked to consider whether, if the general outcome above is accepted, the Act should provide a safeguard for circumstances where (for example):

- a franchisee with a legitimate claim to be compensated by the landlord may be frustrated in making a claim (ie. if the franchisor is insolvent or unwilling to accept/pursue a claim on the franchisee's behalf);
- a franchisor might make a claim of their own, but not on behalf of (or including a component for) the franchisee's loss/damage. This may occur in breach, or in the absence of, contractual arrangements for this event between franchisor/franchisee.

LLFG: The status quo should remain i.e. the sublessee/franchisee should be able to bring a separate claim against the landlord from that of the lessee/franchisor. It is conceivable, for instance, that the franchisor and franchisee will have different bases for their claims - the franchisor may have a claim for loss of profit due to diminution in supply of franchise goods to the franchisee, whereas the franchisee may have various claims such as disturbance, loss of profit, damage to goods etc. These are all separate heads of claim and should be able to be validly pursued against the landlord. While there is minor merit in the landlord only having to deal with a combined claim, the LLFG sees a much more major detriment in that co-ordinating a single claim by the franchisor/ franchisee (for instance) would be replete with difficulties. Potential difficulties may include a bogus claim verses a legitimate claim, as one example of many that come to mind.) Also, query whether franchisor/franchisee could agree on the amount of the claim and division of the compensation paid/awarded and who determines the division if they cannot agree.

SCCA: How the lessee and franchisee conduct the claim on a one party basis is a matter for those parties and the landlord should not be open to a 'double dip'. Attempting to regulate how the lessee and franchisee conduct the claim on a one party basis is unnecessary over-regulation and will only serve to further complicate matters. There needs to be some flexibility in the process because who (as between the lessee and franchisee) will have the greater interest in the claim (and will therefore want to pursue it) will depend on the type and structure of the franchise business.

QLS: QLS propose amending as follows to safeguard the franchisee's existing entitlement to compensation and enable the landlord to deal with a single claim:

- either franchisee or franchisor can make a claim to the landlord directly;
- landlord can then provide a notice of the claim to the other party. If other party fails to respond within a reasonable but certain period (ie. 60 days), that party would be deemed to have waived their rights to make a claim;
- landlord could then negotiate with both franchisor and franchisee for appropriate compensation, with the ability for parties to have the matter determined on a collective basis by QCAT where parties unable to agree.

Note: the QLS proposal has not been considered by the reference group. Could be matter for commercial negotiation.

6.7.9 - Compensation payable by tenant for false or misleading statement		
	Option: omit section 43A Section 43A makes tenant/assignor/assignee liable to pay reasonable compensation for false/misleading statement or misrepresentation made in a disclosure statement given by them under the Act.	Consensus - recommend retain section 43A. While not an issue in practice, the provision should be retained as it promotes effective reciprocal disclosure.
6.7.10 - Compensation where landlord introduces excessive competition		
	Option: New provision: landlord liable to pay reasonable compensation to tenant where landlord introduces excessive competition to centre that damages tenant's business	Consensus - not supported. Not appropriate/practicable for legislative intervention.
6.7.11 - Liability of body corporate to compensate retail tenant for business interruption due to body corporate works		
	Option: New provision: a body corporate for a community titles scheme under the *Body Corporate and Community Management Act 1997* (BCCM Act) is liable to pay retail tenant reasonable compensation for loss/damage for significant business interference caused by: works undertaken by the body corporate/person acting under authority in relation to the leased shop or the building in which the shop situated; or the body corporate failing to take all reasonable steps to prevent/stop significant disruption to the tenant's trading caused by such works.	Consensus - this issue is beyond scope of this review. Reference group recommends referral of this issue for consideration under the BCCM Act.

6.8 - Relocation of tenant's business		
6.8.1 - When do the stand-alone relocation provisions apply?		
	Issue: Legal stakeholders seek clarification that the relocation provisions apply to any lease containing a relocation clause. This is not clear from the current drafting of section 46C, which arguably has effect that where a lease does not contain the precise wording in that section, the relocation provisions in section 46D to 46G do not apply. **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."	**Reference group recommendation:** Consensus - amend per option - technical amendment only.
6.8.2 - When landlord can require relocation		
	Option: technical amendment to clarify that landlord can not require tenant's business to be relocated unless landlord has given tenant a relocation notice containing the details/within timeframe set out in section 46D(2) & (3).	Consensus - no amendment necessary. Existing provisions have this effect.
6.8.3 - Timeframes for landlord's relocation notice and tenant's termination notice		
	Current timeframes: section 46D(3): landlord must give relocation notice to tenant (landlord's notice) at least three months before relocation date. section 46E(1): if tenant elects to terminate lease on basis of the relocation notice, the termination notice (tenant's notice) must be given to landlord within one month. **Option A:** Amend section 46D(3) to extend landlord notice period to six months	**Reference group outcome:** Division of opinion on these options: • SCCA/PCA/NRA/QLS: options not supported (ie. no extension of existing notice timeframes) • L1/API/QNF support options A and B. Note: The current timeframes align with the other States/Territories, including NSW/Vic.

	before relocation day. **Option B:** Amend section 46E to extend tenant notice period to two to three months after receipt of relocation notice.	**Red tape consideration:** Options A and B would increase red tape and compliance costs for landlords in relation to centre redevelopments. Some retail members argue the extended timeframes are a necessary safeguard to enable the tenant to weigh up their options and best protect their business investment.
	Reference group considerations: Members considered the following views: **SCCA/PCA:** • substantial Qld shopping centre redevelopments in last 3 years - not aware of a problems with relocation provisions, particularly 3 month landlord notice period • reality is with development applications, approval processes etc. most people are well aware before formal notification provision triggers • there will need to be centre redevelopments on a regular basis as part of ongoing challenge for retailers to attract customer base - retailers prejudicing their own interests by seeking further regulation **NRA** • there is practice of informal notice in large centres - ie. consultation with tenants through planning process by landlord's managing agents • for smaller developments - landlords generally want security of tenure to finance redevelopments so (unless they do not want particular tenant) they will give tenant adequate notice/take into account tenant's interests • no change - leave as is to promote consistency **L1:** • problem with recent redevelopments as large centres employ good practices/self regulate - timeframes for landlord/tenant notices should be realistic to protect tenant where landlord not acting reasonably • tenant needs longer than 1 month to gather all necessary information and make commercial decision whether to relocate/terminate - ie. quotes from shopfitters/designers etc alone can take in excess of 1 month **QNF:** newsagents support extended timeframes - they have additional complications re territory/comparable location.	
6.8.4 - Requirement for a 'reasonably comparable alternative shop'		
	Section 46D - relocation notice must contain 'details of the reasonably comparable alternative retail shop to be made available' to tenant. **Option:** Include a notation for section 46D which provides a context for what would constitute a reasonably comparable alternative shop.	Consensus - no change, other than amend to clarify that alternative shop must be in the existing centre (per NSW). Not practicable/appropriate to legislate such guidelines - matter for tenant to decide on case by case basis whether to take alternative premises.

6.8.5 - Compensation for relocation		
	Current provision: Tenant is entitled to their reasonable relocation costs <u>including, but not limited to</u>: costs of dismantling or reinstalling fixtures/fittings and modifying/replacing them to the standard existing immediately before relocation; and legal costs: section 46G(1). **Option A:** Insert express provision that landlord is liable to compensate tenant for lost profits during period when 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.	**Reference group outcome:** Consensus - no change (except QLS/QNF, which support option A). Note: related recommendation at item 6.7.3 above for section 43(1)(f) of Act. **Reference group considerations:** The reference group considered the following views: • Compensation is a matter for commercial negotiation on a case by case basis. The Act sets out minimum provisions only - ie. section 46G(1) drafted in terms of *'including but not limited to'* . • In practical terms, for centre redevelopments it's more an argument about rent - ie. rent adjustment to reflect change in circumstances. In landlord's interests to get sign-off on relocation deal with tenant so that development proceeds as quickly/efficiently as possible. • QLS: support option A - strengthens position for tenant by expressly stating cover for loss of profit.
6.8.6 - Application of the relocation/demolition provisions to franchisees		
	Status quo: 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/compensation to the franchisor. **Option:** Insert new provision so that franchisee/licensee who is entitled to occupy the retail shop under the lease, or with landlord consent, has the following rights under the relocation/demolition provisions:	The option raises two principal issues: 1. whether landlord should be required to give relocation/demolition notice to the franchisee/licensee(as well as franchisor/lessee); 2. franchisee's entitlement to compensation under relocation/ demolition provisions. **Reference group outcomes:** **Issue 1:** Divided views on this issue: SCCA/PCA/NRA/LLFG - oppose option (ie. retain status quo)

	(i) landlord 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.	L1/QLS - support amendment per item (i) of option. **Issue 2:** Consensus - recommend retain status quo - ie. Act should not give franchisee an entitlement to claim compensation for relocation/ demolition from landlord. There should be one claim against landlord (by franchisor only) for relocation/demolition compensation, with the division of compensation between franchisor and franchisee to be agreed between them and any dispute between franchisor and franchisee would be addressed under the Franchising Code of Conduct. **Red tape consideration:** Requiring the landlord to also notify the franchisee would increase the administrative burden. In particular, where many franchisor lessees in major shopping centres have been able to negotiate lease terms so that franchisor not required to obtain the lessor's consent to (or give prior notice/ details of) a franchisee being given a licence to occupy.
Reference group considerations: **Issue 1 (notice to franchisee)** ***Opposing view:*** The relocation/ demolition provisions apply only as between landlord/franchisor as parties to the lease. Matter for franchisor to notify franchisee and any dispute between franchisor/franchisee regarding the notice is a dispute under Franchising Code of Conduct (ie. not a retail shop lease dispute). Further to the red tape issue above, SCCA notes that (in its experience) issuing notices to the premises can also be problematic because the recipients/employees often become concerned about their futures.		
6.8.7 - Landlord to disclose possible timing of relocation		
	Option A: amend so that landlord disclosure statement to include proposed/possible timing of any alteration works that may require relocation of the tenant. Landlord's obligation would apply to extent that they are, or should reasonably, be aware of the matters at the time the disclosure statement is given. **Option B:** prescribe minimum timeframe within which landlord can not relocate the tenant in the event that the landlord disclosure statement does	Consensus - no change (ie. options A and B not necessary)

