Department of Justice and Attorney-General

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Review of the Retail Shop Leases Act 1994 (Qld)

Strategic Policy, Legal and Executive Services

Discussion paper

Tomorrow's Queensland:
strong, green, smart, healthy and fair

Toward 2 Tomorrow's Queensland

Queensland Government

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1. Introduction

Background:

The *Retail Shop Leases Act 1994* (the Act) commenced on 28 October 1994 and was enacted to establish a framework to address the imbalance in access to information and negotiating power between large landlords and small retail tenants. The Act replaced the *Retail Shop Leases Act 1984* (the former Act).

The objective of the Act is to promote efficiency and equity in the conduct of certain retail businesses in Queensland through mandatory minimum standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.

Under section 122 of the Act, the Attorney-General (as the Minister with portfolio responsibility for the Act) must review the operation of the Act to decide whether its provisions remain appropriate. The review must be carried out within seven years after the previous review. As the last review of the Act was completed in June 2005, the current review is required to be completed by June 2012.

Purpose of this discussion paper:

This paper forms the basis of the consultation process for the review and is intended to assist stakeholders in the process of preparing submissions in relation to the review.

The list of issues for consideration is not exhaustive. If you think that there are other issues regarding retail shop leasing in Queensland that should be addressed through legislation, please provide your view (including details to support your reasons) through any of the avenues of feedback that have been established.

The issues in this paper and the discussion of possible actions or alternatives do not represent Queensland Government policy.

References in the paper:

For this paper:

- the term 'landlord' means the lessor
- the term 'tenant' means the lessee
- the term 'major tenant' means a major lessee (ie. a tenant with five or more retail shops in Australia)
- the terms 'assignment', 'assignor' and 'assignee' are explained at item 4.4.3
- the term 'transitional provisions' is explained at item 4.9
- 'QCAT' means the Queensland Civil and Administrative Tribunal

- any reference to 'the Act' is to the *Retail Shop Leases Act 1994* (Qld), unless otherwise stated
- any reference to 'the Regulation' is to the *Retail Shop Leases Regulation 2006* (Qld), unless otherwise stated
- any reference to 'the former Act' is to the now repealed *Retail Shop Leases Act 1984* (Qld)
- any reference to the 'NSW Act' is to the *Retail Leases Act 1994* (NSW)
- any reference to the 'Victoria Act' is to the *Retail Leases Act 2003* (Vic)
- any reference to the 'NT Act' is to the *Business Tenancies (Fair Dealings) Act 2003* (NT)
- any references to the 'WA' Act is to the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA)
- any reference to the 'SA Act' is to the *Retail and Commercial Leases Act 1995* (SA)
- any reference to the QCAT Act is to the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)
- matters stated as suggested have been raised by stakeholders during consultation preceding this paper.

How to have your say:

All comments or submissions must be made in writing. Where possible, please:

- reference each comment to the relevant section or question number in the "Issues for consideration" section of the paper
- provide reasons and supporting details or data for your responses.

In particular, it is strongly recommended that submissions made by industry or professional stakeholder bodies be supported by empirical data.

An optional feedback form is provided with this paper. You may elect to provide your comments or submissions using this form, or another format of your choice.

Please provide any comments or submissions by **30 January 2012** by:

- **email**: RetailShopLeases@justice.qld.gov.au
- **mail**: Department of Justice and Attorney-General
  Retail Shop Leases Act Review
  Strategic Policy
  GPO Box 149
  Brisbane QLD 4001

Privacy statement:

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

Comments or submissions from industry or professional stakeholder bodies will be publicly released or have their comment attributed to them as part of the policy development and legislative process.

Other submissions will also be made publicly available unless you notify us in writing that you would like your comments and/or parts of your submission to remain confidential.

Next steps in the statutory review process:

Submissions received in response to the discussion paper will be considered in the development of policy options for any appropriate amendments to the Act and Regulation. Key stakeholders will be further consulted after the results of consultation on this discussion paper have been assessed.

2. Recent National Developments

Productivity Commission Report:

In its 2008 final report, *The Market for Retail Tenancy Leases in Australia* (2008 Report) the Productivity Commission (the Commission) examined and made recommendations for improving the operation of the retail tenancy market nationally. A copy of the report and recommendations can be accessed at:

http://www.pc.gov.au/projects/inquiry/retailtenancies/finalreport

The Commission noted that the main intention of specific retail tenancy legislation is to address imbalances in negotiating power between large shopping centre retailers and small tenants and that, while the market is working reasonably well overall, regulation should not be used to substitute for business decision making and business risk.

The Commission found that the State and Territory retail tenancy legislation is overly prescriptive and that significant differences between jurisdictions persist despite attempts at harmonisation. The Commission also found that the legislative differences across jurisdictions and aspects of the legislative framework that focus on prescribing lease terms and conditions have constrained the market, lowered productivity and added to compliance and administrative costs for business.

The Commission made recommendations for improving the operational efficiency of the retail tenancy market and reducing the regulatory burden on business, including that States and Territories should remove unnecessarily prescriptive elements of the retail tenancy legislation that provide no improvement in operational efficiency compared with the broader market for commercial tenancies (recommendation 6) and, where practicable over the medium term, seek to establish a nationally consistent retail lease framework (recommendation 7). The Commission also recommended the alignment of jurisdictional differences in provisions for unconscionable conduct applying to retail tenancies (recommendation 4).

Various recommendations directed to further improving the transparency, accessibility and consistency of retail lease information nationally were also made by the Commission. These included development of a national reference lease, greater use of simple language in tenancy documentation and nationally consistent reporting of tenancy enquiries, complaints and dispute resolution (recommendations 1 - 3).

Harmonised landlord disclosure statement:

The Council of Australian Government's (COAG) Business Regulation and Competition Working Group referred the Commission's recommendations to the former Small Business Ministerial Council (SBMC). At its May 2008 meeting, the SBMC committed to achieving greater national consistency and harmonisation, while maintaining the effectiveness of fundamental tenancy protections, in retail tenancy markets across States and Territories.

In July 2008, a National Retail Tenancy Working Group (NRTWG) was established to report to the SBMC on harmonisation issues. The NRTWG, in consultation with industry stakeholders, developed a model harmonised landlord disclosure statement.

On 29 July 2009, the SBMC endorsed the core model national landlord disclosure statement. The SBMC noted that the model disclosure statement would be adopted to the extent permitted in jurisdictions where there are legislative and administrative differences.

The model harmonised disclosure statement was implemented in Queensland, Victoria and New South Wales (NSW) from 1 January 2011. The harmonised landlord disclosure statement is aimed at ensuring that tenants are better informed of their rights and obligations under retail tenancy agreements so that they are able to make informed business decisions about their retail shop leases.

3. Executive Summary

The specific issues on which comments are sought are set out below. The number beside each issue corresponds with the numbering in the body of the "Issues for Consideration" section of the paper which provides more detail on each issue. The "Issues for Consideration" section is set out to reflect the structure of the Act.

Object of the Act and how it is to be achieved

4.1A Comment is sought on whether the Act's objective and methods are still relevant.

Interpretation/Coverage of the Act

4.2A Are the current definitions in the Act adequate and appropriate for the Queensland retail leasing environment?

4.2B Are the suggested exclusions from the definition of 'retail shop lease' outlined in section 4.2 of the paper appropriate? In particular, should the following categories of lease be excluded from the operation of the Act:

- **(a)** all leases of retail premises with a floor area of more than 1000m²
- **(b)** all leases by a listed corporation or a subsidiary of a listed corporation
- **(c)** leases of retail premises used for the carrying on of a business by the tenant on behalf of the landlord
- **(d)** any premises in an office tower that forms part of a retail shopping centre where the premises are not used for carrying on a retail business
- **(e)** leases by the State (ie. a State department or agency).

4.2C Should any further definitions or exclusions be contained in the Act?

Operation of the Act and former Act

4.3A Are the application provisions of the Act appropriate?

4.3B Comment is sought regarding the extent to which the transitional provisions in Part 4 of the Act remain relevant or applicable.

Preliminary disclosures about leases

4.4.1A Are the current provisions for disclosure by a landlord to a tenant, including the remedies for non-compliance and defective statement, adequate or appropriate?

4.4.1B Should tenants who are not major tenants be able to waive the disclosure period?

4.4.1C Should a landlord be required to provide a current disclosure statement to the tenant on renewal or extension of a lease?

4.4.2A Are the current provisions for disclosure by the tenant to the landlord adequate or appropriate?

4.4.3A Are the current provisions for disclosure by the assignor and the assignee to each other adequate or appropriate?

4.4.4A Are the current provisions for disclosure between the landlord and an assignee adequate or appropriate?

4.4.5A Are the current provisions for financial advice reports and legal advice reports appropriate?

Minimum Lease Standards

4.5.2A Are the provisions of the Act dealing with turnover rent appropriate?

4.5.2B Should there be a statutory prohibition on a provision in a retail shop lease that enables early termination by a landlord on the basis of inadequate sales or turnover?

4.5.3A Are the provisions about confidentiality of turnover information adequate or appropriate?

4.5.4A Are the current rent review provisions adequate or appropriate?

4.5.4B Does a major tenant need the protection provided for in section 27(8) of the Act?

4.5.5A Are the provisions about early determination of market rent appropriate?

4.5.5B Are the current provisions for determination of current market rent by a specialist retail valuer appropriate?

4.5.5C Does a specialist retail valuer require (and should the tenant be required to provide), the tenant's trading details for the business and any similar businesses operated by the tenant for the purpose of a determination of current market rent under the Act?

4.5.5D Should the Act state a specific timeframe within which parties' submissions are to be provided to the valuer and for the parties' right of reply?

4.5.5E Should the Act provide that extensions of time for making or responding to a submission are to be agreed between the parties and notified to the valuer?

4.5.5F Are there any issues in practice regarding the expiry of a lease, or an option to renew or extend a lease, before the determination of market rent is given by the valuer?

4.5.6A Should the Act be amended to provide that the prohibitions in section 36 do not apply where a landlord and a major tenant have opted out of the rent review provisions under section 27(8) of the Act?

4.5.7A Are the provisions of the Act regarding landlord's outgoings appropriate?

4.5.7B Are the recoverable cost provisions appropriate?

