SHOPPING CENTRE
COUNCIL OF AUSTRALIA

Extending Unfair Contract Protections

To Small Businesses

Submission on the Consultation Paper May 2014

Submission by the

Shopping Centre Council of Australia

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1. Executive Summary

The Shopping Centre Council of Australia is firmly of the view that the extension of the unfair contract terms (UCT) provisions of the *Competition and Consumer Act* to standard form contracts involving small businesses will result in business uncertainty; will increase business costs in Australia; and will place Australia at a significant disadvantage compared to the countries with which we compete.

We believe it is vital for the efficient operation of a market economy that business relationships are able to be formed and operate within a legal framework that provides certainty and instils business confidence. It is also vital that bargains that are struck will endure and be enforceable and are not lightly put aside by courts or tribunals. That is why comparable countries have not taken the radical step that Australia is about to take.

The relationship between business and consumer (for which the UCT regulation was conceived) is quite different to that between business and business. Businesses, whether large or small, must do their homework if they are to succeed and must take responsibility for the business decisions they make. The business to business contract, unlike the business to consumer contract, is commercial in nature and is one on which small businesses could be expected to obtain legal advice. Even if legal advice is not obtained businesses, including small businesses, have greater knowledge of contractual terms and have greater resources to enforce other legal and contractual remedies. In a competitive market, businesses (again including small businesses) also have greater opportunity to negotiate terms than do ordinary consumers.

We are also concerned that the extension of the UCT provisions to business contracts will put the focus on the individual terms of a contract and does not take into account the complexities and subtleties of commercial negotiations. There are many circumstances where businesses compromise and consciously accept less favourable contractual terms in one area in exchange for more favourable terms in another area. Examination of a contractual term by a court will fail to appreciate the overall commercial context and the nuances of commercial negotiations. Courts typically are not commercially experienced and judges generally do not have commercial training or commercial expertise.

We also note that the proposed extension of the UCT provisions to business contracts is inconsistent with '*The Australian Government Guide to Regulation'*, released by the Parliamentary Secretary to the Prime Minister, the Hon. Josh Frydenberg MP, in March 2014. The first two of the 'Ten Principles for Australian Government Policy Makers' in that Guide state: 'Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option'; and 'Regulation should be imposed only when it can be shown to offer an overall net benefit'.

Nevertheless the Federal Government has made clear on several occasions its determination to fulfil its election policy commitment to extend the UCT provisions to standard form contracts involving small businesses. According to a media release on 13 June 2014 the Federal Minister for Small Business, Mr Billson MP, said a meeting of Australian State and Territory Consumer Affairs Ministers "have thrown their support behind an extension of unfair contract term protections to small business."

Given the Federal Government's repeated determination to fulfil its election commitment, therefore, we see little point in addressing Option 1 (Status quo) and Option 2 (Light touch or non-regulatory responses) since these have already been ruled out by the Minister. Our submission therefore addresses only Option 3 (which the Consultation Paper notes is the 'Preferred Option') and Option 4. We understand, from discussions with the Business Council of Australia, it will be addressing Option 1 in detail in its submission. We note our disappointment, however, that only now, after the election policy commitment has been made, is the Federal Government seeking evidence that such an extension is justified and is only now seeking to assess the implications. It is worrying that such a radical and sweeping new law, which has the potential to seriously erode business confidence and certainty, can be pledged for no compelling reason and without proper and rigorous analysis.

We are firmly of the view that it is not appropriate to simply "extend" the existing UCT provisions to business contracts without modification of those provisions to take into account the very different business to business context.

The three major changes we **recommend** are made if the UCT provisions are extended are:

- The current exemption in section 26 (Part 2-3) of the Act, that the laws do not apply to "a term required, or expressly permitted, by a Commonwealth, State or Territory law" should be extended to include "*or which meets the minimum standards of a law of the Commonwealth, State or Territory".*
- The 'rebuttable presumption' in section 23 (that a contract is presumed to be a standard form contract) and in section 25 (that a term of a contract is presumed not to be reasonably necessary to protect the legitimate interests of the party) should be reversed so that the onus is on the party challenging the contract term.
- Guidance must be given in the legislation, or in the Explanatory Memorandum, on the degree of negotiation which must occur before a contract falls outside the scope of being a 'standard form contract'. In our view once a single term has been amended, this is sufficient evidence that a contract is no longer a standard form contract.