	not indicate that the landlord intends to relocate tenant.	
6.9 - Demolition of building in which tenant's business situated		
6.9.1 - Timeframe for tenant's termination notice		
	Currently, a tenant who wishes to terminate the lease earlier than the date stated in the landlord's demolition notice (landlord's notice) must give the landlord at least seven days notice (tenant's notice period): section 46J(2). **Option:** Extend timeframe for tenant's notice period to at least one month before the date the tenant wants the lease to end.	**Reference group recommendation:** Consensus - amend per option. The extended tenant notice period is appropriate as practicable/reflects commercial reality - ie. allows sufficient time for the tenant to remove stock/fixtures/fittings etc. Also a reasonable timeframe in the context of the landlord's minimum notice period (ie. 6 months).
6.9.2 - Compensation for demolition		
	Current provision: Section 46K of the Act deals with demolition compensation. Currently, the landlord is liable to pay reasonable compensation for: (i) tenant's loss/damage due to early termination of the lease - if the demolition is not carried out, or not carried out within reasonably practicable time; or the landlord proves it had a 'genuine proposal to demolish within a reasonably practicable time after termination day' (ii) fit out not provided by the landlord, whether or not the demolition is carried out. **Option A:** Amend section 46K(1)(b) (second limb above) to clarify landlord only liable to compensate tenant for written down value of fit out. **Option B:** Compensation payable by landlord under section 46K(1)(a) (the first limb above) should extend to compensation for loss of business value. **Option C:** Remove existing criteria in 46K(1)(a) and section 46K(2) (ie. first limb above) limiting landlord's liability to pay reasonable compensation for loss/damage suffered by tenant because of early termination of lease.	**Reference group recommendation:** Consensus - no change to section 46K (ie. retain current provision) **Reference group considerations:** The reference group considered the following views**:** • Compensation is matter for commercial negotiation on a case by case basis. Additional prescription not necessary/appropriate - may unduly restrict commercial outcomes. • If parties cannot agree on compensation, QCAT decides. • SCCA: demolition provisions have worked well for the recent massive centre redevelopments in Qld (Westfield Chermside, Indooroopilly etc). Major landlords take commercial view and have incentive to reach agreement - no justification for legislative change.

6.10 - Refurbishment/ refit of leased shop or building		
6.10.1 - Condition for requiring tenant to refurbish/refit shop		
	Option A: Provide that a provision in a lease that requires a tenant to refurbish/refit the leased shop during the lease term is void unless it gives sufficient details to indicate generally the nature, extent and timing of the required refurbishment/ refitting. **Option B:** 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.	**Reference group recommendation:** Consensus - amend per option A. Option A addresses refurbishment required during lease term (as opposed to upfront fit out requirements). The current landlord disclosure requirements relate to upfront fit out (ie. for start of lease) only. **Red tape consideration:** The increase in regulation is justified as it would provide Qld tenants with an equivalent level of protection to the other States/Territories (incl. NSW/Vic) in relation to: • assessing/negotiating/factoring into their decision to enter into the lease any prospective liability to refurbish/refit of the leased shop; and • reduce potential for, or narrow the scope of, disputes about refurbishment/refit works and associated costs during the lease term.
6.10.2 - Landlord to give tenant advance notice of proposed alteration/refurbishment		
	Status quo: Currently, the Act does not require landlords to give existing tenants prior notice of proposed alterations/refurbishment. **Option:** Landlord must not commence any alteration or refurbishment likely to adversely affect a tenant's business unless: (i) the landlord has notified tenant in writing of the proposed alteration/refurbishment at least two months before it is commenced; or (ii) the alteration/refurbishment is necessitated by an emergency and landlord has given tenant the maximum period of notice reasonably practicable in the circumstances.	**Reference group outcome:** General agreement - retain status quo (except L1/ARA/QNF, who support option). **Reference group considerations:** Members considered the following views: • Tenants have an existing entitlement to compensation under section 43(1) irrespective of notice. • Desirable for retailers to receive as much notice as possible for forward planning purposes (ie staff rosters) and to minimise costs/losses associated with advance stock orders etc. • Discussion of potential issues/difficulties regarding how the provision would apply in practice (ie extent of works, including escalation from minor to major; works needing to be done quickly to minimise impact

		on efficient operation of centre). • Unnecessary administrative burden/cost for landlords, including potential to delay centre refurbishment (ie. if technical defect in notice - can be up to 200 tenants in major centre). • Numerous major redevelopments in Qld in recent years and not a problem. Additional regulation would be a barrier to refurbishment when (particularly given difficult/changing retail climate) centres will need to be refurbished regularly to remain attractive to customers. • Practically, if there is to be a material refurbishment, tenants are advised in plenty of time. Act largely working for refurbishments.
6.10.3 - Restrictions on landlord requirements for fit out/ refurbishment of shop		
	Option A: Prohibit lease from requiring refurbishment/refit by tenant at less than five year intervals. **Option B:** Provide that a landlord must not require fit out to be undertaken by a designated contractor/supplier who is a related party/entity of the landlord	**Reference group recommendation:** Consensus - options not supported - recommend no change (except QNF which supports option B) **Reference group considerations:** Option A - matter for commercial negotiation. Option B - these clauses are reasonable - ie. for landlord to designate contractor/suppliers to ensure standards met. Related parties not generally an issue in practice - usually nominated panel of 4 or 5. Fire safety/air conditioning are two areas where landlord designates one contractor (ie. for integrated systems/quality control etc) across centre.

6.11 - End of lease issues (including options, renewal)		
6.11.1 / 6.11.2 - Landlord's obligation to notify tenant about option date		
	Status quo: If a lease contains an option for tenant to renew/extend, the landlord must give tenant written notice (at least two, but not more than six months) of the date by which the option must be exercised: section 46. If the landlord's notice is not given within this timeframe, the Act provides for a max. penalty of 40 penalty units (offence provision) but is silent about what happens between the parties to the lease **Option A:** 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. **Option B:** Extend timeframe for landlord's notice to minimum six and not more than 12 months. **Option C:** Where the landlord does not give notice within the required timeframe, the time for the tenant to exercise the option should be extended by the period that the landlord failed to give the notice, with a corresponding extension for the tenant to give notice of an early determination of market rent under section 27A.	Items 6.11 and 6.12 were considered together. **Reference group recommendation:** Consensus - options not supported - recommend maintain status quo (except NRA, which supports option C). Reference group noted that section 46 was agreed to be inserted in 2006 to protect unsophisticated tenants and is working well. NRA propose option C in lieu of the offence provision - see item 8.1.7 below.
6.11.3/ 6.11.4 - Landlord's obligation regarding renewal where no option /other agreement		
	Status quo: If the no option to renew/ extend contained in the lease, and in the absence of 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. If landlord's notice is not given within the required timeframe, and tenant notifies landlord before the lease expires that the tenant wishes to extend, the lease is extended for six months after landlord gives notice.	**Reference group recommendation:** Consensus - option not supported - recommend maintain status quo **Reference group considerations:** Members consider section 46AA (which was inserted in 2006 to align with NSW) is working well and should be retained. Not necessary to clarify that section 46AA does not operate retrospectively - not an issue in practice, including as very few leases

	Option: Omit section 46AA.	entered into pre April 2006 would remain on foot.
6.11.5 - Market rent where sitting tenant (without option) negotiating new lease		
	Option: Insert new provision: where landlord and tenant negotiating renewal/ extension of lease (other than under option): the rent payable by tenant for the negotiation period is market rent; and 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).	**Reference group recommendation:** Consensus - option not supported - recommend no change. Members agreed that amendment in terms of option not necessary or appropriate. The rent payable over the negotiation period, and any adjustments for that period once terms for new lease agreed, are a matter for commercial negotiation between landlord and tenant.
6.11.6 - Proposal for adoption of ACT end of lease/renewal provisions for shopping centre leases		
	Option A: New provision: for renewal/extension of lease (other than under option), landlord must not propose rent to be charged initially under the renewed lease in excess of market rent. **Option B:** For shopping centre leases, replace section 46AA with the ACT conduct rules. **Option C:** New provision: giving sitting tenant the right to a CMR determination where tenant deems that proposed rent for new lease exceeds market rent.	**Reference group outcomes:** Options A and B - consensus that not appropriate - not supported. Discussion on option C closed with consensus for no change.

Reference group considerations:

Members considered the following views in concluding not to support Option A, B or C:

SCCA

- ACT provisions are not operating because statutory opt out (ie agreement between lessor and lessee) widely exercised. Similar provisions in SA also not functioning.
- options would be substantially overturn law of contract - ie. seek to imply freehold rights into lease contract.
- tenants can improve their security of tenure by negotiating longer leases up front.
- landlord should be able to decide what the premises used for at end lease and at what price - entitled to a return on their capital risk and investment.
- also practical problem -in Qld at least 100,000 leases on foot so on average 20,000 come up for renewal each year. It is conceivable that, under option C, there could be up to 20,000 market rent reviews - currently insufficient SRVs and would result in long term holdovers.
- it is a commercial negotiation - it is the end point of the negotiation that is material (cf. landlord's initial offer). The end point of the negotiation reflects the market and rents are being reduced in current market as a whole - ie. major institutional landlords getting negative 5% on renewals currently.
- retailers can access independent information on rents.

NRA

- SA (1997) and ACT (June 2002) provisions are not functioning
- in Qld/NSW the landlord is required to give the tenant reasonable notice before end of lease (ie. section 46AA) - these provisions are sufficient.
- do not accept that there would be plethora of tenant CMR determinations with option C
- ask for a rent that is reasonable/reflective of current market rent and reviews won't be required - it is about a culture change.

PGA/ QNF/ L1

- have all experienced ambit landlord claims in negotiation (ie. initial offers with 15% up to 60% increases). With these ambit claims, small business sitting tenant does not know what market rent is - they tend to settle rather than negotiate
- landlords exploit fact that small business operators are busy running their business and don't have time/resources/leverage to negotiate rent down to a reasonable amount (cf. chain retailers who have dedicated/professional leasing staff. If there is a reasonable offer, tenant would take it.

ARA

- for smaller retailers the business is their whole livelihood - these huge claims come through and they are looking at having to close up the shop or sign the lease and then be forced to close in the future
- sitting tenant does not know if the landlord has someone to replace them - many cannot risk going to landlord with final offer
- 3 problems: i) need to educate retailer to get independent advice on rents; ii) stress/pressure on small business owners; iii) small tenants end up subsidising concessions made to larger retailers.

6.11.7 - Landlord to compensate tenant for fit out at end of lease		
	Option: New provision: that 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.	Consensus - option not supported - recommend no change.
6.12 - Lease dealings - security and assignments		
6.12.1 - Tenant's right to deal with lease and business assets by way of security		
	Section 45 of the Act contains an implied condition that the landlord must not obstruct/hinder the tenant in dealing with lease/business assets by way of security. The parties may contract out of this implied condition by a declaration under section 45(3). **Option A:** Omit section 45 in its entirety. **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.	Consensus - no change (ie. retain section 45, including ability to contract out).