4.5.8A Are the current provisions for the management of sinking funds, (including accountability requirements) adequate?

4.5.8B Should the Act set out what happens to the sinking fund when the building or shopping centre in which the retail shop is located is destroyed or demolished; or where the shopping centre ceases to operate?

4.5.8C Are the provisions about contributions to promotion and advertising (including accountability requirements) adequate?

4.5.9A Are the current implied compensation provisions adequate or appropriate?

4.5.9B Should the Act be amended so that:

(a) a lease may include a clause preventing or limiting a claim for compensation for a specific occurrence if the likelihood of the occurrence was specifically drawn to the attention of the tenant in writing before the lease was entered into?

(b) the implied compensation provisions do not apply to an action taken by a landlord as a reasonable response to an emergency situation, or to comply with a requirement imposed by a public or local authority under legislation?

(c) the landlord is only liable to compensate the tenant under sections 43(1)(a)-(c) where the landlord has acted unreasonably? If so, is it appropriate that recognised shopping centre practices are considered in determining whether the landlord has acted unreasonably?

4.5.9C Comment is sought about any implications of omitting section 43(1)(f) from the Act, including having regard to the specific relocation and demolition provisions in sections 46C to 46K of the Act.

4.5.10A Comment is sought on whether it is necessary or appropriate to amend the Act to provide for rent abatement and termination of the lease where the shop or building is damaged.

4.5.10B Comment is sought on your experiences as a tenant or landlord whose retail shop premises, building or shopping centre was damaged in the Queensland floods.

4.5.11A Are the relocation provisions clear or appropriate?

4.5.11B Is the current time period within which a tenant (who has received a relocation notice) may provide a termination notice to the landlord sufficient or appropriate?

4.5.12A Are the demolition provisions (including the relevant timeframes and compensation payable by the landlord) clear and appropriate?

4.5.13A Should the Act prohibit a landlord from requiring a tenant to refurbish or refit the shop unless the lease specifies the nature, extent and timing of the refurbishment?

4.5.13B Should the Act require a landlord to give advance notice to a tenant whose business is likely to be adversely affected by any proposed alteration or refurbishment by the landlord?

4.5.14A Are the unconscionable conduct provisions appropriate?

4.5.14B Are the unconscionable conduct provisions influencing conduct in the Queensland retail leasing sector, including reducing costs associated with unnecessary disputation?

4.5.15A Are the provisions about the tenant's right to deal with the lease and business assets appropriate?

4.5.15B Are the provisions about lease renewal appropriate?

4.5.16A Are the provisions about the tenant's liability for legal and other costs associated with the lease appropriate?

4.5.17A Are the provisions about consent to assignment appropriate?

4.5.17B Should the Act be amended to clarify that a guarantor of the assignor is also released when the conditions in section 50A are met?

Retail shop lease trading hours

4.6A Are the provisions about core trading hours clear and appropriate?

Retail tenancy dispute resolution and administration

4.7.1A Are the existing provisions about the mediator's and the QCAT's jurisdiction adequate or appropriate?

4.7.1B Are the existing provisions about the exclusion of other jurisdictions appropriate? If not, please give your reasons, including supporting details.

4.7.2A Are the provisions of the Act about mediation appropriate?

4.7.3A Are the provisions regarding an application by a party to QCAT appropriate?

4.7.3B Should the Act provide that (except for proceedings for an order in the nature of an injunction) the jurisdiction of QCAT to hear a retail tenancy dispute does not apply unless and until the mediation process is complete?

4.7.3C Are the provisions about the orders that QCAT may make adequate or appropriate?

4.7.3D Comment is sought about whether the dispute resolution provisions in the Act generally enable the efficient and effective resolution of retail tenancy disputes.

4.7.3E Comment is sought about whether any retail shop lease expertise considered necessary by QCAT to decide the dispute should be provided by assessors appointed by the President of QCAT on a case by case basis (rather than having a tenant and a landlord representative as QCAT members for each proceeding)?

Miscellaneous

4.8A Are the provisions about the evidentiary provisions, regulations and review of the Act still appropriate?

Transitional provisions

4.9A Comment is sought about the extent to which the transitional provisions remain relevant or applicable.

Suggestions for simplification or harmonisation of the Act and the Retail Shop Lease Regulation 2006

4.10A Comment is sought on any aspects of the Act or the Regulation which you consider should be removed, simplified or streamlined to improve operational efficiency or reduce the regulatory burden for business.

4.10B Comment is sought (in particular from landlords or tenants who operate relevant businesses in other Australian States or Territories) about any provisions in other state/territory retail lease legislation that should apply in Queensland.

4. Issues for consideration

4.1 Object of the Act and how it is to be achieved

Sections 3 and 4 of the Act outline the object of the Act and how it is to be achieved. The objective of the Act is to "promote efficiency and equity in the conduct of certain retail businesses in Queensland." This object is to be achieved through mandatory minimum standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.

4.1A Is the Act's stated objective and how it is to be achieved still relevant? If not, please provide your reasons.

4.2 Interpretation/Coverage of the Act

The Act assigns specific meanings (definitions) for certain words or terms used in the Act. These are the standard definitions and the extended definitions.

The standard definitions are set out in the dictionary in the Schedule to the Act. The standard definitions include 'lease', 'lessee' (tenant), 'lessor' (landlord), 'retail shop', 'retail shop lease', 'major lessee' (major tenant) and 'retail tenancy dispute'.

The extended definitions are set out in sections 6 to 9 of the Act and give the meanings for 'common areas', 'outgoings', 'retail shopping centre' and 'turnover'.

Definition of 'retail shop lease'

The Schedule to the Act defines 'retail shop lease' to mean a lease of a retail shop other than a lease for:

- a retail shop with a floor area of more than 1000m² by a listed corporation or a listed corporation's subsidiary
- certain retail shops within the South Bank Corporation area
- premises in a theme or amusement park
- premises at a flea market, including an arts and crafts market

- a temporary retail stall at an agricultural/trade show, or a carnival, festival or cultural event
- premises used for certain non-retail activities included within the common areas of a shopping centre. These non-retail activities include amenities that provide information (eg. internet terminals), entertainment (eg. amusement machines), community (eg. ATMs and public telephones) and leisure (eg. vending machines) facilities; telecommunications equipment; displayed advertisements; storage and parking
- premises with a floor area of more than 10,000m² (see section 10 of the Regulation).

Exclusion of leases with floor area greater than 1000m²:

A 1000m² floor area limit covers most small to medium businesses, while excluding large retail businesses such as supermarkets and department stores. However, the Act currently only excludes premises with a floor area of more than:

- 1000m² if they are leased by a listed corporation (ie. public company) or it's subsidiary
- 10,000m² (whether or not the tenant is a listed corporation or subsidiary).

The NSW Act, the NT Act and the WA Act exclude all leases of retail premises with a floor area of more than 1000m², irrespective of whether the lease is by a listed corporation/subsidiary. It has been suggested that the definition of 'retail shop lease' in the Act should be amended to align with these jurisdictions so that all leases of retail shops with a floor area of more than 1000m² are excluded from the operation of the Act.

The Productivity Commission noted in its 2008 Report that a floor size limit does not necessarily correlate to the financial resources of a tenant (ie. some large Australian retail businesses have relatively small premises and would be covered by legislation with a floor area limit).

Exclusion of leases by a listed corporation or subsidiary:

The NT Act, the SA Act and the Victoria Act do not apply where the tenant is a listed corporation (ie. public company) or subsidiary, irrespective of the floor area of the leased premises. It has been suggested that the definition of 'retail shop lease' in the Act should be amended so that the position is the same in Queensland.

Exclusion of business operated on behalf of landlord by tenant:

The NSW Act and the Victoria Act exclude leases for retail premises where the business is operated by a tenant on behalf of the landlord. In NSW, this applies where a landlord leases or sub-leases the premises to their employee or agent and the business operated by the tenant provides an exclusive service to

the members or customers of the landlord (as opposed to a business open to the public in general).

For example, a relevant lease of a golf club restaurant which only members of the landlord's business can attend will be excluded, while a restaurant lease in a league's club restaurant (which is open to the public) may be covered by the relevant Act.

The provision in the Victoria Act is in similar terms to that in NSW.

In Queensland, the Act does not currently exclude from its operation leases for retail premises where the business is operated by a tenant on behalf of the landlord.

Exclusions regarding leases for commercial premises:

The Act currently applies to a lease for commercial purposes or professional services (ie. medical practitioners, accounting and stockbroking firms, financial institutions and architects etc.) if the office premises are situated in a retail shopping centre (refer definition of 'retail shop' in the Schedule and definition of 'retail shopping centre' at section 8).

It has been suggested that the definition of 'retail shop lease' in the Act should be amended to exclude any premises in an office tower that forms part of a retail shopping centre where the premises are not used for carrying on a retail business.

Exclusion where the State is a tenant:

The Act currently binds the State (section 10). This means, for example, that the disclosure requirements under the Act (refer to Preliminary Disclosures at item 4.4 below) may apply where the State is not a major tenant. If the preliminary disclosure requirements apply, then disclosure statements must be provided to and by the State and the State must provide legal and a financial advice reports to the landlord.

It may also mean that, if the State is a tenant (and not a major tenant), the State and the landlord cannot opt out of the rent review provisions of the Act (refer to item 4.5.4 below).

It has been suggested that a lease of a retail shop by a State entity (ie. where a department or agency of the State is a tenant) should be excluded from the operation of the Act.

4.2A	Are the current definitions in the Act adequate or appropriate for the Queensland retail leasing environment?
4.2B	Are the suggested exclusions from the definition of 'retail shop lease' outlined above appropriate for the Queensland retail leasing

environment? In particular, should the following categories of lease be excluded from the operation of the Act:

(a) all leases of retail premises with a floor area of more than 1000m²;

(b) all leases by a listed corporation or a subsidiary of a listed corporation;

(c) leases of retail premises used for the carrying on of a business by the tenant on behalf of the landlord;

(d) any premises in an office tower that forms part of a retail shopping centre where the premises are not used for carrying on a retail business;

(e) leases by the State (ie. a State department or agency)

4.2C Should any further definitions or exclusions be contained in the Act?