We also **recommend** the definition of a 'small business' for the purposes of extending the UCT provisions be consistent with the definition of a 'small business employer' in the *Fair Work Act* i.e. a business that employs fewer than 15 employees. If this is not accepted we **recommend** the definition of a small business entity in the *Income Tax Assessment Act* 1997 be adopted i.e. an aggregated turnover in the previous year of less than $2 million.

We strongly **recommend** that publicly listed companies, and subsidiaries and related body corporates of publicly listed companies, are excluded from the UCT provisions, irrespective of the definition of 'small business' that is adopted.

We also **recommend** that retail leases (contracts) which are regulated by state and territory retail tenancy legislation should be exempted from the new law.

In making this final recommendation we are responding to comments by Minister Billson, in his address to the Franchise Council of Australia on 21 October 2013, in which he stated he did not intend to create a "forum shopping extravaganza" and that, where satisfied there is "enforceable equivalence" through other mechanisms that provide protections for small business, "we won't go at these transactions twice". In *Business Spectator* on 5 February 2014 the Minister was paraphrased as saying "to be exempt from the proposed legislation organisations must show that the existing regulations achieve the same objective as the proposed legislation . . ."

Throughout Australia there exists extensive state and territory legislation regulating retail leases. This legislation is long-standing; is industry-specific; and contains detailed provisions regulating all aspects of retail leasing. The general approach of this legislation is to outline minimum conditions which must apply in the lease entered into by the landlord and tenant; to lay down detailed rules on key aspects of the retail tenancy relationship; and to seek to resolve retail tenancy disputes by easily-accessible and cost-efficient mediation. In other words the legislation exists in order to ensure there is a *fair* relationship between landlords and small (and, even, medium-sized) tenants. If mediation is not successful either party is able to refer the matter to specialist tribunals for prompt and objective arbitration. In serious cases involving allegations of unconscionable conduct, retail tenants have the opportunity of bringing applications under the *Competition and Consumer Act* ("the Act") via the Australian Competition and Consumer Commission or the relevant state tribunals under the unconscionable conduct provisions of state retail tenancy legislation.

There is, therefore, already in existence an extensive body of legislated rules about fair behaviour by retail property owners and their managers when dealing with their tenants and legislated rules about fair retail lease terms. If a lease term fails to meet the minimum standards in the legislation, the lease term is void. Where a tenant claims an owner or manager has breached one of the rules there is adequate redress by low cost mediation or, as a last resort, legal proceedings in specialist tribunals.

We understand Australia is unique among western countries in having such detailed legislation governing retail leasing. We also believe there are very few other areas of commerce in Australia where business to business contracts are already so highly regulated by governments.

We have demonstrated in section 4 of this submission that the existing state and territory retail tenancy legislation achieves the same objective as the proposed extension of UCT provisions but does so in a much more direct and more comprehensive manner and with much greater certainty for all parties. This legislation does not rely on vague and subjective notions about whether a lease term is 'unfair'; nor depend on the vagaries of judicial interpretation. State and territory retail tenancy legislation not only provides "enforceable equivalence" to the extension of the UCT provisions; the legislation is far superior in providing protections for small retail businesses, not only in negotiating the terms of leases but in the day-to-day administration of the lease.

Without an exemption for those retail leases already regulated by state and territory governments, the Federal Government's proposed extension of the UCT provisions to business to business contracts will impose an additional layer of business regulation. This will mean 'double regulation' of these contracts. It will also mean regulation which is inconsistent with, and which potentially undermines, state and territory legislation (as explained in section 2.11 of this submission). This will also counteract the Government's objective of reducing unnecessary business red tape by an amount of $ 1 billion a year.