6.12.2 - Landlord's consent to assignment of lease		
	Current 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 the assignee an existing right under the lease; or impose an unreasonable condition. **Option:** Omit section 50.	Consensus - retain section 50, with no change Members considered the opportunities to harmonise with other jurisdictions in terms of timeframes and setting out relevant considerations for withholding consent and concluded the current provision is working well and no change is required.
6.12.3 - Release of assignor's guarantor from future liability under lease		
	Option: Amend to clarify that release of the assignor under section 50A includes the assignor's guarantor(s).	Consensus - recommend amend per option. Note: there is no restriction on landlord requiring new guarantees in respect of assignee - commercial matter; not unreasonable for landlord to require as condition of consent to assignment.
6.12.4 - Criteria for release to apply on assignment of lease		
	Current provision: Assignor is released from future liability under the lease only if: the landlord, assignor and assignee have each complied with their respective disclosure requirements under the Act; and each such disclosure statement is not defective: section 50A of Act. **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.	Consensus - option not supported - no change to section 50A Benefit to landlord and assignee for section 50A to be retained - assists in ensuring transparent assignment - ie. landlord can rely on Act to require proper exchange of disclosures and reduce risk of incoming tenant being mislead/misunderstanding. Without section 50A, outgoing and/or incoming tenant may be disinclined to meet their disclosure obligations.

6.12.5 - Monetary caps on personal guarantees		
	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.	Consensus - option not supported. Commercial matter for negotiation. Bank guarantees are an alternative.
6.13 - Unconscionable conduct		
6.13.1 - Replace unconscionable conduct test with unfair conduct test		
	Current provision: A landlord or tenant must not, in connection with a retail shop lease, engage in conduct that is, in all the circumstances, unconscionable: section 46A **Option A:** 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.	**Reference group recommendation:** Consensus - recommend no change (except QNF, which has in principle preference for option A)
Reference group considerations: The reference group considered the following views: • QNF: bar for unconscionable conduct is too high. • SCCA: Federal Coalition (now Government's) policy commitment to extend unfair contract protections in Australian Consumer Law (ACL) to small business may impact retail lease matters. Suggest no change pending what happens at federal level. NRA: from experience, unconscionable conduct often used as catch-all in retail shop lease disputes - in most cases conduct not even found to be unfair. Option A unlikely to result in significantly different outcomes for tenants - need to recognise the difference between a hard bargain and unfair.		
6.13.2 - Expand QCAT powers to deal with unconscionable conduct		
	Current limited powers: QCAT may only make one of two specified orders on a finding of unconscionable conduct. These are that the party who engaged in the conduct is:	**Reference group outcome:** Consensus agreement that: i) The issue of whether QCAT's powers to make orders on a finding of

	• 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.	unconscionable conduct should be expanded is a matter for consideration as part of the outcomes of the QCAT review; and also subject to any relevant outcomes of the Federal Coalition Government's small business policy commitment to extend unfair contract protections to small business (see detail re member views below). ii) Parties should continue to be able to bring unconscionable conduct proceedings in the courts as an alternative to QCAT. iii) QCAT should not have the power to rewrite/substitute contracts in relation to a claim for unconscionable conduct in connection with a retail shop lease.
	Notes: The reference group noted that: • Unconscionable conduct is a complex area of law. • the Act does not make specific provision for constitution of QCAT for unconscionable conduct claims - ie. constituted by a legally qualified member and industry representative members under section102. • compare NSW ADT Act - specific provision for constitution of Tribunal for unconscionable conduct claims in Retail Leases Division - ie. judicial member assisted (in advisory capacity only) by two industry members (NSW model). • It is unclear what implications/impacts the Federal Coalition Government's policy commitment to extend of unfair contract protections in the ACL to small business may have for retail shop lease matters. **Member views - expansion of QCAT's powers:** Division of views for outcome item (i) above, as follows: ***SCCA/PCA:*** • Oppose expansion QCAT powers - unconscionable conduct is complex area of law which should be applied by a higher court (ie. at least District Court level. • Concern about diminution in standards for judicial consideration of unconscionable conduct matters at state level - NSW model is exception. Also special provision in NSW retail leases Act for removal of unconscionable conduct proceedings to Supreme Court • Open for parties in Qld to commence unconscionable conduct proceedings in court (cf QCAT) and seek appropriate declaratory/remedial orders. • QCAT should deal only with less complex claims (ie. those about payment of money) - no case for extension of QCAT's powers.	

	QLS/NRA/ARA/L1: Support option A on the basis that the equitable jurisdiction to hear/determine unconscionable conduct matters is exercised by a judicial member (with industry representatives assisting in an advisory capacity - ie. per NSW model); and that there is an alternative avenue available through courts. ***QNF:*** support option A.	
6.14 - Other implied lease terms		
6.14.1 - Mandatory registration of leases, including lease incentives		
	Issues: In Queensland, 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 and no timeframe within which a landlord (who intends to register a retail shop lease) must lodge the lease for registration. **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 to an 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.	**Reference group outcome:** Consensus agreement**:** issues associated with mandatory registration of leases, including lease incentives contained in side agreements, are not matters for the Act and beyond scope of the review. **Reference group considerations:** These options have been raised by tenant and valuation/ data provision stakeholders advocating compulsory registration of retail shop leases and incentives information to overcome a lack of information available to shopping centre tenants in relation to effective rents. SCCA raised the following concerns about these options: • Qld land title legislation does not mandate registration of leases - it is a matter for the parties. • In terms of setting a timeframe for registration, there are difficulties from a practical perspective, for example, multiple owners, tenants not willing to sign, lawyer delays etc. • Information disclosure and availability a matter for industry not government**.** • Commercial confidentiality While other members restated concerns about the unavailability of comprehensive market rent data and the mutual benefit to landlords and tenants in the registration of leases, they agreed the option was beyond the scope of the review.

6.14.2 to 6.14.5 - Proposals for regulation of insurance/indemnity provisions in retail shop lease		
	Item 6.14.2 (Prohibition on regulation of tenant insurances): ***Option:*** prohibit any provision in a lease that: (i) requires a tenant to take out joint insurance covering the liabilities of landlord and tenant; (ii) regulates a 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". **Item 6.14.3 (Regulation of indemnity provisions in lease)** Currently, a lease can require the tenant to indemnify the landlord for loss/damage resulting from actions/omissions by or for the tenant (the indemnity provision): section 24(1)(b)(iii) of Act. ***Options:*** Cumulatively: **(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/omission by or for the tenant; and (ii) the act/omission occurs within the building/centre of which leased premises form part. **(B)** Insert new provision that a clause in a lease is void to the extent that it requires tenant to indemnify landlord against: (i) any liability, penalty, claim or demand for which landlord would otherwise be liable; (ii) 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. Insert new provision that clause in lease requiring the tenant to indemnify the landlord other than in accord with above is void **Item 6.14.4 (Tenant responsibility under lease):** *Option:* Prohibit provision in lease that makes tenant responsible for actions of any person other than tenant, or their employee/agent.	Members discussed items 6.14.2 - 6.14.5 as a package **Reference group outcome:** Consensus - options not supported - recommend no change. However, the reference group recommends that the legal advice report include a statement about advices to the tenant on insurance/indemnity provisions in relation to the lease - see item 5.5.3 above for detail. **Reference group/red tape considerations:** General view of reference group that: • insurance and indemnity provisions in a lease are a matter for commercial negotiation between the parties on a case by case basis • it is not practicable/appropriate for the Act to regulate risk - ie. attempting to legislate a 'one size fits all' solution will not work • the options would substantially increase the regulatory burden on the Qld retail sector. The following views were considered by members for item 6.14.2: SCCA (legal representative): • past trend for landlords to require joint insurances - landlords have moved away from this partly because of the Insurance Contracts Act and also insurers/available products now better address the insurance of landlords' interests • three ways landlord can insure: - joint parties: tenant and landlord have all rights; - landlord noted as an insured party: landlord has some rights and can initiate/pursue claim and deal with insurer. Most centre landlords will accept this arrangement; - landlord's interest noted on policy - can be problematic because if tenant makes claim insurer can't pay without landlord consent but landlord has no direct say/input - landlords often reluctant to accept this level of cover

	Item 6.14.5 (Provision for release of landlord by tenant): *Option:* Prohibit provision in lease that constitutes release of the landlord by tenant and which does not exclude any negligent act/omission of landlord, or their employee/agent.	• level of cover landlord willing to accept depends on various factors, including landlord's structure and type/location of centre etc
6.14.6 - Security of tenure - statutory minimum lease term		
	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). **Option:** Prescribe a mandatory minimum lease term in the Act	Consensus - option not supported - no change The status quo in Qld allows flexibility - lease terms are a matter for negotiation between landlord and tenant. The option would substantially increase red tape and compliance costs for the Qld retail sector. Also noted that an implied minimum lease term was removed from the Qld Act in 1994 at the request of a retailer association.
6.14.7 - Implied lease conditions for damaged premises		
	The Act is currently silent about what happens between the landlord and the tenant where the shop/building/centre is damaged (ie. by flooding). **Option:** Insert new implied provisions regarding rent and outgoings abatement/reduction; respective termination rights (ie. where repair impractical; landlord failure/delay to repair etc to align with NSW/Vic	Consensus agreement- retain status quo These are matters for commercial negotiation - a well drafted lease should address these issues. Not practicable/appropriate to regulate as no 'one size fits all' solution.
6.14.8 - Rent abatement where landlord closes shopping centre as precaution		
	Option: 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 centre/ 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, or there is no damage to the centre/leased building.	Consensus - option not supported. Matter for commercial negotiation cf. legislative change.

6.14.9 - Tenant contributions to cost of landlord's works		
	Option A: 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:** If a tenant is liable under the lease to pay an amount for costs of or associated with specified landlord works, the following conditions apply: (a) the works must be carried out by person(s) with suitable skills /experience engaged or 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	Consensus - options not supported. Matters for commercial negotiation cf. legislative change.
6.14.10 - Capital costs/expenditure not recoverable from tenant		
	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:** amend that provision in lease is void to extent that it requires tenant to pay any amount for capital costs of building/associated areas.	Consensus - no change Option would be a technical amendment to align with other States/Territories (incl. NSW/Vic). Members were of the view that this is not necessary as the current provision is working well.