Please provide reasons and supporting details for your response to each of the above questions. These may include details about (but not limited to) any advantages or disadvantages of amending the definition, or any risks of, or alternatives, to doing so.

4.3 Operation of Act and former Act

Sections 10 to 20 of the Act cover the operation of the Act and the former Act and their application to various leasing arrangements.

These provisions are technical and include:

- the date that a retail shop lease is taken to be entered into (section 11)
- the Act applies to all retail shop leases of premises in Queensland, regardless of where the lease is entered into and even if the lease states that it is governed by a law other than Queensland law (section 12)
- the limited application of the Act to short term leases. A 'short term lease' means a retail shop lease for not more than 6 months (being the combined period of the original term and any periods for which the tenant has the right to extend the lease) (section 13(8)). Only the Objects (refer item 4.1 above), Interpretation/Coverage (refer item 4.2 above) and trading hours (refer item provisions of the Act apply to short term leases
- the application of the Act to premises that become or cease to be a retail shop after commencement, assignment or renewal of the lease under an option (section 15)
- the application of the Act to certain leases for the business of a service station that are regulated by the *Trade Practices (Industry Codes–Oilcode) Regulations 2006* (Cth) (section 17)
- various transitional provisions (sections 13, 14 and 16).

Transitional provisions are provisions in an Act that provide for an adequate transition from the law applying before, to the law that applies after, an amendment or change to the Act.

4.3A	Are the application provisions of the Act appropriate within the Queensland retail sector? If not, please provide details of your reasons.
4.3B	Please provide your comments regarding the extent to which the transitional provisions in Part 4 of the Act remain relevant or applicable.

4.4 Preliminary disclosures about leases

Sections 21 to 23 of the Act cover the preliminary disclosures that are required for retail shop leases. Preliminary disclosure is not required for a short term retail shop lease; a retail shop lease for a periodic tenancy or a tenancy at will; or a renewal under an option in the lease.

A periodic tenancy is not defined in the Act but is understood according to its ordinary commercial meaning to be a tenancy that exists for a period of time determined by the term of the payment of rent (ie. from year to year, month to month or week to week) until terminated by the tenant or landlord by notice required under the relevant statute or common law of the jurisdiction.

A tenancy at will is not defined in the Act but is understood according to its ordinary common law meaning to be a tenancy which either the landlord or the tenant may terminate at any time by giving reasonable notice. Unlike a periodic tenancy, it is not associated with a time period.

4.4.1 Landlord disclosure to tenant:

Under section 22 of the Act, a landlord must give to a prospective tenant a disclosure statement (lessor disclosure statement) and a draft lease at least seven days before a lease is entered into (the disclosure period).

A lessor disclosure statement must be in the approved form and contain the details set out in section 3 of the Regulation.

The lessor disclosure statement is comprehensive and includes:

- the lease term and any options to renew
- details about the rent, including the method and timing for rent adjustments; any rent free periods; calculation of turnover rent or provision of turnover information to the landlord

- details of any landlord outgoings payable by the tenant and any other costs payable by the tenant under the lease, including promotion amounts and the landlord's costs of obtaining mortgagee consent
- the core trading hours the lessee's entitlement to access the shop outside these hours
- identification of any provisions in the lease about demolition of the shop or building and/or relocation
- the tenant's permitted use of the shop and whether it is exclusive
- if the shop is situated in a retail shopping centre - details including the number of retail shops in the centre; the centre's lettable area; and any assurances by the landlord about the nature of other businesses operating in the centre
- details about available parking bays and any services, facilities, fixtures, plant or equipment to be provided by the lessor for the benefit of the leased shop
- details of any works to be carried out by the lessor before the lease starts and an estimate of any lessee contribution
- details of any fit out works to be carried out by the lessee; any contribution by the lessor to the costs and any quality or standard requirements the lessee must comply with
- any alteration works to be carried out by or for the lessor to the shop, building, shopping centre or surrounding roads
- any current legal proceeding in relation to the lawful use of the shop, building or shopping centre.

The approved form for the lessor disclosure statement can be accessed at:

http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/78469/Retail-shop-leases-Lessor-disclosure-statement.pdf

Currently, the only exception to the disclosure period is where the prospective tenant is a major tenant gives the landlord written notice that the major tenant:

- has received appropriate financial and legal advice about the lease
- waives the entitlement to the disclosure period.

However, the landlord is still required to give the disclosure statement to the major tenant before the tenant enters into the lease.

Where the landlord does not give the tenant a disclosure statement within the disclosure period, or the disclosure statement given is incomplete or false or misleading (ie. a defective statement):

- the tenant may terminate the lease within six months of entering into the lease

- the landlord is liable to pay reasonable compensation for loss or damage suffered by the tenant because of the non-compliance or defective statement.

However, a tenant may not terminate because of a defective statement if:

- the landlord acted honestly and reasonably and ought reasonably to be excused
- the tenant is in substantially as good a position as it would have been in if the statement was not defective.

The obligation of the landlord to give a prospective tenant a disclosure statement does not apply to an assignment of a retail shop lease. (An 'assignment of a lease' is explained below at item 4.4.3).

The NSW Act and the Victoria Act require a landlord to give a current disclosure statement to the tenant on renewal of the lease.

4.4.1A Are the current provisions for disclosure by a landlord to a tenant, including the remedies for non-compliance and defective statement, adequate or appropriate?

If not, please provide your reasons, including supporting details.

These may include (but are not limited to) details about:

- compliance and other costs to business;
- alternatives that promote efficiency and equity in the conduct of business under a retail shop lease.

4.4.1B Should tenants who are not major tenants be able to waive the disclosure period? If yes:

(a) in what circumstances should tenants be able to do so?;

(b) what are the risks of tenants waiving the disclosure period; and

(c) what safeguards (if any) may be put in place to protect their interests?

Please provide supporting details for your response.

4.4.1C Should a landlord be required to provide a current disclosure statement to the tenant on renewal or extension of a lease? Please provide reasons for your response.

4.4.2 Tenant disclosure to landlord:

Under section 22A of the Act, before entering into a retail shop lease, the prospective tenant must give the landlord a disclosure statement (lessee

disclosure statement) in the approved form and containing the details set out in section 4 of the Regulation. This obligation does not apply to an assignment of a retail shop lease.

The approved form for the lessee disclosure statement can be accessed at;:

http://www.justice.qld.gov.au/__data/assets/pdf_file/0008/18692/lessee_disclosure_statement.pdf

The details that the tenant is required to disclose to the landlord include:

- the number of retail business premises leased by the tenant
- sufficient details the tenant's experience in retail business to demonstrate their ability to meet the financial and other obligations of the lease
- anything known to the tenant that may affect the their ability to meet the financial and other obligations of the lease
- any statements or representations made by or for the landlord during the lease negotiations that the tenant is relying on
- a declaration that no other promises, representations, warranties or undertakings have been made by or for the landlord to the tenant about the premises or the business.

This provision is reciprocal to the landlord's disclosure obligation and is intended to increase the level of pre-lease information that must be exchanged between the parties to assist their respective decision making processes for entering into the lease. The provision is also intended to actively address the potential threat of action under the unconscionable conduct provisions (refer item 4.5.14 below) based on a lack of evidence of disclosure to a weaker party.

If the tenant fails to give the landlord a disclosure statement, the landlord may within two months from when the lease is entered into, apply to QCAT for an order that the tenant provide the statement.

If the tenant makes a false or misleading statement or representation in the disclosure statement, the tenant is liable to pay reasonable compensation for loss or damage suffered by the landlord because of the false or misleading statement or representation (section 43A).

4.4.2A	Are the current provisions for disclosure by the tenant to the landlord adequate or appropriate? If not, please provide your reasons with supporting details.

4.4.3 Assignor and assignee disclosure obligations:

If the tenant wants to sell their business before the lease expires, the retail shop lease needs to be transferred to the buyer of the business, with the landlord's consent. This is called an 'assignment' of the lease. The new tenant (the 'assignee') agrees to take over the rights and obligations of the original tenant (the 'assignor') by accepting all the terms and conditions of the lease.

Under section 22B of the Act, the assignor and prospective assignee disclosure obligations require the provision of disclosure statements by both parties to each other before the landlord's consent to assignment is sought.

The assignor and assignee disclosure statements must be in the approved form and contain the details set out in the Regulation.

The details that the assignor is required to disclose to the assignee include:

- any options to renew and the next date for exercising the option
- rent, outgoings, promotion amounts and other charges payable to the landlord under the lease
- the basis for a rent review under the lease and the date for the next review
- if the assignment involves the prospective assignee carrying on the business, details of sales figures and trading performance for the last five years or the period that the assignor has carried out the business (if less than five years)
- any outstanding notices from the lessor under the lease or any government entity in relation to the shop
- any encumbrance on the lease or the shop's fixtures/fittings
- any fixtures or fittings not owned by the assignor
- any rent concessions or other benefits applicable to the balance of the lease term
- whether the lease contains a provision releasing the assignor from liability under the lease on assignment (section 5 of the Regulation).

The approved form for the assignor disclosure statement can be accessed at:

http://www.justice.qld.gov.au/__data/assets/pdf_file/0005/18428/assignor_disclosure_statement.pdf

The details that a prospective assignee is required to provide to the assignor are the same as those that a prospective tenant is required to provide to the landlord (section 6(a)-(i) of the Regulation). The approved form for the assignee disclosure statement can be accessed at:

http://www.justice.qld.gov.au/__data/assets/pdf_file/0004/18427/assignee_disclosure_statement.pdf

If either party fails to give the other a disclosure statement, the other party may apply to QCAT within two months of the assignment date for an order that the statement be provided.

If either party makes a false or misleading statement or representation in their disclosure statement, the other may claim reasonable compensation for loss or damage suffered because of the false or misleading statement or representation.

4.4.3A	Are the current provisions for disclosure by the assignor and assignee to each other adequate or appropriate? If not, please provide your reasons with supporting details.

4.4.4 Landlord and assignee disclosure obligations:

Under section 22C of the Act, the landlord must give a prospective assignee (who is not a major tenant) a disclosure statement and a copy of the lease at least seven days before the assignment is entered into. The information the landlord is required to provide is the same as that set out at item 4.4.1 above (ie. for landlord disclosure to the tenant).