2. Option 3 – Legislative Amendment To Extend The Existing Unfair Contract Term Provisions To Small Business Contracts (Preferred Option)

2.1 Definition of small business

It is important that the new law applies only to those small businesses considered to need the protection of Parliament in their business dealings. As the Consultation Paper notes, the more businesses that are covered, the higher the compliance costs imposed on Australian industry. It is also the case that the more businesses that are covered, the more likely that 'moral hazard' will become a feature of Australian commerce.

The most common definition of a 'small business' is one which employs fewer than 20 employees. As noted on page 63, however, this is a very generous definition since, according to ABS data, approximately two million businesses, or around 97% of total businesses in Australia, would be covered by this definition. We therefore **recommend**, on the grounds of consistency, the definition of a 'small business employer' in the *Fair Work Act* also be adopted for the purposes of this law i.e. a business that employs fewer than 15 employees at a particular time.

If this recommendation is not adopted then we **recommend** the definition be based on annual turnover. Again, on the grounds of consistency, we recommend the definition of a 'small business entity' in the *Income Tax Assessment Act 1997* be adopted for the purposes of the new law i.e. an aggregated turnover in the previous year of less than $2 million.

We do not believe a transaction threshold is appropriate for this purpose since this would also inadvertently permit large businesses to challenge a contractual term since not all transactions of large businesses are themselves large. A transaction threshold is also likely to come under pressure from small business organisations to be increased on a regular basis. The unconscionable conduct provisions in the (former) *Trade Practices Act*, for example, originally had a transaction threshold of $3 million. After lobbying this was increased to $10 million and was ultimately abolished.

An exclusion of publicly listed companies by itself is not a sufficient definition of a 'small business'. In retailing there are many examples of unlisted companies (such as BB Retail Group and the Cotton On Group) which own hundreds of retail stores, which obviously give them a bargaining strength far in excess of any single landlord. This would also permit some international retailers, such as Zara, to be covered. The grocery chain Aldi, for example, with more than 300 stores in Australia (and further growth planned), is an unlisted company and it would obviously be absurd for Aldi to have the protection of the UCT provisions.

We strongly **recommend** that publicly listed companies, and subsidiaries and related body corporates of publicly listed companies, be excluded from being able to rely on the UCT provisions, irrespective of the definition of 'small business' that is adopted. While such an exemption would probably be unnecessary if our recommendations above for a definition of 'small business' were adopted, it is important this exclusion be established from the outset, particularly if a different definition of a 'small business' is adopted. We note that publicly listed companies are excluded from actions for unconscionable conduct under section 22 (Part 2-2) of the Act. It would be anomalous if they are not also excluded from the UCT provisions.

2.2 Large business to small business contracts

The Consultation Paper raises the issue of whether to extend the UCT provisions only to large business contracts with small business or to also include small business to small business contracts. Any notion that small business to small business contracts should be regulated should be emphatically ruled out. The only justification for regulating business to business contracts is an assessment that there is some aspect of market failure, such as an imbalance in bargaining power. We are unaware of any evidence that suggests there is a market failure in markets where small businesses are dealing with small businesses.

2.3 Acquisition versus supply

The Consultation Paper also raises the issue of whether the UCT provisions to all contracts involving either supply or acquisition of goods and services by small businesses or only contracts involving acquisition of goods and services by small businesses. We strongly believe any extension should be limited to small business contracts involving the acquisition of goods and services from another business (option B2 on page 65). Buying and selling are very different concepts. Where a small business is the seller of goods or services, they may decide to participate in a competitive tender or an RFP process where the purchasing company uses standard terms for the acquisition of goods or services. This process allows the purchaser of the goods or services to compare 'apples with apples'. If the UCT provisions are extended to include the supply of goods or services by a small business, a company looking to acquire goods or services may elect to only seek tenders from, or contract with, exempt entities seeking to avoid the potential contractual uncertainty associated with a small business supplier as against an exempt supplier.