6.14.11 - Liquidated damages clauses in leases		
	Context: These options were proposed by a retail stakeholder on the basis that liquidated damages clauses in shopping centre leases are operating as penalties, rather than fair compensation for the landlord's loss resulting from the tenant's breach of the lease. For example, a liquidated damages clauses may apply where a tenant fails to trade under the terms of the lease - ie. does not open for trade on a Sunday/public holiday; or ceases operations altogether (known in the industry as "going dark"). Liquidated damages clauses also commonly apply where the lease is terminated due to tenant default. The damages are generally for lost rent, re-letting costs etc and are designed to codify the landlord's entitlement at common law. **Option A:** Insert new provision prohibiting liquidated damages clauses in retail shop leases. **Option B:** (If option A not accepted) Act should require landlord to engage in reasonable negotiation with the tenant regarding the terms/formulation of a liquidated damages clause - or at least require landlord to clearly demonstrate the basis upon which the liquidated damages clause represents a genuine pre-estimate of the landlord's loss suffered as a result of the tenant's breach of lease.	**Reference group outcome:** Consensus - options not supported - recommend no change (except NRA/QNF) NRA/QNF - in principle support for option A **Red tape increase:** Prohibiting or otherwise regulating liquidated damages clauses in retail shop leases is beyond the scope of the Act. To do so would increase the regulatory burden and impinge on commercial relations/outcomes. Not a matter for government intervention. **Reference group considerations:** The regulation of liquidated damages clauses is beyond the scope of the Act. Such clauses are a matter for commercial negotiation between landlord and tenant; and the construction/enforceability of liquidated damages clauses is a complex/technical area of the law. See also red tape issue above. **NRA**: Support prohibition of liquidated damages clauses in retail leases. In practice, these clauses are generally only used by (some, not all) major shopping centre landlords. In these cases, the liquidated damages clause is in effect non-negotiable (ie. tenant not in a position to negotiate terms or removal unless they are a sophisticated tenant with adequate leverage at the time the lease is negotiated). Also, there has been disclosure about how the charges have been established; and there are other avenues available to the landlord for breach of lease.
7.0 - Dispute resolution and administration		
7.1 - Compulsory mediation		
	Current arrangements: A party to a retail tenancy dispute can not be compelled to attend a mediation conference: section 59 of Act.	**Reference group outcome:** Agreed - no change (except SCCA, which supports option A) **Reference group considerations:**

	Under the QCAT Act, QCAT can direct the parties to a proceeding to attend or be represented at one or more compulsory conferences. 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: **Option A** *(loosely based on the NSW/Vic positions)***:** 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. **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.	Generally, it was agreed there were benefits in encouraging the parties to make the best use of mediation to resolve retail shop lease disputes. There were differing views whether mediation should be compulsory: SCCA: • making mediation under the Act compulsory would focus parties and minimise one/both parties wanting their day in court - Option A is a mechanism to promote this. • concern re option B that compulsory conference under QCAT Act not mandatory - ie. if QCAT doesn't direct conference opportunity for mediation would be lost. QLS: • noted in principle preference for option B as compulsory conferences effective to settle disputes - the sooner the dispute goes to compulsory conference the better as can reality test the day in court approach, including defining/settling issues • query whether constructive/cost effective to have in effect two mediation processes. Other members: • options A and B not supported - no change necessary to the current arrangements, which are working effectively. They are flexible in facilitating mediation while providing for structured conferences to assist in resolving the dispute where mediation is unlikely to be effective. NRA: mediation provisions in Act should include provision that statements made in mediation cannot be used against that party in court (per NSW)

7.2 - Timeframe for mediation		
	Current provision: A mediator must refer a retail tenancy dispute to QCAT if the dispute is within jurisdiction and: • the parties can not reach a mediated solution; or • a party to the dispute does not attend the mediation conference; or • the dispute is not settled within four months after the dispute notice is lodged: section 63 of Act. **Option:** Remove the four month timeframe in section 63 and instead provide for mediator to refer dispute if they consider that there is undue delay (ie. party not providing/ responding to material when required etc)	**Reference group recommendation:** Consensus - no change to current provision. **Reference group considerations:** Members generally concluded that the provision is operating well/no problems in practice - current provisions allow mediator to refer for undue delay. SCCA: • timeframe for mediation should be in the hands of the mediator (cf. current section 63(1)(iii) which provides mediator must refer if dispute not settled in 4 months). Background information, expert evidence etc needed to inform decision to settle can take longer to than 4 months to obtain/consider for more complex disputes - even with no fault it can get bogged down; • prefer option but given not a widespread issue in practice, agree to no change.
7.3 - Legal representation		
	Currently, at a mediation conference under the Act, 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: section 57 of Act For QCAT proceedings, the parties must represent themselves, unless the interests of justice require otherwise: section 43 QCAT Act. **Option:** Legal representation for mediation and QCAT proceedings should be allowed as of right where the claim is for more than $50,000.	**Reference group outcome:** Reference group noted that 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. Members' views have been provided to the QCAT review.

7.4 - Constitution of QCAT - industry representatives or assessors		
	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). 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. **Option:** Remove the requirement in section 102 for the constitution of QCAT to include industry representative members and instead allow the presiding member to appoint a person(s) with the appropriate knowledge, expertise, or experience as assessors.	**Reference group outcome:** Consensus support for continuation of lessor/lessee representatives (option not supported). Members concluded the complexity of retail investment and relationships between parties means industry representatives' input is invaluable (ie. important industry experience/ insight to assist legal member). QLS/NRA: considered it desirable to clarify industry representatives' role as advisors not decision makers.
7.5 - Jurisdiction of mediators and QCAT for retail shop lease disputes		
7.5.1	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: section 103(b)(i) and section 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.	Consensus - option supported Agreed provided landlord can choose to pursue rent arrears in other jurisdictions
7.5.2	**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).	Consensus - amend per option. Technical amendment only
7.5.3	**Option:** Amend to clarify the nature and extent of QCAT's jurisdiction in relation to retail tenancy disputes as required, including where urgent injunctive relief is sought.	Consensus agreement: to clarifying QCAT's jurisdiction in relation to retail tenancy disputes, subject to review of draft by QLS and LLFG in particular.

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 rent. **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	Consensus agreement - no change Members do not support the option. They concluded that QCAT should only have jurisdiction regarding procedure, not the amount of the determination.
7.6 - QCAT power to order rectification of lease		
	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. .	Consensus agreement - no change (option not supported)
7.7 - Timeframe for commencement of proceedings		
	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.	Consensus agreement: clarification per option required. Members held differing views as to the time within a proceeding should be required to be commenced (at 1, 3 to 6 years) but agreed that it would be desirable to clarify the interaction of section 61 and section 64 in relation to QCAT's power to extend time. QLS: in principle support for overriding power to extend under section 61 QCAT Act. DJAG to consult further with QCAT.
8.1 - Penalties consideration has been given to whether offences/ penalties under the Act are appropriate to be retained		
8.1.1A	**Option:** remove offence provision for: **section 23 -** landlord's failure to give tenant certified copy of lease within 30 days after lease signed Max penalty: 40 penalty units	**Consensus agreement** - retain requirement but remove penalty Retention of the express requirement for landlord to give signed/certified copy of lease to the tenant is justified as it underscores the importance of the signed lease as a binding contract setting out the rights/obligations of both parties to the lease. Removal of the penalty is justified as section 23 is procedural in nature; and a tenant can lodge a dispute with QCAT if landlord does not provide signed/certified lease.

8.1.1B	**Option:** remove offences but retain current compensation rights for: **section 26(1),(3)&(4) -** unauthorised disclosure of tenant's turnover information by landlord/prospective purchaser/ mortgagee and their professional advisers **section 35(1)** - unauthorised disclosure of parties' submissions/lease information by SRV For each of above: • max penalty: 60 penalty units; and • tenant/landlord entitled to reasonable compensation from disclosing party for loss/damage suffered due to the disclosure	**Consensus agreement** - retain existing confidentiality requirements, together with compensation and penalty provisions. Retention of the existing provisions with no change is justified as: • there are significant commercial sensitivities associated with tenants' turnover information and some lease information; • both the compensation and penalty provisions underscore the importance of commercial confidentiality and operate as an incentive for relevant parties to maintain appropriate confidentiality; and • the provisions are working (ie. in the reference group's experience there are very few, if any, disputes regarding unauthorised disclosure of the protected information) For professional advisors/valuers, the reference group notes that regulatory offence provisions carry more weight in, and underscore the seriousness of, professional conduct disciplinary proceedings.
8.1.2	**Option:** remove offence provision for: **section 37(2)** - landlord's failure to: • specify in lease outgoings payable by tenant and how they will be determined/apportioned/recovered (outgoings provisions); • give tenant an annual estimate of outgoings and an audited annual statement within stated timeframes and meeting specified requirements (outgoings statements) Max penalty: 60 penalty units	**Consensus agreement** to: • remove the penalty provision; and • replace with an implied term that a tenant's obligation to pay their share of the landlords outgoings is suspended: (i) where the lease does not contain outgoings provisions in terms of section 37(2)(a); or (ii) until the landlord gives the tenant the outgoings statements required under section 37(2)(b) (the implied term).

Reference group considerations: Retention of the requirements for outgoings provisions in the lease and landlord's annual outgoings estimate and audited statement are justified as: outgoings are a key component of a retail tenant's occupancy costs; the obligations provide transparency for tenants in relation to the landlord's expenditure on outgoings for the centre/building; and the obligations align with good business practice and reduce the propensity for disputes. Replacing the penalty provision with the implied term is justified as it would: provide a more effective/direct incentive for landlords to comply with the outgoings accounting/reporting obligations; and align with NSW/Vic/WA. The reference group notes that non-compliance with these obligations is more prevalent with small/independent landlords (ie. not an issue in major shopping centres).		
8.1.3	**Option:** remove offence for: **section 39** - prohibition on key money, or any amount for goodwill of tenant's business, being sought/accepted by or on behalf of landlord For contravention: • max penalty:100 penalty units; and • tenant can recover amount/value of benefit as a debt (recovery provision)	**Consensus agreement** - retain penalty provision Retention of the key money prohibition is justified as it is protects tenants and an equivalent protective provision exists in all other State/Territory jurisdictions. The penalty provision should be retained (as well as the recovery provision) as it operates as a disincentive to landlords who may seek such payments from unsophisticated tenants.
8.1.4	**Option:** remove offence provisions relating to sinking funds: **section 40(3)**; **section 40(4)** - misapplication of sinking fund monies by landlord **section 40(7)** - landlord must not seek/accept tenant contributions that would exceed sinking fund credit cap of $100, 000. Max penalty: 100 penalty units	**Consensus agreement -** remove penalty provisions Remove these penalty provisions - retention unnecessary as there are few (if any) remaining shopping centres with a sinking fund (see items 6.5.1-6.5.3 above)
8.1.5	**Option:** remove offence for: **section 41(2)** - landlord's misapplication of promotion/advertising amounts Max penalty: 100 penalty units	**Consensus agreement -** retain penalty provision **P**enalty provision operates as a disincentive for landlords to apply funds other than for the benefit of the particular centre
8.1.6	**Option:** remove offence for: **section 45(1):** landlord must not obstruct/hinder tenant in dealing with lease/tenant's business assets by way of security. Max penalty: 40 penalty units.	**Consensus agreement**: remove offence provision Tenant would have recourse to QCAT dispute process if obstructed/ hindered.