The assignee must also give the landlord a disclosure statement before the assignment is entered into. The assignee disclosure statement to the landlord includes (section 6(a)-(i) of the Regulation):

- details of any statements or representations made by or for the landlord during the lease negotiations that the assignee is relying on
- a declaration that no other promises, representations, warranties or undertakings have been made by or for the landlord to the assignee about the premises or the business.

If the either party fails to give the other a disclosure statement, the other party may apply to QCAT within two months of the assignment date for an order that the statement be provided.

If either party makes a false or misleading statement or representation in their disclosure statement, the other may claim reasonable compensation for loss or damage suffered because of the false or misleading statement or representation.

The NSW Act and the Victoria Act do not require any disclosure between the landlord and the assignee. In those jurisdictions, only the assignor is required to give disclosure to the assignee. However, section 22C of the Act affords additional protection to assignees and landlords by requiring each to disclose to the other directly.

4.4.4A Are the current provisions for disclosure between the landlord and assignee adequate or appropriate? If not, please provide your reasons with supporting details.

4.4.5 Financial and legal advice reports

A tenant or assignee (who is not a major tenant) must, before entering into the lease or the assignment, give the landlord a financial advice report signed by a qualified accountant and a legal advice report signed by a lawyer. The financial and legal advice reports must be in the approved form and include the details set out in the Regulation.

The main details required to be included in a financial advice report are a statement by an accountant that the prospective tenant or assignee has been advised:

- about their financial obligations under the lease, including the rent, outgoings and other payments; the potential financial impact of the rent review and that the operation of the business is restricted by the term of the lease
- to obtain further professional advice, including advice about the sales volume needed to meet costs of carrying on the business; appropriate accounting and reporting systems; cash flow and sales budget forecasting and taxation requirements (section 7 of the Regulation).

The main details required to be included in a legal advice report are a statement by a lawyer that the prospective tenant or assignee has been advised:

- about the lease, including how rent and outgoings are calculated; rent review; any special or unusual terms or conditions of the lease; whether a repayable bond or guarantee is required; options to renew; the parties' obligations at the end of the lease; any relocation provisions, permitted use and the consequences of a breach of a term or condition of the lease
- to obtain further professional advice, including about town planning matters; building laws, statutory approvals and financial advice about the operation of the business (section 8 of the Regulation).

The approved forms for the financial advice report and the legal advice report can be accessed at:

http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/18663/financial_advice_report.pdf

http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/18691/legal_advice_report.pdf

If a tenant or assignee fails to give the landlord a financial or legal advice report, the landlord may apply to QCAT for an order that the report be provided.

Queensland is the only Australian jurisdiction that currently requires tenants and assignees to provide financial and legal advice reports for a retail lease.

4.4.5A Are the current provisions for financial advice reports and legal advice reports appropriate?

If not, please provide your reasons with supporting details. These may include (but are not limited to) compliance costs to business and information regarding risks or benefits to business if the provisions were amended to be less prescriptive or removed from the Act.

4.5 Minimum Lease Standards

4.5.1 Tenant's obligations to make particular payments

Sections 24 and 24A of the Act regulate a tenant's obligations to make particular payments under a lease. A lease must not require the tenant to make any payment to the landlord, except for:

- rent
- if the lease specifically provides for it - landlord's outgoings, damages for breach of a term of the lease, a tenant's indemnity for loss or damage caused by the tenant, interest on arrears of rent or outgoings
- the landlord's reasonable legal and other expenses in responding to the tenant's request for a variation of the lease (such as a rent concession), or the landlord's consent to a sublease or licence by the tenant.

If a lease requires the tenant to pay any amounts other than the above the relevant clause of the lease will not be legal or binding on the tenant. The exceptions to this are the particular payments that a tenant may be required to make listed in section 24(4) of the Act. These include GST amounts; shared costs of a specialist retail valuer determination; the landlord's costs and expenses relating to an assignment; a repayable bond by the lessee and payments for lessor fit out or for the grant of a franchise.

4.5.2 Turnover rent

Section 25 of the Act applies where the rent under a retail shop lease is calculated in whole or part as a percentage of the turnover of the tenant's business carried on in or from the leased shop (turnover rent). Turnover rent therefore varies with the tenant's sales performance and can increase or decrease over the period of the lease.

'Turnover' is the gross sales of the business for any particular period. However, turnover does not include amounts such as the following:

- the net amount of discounts reasonably and properly allowed in the usual course of business
- uncollected credit account amounts that have been written off
- certain cash or credit refunds for returned goods and cancelled lay-bys
- refunds on fees for services
- taxes (including GST) imposed at the point of sale or hire
- the value of goods returned to shippers, wholesalers or manufacturers
- receipts from the sale of shop fixtures and fittings
- amounts received from sales made on a commission basis (other than commission on sales) (section 9 of the Act).

If turnover rent is payable under the lease the tenant must give the landlord, at the end of each:

- month, or at other agreed times, a statement of turnover for that month
- year, or at other agreed times, a statement of turnover prepared by a registered auditor.

All other Australian jurisdictions, except Queensland and WA, prohibit a provision in a retail shop lease enabling termination by a landlord on the grounds that a tenant has failed to achieve specified sales or turnover.

4.5.2A Are the provisions of the Act dealing with turnover rent appropriate? If not, please provide your reasons with supporting details.

4.5.2B Should there be a statutory prohibition on a provision in a Queensland retail shop lease enabling early termination by a landlord on the basis of inadequate sales or turnover? Please address the following questions in your response:

(a) have you had your lease terminated for this reason?

(b) do you think any lease provision that allows termination for failure to achieve a specified turnover should be mutual?

Please provide reasons for your response, including supporting details.

4.5.3 Confidentiality of turnover information

Section 26 of the Act prohibits a landlord from disclosing a tenant's turnover information without the tenant's agreement, except in certain specified circumstances outlined below.

A landlord may disclose information:

- in a document giving aggregate turnover of businesses in the shopping centre (provided information about the turnover of an individual's business is not disclosed)
- specifying the turnover of a tenant's business to a prospective purchaser or mortgagee of the shopping centre (or their advisor/ agent); a court; a mediator or QCAT under the Act; or a specialist retail valuer for the purposes of a current market rent determination.

Sections 26(3) and (4) of the Act place restrictions on the use and disclosure of relevant information by a prospective purchaser/mortgagee of the shopping centre (or their advisor/agent) and the landlord's professional advisors.

Where confidentiality is breached by the landlord or another of the above persons to whom the landlord has disclosed the turnover information:

- the person who has disclosed the information in contravention of the confidentiality provisions may be liable to a monetary penalty
- the tenant is entitled to reasonable compensation for loss or damage caused by the wrongful disclosure as agreed between the landlord and the tenant or, if no agreement, by the QCAT dispute resolution process (refer item 4.7 below).

Any agreement by a tenant about the disclosure of turnover information or the amount of compensation payable must be given apart from a provision in the lease.

4.5.3A	Are the provisions about confidentiality of turnover information adequate or appropriate? If not, please give your reasons with supporting details, including any relevant examples from your experience.

4.5.4 Timing and bases of rent reviews

Section 27 of the Act sets out the minimum standards that apply where the rent payable under a retail shop lease is to be reviewed during the term of the lease or under an option to renew or extend the lease.

The basis and timing of rent reviews must be stated in the lease and rent may not be reviewed more than once for each year of the lease, except in the first

year. Section 27 sets out the mechanisms for annual rent reviews and the rent payable after an invalid review.

A landlord and a major tenant can opt out of the rent review provisions if the tenant has provided the landlord with written notice that the tenant has obtained appropriate financial and legal advice about the lease and the lease provides for the timing and basis for each review (section 27(8)).

A lease may include a clause limiting the amount by which the rent may be increased.

4.5.4A	Are the current rent review provisions adequate or appropriate? If not, please give your reasons with supporting details.
4.5.4B	Does a major tenant need the protection provided for in section 27(8) of the Act?

4.5.5 Current market rent determinations

Sections 27A to 35 of the Act deal with determinations of current market rent.

Tenant request for early determination of market rent:

If the lease contains an option for the tenant to renew or extend the lease at the current market rent and the market rent has not already been agreed, the tenant may request an early determination of market rent before exercising the option (early determination). The tenant must make the early determination request within the specified period (section 27A).

The early determination provisions do not apply if the tenant is a major tenant who has opted out of the rent review provisions.

Determination by a specialist retail valuer:

Sections 28A to 35 of the Act set out the framework for a determination of current market rent by a specialist retail valuer (valuer) for the purposes of rent review during the term of the lease or under an option to renew the lease, or for a tenant's request for an early determination.

The provisions set out the process and requirements for a valuer determination, including:

- provision and exchange of party submissions and right of reply (section 28A)
- the matters to be considered by the valuer (section 29)
- information the valuer may require from the landlord (section 30)

- the timeframe for, effect and cost of the determination (sections 32, 33 and 34 respectively)
- confidentiality obligations of the valuer (section 35).

Section 28A of the Act currently provides that the valuer decides the timeframes within which the parties are to provide their submissions to the valuer and for the right of reply by each party. It has been suggested that it would be simpler and reduce costs if the Act required that:

- the parties' submissions be provided to the valuer within a stated timeframe after the appointment of the valuer
- any extension of this timeframe must be agreed by the parties and notified in writing to the valuer.

Section 30 of the Act provides that the valuer may require the landlord to give the valuer "any relevant information about leases in the retail shopping centre in which the shop is situated". If the landlord fails to provide the information to the valuer within 14 days, the valuer must give the tenant a notice in writing of the failure and a retail tenancy dispute exists between the landlord and the tenant ((refer item 4.7 below for the QCAT dispute resolution process).

The disclosure of information about the turnover of the tenant's business by the landlord to the valuer under section 30 of the Act is permitted under section 26 of the Act (ie. the landlord does not breach the duty of confidentiality).

It has been suggested that access to the tenant's trading details for the business operated from the leased shop (and also any similar businesses operated by the tenant) would greatly assist the valuer to assess the current market rental and that the Act should expressly provide for such details to be given to the valuer by the tenant for the purposes of the determination. This would cover situations where the tenant's trading details are not available to the landlord for provision to the valuer.

4.5.5A Are the provisions about early determination of market rent appropriate?