2.4 Standard form contracts

One of the problems in "extending" the existing UCT provisions to business contracts is the implicit assumption in the ACL provisions that a 'standard form contract' is inherently 'bad'. This can be seen from the list of matters which a court must take into account in deciding whether a contract is a standard form contract. The guidance currently given to courts include "whether another party was, in effect, required to accept or reject the terms of the contract . . . in the form in which they were presented" and "whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties." These matters carry overtones of being commercial behaviours that should be discouraged.

This is faulty thinking, however. Standard form contracts which are clear in their terms; are disclosed well in advance of exchange; and have been crafted by industry associations and their lawyers/experts with due regard to the legitimate interests of all sides; are obviously beneficial. Such beneficial standard form contracts should be encouraged by governments, not discouraged. For small businesses, in particular, beneficial standard form contracts minimise legal and other costs, minimise risks and encourage consistency of treatment. They are particularly useful where the subject matter of the relevant contract is of relatively little value (having regard to the time and costs likely to be involved for the parties negotiating each time the contract from scratch) or where little time is typically afforded to the prospective parties to enter into contract.

In business transactions there are many instances where standard form contracts are beneficial. (There are also many beneficial standard form consumer contracts, such as the Law Society of NSW's widely used 'Contract for the Sale of Land,' which is also sometimes used by businesses.) 'Standard' retail leases, for example, are produced by bodies such as the Law Society and the use of such leases is often encouraged by State Governments. This is because such leases considerably reduce business transaction costs for small businesses. A tenant can enter into such a lease with the knowledge that, since it has the imprimatur of an independent body such as a Law Society, it is a 'fair' lease and is therefore likely to include all necessary protections. The use of such leases is often common, for example, in 'retail strips' (which do not have the leasing complexity of a shopping centre) and such strips usually have a higher proportion of small business tenants than in a shopping centre. It is anomalous, and borders on the absurd, that the terms of such leases (which are designed to reduce legal costs on small business and to simplify business transactions) will now be open to challenge because they are clearly 'standard form contracts' and because one party (for example, the tenant) is not prepared to incur the legal costs involved in, and taking the risks associated with, negotiating the terms of that industry accepted lease.

Most large businesses operate on the basis of 'standard leases' or 'precedent leases'. This is obviously the most efficient way of doing business. Such standard leases have often been compiled and refined as a result of years of experience having regard to the legitimate interests of both lessors and lessees. These leases are obviously prepared by one party before any discussion has occurred with the actual other party, notwithstanding that they generally take into account the interests of the other party. This is standard commercial behaviour. Indeed, in the case of shopping centres, retail tenancy legislation requires that a copy of the standard lease be provided to prospective tenants at the commencement of negotiations. It would obviously be absurd if such standard leases were deemed by courts to be a 'standard form contract', and the terms of which are liable to be declared void, simply because they are required by legislation to be prepared in advance of negotiations beginning over the terms of the contract.

2.5 'Rebuttable presumptions'

In a business to business context there is no justification for reversing the usual onus of proof and including a presumption that all contracts are 'standard form contracts', thus putting the onus on the party seeking to enforce the contract to prove that it is not a standard form contract. This would have the effect of encouraging businesses to seek to avoid their contractual obligations and to contest litigation, something the Government has said it wants to avoid.

The onus should be on the party challenging the contract term to prove that the contract is a standard form contract rather than the party seeking to rely on it. The contract should be assumed to be binding unless shown to be otherwise.

Similarly, in the current UCT provisions, a term of a consumer contract is presumed not to be reasonably necessary to protect the legitimate interests of the business and it is up to the party who would be advantaged by the term to rebut the presumption. Whilst this may make sense in a business to consumer contract it makes little sense in a business to business contract. Executives of public companies, in particular, have a duty to take every action they can to protect their shareholders' investments. It should not be a function of a court, with little business experience in business, to make such a judgment without an understanding of the general commercial context which may require such a term.