8.1.7	**Option:** remove offence for: **section 46**: if lease gives tenant option to renew/extend, offence if landlord fails to give tenant written notice of the option date within specified timeframe. Max penalty: 40 penalty units.	**Consensus agreement**: remove offence provision See item 6.11.1/6.11.2 above.
8.1.8	**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 tenant's association to promote a retail shopping centre for another purpose of mutual interest to tenants. Max penalty: 40 penalty units.	**Consensus agreement**: Remove offence and provide for any such lease provision to be of no effect.
8.1.9	**section 53:** Trading hours offence in relation to leases existing at the commencement of the *Trading (Allowable Hours) Amendment Act 1994*. Max penalty: 100 penalty units.	**Consensus agreement**: remove offence provision No longer relevant
8.1.10	**section 62**: offence for a person, other than the mediator, to make an official record of anything said at mediation conference. Max 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. Max penalty: 100 penalty units	**Consensus agreement**: retain both offence provisions Standard for dispute resolution
8.2 - Provision for mandatory statutory review		
	Option: Repeal section 122, which mandates a review of the Act every seven years	Divided views on option: • support: SCCA/PCA • oppose: NRA/L1/QNF/API No view: QLS/LLFG/PGA/API/CCIQ Reference group discussion noted this is a matter for Government.

Attachment 3

Reference Group Report - *Retail Shop Lease Act 1994* (Qld) review
Technical Amendments

- Exclusion of ATMs/vending machines in shopping centre common areas from *retail shop lease* definition (2.3)
- In principle support to insert new definition: *renewal* of lease (3.7)
- Amend section 11 - when lease taken to be entered into (4.1)
- Omit section 16 - exempt enterprise leases (4.3)
- Amend section 19 - clarify prohibition on contracting out through related document (4.4)
- Amend section 23 – landlord to give tenant original (or certified) copy of signed lease (5.1.7)
- Amend section 22A - timeframe for lessee disclosure (5.2.1)
- Amend section 22B - timeframe for assignor disclosure to assignee (5.3.1)
- Amend section 22C – timeframe for assignee disclosure to landlord (5.3.5)
- Amend section 27(8) to remove professional advice notification requirement for major lessee opt-out of implied rent review provisions (6.2.4)
- Amend to clarify conflict between major lessee opt out of rent review provisions and section 36 (6.2.5)
- Amend section 27A to clarify that option exercise date is 21 days after lessee receives current market rent (CMR) determination (6.3.1)
- Amend section 27A(1A) to remove professional advice notification requirement for major lessee opt-out of CMR provisions (6.3.2)
- Insert deeming provision for party submissions to specialist retail valuer (6.3.3)
- Amend CMR formula in section 29(a)(i) to correspond with NSW/Vic equivalent provision (6.3.4)
- Amend section 33 to clarify that retail shop lease dispute exists if CMR determination not complied with (6.3.7)
- Amend section 7(3) to exclude landlord's insurance excess from recoverable outgoings (6.4.2)
- Clarify excluded areas for purpose of calculating apportionable outgoings (6.4.4)
- Amend section 41 so unspent advertising/promotion contributions to carry forward (6.5.4)
- Amend to clarify interaction between section 43(1)(f) and stand-alone relocation/demolition provisions (6.7.3)
- Amend section 46C to clarify when stand-alone relocation provisions apply (6.8.1)
- Clarify for section 46D that alternative shop must be in existing centre (6.8.4)
- extend timeframe for a tenant who has received a demolition notice to give the landlord notice of earlier termination from seven days to one month (6.9.1)
- Technical amendments to clarify nature/extent of QCAT jurisdiction (7.5.3)
- Clarify interaction between QCAT Act and RSLA re extension of time to commence proceedings (7.7) – further consultation with QCAT required
- Remove transitional extended trading hours prohibition - s.53(1) (8.1.9)

Attachment 4

Reference Group Report - *Retail Shop Lease Act 1994* (Qld) review

Red tape overview

The red tape and related considerations in relation to the various issues/options considered by the Reference Group are set out in **Attachment 2**.

A Red tape reduction measures

1. The following recommendations of the Reference Group (agreed by consensus) would reduce red tape:

   - exclude from the operation of the Act leases by a tenant who is operating a business for the landlord from the leased premises (2.4)
   - in principle agreement that non-retail leases in shopping centres (ie. commercial offices or non-retail service tenancies such as medical/ accounting/legal practices) should be excluded from operation of the Act (2.5)
   - provide for a tenant (who is not a major lessee) to waive/shorten the disclosure period by giving the landlord written notice of waiver and both a legal and financial advice report (5.1.4)
   - provide that, within 30 days after the lease is signed by both parties, the landlord must give the tenant either an original or certified copy of the signed lease (5.1.7)
   - allow an assignee (who is not a major lessee) to waive/ shorten the disclosure period by giving the landlord written notice of waiver and legal and financial advice reports (5.3.3-5.3.5);
   - provide that a clause in a lease preventing/limiting a business disturbance compensation claim for a particular occurrence is not prohibited, provided tenant given specific notice before entering into the lease (6.7.5)
   - amend so landlord is not liable to pay compensation under section 43(1) of the Act where their action resulting in business disturbance is in response to an emergency or requirement under legislative authority (6.7.6)
   - amend so that a tenant under a retail shop lease is not liable to pay landlord's expenses incurred in obtaining mortgagee consent (6.6.1)
   - amend section 50A(2) of the Act to include release of the assignor's guarantor(s) from liability under lease (6.12.3)
   - remove various offence provisions (8.1)

2 The following Reference Group outcomes (on which consensus was not reached) would reduce red tape:

   - exclude from the operation of the Act all leases with a floor area greater than 1000m^2 (2.1)
   - exclude from the operation of the Act all leases where the tenant is a listed corporation/subsidiary (2.2)
   - exclude from the operation of the Act leases by Commonwealth, State and local governments or exclude unnecessary procedural requirements (2.6/2.7)

- provide that a landlord is required to complete a disclosure statement only to the extent that is relevant to the lease concerned/ insert a notation that strict compliance with the approved form is not necessary and substantial compliance is sufficient (5.1.1)
- provide that a tenant (who is not a major lessee) may waive/shorten the disclosure period by giving the landlord: written notice of the waiver; and a legal advice report and a financial advice certificate (5.1.4)
- remove existing requirement for a major lessee who elects to waive the landlord disclosure period to give the landlord written notice stating they have received appropriate financial/legal advice about the lease/assignment (5.1.4 & 5.3.3/ 5.3.4)
- omit section 25(3) and 25(4) about disclosure of turnover (6.1.1 – 6.1.2)
- provide mechanism for general opt out of implied rent review provisions (6.2.3)
- remove requirement for professional advice notification in major lessee's opt out notices under sections 27 and 27A (6.2.4 & 6.3.2)
- amend section 43(1) so that landlord's liability to compensate tenant triggers only where the: tenant has requested the landlord in writing to rectify a matter; and landlord fails to rectify the matter as soon as reasonably practicable after receipt of the tenant's notice (6.7.1)

B Additional requirements

3. The Reference Group recommended, by consensus, that the Act be amended to include the additional requirements/obligations listed below:

- amend the Regulation to require an assignor to disclose to an assignee details of any current or previous: arrears/breaches for which the landlord has not issued notice to the assignor; rent abatement in favour of assignor (5.3.2)
- require the lessee/ franchisor to give disclosure to the franchisee (who occupies the leased premises as licensee or sublessee) (5.4)
- amend the Regulation to require the legal advice report to also include a statement about the tenant's insurance and indemnity obligations under the lease (5.5.3)
- require landlord's annual outgoings estimate and audited statement to include a breakdown of management fees per equivalent provision in the NSW Act (6.4.1)
- require landlord to make available to tenant marketing plan detailing proposed advertising/promotion expenditure (6.5.5)
- provide that a lease requiring the tenant to refurbish/refit the premises during the lease term is void unless the lease contains sufficient detail to give tenant an indication of the nature/extent/timing of the required refurbishment/refit (6.10.1).

4. A majority of the Reference Group also supported amending to require landlord disclosure on renewal/ extension of an existing lease (pursuant to option or otherwise by agreement) (5.1.5)

REFERENCE GROUP CONSENSUS RECOMMENDATIONS

Retail Shop Leases Act Statutory Review (Qld)

Part 1: Consensus recommendations for no legislative change

(Note: The bracketed number for each item in this Part corresponds with the relevant Reference Group Report item. The report sets out the outcome and considerations for each item)

Object of the Act

- Object statements in section 3 and 4 remain appropriate (1.0)

Clarification of defined terms

- Term *floor area* does not need to be defined for the purposes of the Act (3.1)
- Not appropriate to amend the definition of *lease* to mean a lease/sublease, or agreement for either and exclude from the operation of the Act a right/licence to occupy premises (3.2)
- Not appropriate to amend so that certain minimum lease standards under the Act apply to short term leases - i.e. implied compensation, lease dealings, unconscionable conduct, relocation/demolition (3.3)
- Not necessary/appropriate to amend so that successive/rolling short term leases entitling a tenant to uninterrupted possession for more than one year are covered by the Act (3.4)
- Not necessary to amend the definition of *turnover* for the purposes of the Act to clarify whether online sales are, or are not, included (3.5)

Preliminary disclosures about leases

- Not appropriate to amend section 22(1) to increase landlord disclosure period to 14 days (5.1.2)
- Not appropriate to extend the current period in which a tenant may terminate the lease if the landlord does not give a disclosure statement, or where the statement is incomplete or false/misleading (defective disclosure) from six months to 12 months (5.1.6)
- For landlord disclosure to assignee: maintain status quo for full landlord disclosure to assignee (5.3.3)
- Not appropriate to omit section 22E which provides that, if a disclosure requirement under the Act (other than landlord disclosure to tenant under section 22) is not given and the lease/assignment is entered into, a retail tenancy dispute exists and the

receiving person may (within two months after lease/assignment is entered into) apply to QCAT, for an order that the relevant disclosure be given (5.6)

Minimum lease standards

Turnover/information

- Not appropriate/practicable to regulate 'industry appropriate' turnover rent formula (6.1.3)
- Not necessary/appropriate to provide per WA Act that lease can only provide for turnover rent where there is agreement to this effect between landlord and tenant (6.1.4)
- Not necessary/appropriate to prohibit provision in lease that permits termination of lease on basis that tenant's business failed to achieve specified sales/turnover performance (6.1.5)
- Not appropriate to require landlord to disclose aggregated centre turnover to prospective tenants (6.1.6)