4.5.5B Are the current provisions for determination of current market rent by a specialist retail valuer appropriate?

4.5.5C Does a specialist retail valuer require (and should the tenant be required to provide to the valuer), the tenant's trading details for the business conducted in the premises the subject of the determination and any similar businesses operated by the tenant for the purpose of a determination of current market rent under the Act?

4.5.5D Should the Act state a specific timeframe within which the parties must provide their submissions to the valuer and for the parties' right of reply (rather than the valuer determining these periods on a case by case basis)? For example, should the Act state that the parties must provide their submissions to the valuer within 7 days of the appointment of the valuer?

4.5.5E Should the Act provide that any extension(s) of time for making submissions to the valuer, or responding to a submission, is to be agreed between the parties and notified in writing to the valuer?

Please provide reasons for your responses to the above questions, including any supporting details.

4.5.5F Are there any issues in practice regarding the expiry of a lease, or an option to renew or extend a lease, before the determination of market rent is given by the valuer?

4.5.6 Prohibitions on certain rent review provisions

Sections 36 and 36A the Act provide that certain rent review provisions in a retail shop lease, including ratchet rent provisions, are void.

A ratchet rent clause is a clause in a lease that allows the rent to rise, but not fall. Section 36A of the Act specifically defines the term 'ratchet rent provision' for the purposes of the Act and ensures that rent reviews are not avoided by including a ratchet rent provision in a retail shop lease.

It has been suggested that the prohibitions on certain types of rent review set out in section 36 of the Act should not apply if:

- the tenant is a major tenant and has provided the landlord with written notice that the tenant has obtained appropriate financial and legal advice about the lease
- the lease provides for the timing and basis for each review (ie. the parties have opted out of the rent review provisions as allowed under section 27(8) of the Act).

4.5.6A Should the Act be amended to provide that the prohibitions in section 36 do not apply where a landlord and a major tenant have opted out of the rent review provisions under section 27(8) of the Act? Please give reasons for your response, including supporting details.

4.5.7 Landlord's outgoings and other payments

What are landlord's outgoings?:

A landlord's outgoings (see extended definition at section 7) are:

- the landlord's reasonable expenses directly attributable to the operation, maintenance or repair of the leased building or retail shopping centre and associated areas
- charges, levies, premiums, rates or taxes payable by the landlord as the owner or occupier of the centre or building, or the land on which it is located
- if provided in the lease, GST amounts.

Section 7(3) of the Act sets out particular items that are not landlord's outgoings. These include land tax payable on the land on which the centre or building is situated; expenditure of a capital nature; landlord's contributions to merchants' associations and centre promotion funds; and payment of interest and charges on the landlord's borrowings.

The current prohibition on a landlord including land tax in the landlord's outgoings is a matter of land tax policy and is beyond the scope of this review.

Landlord's outgoings may be specific or apportionable and include such expenses as insurance, local authority rates, security, electricity, water, cleaning and garbage collection. For tenants located in shopping centres additional outgoings such as air conditioning of common areas, fees for the centre manager, centre landscaping, and maintenance of car parks and other public amenities and facilities are typically included.

If the lease requires the tenant to contribute to the landlord's outgoings, (including sinking fund maintenance and promotion amounts - refer item 4.5.8 below), the lease must specify:

- what expenses are to be regarded as outgoings
- how they will be apportioned to the tenant
- how the landlord will recover them (section 37).

The apportionable outgoings (which include sinking fund maintenance amounts – refer item 4.5.8 below) paid by each tenant must reflect the proportion of the floor area that the shop occupies to the total lettable area in the centre or building (section 38).

Auditing and accounting requirements for landlord's outgoings:

For landlord's outgoings that are not attributable to the tenant's direct use of services or facilities (for example, promotion and sinking fund maintenance amounts) the landlord must give the tenant an:

- annual estimate of outgoings to which the tenant must contribute at least one month before the start of the accounting period, or when the lease is entered into (annual estimate of outgoings)
- audited annual statement of outgoings prepared by a registered auditor within three months after the end of each accounting period (audited annual statement).

The annual estimate of outgoings must be in the approved form, which can be accessed at:

http://www.justice.qld.gov.au/__data/assets/pdf_file/0017/18422/annual_estimate_of_outgoings.pdf

The audited annual statement must be in the approved form and the requirements for the statement are set out in section 37(5). The approved form can be accessed at:

http://www.justice.qld.gov.au/__data/assets/pdf_file/0003/18444/audited_statement_of_outgoings.pdf

If the landlord does not give the annual estimate of outgoings and the audited annual statement to the tenant within the required timeframes, a monetary penalty may apply.

Payments for key money and goodwill:

A landlord (or a person acting for the landlord) is prohibited from seeking or accepting payment of key money or for goodwill in relation to a retail shop lease (section 39).

'Key money' is defined in the Schedule to the Act and means:

- an amount to be paid to or at the direction of a landlord by way of a premium, non-refundable bond or otherwise for the granting, renewing or assigning of a lease
- any benefit to be conferred on or at the direction of the landlord for the grant, renewal or assignment.

However, the landlord is able to recover or receive from the tenant costs associated with investigating an assignee; assigning the lease; rent in advance; a repayable bond; fit out costs; franchise costs; and goodwill associated with purchase of the landlord's business (the recoverable cost provisions).

4.5.7A Are the provisions of the Act regarding landlord's outgoings appropriate?

4.5.7B Are the recoverable cost provisions appropriate?

Please give reasons for your responses, including supporting details.

4.5.8 Sinking fund and promotion/advertising

Sinking fund:

A lease can require a tenant of a retail shop to contribute amounts to a sinking fund for major maintenance and repairs (maintenance amounts) to the:

- buildings, plant and equipment and areas used in association with the shopping centre or building in which the shop is situated
- the plant and equipment and areas used in association with the shop itself (the proper purposes).

The management and administration of the sinking funds for retail shopping centres, retail strips and stand alone retails shops is regulated by section 40 of the Act. These provisions include that the landlord:

- must pay maintenance amounts paid by tenants for the credit of the sinking fund to an interest bearing account (if the landlord does not comply it is an offence and a monetary penalty may apply)
- must only apply sinking fund amounts for a proper purpose (if the landlord does not comply it is an offence and a monetary penalty may apply)
- is liable to pay into the sinking fund any deficiency attributable to a failure by the landlord or a predecessor in title of the landlord to apply sinking fund monies for a proper purpose
- must not seek or accept payment of maintenance amounts from a tenant that would result in the fund being more than $100,000 in credit (if the landlord does not comply, it is an offence and a monetary penalty may apply).

Also, the total payments into the sinking fund by all tenants of the retail shops to which the fund relates for any one year must not be more than 5% of the total of the landlord's estimated outgoings for the retail shops for the year.

For the accounting and auditing requirements relating to the sinking fund, refer item 4.5.7 above (landlord's outgoings).

Section 25B of the NSW Act sets out what happens to the sinking fund if the building or retail shopping centre in which the retail shop is located is destroyed, or demolished or the retail shopping centre ceases to operate. In these cases, the landlord must repay to the tenant the proportion of the total amount credited to the fund that is equal to the proportion that the lettable area of the tenant's shop bears to the total lettable area of all the shops required to contribute to the fund. For this provision, the landlord and the tenant are those who were the landlord and tenant under the retail shop lease immediately before the destruction or demolition of the building or centre, or the retail shopping centre ceased to operate.

Promotion and advertising amounts:

If promotion and advertising expenses (promotion amounts) are not included in the outgoings of a retail shopping centre under the lease, the landlord can require the tenant to contribute separately to promotion amounts if agreed to in the lease. These promotion amounts contributed by the tenant can only be used by the landlord for promotion and advertising directly attributable to that centre. However, the landlord can use the money for joint promotions and advertising with other shopping centres (section 41).

If promotion amounts are treated as part of the landlord's outgoings under the lease, the auditing and accounting requirements for landlord's outgoings apply (refer item 4.5.7 above).

The promotion and advertising fund provisions in the NSW Act, the NT Act and Victoria Act require that any unspent tenant contributions must be carried forward by the landlord towards future expenditure on advertising or promotion at the centre. The Victoria Act also provides that, within four months of the end of the lease, an adjustment must be made on a pro rata basis between the landlord and the tenant to account for any underpayment or overpayment by the tenant for advertising or promotion costs.

4.5.8A	Are the current provisions for the management of sinking funds, (including accountability requirements) adequate?
4.5.8B	Should the Act set out what happens to the sinking fund when the building or shopping centre in which the retail shop is located is destroyed or demolished; or where the shopping centre ceases to operate?
4.5.8C	Are the provisions about contributions to promotion and advertising, (including accountability requirements) adequate or appropriate? For example, should the Act provide for: (a) what happens to unspent tenant contributions?; (b) the landlord to make a marketing plan available to the tenant? Please give reasons for your above responses, including supporting details.Please also give any examples of problems or difficulties your business has experienced regarding the sinking fund or promotion and advertising amounts.

4.5.9 Implied provisions for compensation

Sections 42 to 44 of the Act set out the compensation provisions that are implied in retail shop leases, including where a lease has expired and the tenant is still in occupation of the shop while negotiating for a new lease. The compensation provisions also apply:

- where a tenant, subtenant or franchisee is entitled to occupy the shop under the lease or with the landlord's consent
- to an assignee of the lease.

The landlord is liable to pay reasonable compensation to the tenant for loss or damage when the landlord (or a person acting under the landlord's authority):

- substantially restricts the tenant's access to the leased shop (section 43(1)(a))
- takes action that restricts or alters customer access to or flow past the shop, unless the landlord's action is required by law (section 43(1)(b))
- causes significant disruption to the tenant's trading or fails to take steps to stop or prevent disruption (section 43(1)(c))
- does not rectify a breakdown of plant or equipment under the landlord landlord's care, or a defect in the centre or shop building which was not apparent to the tenant on entering into the lease
- neglects to clean, maintain or repaint the centre or shop building where it is the landlord's responsibility under lease to do so
- causes the tenant to vacate the shop before the end of the lease due to extension, refurbishment or demolition of the centre or shop building (section 43(1)(f))
- makes a false or misleading statement or misrepresentation causing the tenant to enter into the lease or renewal
- does not ensure the premises are available for trading on the date specified in the disclosure statement.