Where a landlord, for example, seeks to rely on a term of a lease which was originally drafted and approved by the Law Society (with every intention of representing a fair balance between the legitimate interests of both lessors and lessees), there is no justification for that landlord having to bear the burden of proving that the compromise originally reached by the Law Society constitutes a compromise that was reasonably necessary in order to protect the landlord's interests.

At least where the terms of the proposed contract were available to both parties well in advance of exchange, or where the parties have a cooling off period, the rebuttable presumption should instead be that each term of a business to business contract is reasonably necessary to protect the legitimate interests of one or other of the parties to that contract.

Contract terms are not included in business contracts in order to make the document as complex or as thick as possible. Shopping centre lease terms, for example, are included because many years of legal and operational experience have found them necessary to protect both the property owner's and the lessee's legitimate interests. Once again the onus should be on the party challenging the contract term to demonstrate that the term is not reasonably necessary to protect the legitimate interest of the party advantaged by the term.

We **recommend**, if the UCT provisions are extended to business contracts, the current presumptions - that a contract is a standard form contract and that a contract term is not reasonably necessary to protect the legitimate interests of the business - are reversed.

2.6 Meaning of unfair

The concept of 'unfairness' is subjective. Because each party to a commercial transaction between businesses is obliged to protect its own interests, the concept provides no meaningful guide as to how one business is to act in a particular transaction with another business. Commercial parties require laws that, in any given situation, ensure both parties seeking legal advice as to their rights and obligations can expect clear, confident and consistent answers from their advisers. Those laws should ensure neither party is tempted to embark on lengthy and expensive litigation in the belief that victory depends on winning the sympathy of the court or winning the lottery of which judge may be sitting on the bench.

This is one of the reasons why successive governments in Australia, until now, have rejected the adoption of vague and subjective concepts such as 'fairness' as a legal norm or standard (rather than a desirable guiding principle) in transactions between businesses.

One of the key legal doctrines in Australia is the separation of powers doctrine which suggests that all regulation should set down clear standards which are capable of being interpreted and applied correctly and consistently by judges, without wide judicial discretion on matters of subjective merit which require arbitrary or prerogative judgment.

Section 24 (Meaning of unfair) and section 25 (Examples of unfair terms) of the UCT provisions ignore this doctrine by including vague terms which give considerable discretion to judges to make determinations on the basis of their own perceptions, rather than clear and consistent standards. Section 24, for example, affords a court an extraordinarily wide discretion in that it "may take into account such matters as it thinks relevant". While this might not be consequential in a business to consumer contract it can have profound consequences in the context of business to business regulation. It is not clear whether, and to what extent, this discretion may be read down so that it is confined to matters relevantly connected to the actual findings that the court is required to make in relation to the definitional elements of section 24.

This uncertainty is compounded by the fact that it is not clear that an appeal could lie against a decision of a court in such cases. Appeals normally lie only in matters of law. Decisions on whether a contract term is unfair will be a subjective decision, given the vagueness of these concepts. Provided a court does take into account the items listed in section 22(2) it is difficult to see how an appeal can lie against the court's exercise of its discretion of "such [other] matters it thinks relevant."

The fact that the individual subjective views of judges as to what, in a given set of circumstances, is fair will most likely not be able to be appealed against means that there will not be a 'rule of law' but rather the 'luck of the draw'. Without appellate overview there will also be no meaningful development of binding precedents and consequently no consistency of decision making. There is no prospect of a coherent and consistent body of case law being compiled.

We also question the relevance of 'transparency' as a criterion to be taken into consideration (section 24(3)) in deciding whether a lease term is unfair in a business to business contract. While this may be a relevant consideration in a consumer contract, business contracts are very complex, are drafted by lawyers and contain contractual terms that are well understood by legal practitioners but might not be "readily available to any party affected by the term".