Rent review provisions

- Not necessary/appropriate to amend implied provisions re timing and bases for rent review in section 27 of the Act, including to omit section 27(5)(g) so that rent reviews are limited to one review basis only (6.2.2)

Current Market Rent (CMR) determinations

- Not appropriate to omit section 27A (early determination of market rent) (6.3.1)
- Prescriptive framework for parties' submissions to specialist retail valuer (SRV) not recommended - i.e. prescribed timeframes, extensions of time, exchange of submissions through valuer (6.3.3)
- Not necessary/appropriate to 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) (6.3.5)
- Not necessary/appropriate to insert confidentiality provision governing the landlord/tenant use or disclosure of information provided to them through exchange of submissions, or otherwise during the CMR determination process (6.3.6)
- Not appropriate to amend section 28 so that when parties cannot agree on SRV, to be nominated by body specified in the lease, or chief executive (6.3.8)

Landlord's outgoings and other payments

- Not appropriate to remove 5% itemisation requirement for landlord's annual estimate and audited statement of outgoings (6.4.3)
- Not necessary/appropriate to require landlord to make available to tenant any documentation required by the auditor for preparation of the annual audited statement of outgoings (6.4.3)
- Not necessary/appropriate to insert new provision that auditor must: 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 take into account any tenant submission received (6.4.3)

- Not necessary to clarify how section 38 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. (6.4.4)
- Not appropriate to increase kiosk footprint areas by 20% - 50% for the purposes of outgoings apportionment under section 38 (6.4.4)
- Not necessary/appropriate to adopt as binding 2002 Australian Retailers Association Tenancy Committee 'Shopping Centre Code of Conduct on Outgoings' (6.4.5)

Sinking fund

- No amendment/repeal of section 40 of the Act (which regulates payments to/keeping of sinking fund for major maintenance/repairs). These provisions are largely not relevant to modern retail shopping centres but retain as cannot be certain that no sinking funds remain (6.5.1 - 6.5.3)

Tenant's liability for landlord's legal and other costs

- Not necessary/appropriate to legislate a cap on landlord's existing entitlement to recover from the tenant reasonable costs of/incidental to the assignment; and reasonable legal/other expenses in responding to tenant's request for consent to sublease/licence (6.6.3)

Compensation under the Act

- Not appropriate to amend section 43(1)(c) to clarify that landlord only liable to compensate a tenant under that section where landlord has acted unreasonably; and that regard had to 'recognised shopping centre management practices' in determining whether landlord acted unreasonably (6.7.2)
- Not appropriate to omit section 43A which makes tenant/assignor/assignee liable to pay reasonable compensation for false/misleading statement or misrepresentation made in a disclosure statement given by them under the Act (6.7.9)
- Not appropriate to provide that landlord liable to pay reasonable compensation to tenant where landlord introduces excessive competition to centre that damages tenant's business (6.7.10)
- Not appropriate to extend business disruption compensation provisions in Act to provide for liability of body corporate to compensate retail tenant for business interruption due to body corporate works (6.7.11)

Relocation/demolition of tenant's business

- Not necessary - technical amendment to clarify that landlord can not require tenant's business to be relocated unless landlord has given tenant a relocation notice containing the details/within timeframe set out in section 46D(2) & (3) (6.8.2)
- Not appropriate to amend to allow franchisee/licensee (who is entitled to occupy the retail shop under the lease, or with landlord consent) to claim reasonable costs/compensation from landlord under the relocation/demolition provisions (6.8.6)
- Not necessary/appropriate to amend so that landlord disclosure statement to include proposed/possible timing of any alteration works that may require relocation of the tenant (to extent that landlord is/should reasonably be aware of at the time the disclosure statement is given) (6.8.7)

- Not necessary/appropriate to prescribe 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 (6.8.7)
- Not necessary/appropriate to amend to limit, extend or clarify landlord's liability to pay reasonable demolition compensation (6.9.2)

Refurbishment/refit of leased shop or building

- Not practicable/appropriate to amend to require landlord to give tenants advance notice of proposed alteration /refurbishment (6.10.2)
- Not appropriate to prohibit lease from requiring refurbishment/refit by tenant at less than five year intervals (6.10.3)
- Not appropriate to provide that landlord must not require fit out to be undertaken by a designated contractor/supplier who is a related party/entity of the landlord (6.10.3)

End of lease/renewal

- Not appropriate to omit section 46 which requires landlord to give tenant written notice of the date by which the option under a lease must be exercised (6.11.1)
- Not appropriate to extend timeframe for landlord's notice under section 46 to a minimum of six and not more than 12 months (6.11.2)
- Not appropriate to omit section 46AA (i.e. where lease does not give 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) (6.11.3)
- Not necessary/appropriate to provide that where landlord and tenant negotiating renewal/extension of lease (other than under option): the rent payable by tenant for the negotiation period is market rent; and the commencement of the new lease should be prospective ((6.11.5)
- Not necessary/appropriate to provide, for renewal/extension of lease (other than under option), that landlord must not propose rent to be charged initially under the renewed lease in excess of market rent (6.11.6)
- Not appropriate to replace section 46AA with the ACT conduct rules (6.11.6)
- Not appropriate to amend so that sitting tenant entitled to CMR determination where tenant deems that proposed rent for new lease exceeds market rent (6.11.6)
- Not appropriate to amend so that 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 (6.11.7)

Security and assignments

- Not appropriate to omit or otherwise amend section 45 which provides that the landlord must not obstruct/hinder the tenant in dealing with lease/business assets by way of security or provide that it cannot be contracted out of (6.12.1)
- Not appropriate to omit or otherwise amend section 50 which 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 the assignee an existing right under the lease; or impose an unreasonable condition (6.12.2)

- Not appropriate to amend section 50A so that the release of the assignor from future liability is not dependent on relevant disclosures having been made (6.12.4)

Not appropriate to legislate a cap for 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 (6.12.5)

Unconscionable conduct

- Issues relating to the expansion of QCAT's powers to deal with unconscionable conduct are beyond scope of this review – (6.13.2).

Other Implied terms

- Mandatory registration of leases, including lease incentives beyond scope of the review (i.e. not a matter for the Act) (6.14.1).
- Not practicable/appropriate to legislate the following in relation to retail tenant's insurance:
  - prohibit any provision in a lease that: requires a tenant to take out joint insurance covering the liabilities of landlord and tenant; (6.14.2); or regulates a 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"(6.14.2)
  - new restrictions on liability for tenant to indemnify landlord (6.14.3)
  - prohibit provision in lease that makes tenant responsible for actions of any person other than tenant, or their employee/agent (6.14.4)
  - prohibit provision in lease that constitutes release of the landlord by tenant and which does not exclude any negligent act/omission of landlord, or their employee/agent (6.14.5)
- Not appropriate to prescribe a mandatory minimum lease term in the Act (6.14.6)
- Not practicable/appropriate to insert new implied provisions regarding rent and outgoings abatement/reduction; respective termination rights - i.e. where repair impractical; landlord failure/delay to repair (6.14.7)
- Not appropriate to provide for tenant entitlement to reasonable reduction in rent for period that leased shop can not be opened for trade due to closure of the centre/building in which the leased shop is located where landlord deemed closure necessary without being directed/required to do so by a public authority/to comply with a legislative duty; and the emergency situation does not eventuate or there is no damage to the centre/building (6.14.8)
- Not necessary/appropriate to provide that 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 (6.14.9)
- Not necessary/appropriate to legislate conditions regarding engagement of contractors and agreement on cap for tenant contribution where lease makes tenant liable to contribute to costs of landlord's works (6.14.9)
- Not appropriate to amend so provision in lease is void to extent that it requires tenant to pay any amount for capital costs of building/associated areas (6.14.10)

- Not appropriate for Act to prohibit or otherwise regulate liquidated damages clauses in retail shop leases – beyond scope of Act (6.14.11)

Dispute resolution provisions/QCAT

- Not appropriate to amend so that referral of a retail shop lease dispute to QCAT (other than proceedings in the nature of an injunction) is subject to certification that the mediation process has failed and outstanding issues are unlikely to be resolved (7.1)
- Not appropriate to 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 – i.e. no separate mediation process (7.1)
- Not necessary to amend section 63 of Act to provide for mediator to refer dispute if they consider that there is undue delay (instead of current provision that mediator must refer where dispute not settled within four months after the dispute notice is lodged) (7.2)
- Legal representation for mediation and QCAT proceedings should be allowed as of right where the claim is for more than $50,000 - beyond scope of this review, matter for QCAT review (7.3)
- Not appropriate to remove the requirement in section 102 for the constitution of QCAT to include industry representative members and instead allow the presiding member to appoint a person(s) with the appropriate knowledge, expertise, or experience as assessors (7.4)
- Not necessary/appropriate to amend section 103 of Act to provide that 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 (7.5.4)
- Not appropriate to amend section 83(2)(i) of Act to omit requirement for the parties to the dispute to consent for QCAT to make an order to rectify the lease (7.6)
- Offences and penalties
- Not appropriate to remove the following provisions:
    - section 26(1),(3)&(4) - unauthorised disclosure of tenant's turnover information
    - section 35(1) – unauthorised disclosure of parties' submissions/lease information by SRV
    - section 39 – prohibition on key money, or any amount for goodwill of tenant's business, being sought/accepted by or on behalf of landlord
    - section 41(2) – landlord's misapplication of promotion/advertising amounts
    - section 62: offence for a person, other than the mediator, to make an official record of anything said at mediation conference
    - section 113: offence for a mediator or former tribunal member to disclose information coming to their knowledge during the dispute resolution process or hearing (8.1).

Part 2 - Amendments recommended by Reference Group consensus and contained in the Bill

(Note: the bracketed number for each item in this Part corresponds with the relevant Reference Group Report item).

Leases excluded from operation of Act

- Exclude from the definition of retail shop lease automated teller machines (ATMs) and vending machines within common areas of a retail shopping centre (2.3)
- 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 (2.4)
- Exclude non-retail leases in those areas of a shopping centre that are generally regarded/identified as commercial or for non-retail service providers (ie. office towers; medical centres) (2.5)

Operation of the Act and the former Act

- Streamline/clarify current application and transitional provisions as appropriate (4.2)
- Repeal section 16 as unnecessary (4.3)
- Amend section 19 of the Act to clarify that a provision in any agreement/other document relating to a retail shop lease is void to the extent it purports to contract out of a provision of the Act (4.4)

Preliminary disclosures about leases

- Amend to enable a tenant (who is not a major lessee) to waive/shorten the disclosure period by giving the landlord: written notice of the waiver; and a legal advice report and a financial advice certificate (5.1.4)
- Amend section 23 of the Act so that, within 30 days after the lease is signed by both parties, the landlord must give the tenant either an original or certified copy of the signed lease (5.1.7)

Disclosure on assignments of lease

- Amend section 5 of the Regulation to require the assignor to also 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 (5.3.2)
- For landlord disclosure to assignee: amend to allow assignee (who is not a major lessee) to waive/ shorten the disclosure period by giving the landlord: written notice of the waiver; and both legal and financial advice reports; (5.3.3 -5.3.5)

Disclosure to franchisee under the Act

- Insert new provision: within 7 days before giving a licence 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.