Currently, the compensation payable under these provisions cannot be limited under the lease. It has been suggested that the Act should allow a lease to include a clause preventing or limiting a claim for compensation for a specific occurrence if the likelihood of the occurrence was specifically drawn to the attention of the tenant in writing before the lease was entered into.

Section 34(3) of the NSW Act allows for a lease to include a clause preventing or limiting a claim for compensation for a specific occurrence if the likelihood of the occurrence was specifically drawn to the attention of the tenant in writing before the lease was entered into. The NT Act (section 47) and the SA Act (section 38) contain a similar provision.

It has been suggested that the recent floods in Queensland have highlighted the need for the implied compensation provisions to allow for the closure of a shopping centre by the landlord in the face of an actual or anticipated emergency or threat to persons or property in or near the centre. The equivalent compensation provisions in the NSW Act (section 34) and the Victoria Act (section 54) do not apply to an action taken by a landlord:

- as a reasonable response to an emergency situation or

- to comply with a requirement imposed by a public or local authority acting under an Act.

In an emergency context, it has also been suggested that the Act be amended so that:

- the landlord is only liable to compensate the tenant under sections 43(1)(a)-(c) where the landlord has acted unreasonably
- recognised shopping centre practices are considered in determining whether the landlord acted unreasonably.

Currently, section 43(1)(f) states that the landlord is liable to pay reasonable compensation to the tenant for loss or damage when the landlord requires the tenant to vacate the shop before the end of the lease due to the extension, refurbishment or demolition of the centre or shop building. It has been suggested that this section be removed from the Act because sections 46H to 46K of the Act deal specifically with compensation payable by a landlord to a tenant where the landlord terminates the lease due to a proposal to demolish the centre. [Refer item 4.5.12 below.]

4.5.9A Are the current implied compensation provisions adequate or appropriate?

Please give detailed reasons for your response.

4.5.9B In particular, should the Act be amended so that:

(a) a lease may include a clause preventing or limiting a claim for compensation for a specific occurrence if the likelihood of that occurrence was specifically drawn to the attention of the tenant in writing before the lease was entered into?;

(b) the implied compensation provisions do not apply to an action taken by a landlord as a reasonable response to an emergency situation, or to comply with a requirement imposed by a public or local authority under legislation?;

(c) the landlord is only liable to compensate the tenant under sections 43(1)(a)-(c) where the landlord has acted unreasonably? If so, is it appropriate that recognised shopping centre practices are considered in determining whether the landlord has acted unreasonably?

4.5.9C What are your views about the implications of the omitting section 43(1)(f) from the Act, including having regard to the specific relocation and demolition provisions in sections 46C to 46K of the Act?

Please give reasons for your responses to each of the above

questions, including supporting details. These may include (but are not limited to) information about the advantages or disadvantages of the proposal and any alternatives to address the issues or concerns raised.

4.5.10 Implied provisions for damaged premises

It has been suggested that the Act should provide for an abatement of rent and outgoings payable by the tenant to the landlord where the retail shop or the building in which the shop is located is damaged, including by flood.

The NSW Act (section 36) and the Victoria Act (section 57) include the following implied provisions in the event of damage to the shop or building that is not caused by the tenant:

- the tenant is not liable to pay rent or any amount payable to the landlord as outgoings or other charges until the shop can again be used under the lease
- if the shop can still be used under the lease but the use is diminished due to the damage, the tenant's liability for rent and outgoings is reduced proportionately
- if the landlord notifies the tenant in writing that the landlord considers that the extent of damage makes repair impractical or undesirable, the landlord or tenant may terminate on seven days notice
- if the landlord fails to repair within a reasonable time after the tenant has requested the landlord in writing to do so, the tenant may terminate the lease on seven days notice
- the above provisions do not affect the right of the landlord to recover damages from the tenant for damage to the premises or building attributable to the tenant
- a lease must not contain a provision which has the effect of limiting the liability of a party to the lease to pay compensation to another party to the lease for the damage to the premises or building
- the landlord and tenant are not prevented from terminating the lease by agreement if the shop or building is damaged or destroyed.

The retail shop lease legislation in the other Australian jurisdictions, except Queensland and WA, include similar provisions.

4.5.10A	Do you think it is necessary or appropriate that the Act should be amended in line with NSW and Victoria (or in some other way) to provide for rent abatement and termination of the lease where the shop or building in which the shop is located is damaged?

	Please provide detailed reasons in support of your view. These may include (but are not limited to) information about the advantages or disadvantages of the proposal and any alternatives to address the issue.
4.5.10B	You are invited to provide details of your experiences as a tenant or landlord whose retail shop premises, building or shopping centre was damaged in the Queensland floods. This may include things such as whether or to what extent your rent and outgoings payments were reduced and whether your premises were adequately repaired in a reasonable timeframe, including the impact of insurance claims processes.

4.5.11 Relocation of tenant's business

Sections 46C to 46G of the Act set out the process and requirements for the relocation of a tenant's business if the lease contains a specific relocation provision.

If the landlord intends to relocate the tenant's business to different premises in circumstances where the landlord proposes to refurbish, redevelop or extend the building in which the shop is located, the landlord must give the tenant at least three months written notice of the relocation (the relocation notice).

The relocation notice must indicate a genuine proposal that is to be carried out within a reasonably practicable time after relocation and cannot be carried out without vacant possession of the shop. The notice must also include details of the reasonably comparable alternative retail shop to be made available to the tenant (section 46D).

If the tenant wishes to terminate the lease, the tenant may give the landlord a written notice within one month of receiving the relocation notice. If the tenant gives this notice, the lease terminates on a day agreed between the parties or, if no agreement, within three months after the notice is given.

If the tenant does not give the landlord a termination notice, the tenant is taken to have accepted the landlord's offer to lease the alternative shop stated in the relocation notice (or an alternative shop as agreed between the landlord and the tenant). The terms and conditions of the new lease are as agreed between the landlord and tenant (section 46E).

If the landlord and tenant cannot reach an agreement about the terms and conditions of the new lease, the terms and conditions will be the same as those in the existing lease, except that:

- the term of the new lease is the same as the remaining term of the existing lease

- the rent is adjusted to take into account the difference in the commercial values of the shops when the business is relocated (section 46F).

The tenant is entitled to be paid by the landlord for the reasonable costs of relocation, including removing and replacing fixtures and fittings and legal costs (section 46G).

4.5.11A	Are the relocation provisions clear or appropriate? If not, please give your reasons, including supporting details.
4.5.11B	Is the time period of one month (following receipt of the relocation notice from the landlord) for the tenant to provide a termination notice to the landlord sufficient or appropriate?

4.5.12 Demolition of building

Sections 46H to 46K of the Act set out the process and requirements that apply if the lease provides for termination by the landlord because of the proposed demolition of the building in which the shop is situated.

The landlord must give the tenant at least six months written notice of the termination of the lease. The notice must indicate a 'genuine proposal to demolish' within a reasonably practicable time after termination (a genuine demolition proposal) and state the date on which the lease terminates (the termination day) (section 46I).

The term 'genuine proposal to demolish' is not defined in the Act and has its common law meaning as determined by the courts having regard to the particular circumstances.

If the landlord gives the tenant a termination notice the tenant may terminate the lease earlier than the termination day by giving the landlord seven days written notice (section 46J).

If the landlord can prove that there was a genuine demolition proposal when the landlord's termination notice was given, the landlord is liable to pay the tenant reasonable compensation for any fit out that was not provided by the landlord, whether or not the demolition is carried out. Fit out' includes the provision or installation of finishes, fixtures, fittings, equipment and services (section 46K(2)).

If the landlord cannot prove that there was a genuine demolition proposal when the landlord's termination notice was given, the landlord is liable to pay the tenant reasonable compensation for the:

- loss or damage suffered by the tenant because of the early termination of the lease if the demolition is not carried out or is not carried out within a reasonably practicable time after demolition
- fit out that was not provided by the landlord, whether or not the demolition is carried out (section 46K(1)).

The amount of compensation payable by the landlord to the tenant is the amount agreed between the parties or, if the parties cannot agree, the amount decided under the QCAT dispute resolution process (refer to item 4.7).

The Act does not currently provide for what happens to the sinking fund when the building or shopping centre in which the retail shop is located is demolished. (Refer discussion at item 4.5.8 above).

4.5.12A	Are the demolition provisions (including the relevant timeframes and compensation payable by the landlord) clear and appropriate? If not, please set out your reasons, including supporting details.

4.5.13 Refurbishment and refitting

Requirement for tenant to refit or refurbish:

The retail leasing legislation in all other Australian jurisdictions, except Queensland and SA, provides that a tenant can be required to refurbish or refit the leased shop only if the lease specifies the nature, extent and timing of the refurbishment or refitting.

Under the SA Act, a tenant may be required to refit the shop if the disclosure statement discloses the obligation and contains sufficient details about the associated cost (section 13(1)).

In Queensland, the landlord's disclosure statement must include details of any fit out works to be carried out by the tenant, any contribution to be made by the landlord to the cost of the tenant's fit out and any requirements the tenant must comply with relating to the quality or standard of the shop front or fitout.

Requirement for landlord to give tenant advance notice of proposed alterations or refurbishment:

The retail leasing legislation in all other Australian jurisdictions (except Queensland and WA) contain provisions to the effect that, if the landlord proposes alteration or refurbishment to a building or centre where the tenant is not required to relocate to another premises so that the works can be done, the landlord must give notice (generally two months notice) of the proposed works to any tenant whose business is likely to be adversely affected by the

works. The business of a tenant may be adversely affected, for example, by a reduction in customer flow past the shop resulting in decreased takings.

In NSW and Victoria, if the alteration or refurbishment is necessitated by an emergency, the landlord need only give the maximum period of notice that is reasonably practicable in the circumstances.

4.5.13A Having regard to the Queensland retail leasing environment and practices, is it necessary or appropriate for the Act to provide that a tenant can only be required to refurbish or refit the leased shop if the lease specifies the nature, extent and timing of the refurbishment or refitting?

4.5.13B Having regard to the Queensland retail leasing environment and practices, should the Act require a landlord to give advance notice to a tenant whose business is likely to be adversely affected by any proposed alteration or refurbishment by the landlord? If so, what notice period is appropriate?

Please give reasons for your responses, including supporting details. These may include (but are not limited to) information about the advantages or disadvantages of the proposal and any alternatives to address the issue.

4.5.14 Provisions about unconscionable conduct

Sections 46A and 46B of the Act deal with unconscionable conduct in connection with retail shop leases.

Section 46A prohibits both landlords and tenants from engaging in conduct in connection with a retail shop lease that is, in all the circumstances, unconscionable (unconscionable conduct). The initiation of legal proceedings, referral to arbitration or a failure to renew the lease, without more, does not constitute unconscionable conduct.

Section 46B of the Act sets out the factors that QCAT may, and must not, have regard to in deciding if a party to a retail tenancy dispute has engaged in unconscionable conduct.

The factors that QCAT may have regard to include matters consistent with the unconscionable conduct provisions in the former *Trade Practices Act 1974* which are now contained in the Australian Consumer Law, Chapter 2 Part 2-2 of the *Competition and Consumer Act 2010* (Cth). These factors include:

- the relative strengths and bargaining positions of the parties
- whether the other party was able to understand any documents relating to the lease

- whether any undue influence or pressure was exerted, or unfair tactics used, by one party to the lease against the other party
- the amount for which and circumstances under which the other party could have acquired an identical or equivalent lease from another person
- certain industry codes
- the extent to which the parties acted in good faith.

Refer to item 4.7.3 below for the orders that QCAT may make if it finds that a party has engaged in unconscionable conduct.

4.5.14A Are the unconscionable conduct provisions appropriate?

4.5.14B Do you consider that the unconscionable conduct provisions are influencing conduct in the Queensland retail leasing sector, including reducing costs associated with unnecessary disputation between tenants and landlords? Please provide details to support your response.

4.5.15 Lease dealings, including renewal

Sections 45 to 46AA of the Act provide for the tenant's right to deal with lease and business assets and lease renewal.

Tenant's right to deal with lease and business assets:

A landlord must not obstruct or hinder the tenant from using the assets of the business (including the lease) as security. However, there must be an agreement between the landlord and any prospective secured creditor about specific actions by the creditor in exercising its rights in relation to the lease or business assets (section 45). The landlord and the tenant can contract out of the requirements of section 45 under the lease.

Where there is an option to renew in the lease:

If the lease provides for an option to renew or extend by the tenant, the landlord must give the tenant not less than two and not more than six months written notice of the date by which the tenant must exercise the option (section 46). It is an offence if the landlord does not comply with this requirement and a monetary penalty may apply.

Where the lease contains an option for the tenant to renew or extend the lease at the current market rent and the tenant has requested an early determination of market rent, the last day on which the option must be exercised is the earlier of 21 days after the tenant receives written notice of the current market rent determination or the lease end date (section 27A).

Where there is no option to renew in the lease:

If the lease does not provide for an option to renew or extend the lease (or is not the subject of an agreement to do so), the landlord is required to give written notice to the tenant (the landlord's notice) either:

- offering to renew or extend the lease and setting out the proposed terms
- advising that they do not intend to offer a renewal or extension.

If the existing lease is for a period of more than one year, the landlord's notice must be given at least six months but not more than one year before the end of the lease. If the existing lease is for a period of less than one year, the landlord's notice must be given at least three months but not more than six months before the end of the lease (the notice provisions).

The landlord cannot withdraw an offer to renew or extend the lease until one month after it is made, or if the tenant accepts the offer within that period.

If the landlord does not comply with the notice provisions, the term of the lease is extended until six months after the landlord gives the notice (the extended period). However, the extended period will only apply if the tenant has requested an extension of the lease in writing from the landlord before the lease end date.

The tenant may terminate the lease during the extended period by giving one month's written notice to the landlord (section 46AA).

4.5.15A	Are the provisions about the tenant's right to deal with the lease and business assets appropriate? If not, please set out your reasons.
4.5.15B	Are the provisions about lease renewal appropriate? If not, please set out your reasons.

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

A tenant is not liable to pay for the landlord's legal or other expenses relating to the preparation, renewal or extension of a lease (section 48 (1)(a)).

However, the tenant can be required to pay for:

- registration of the lease, including associated survey fees (section 48(2)(a))
- the landlord's reasonable expenses incurred in obtaining mortgagee consent to the lease (section 48(2)(b))
- lease duty and registration costs (sections 48(2)(c)&(d))

- the landlord's reasonable costs and expenses for a lease assignment, including investigating a proposed assignee and any necessary consents (sections 39(2)(a)&(b))
- the landlord's reasonable costs and other expenses in responding to the tenant's request for a variation of the lease (including a rent concession); or consent to a sublease or licence by the tenant (section 24(1)(c)).

4.5.16A	Are the provisions about the tenant's liability for legal and other costs associated with the lease appropriate? If not, please give your reasons.

4.5.17 Assignments of leases

A retail tenancy dispute exists between a landlord and a tenant if:

- the lease provides that the lease may only be assigned with the landlord's consent
- the tenant requests the landlord's consent to an assignment of the lease in writing and has given the landlord full particulars of the proposed assignment
- the landlord does not give an answer to the tenant within one month (section 50(1)).

A retail tenancy dispute also exists between a landlord and a tenant if the landlord, in consenting to an assignment:

- imposes a new obligation on an assignee under the lease
- withdraws from an assignee an existing right under the lease
- imposes a condition for consent that the tenant considers unreasonable (section 50(2)).

Refer to item 4.7 below regarding retail tenancy dispute resolution.

Section 50A of the Act provides for release of the assignor (ie. the former tenant) from liability under the lease provided that the landlord, assignor and assignee have each complied with the specified disclosure obligations and each disclosure statement is not defective. (Refer to item 4.4.3 above for disclosure obligations).

There have been various submissions that the Act should also be amended, in line with other state and territory jurisdictions (the ACT, NSW, the NT and WA), to expressly provide that a guarantor of the assignor is also released from liability in the above circumstances.

4.5.17A	Are the provisions about consent to assignment appropriate?
4.5.17B	Should the Act be amended to clarify that a guarantor of the assignor is also released when the conditions in section 50A are met? Please give reasons for your responses, including any supporting detail.

4.6 Trading hours

Sections 51 to 53 of the Act deal with retail shop lease trading hours.

A retail shop lease may include a condition that requires a tenant to keep the leased shop open for trading during the core trading hours for the shopping centre. Core trading hours for a retail shopping centre must be within the allowable trading hours under the *Trading (Allowable Hours) Act 1990* (Qld).

Under the Act, tenants may nominate a change to core trading hours by resolution through the conduct of a ballot. The resolution must be supported by at least 75% of the tenants that voted.

4.6A	Are the Act's provisions about core trading hours clear and appropriate? Please provide reasons for your response, including supporting details.

4.7 Dispute resolution and administration

A **retail tenancy dispute** is a dispute under or about a retail shop lease, or about the use or occupation of a leased shop under a retail shop lease, regardless of when the lease was entered into.

The Act sets out a dispute resolution process for retail tenancy disputes. These disputes are resolved through a two step process which generally involves mediation in the first instance and, if the dispute is not resolved by mediation, a hearing by QCAT.

Part 8 of the Act covers the lodgement of a notice of dispute, the mediation process, referrals and applications to QCAT, and the orders QCAT may make to resolve a dispute.

Part 9 of the Act deals with administrative matters, including the jurisdiction of mediators and QCAT, the appointment of mediators, the constitution of QCAT and confidentiality, privilege and immunity.

4.7.1 Retail shop lease disputes that can be dealt with by mediators and QCAT (Jurisdiction)

Matters for which mediator/QCAT does not have jurisdiction:

The Act gives both a mediator appointed under the Act and QCAT jurisdiction for the resolution of retail tenancy disputes, except where the dispute is about:

- an issue the subject of arbitration or an arbitration award, or before or decided by a court (arbitration or court matters)
- rent arrears (other than a dispute about rent arrears where the dispute is also about payment of compensation by the landlord to the tenant); the amount of rent payable or the amount of landlord's outgoings (retail monetary disputes)
- certain leases for the business of a service station that are regulated by the *Trade Practices (Industry Codes–Oilcode) Regulations 2006* (Cth) (section 97(1) and 103(1) of the Act).

Court matters are resolved as appropriate in the jurisdiction where the dispute was first lodged.

Retail shop lease disputes that are the subject of arbitration are usually dealt with by an arbitrator or arbitrators appointed pursuant to an arbitration agreement. That agreement usually determines the jurisdictional seat for the arbitration. Disputes regarding the enforceability, or seeking judicial review, of the arbitrator's award are dealt with in the court of relevant jurisdiction depending upon the where the arbitration took place. In Queensland, the *Commercial Arbitration Act 1990* currently confers jurisdiction on the District and/or the Supreme Court.

The jurisdiction in which retail monetary disputes are dealt with depends on the monetary amount in dispute and whether the amount is a fixed amount or an amount agreed between the parties. If the amount is a fixed or agreed amount up to and including $25,000, the dispute may be dealt with in the QCAT minor civil debt jurisdiction.

If a retail monetary dispute is for an amount that is:

- disputed (ie. is not a fixed amount or an amount agreed between the parties)
- above the QCAT monetary limit of $25,000

the dispute may be heard by the court with the relevant civil monetary jurisdiction (ie. the Magistrates Court deals with disputes involving a monetary amount up to and including $150,000).

QCAT does not have jurisdiction for any retail tenancy dispute where the amount, value or damages in dispute is more than $750,000 (section 103(2)(c)). These disputes may be dealt with in the Supreme Court of Queensland.

Matters for which mediator/QCAT has jurisdiction:

Both mediators and QCAT have jurisdiction to mediate or hear retail tenancy disputes (other than the categories of dispute set out above) where the monetary amount in dispute is up to and including $750,000. This jurisdiction includes disputes about:

- the procedure for determining the rent payable (but not the actual amount)
- the basis on which the landlord's outgoings are payable and the procedure for charging the tenant for the outgoings (but not the actual amount of the outgoings)
- whether an item of the landlord's outgoing was reasonably incurred in, or is directly attributable to the operation, maintenance or repair of the building (section 97(3) and section 103((2)).

QCAT also has jurisdiction to hear a dispute about rent arrears if the dispute is also about the payment of compensation by the landlord (section 103(2)(d)).