- To comply with this obligation:
  - 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 28 days;
  - franchisor to pay landlord's reasonable costs of providing updated disclosure.
- Waiver of disclosure period to apply as between franchisor/franchisee (5.4)
- Recommend amendment as above for sublease arrangements (5.4)

Financial and legal advice reports

- Amend Regulation so that the legal advice report includes statement to the effect that the lawyer has:
  - given legal advice about any requirements in the lease for indemnification of the landlord by the tenant and/or explained to the tenant the need to obtain such advice from an appropriately qualified lawyer; and
  - brought to the tenant's attention the need to obtain advice from an insurance broker (or appropriate industry specialist) about the tenant's insurance obligations under the lease (5.5.3).

Rent review provisions

- Technical amendment to clarify that the rent review clause prohibitions in section 36 (d) and (e) do not apply where a major lessee has opted out of the implied rent review provisions (6.2.5).

Current market rent determinations

- Omit section 27A(6)(b) so last date for exercise of option will be 21 days after lessee receives CMR determination (6.3.1)
- Insert deeming provision in section 28A to effect that if a party does not make a submission within the timeframe determined by the valuer, that party is taken not to have made a submission for the purposes of the determination (6.3.3)
- Minor technical change to existing wording of section 29(a)(i): omit the words 'use for which the shop may be used under the lease or a substantially similar use'; and insert the words 'same or a substantially similar use to which the shop may be put under the lease' (6.3.4)

Landlord's outgoings and other payments

- Amend section 37 of Act to insert provision per NSW: 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 (6.4.1)
- Amend section 7(3) of the Act to exclude from recoverable landlord's outgoings any amount paid by a landlord relating to an excess under the landlord's insurance policy for the building/centre (6.4.2)
- Technical amendment to section 38 to clarify 'total area' for purposes of outgoings apportionment (6.4.4)

Promotion/advertising contributions

- Amend to clarify that unspent promotion amounts to be carried forward for application to future advertising/promotion of the centre (6.5.4)
- Amend to require landlord to make available to tenant (ie. by uploading onto central website accessible to tenants) a marketing plan detailing landlord's proposed advertising/promotion expenditure during relevant accounting period. Marketing plan to be made available at least one month before the start of each accounting period (6.5.5)

Tenant's liability for landlord's legal and other costs

- Amend section 48 to provide that registration/survey fees payable by tenant; and that landlord liable for costs of mortgagee consent (6.6.1)

Compensation under the Act

- Retain section 43(1)(f), subject to clarification that it does not apply to the extent that the tenant is otherwise entitled to reasonable costs or compensation for relocation/ demolition under section 46G or section 46K (6.7.3 - 6.7.4)
- Insert new provision: lease may include 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 occurrence, including an indication of basis on which assessment reached; and
  - details of the timing/duration/effect of the occurrence so far as can be predicted (6.7.5)
- Insert new provision - landlord's liability under section 43(1) does not apply where action taken by landlord: as a reasonable response to an emergency; or to comply with any legislative duty; or resulting from a requirement imposed by body acting under legislative authority (6.7.6)

Relocation of tenant's business

- 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."(6.8.1)
- Amend to clarify that alternative shop under section 46D must be in the existing centre (6.8.4).

Demolition of building in which tenant's business situated

- Extend timeframe for tenant's notice period under section 46J(2) to at least one month before the date the tenant wants the lease to end (6.9.1)

Refurbishment/ refit of leased shop or building

- Provide that a provision in a lease that requires a tenant to refurbish/refit the leased shop during the lease term is void unless it gives sufficient details to indicate generally the nature, extent and timing of the required refurbishment/ refitting (6.10.1)

Lease dealings – security and assignments

- Amend to clarify that release of the assignor under section 50A includes the assignor's guarantor(s) (6.12.3)

Dispute resolution and administration

- 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, provided landlord can choose to pursue rent arrears in other jurisdictions (7.5.1)
- 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 (i.e. up to $750,000) (7.5.2)
- Agree in principle to consider amendments to clarify QCAT's jurisdiction in relation to retail tenancy disputes (7.5.3). Including, 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 (7.7)

Penalties (8.1)

- Section 23 (landlord's failure to give tenant certified copy of lease within 30 days after lease signed) - retain provision but remove offence.
- Remove the penalty provision under section 37(2) and replace with an implied term that a tenant's obligation to pay their share of the landlords outgoings is suspended: where the lease does not contain outgoings provisions in terms of section 37(2)(a); or until the landlord gives the tenant the outgoings statements required under section 37(2)(b).
- Remove penalty provisions under:
  - section 40(3) &(4): misapplication of sinking fund monies by landlord
  - section 40(7):landlord must not seek/accept tenant contributions that would exceed sinking fund credit cap of $100,000
  - section 45(1): landlord must not obstruct/hinder tenant in dealing with lease/tenant's business assets by way of security
  - section 46: if lease gives tenant option to renew/extend, offence if landlord fails to give tenant written notice of the option date within specified timeframe
  - section 53: trading hours offence in relation to leases existing at the commencement of the *Trading (Allowable Hours) Amendment Act 1994*
- Section 49 (offence for landlord to prevent/ restrict tenant from forming/joining tenant's association to promote a retail shopping centre for another purpose of mutual interest to tenants) - remove offence and provide for any such lease provision to be of no effect.

Review outcome for options on which no Reference Group (RG) consensus

References to 'the Bill' are to the Retail Shop Leases Amendment Bill 2014

Part 1 - Amendments in the Bill not based on Reference Group consensus	
1000m^2 floor area exclusion	
Amendment: The Bill excludes from the operation of the Act all leases with a floor area greater than 1000m^2	Amendment progressed on basis of predominant RG view that it will significantly reduce unnecessary regulation of the Queensland retail sector, with minimal impact on small to medium business; and will align with other jurisdictions, including NSW and WA. See item 2.1 of RG report for considerations with respect to small/medium business impacts.
Application of Act to shopping centre leases where government is tenant	
Amendment: The Bill excludes procedural requirements in the Act which are unnecessary for government leases (i.e. s 22A, s. 22D and s. 46)	There was predominant RG support for the outright exclusion of leases where the Commonwealth, State or a local government is the tenant of premises situated in a retail shopping centre (government leases). The amendment is appropriate as it will continue government tenants on the same footing as other non-retail tenants in a retail shopping centre, while reducing unnecessary red tape with respect to government leases.
Amendment to clarify when lease taken to be entered into	
Amendment: The Bill amends s. 11 of the Act (when lease entered into) to include date lessee pays rent under lease	Technical amendment to clarify when a lease is entered into for the purposes of the Act. While supported by RG, the Bill also clarifies that payment of security deposit is not rent for purposes of the section
Clarification about when lessor disclosure statement is not a defective statement	
Amendment: The Bill clarifies that a lessor disclosure statement is not defective if it omits irrelevant information or the layout is not strictly in accord with the approved form	Amendment progressed (with predominant RG support) as will remove red tape for landlords and minimise unnecessary information received by tenants, without prejudicing the tenant's entitlement to full disclosure in respect of those matters relevant to the particular lease proposed to be entered into.

Simplified waiver of landlord disclosure by major lessee	
Amendment: The Bill removes the existing requirement for a major lessee who wishes to waive the landlord disclosure period to notify landlord that appropriate financial/legal advice received about proposed lease/assignment	Amendment (predominantly supported by RG) progressed as existing professional advice notification is an unnecessary administrative burden for major lessees
New requirement for lessor disclosure on renewal of lease under an option	
Amendment: The Bill requires the lessor to give a disclosure statement to the lessee within a specified period after the lessee has notified the lessor of exercise of the option to renew; and allows the lessee a specified period after receipt of the disclosure within which to notify the lessor that the lessee does not wish to proceed.	This amendment is based on legal stakeholder feedback on a consultation draft of the Bill and will facilitate the tenant making a fully informed decision about whether to renew the lease (i.e. before they are legally bound to do so) in line with the predominant RG intent. An agreement to renew a lease, other than under an option, is taken to be a new lease for the purposes of Part 5 of the Act.
Timeframe for lessee disclosure to lessor	
Amendment – The Bill amends section 22A to require a prospective tenant to give disclosure to the landlord at least seven days before entering into the lease	Technical amendment (with predominant RG support) to align with lessor disclosure period. There was strong RG strong consensus support for retention of the requirement for reciprocal lessee disclosure on the basis that it is beneficial for both prospective tenants (in particular new or inexperienced small business owners) and landlords; and is operates to assist in minimising retail shop please disputes.
Timeframe for assignor disclosure to assignee	
Amendment: The Bill amends section 22B(1) so that, for an assignment in connection with the sale of the assignor's business to the assignee, the assignor is required to give a disclosure statement to the assignee before the	This amendment is based on legal stakeholder feedback on the consultation draft of the Bill and ensures the efficacy of assignor disclosure requirement (as an assignee safeguard) where the assignment is associated with the purchase of the assignor's business conducted from the leased shop by the assignee. The Bill also amends to clarify when assignee disclosure is required to be given to the assignor

assignee enters into the business sale contract.	
Regulation of turnover statements given to landlord	
Amendment: The Bill removes the existing provisions in section 25 of the Act for a lessee under a turnover lease to give the landlord: a monthly turnover certificate; and annual audited turnover statement.	This amendment is based on predominant RG acknowledgement and agreement that the collection, supply and use of the turnover information of retail lessees are matters for industry resolution and commercial negotiation rather than government intervention. On this basis, the key RG industry stakeholders indicated agreement for industry-driven discussion toward developing an agreed industry practice for collection/supply/use of retail turnover in shopping centres.
Simplification of major lessee opt out of implied rent review provisions	
Amendments: The Bill contains technical amendments to streamline/clarify the provision for major lessee opt out of the implied provisions for timing and bases of rent review in section 27 of the Act (implied rent review provisions) A major *lessee* is a lessee with five or more retail shops in Australia	Amendment progressed as a red tape reduction measure to remove superfluous requirement, including with regard to the predominant RG view that major lessees are / should be sufficiently sophisticated to undertake appropriate due diligence and obtain financial legal / advice as required to protect their commercial interests. It is noted that the major lessee opt-out mechanism in section 27(8) of the Act was introduced by the 2006 Act Amendments and general feedback to the review is that it is working well. There has been no evidence provided to the review to substantiate concerns raised by some retail tenant representatives regarding an associated two-tier rental market.
Simplify major lessee opt out for early determination of CMR	
Amendment: The Bill removes superfluous requirement for professional advice notification in a major lessee opt out notice under s. 27 of the Act (early determination of current market rent)	Amendment will remove an unnecessary administrative requirement for major lessees
Landlord's costs where tenant does not proceed	
Amendment: The Bill clarifies that the landlord's reasonable legal costs/other expenses in relation to negotiation/ preparation of an engrossed/final lease are	Amendment progressed on basis of key RG tenant and landlord representative support, with an appropriate notification mechanism to safeguard the lessee.