Exclusion of other jurisdictions:

Section 94(1) of the Act provides that on and after the lodgement of a dispute notice for a retail tenancy dispute (refer item 4.7.2 below for lodgement of dispute notice), the dispute must not be referred to arbitration or heard by a court.

The exceptions to this include where:

- the dispute notice is withdrawn under section 91 of the Act, or the referral of or application for the dispute is withdrawn under the QCAT Act
- a proceeding about the issue in dispute was started in a court before the dispute notice was lodged and the proceeding has not been removed or transferred to QCAT
- an application for an order in the nature of an injunction about the issue in dispute is made to a court
- a mediator or QCAT refuses to mediate or hear the dispute because they are of the opinion that the dispute is not within their jurisdiction
- the mediator cannot reach a solution to the dispute and QCAT does not have jurisdiction to hear the dispute (section 94(2)).

4.7.1A	Are the existing provisions about the mediator's and QCAT's jurisdiction adequate or appropriate? If not, please give your reasons, including supporting details.
4.7.1B	Are the existing provisions about the exclusion of other jurisdictions appropriate? If not, please give your reasons, including supporting details.

4.7.2 Mediation process

Sections 55 to 62 of the Act set out matters regarding the mediation process. These provisions include:

- a party to a retail tenancy dispute that is within a mediator's jurisdiction may lodge a notice of dispute with the Principal Registrar of QCAT (Principal Registrar). The dispute notice must be in the approved form and lodged with the Principal Registrar exercising the delegated power of the Director-General of DJAG (section 55)
- as soon as practicable after the dispute notice is lodged, the Principal Registrar must nominate a mediator for the dispute and notify the parties of the mediator and details of the mediation conference (section 56)
- each party must conduct their own case at the mediation conference, except where they are a corporation or the mediator is satisfied an agent should be permitted to represent them (section 57)
- a party to a dispute cannot be compelled to attend a mediation conference (section 59).

Reference of a dispute to QCAT by mediator:

A mediator must refer a dispute to QCAT if:

- the retail shop lease has not ended more than one year before the dispute notice was lodged
- the dispute is within QCAT's jurisdiction and the parties do not reach a mediated solution
- a party to the dispute does not attend mediation; or the dispute is not settled within four months after lodgement of the notice of dispute (section 63).

If the mediation is unsuccessful and the lease ended more than one year before the notice was lodged, a party may pursue a claim through the relevant court that has jurisdiction.

4.7.2A	Are the provisions of the Act dealing with mediation appropriate? Please provide reasons for your responses, including supporting details.

4.7.3 Proceedings before QCAT

Application to QCAT by a party to a retail tenancy dispute:

A party to a retail tenancy dispute may apply directly to QCAT for an order to resolve the dispute if the retail shop lease has not ended more than one year before the dispute notice was lodged and:

- the party claims that the other party has not complied with the mediation agreement within the time stated in the agreement, or otherwise within two months from the agreement date or
- a mediator refuses to refer the dispute to QCAT on the basis that the dispute is not within QCAT's jurisdiction or
- a court has ordered that a proceeding started in the court be referred to QCAT (section 64).

Where a party to a retail tenancy dispute is excluded from applying to QCAT because the lease ended more than one year before the dispute was lodged, the party may pursue a claim through the relevant court that has jurisdiction. The party may also apply to QCAT under section 61 of the QCAT Act for an order to extend the one year timeframe fixed under section 64 of the Act.

The NSW Act (section 68) and the Victoria Act (section 87) expressly provide that, except for proceedings for an order in the nature of an injunction, a retail tenancy dispute may not be the subject of proceedings before the relevant tribunal or court unless and until the mediation process is complete (ie. the Registrar certifies that mediation has failed or is unlikely to resolve the dispute).

4.7.3A	Are the provisions regarding an application by a party to QCAT appropriate?
4.7.3B	Should the Act make express provision to the effect that (except for proceedings for an order in the nature of an injunction) the jurisdiction of QCAT to hear a retail tenancy dispute under section 103 does not apply unless and until the mediation process is complete? (ie. along the lines of the current position in Victoria and NSW).

Please provide reasons for your responses, including supporting details.

QCAT orders, including for unconscionable conduct:

QCAT may make the orders, including declaratory orders, it considers just to resolve a retail tenancy dispute. The orders QCAT may make are set out in section 83 of the Act. These include enforcement and payment orders, and in certain circumstances, orders about the amount of compensation payable and setting aside the determination of a specialist retail valuer.

However, if QCAT finds that a party to a dispute engaged in unconscionable conduct in connection with the lease, QCAT may only make one of two specified orders based on the unconscionable conduct. These are either that the party who engaged in the unconscionable conduct is required to pay an amount to a stated person, or is not required to pay any amount.

4.7.3C	Are the provisions regarding the orders that QCAT may make adequate or appropriate?

Procedural matters (Part 9):

Constitution of QCAT for retail shop lease dispute proceeding:

Section 102 of the Act provides for how the Tribunal is to be constituted for a retail shop lease dispute proceeding. If the amount in dispute is less than $25,000 (the current QCAT prescribed amount) QCAT may be constituted by a legally qualified member or a QCAT adjudicator. If the amount in dispute is $25,000 or more, the Tribunal must be constituted by a legally qualified member, a person representing retail shop lessors and a person representing retail shop lessees (industry representative members).

Concern has been raised in preliminary consultation for the review regarding the relationship between the independence of QCAT and the requirement under section 102 of the Act that (for a proceeding that relates to an amount of $25,000 or more) the tribunal which hears and determines the dispute is to include industry representative members. The concern is that such members have an actual or discernable shared interest with the parties to the dispute.

It has been suggested that (rather than having industry representative members as QCAT members for retail lease dispute proceedings) persons with relevant knowledge, expertise and experience in retail shop lease matters may, if necessary, on a case by case basis, be appointed by the President of QCAT as assessors under section 110 of the QCAT Act.

Section 111 of the QCAT Act sets out how an appointed assessor may assist QCAT on request. The assessor's role may include:

- providing expert evidence in a proceeding

- giving advice to QCAT, including conducting an inquiry or investigation into a matter and giving a written report of the assessor's findings to QCAT
- assisting QCAT to ensure that the parties understand QCAT practice and procedures; the nature of assertions made in the proceedings and the legal implications of those assertions and the relevant QCAT decision for the proceeding
- deciding a question of fact arising in a proceeding and reporting to QCAT stating the assessor's decision and reasons for decision.

Under section 111(3) of the QCAT Act, a copy of any assessor's report is given to each party to the proceeding and each party is given an opportunity to make written submissions to QCAT about the report before QCAT decides whether QCAT adopts or rejects the assessor's findings.

QCAT may order a party to a proceeding to pay or contribute to the assessor's costs only if (before getting the assessor's assistance) QCAT has advised the party of the intention to get assistance from an assessor, the likely costs of the assessor and the likely amount of the payment or contribution. QCAT must also give the party an opportunity to be heard on the matter (section 112 QCAT Act).

Section 113 of the QCAT Act provides for the disclosure of interests by an assessor.

Appointment of mediators:

The Act provides that the Minister or his delegate may appoint the number of persons the Minister considers necessary to be mediators (section 95).

The NSW Act (section 65(3)) and the Victoria Act (section 84(2)) and the NSW Act (section 65(3)) require the relevant dispute resolution body to, in arranging for the resolution of retail tenancy disputes, have regard to the need for the mediation to be conducted by persons who are experienced in the field of retail shop leases.

General:

The process for making an application to QCAT and the general powers and procedures for QCAT proceedings (including legal representation, costs and appeals) are set out in the QCAT Act.

4.7.3D	Do the dispute resolution provisions in the Act generally (including the mediation, jurisdictional and procedural provisions) enable efficient and effective resolution of retail tenancy disputes?
4.7.3E	What do you think about the suggestion that, for retail shop lease dispute proceedings before QCAT, any retail shop lease expertise

considered necessary by QCAT to decide the dispute should be provided by an assessor or assessors appointed by the President of QCAT on a case by case basis (rather than having industry representative members for each proceeding)?

Please give reasons for your responses, including any supporting details.

4.8 Miscellaneous

Sections 120 to 122 of the Act cover the evidentiary provisions, the regulation making power and the review of the Act.

4.8A	Are the provisions about evidentiary provisions, regulations and review of the Act still appropriate?

4.9 Transitional Provisions

Transitional provisions are provisions in an Act that provide for an adequate transition from the law applying before, to the law that applies after, an amendment or change to the Act.

Sections 123 to 135 of the Act include transitional provisions for *Retail Shop Lease 1984* references, the *Retail Shop Leases Amendment Act 2000*, the *Retail Shop Leases Amendment Act 2006* and the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009*.

4.9A	Please provide your comments regarding the extent to which the transitional provisions remain relevant or applicable.

4.10 Retail Shop Lease Regulation 2006

The Regulation prescribes businesses as retail businesses by describing the combination of goods or services in which a business can trade. The Regulation also prescribes the particulars for the disclosure statements and the financial and legal advice reports.

4.11 Suggestions for simplification or harmonisation

To the extent that has not been addressed in your responses to the above questions:

4.10A Comment is sought on any aspects of the Act or the Regulation which should be removed, simplified or streamlined to improve operational efficiencies, or reduce the regulatory burden, for business. Please provide your reasons, including supporting details, setting out:

(a) why this change is necessary and appropriate from an individual business or an industry perspective;

(b) details of how any simplification or reduction in the regulatory burden may be achieved; and

(c) any alternatives to make processes, or compliance with requirements, under the Act more efficient and effective.

4.10B Comment is also sought (in particular from landlords or tenants who operate relevant businesses in other Australian States or Territories and/or their professional advisors) about any provisions in the retail leases legislation in other state/territory jurisdictions that should apply in Queensland. Please provide your reasons, including supporting details, as to why this is necessary and appropriate from an individual business or an industry perspective.

Examples of supporting details for responses to the above questions include details about (but not limited to):

- reduced business and compliance costs (ie. what are these costs and to what extent will they be reduced);
- other benefits to business, such as improved commercial decision making, increased operational efficiencies or improved competitiveness of the business;
- any potential disadvantages or risks for business.