recoverable from the tenant where the tenant withdraws/does not proceed with the lease.	
Definition of 'core trading hours' for purposes of the Act	
Amendment: The Bill contains a technical amendment to the definition of *core trading hours* at section 51(b)(ii) for the purposes of the Act to clarify that it refers to the hours the *majority* of centre tenants are required by the landlord to keep their premises open for trading.	This amendment is required to address existing legal uncertainty in interpretation of the definition, including with regard to variations in trading hours across the tenancy mix of modern major shopping centres.
Tenant notice to landlord pre-requisite to claim for compensation for business disturbance	
Amendment: The Bill requires a tenant to give a notice to rectify to the landlord for the business disruption provisions in section 43(1) of the Act and clarifies that failure to give such notice will be taken into determining in the event of dispute	The amendment reflects industry best practice and streamlines the compensation provisions, while continuing to safeguard the interests of small business tenants. The additional regulatory requirement for the tenant is justified as: landlord should be given notice/opportunity to rectify and mitigate their liability; written notice assists to prevent frivolous/ vexatious claims. On balance, it was considered that rectification notice as a pre-condition to a tenant's claim for compensation would unfairly disadvantage unsophisticated small business tenants who fail to give contemporaneous notice (for example, in relation to customer flow impacts arising from major works to the shopping centre car park or entry points that everybody in the centre is aware of)
Part 2 - Matters without Reference Group consensus and not progressed in the Bill	
Exclude leases by publicly listed corporation	
Option: (to align with Vic, WA, SA and NT) exclude from the operation of the Act <u>all</u> leases where the tenant is a listed corporation/ subsidiary **Context:** While the Act currently excludes leases by a listed corporation where the floor area is greater than 1000m2, a significant number of retail	On balance, an amendment in terms of the option has not been progressed in the Bill as it does not have predominant reference group support; and with regard to implications for the existing entitlement of franchisees to claim compensation for business disruption from the retail landlord under section 43(1) of the Act. While implementation of the option would be a key deregulation measure, key tenant and franchise stakeholders argue it would operate to deprive a significant proportion of Queensland retail franchisee businesses of the benefits of statutory protection under the Act. This is because many franchise networks are based on a structure

chain stores in Queensland shopping centres with retail floor space of less than 1000m2 are owned by listed companies. These businesses, which have significant bargaining power and capacity to make informed business decisions, do not require protection under retail leases legislation.	where the franchisor (which is a listed corporation/subsidiary) leases the premises from the landlord and grants the franchisee a license to occupy the premises in conjunction with the franchise agreement. No data in relation to the proportion of franchise networks that would be adversely affected by a listed corporation exclusion in Queensland was made available to the review by opposing submitters. Qualitative or quantitative evidence that retail franchisees in those States/Territories where the exclusion applies are worse off than their Queensland counterparts was also not made available to the review. These issues will continue to be monitored by the Department of Justice and Attorney-General (DJAG) with regard to any relevant developments/ proposals in other jurisdictions, including outcomes of the Office of the NSW Small Business Commissioner's recent review of the *Retail Leases Act 1994* (NSW) and relevant developments in the Commonwealth's framework for regulation of the franchising industry.
Definition of 'turnover'- special provision for pharmacies	
Option: Amend definition of *turnover* in section 9(2) of the Act to exclude: amounts received in relation to and associated with the *Health Act 1953* (Cth), in particular the pharmaceutical benefits scheme.	This option was not progressed having regard to the following: • under section 139I of the *Pharmacies Registration Act 2001* (Qld) a lease for a 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; • sales reporting by pharmacy tenants to shopping centre landlords is a commercial/industry matter; and • the option did not have predominant reference group support.
Definition for 'renewal' of lease	
Option: Technical amendment to clarify definition of '*renewal*' for purposes of the Act	While the RG report indicates in principle support for inclusion of a definition of 'renewal', no agreement was reached as to an appropriate definition. It was concluded during consultation on drafting that a definition of *renewal* is not necessary for the purposes of the Act.
Lessee disclosure statement – additional declaration about pre-lease representations	
Option: Technical amendment to section 4(h) of the Regulation (lessee's declaration about pre-lease representations) to effect that no representations made by/on behalf of lessor other than those contained	No change – the current lessee declaration regarding pre-lease representations is appropriate

in the lease.	
Financial advice report - sales projections/occupancy cost ratios	
Option: Expand financial advice report requirements to include advice about sales projections, occupancy cost ratios and other industry benchmarks acceptable for the proposed permitted use.	No change per predominant RG view that not practicable/ would constitute excessive regulation
Mechanism for general opt out of implied rent review provisions	
Option: Amend to allow tenants (who are not major lessees) to opt out of the implied provisions for timing/bases of rent review where: • before entering into lease, tenant to give landlord written notice of opt out; plus financial and legal advice reports; and • lease provides for timing/basis for each review.	On balance, an amendment in terms of the option has not been progressed having regard to the lessee equity objectives of the Act and the absence of an equivalent mechanism in the other State/Territory jurisdictions. DJAG to keep watching brief for relevant developments
Effect of determination of current market rent	
No change to section 33 of the Act	The review noted that the purpose of having the rent determined by an independent expert is to avoid costly litigation. Under section 33 of the Act, a determination of current market rent for a leased shop by a specialist retail valuer (SRV) is final and binding on the lease parties. This is appropriate as a dispute about the quantum of current market rent is one which requires for its resolution the exercise of the expert skill and judgement of the SRV. If the SRV does not comply with the requirements under section 29 of the Act, QCAT has jurisdiction to hear a retail tenancy dispute about the procedure for determination of rent (but not the actual amount of the rent). Depending on the circumstances, the affected party may also have a negligence claim against the valuer. This is not a matter for the Act.

Statutory protection for SRVs	
Option: insert a provision in line with NSW Act so that a specialist retail valuer is not liable for anything done or omitted to be done in good faith for the purposes of a determination of current market rent under the Act.	Retain status quo; with DJAG to keep watching brief, including for relevant outcomes from a recent statutory review of the NSW Act. The RG generally agreed that there is no systemic problem with the quality of CMR determinations in Qld. However there is an acknowledged shortage of SRVs, particularly in regional areas. The prevailing legal and industry stakeholder view is that, as an expert valuer undertaking a commercial service for a fee, the SRV should manage their own professional/ commercial risk through appropriate transactional documents (i.e. including a release/indemnity provision in the terms of engagement) and professional indemnity insurance.
Landlord's liability to franchisee for compensation under section 43	
Options: to omit/narrow extended definition of *lessee* in Schedule relating to franchisee entitlement to compensation for business disturbance under section 43 of the Act.	Retain status quo which protects the franchisee as end-user of the leased premises. DJAG to keep watching brief for developments in other State/Territory jurisdictions. Key industry reference group members sought amendment to clarify that: • there can be only one claim against the landlord for compensation under section 43 of Act (i.e. the landlord should not be exposed to competing/ concurrent compensation claims by franchisor/licensor and franchisee/ licensee); and • franchisor/ franchisee must agree between themselves the amount of the claim and division of compensation paid/awarded (the recommended outcome). This amendment has not been progressed having regard to a RG legal reference member concern, including that the associated red tape reduction benefit to landlords would likely be outweighed by: difficulties in co-ordinating/agreement on, a single combined claim by franchisor/ franchisee; and detriment to franchisees who would lose their existing entitlement to claim compensation directly from the landlord.
Timeframes for landlord's relocation notice and tenant's termination notice	
Options: to extend landlord and tenant notice periods under sections 46D and 46E of Act	No change - current timeframes align with the other States/Territories, including NSW/Vic.

Compensation for relocation	
Option: Insert express provision that landlord is liable to compensate tenant for lost profits during period when tenant is unable to trade due to relocation (in addition to relocation costs).	No change on basis of predominant RG view Compensation is a matter for commercial negotiation on a case by case basis. Sufficient/ appropriate that Act sets out minimum provisions only **–** i.e. section 46G(1) drafted in terms of *'including but not limited to'* .
Application of the relocation/demolition provisions to franchisees	
Options: Provide statutory protections for franchisees (who are licensees) in relation to relocation/ demolition - i.e. direct notification by landlord; and statutory entitlement to reasonable compensation/ costs.	No change on basis of predominant RG view. There should be one claim against landlord (by franchisor only) for relocation/ demolition compensation, with the division of compensation between franchisor and franchisee to be agreed between them and any dispute between franchisor and franchisee would be addressed under the Franchising Code of Conduct.
Landlord to give tenant advance notice of proposed alteration/refurbishment	
Option: Require landlord to give tenant whose business likely to be adversely affected at least two months advance written notice of alteration/ refurbishment.	No change on basis that increase in red tape not sufficiently justified by proponents.
Landlord's obligation to notify tenant about option date	
Option: omit section 46 of Act.	No change – RG feedback that provision protects unsophisticated tenants and is working well.
Replace unconscionable conduct test with unfair conduct test	
Options: relating to application of unfair conduct test in lieu of existing unconscionable conduct provisions of Act	No change as not necessary/appropriate and strong predominant RG opposition to associated proposals. There will be ongoing monitoring with respect to the existing unconscionable conduct provisions in Part 6 Division 8A of the Act by DJAG having regard to developments in other jurisdictions.

Gross leases	
Option: Consider mandating gross leases under the Act.	The type of lease entered into between a retail lessor and lessee is a matter for commercial negotiation and not for government regulation.
Liquidated damages clauses	
Options: Relating to regulation of liquidated damages clauses in retail shop leases	No change to Act in accord with predominant RG view (including legal stakeholder representatives) Prohibiting or otherwise regulating liquidated damages clauses in retail shop leases is beyond the scope of the Act. To do so would increase the regulatory burden and impinge on commercial relations/ outcomes. Not a matter for government intervention.
Compulsory mediation	
Option: Amend to provide for compulsory mediation; or 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.	No change having regard to predominant RG view.