2.7 Types of unfair contract terms

The UCT provisions include a non-exhaustive list of examples of the types of terms in a standard form contract that a court *may* regard as unfair. The provisions do not prohibit the use of these terms; nor do they create a legal presumption that the terms listed are unfair. Each of these examples therefore leaves the actual decision as to whether or not they are unfair open to the discretion of the court, depending on the particular circumstances. This creates significant uncertainty for businesses which are otherwise seeking reasonable certainty from a contract, at least for the period of the contract. After all this is the very reason for the existence of contracts.

This uncertainty also means any audit by a company of its standard contracts, to determine whether or not these include terms which might be considered 'unfair', will be impossible to undertake since there is no relevant case law and interpretation of these terms will ultimately depend on judicial interpretation and the lottery of which judge sits on a particular case.

When the previous Federal Government proposed in 2009 to extend the UCT provisions to business contracts, the legal firm Corrs noted: "*Although terms of the type identified are not automatically regarded as unfair, it is unclear what weight the courts will place upon these legislative examples and defendants to unfair contract claims may face significant challenges in establishing that terms included in this list are not unfair.*" This observation remains valid today.

To give one example, 'a term that limits, or has the effect of limiting, one party's right to sue another party' may be unfair as may be 'a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract', may also be unfair. Many business contracts contain clauses which stipulate that the terms and conditions contained in the lease comprise the whole agreement between the parties, and that no further or other terms and conditions are implied in the lease or arise between the parties because of any promise, representation, warranty or undertaking given or made by any party to the lease on or before the lease execution. The purpose of such clauses is to ensure that parties enter into a lease in good faith and that the lease term will not be characterised by disputes that are unrelated to the observance of the lease terms once the lease has been entered into.

Such 'whole of agreement' clauses are not a contract term with the purpose of seeking to limit a party's rights to sue on the contract. In addition, it is a clause on which most lessors will not compromise or negotiate, because to do otherwise would make the lessor vulnerable to vexatious claims if the lessee subsequently wished to terminate the lease. It is unreasonable and unjustifiable to suggest that such clauses may now be held to be unfair on the whim of a court. That would now be the risk.

The uncertainty for businesses created by the vague nature of the list of examples of unfair terms is compounded by the provisions leaving it open to future governments by regulation to proscribe further unfair terms by regulation. At present the relevant minister must take into consideration the detriment that a term could cause; the impact on business generally; and the public interest. Such a major step of prescribing an additional unfair term should be done by legislation, where the full scrutiny of Parliament can be applied, not by means of subsidiary regulation.

2.8 'Upfront price' of the contract

The Consultation Paper makes no reference to how the 'upfront price' of the contract would be handled in the event of an extension of the UCT provisions to business contracts. The UCT provisions do not apply to the up-front price payable under the contract provided it was disclosed before the contract was entered into. The up-front price is the amount the consumer agrees to provide under the contract and covers a future payment or series of future payments provided these were disclosed at the time the contract was entered into. In considering whether a future payment, or a series of future payments, forms part of the up-front price, a court may take into account whether these payments were disclosed in a transparent way. A court may also consider whether the consumer was made aware of the basis on which such payments would be determined at or before the contract was made.

We assume, if the UCT provisions are extended to businesses, that the upfront price payable under the contract will also be exempted, provided the same disclosures and transparency applies. In the case of a lease, we also assume the up-front price includes the amount of rent payable over the period of the lease, inclusive of options periods, provided the lease discloses the amounts payable in future years or the basis on which the future year payments will be made. The Federal Parliament has taken the position that an ordinary consumer has sufficient commercial acumen to understand and to negotiate the amount the consumer will be paying under the contract. It would be very strange if Parliament was to legislate on the assumption that a small business person has less commercial acumen than an ordinary consumer when negotiating a contract.

2.9 Extent of negotiations

The current guidance given to the courts (s. 27(2)) states that, in determining whether a contract is a standard form contract, the court must take into account (among other matters) "whether another party was, in effect, required to either accept or reject the terms of the contract [other than the exclusions in s. 26(1)] in the form in which they were presented". The guidance also includes "whether another party was given an effective opportunity to negotiate the terms of the contract [other than those nominated in s. 26(1)."]

A reasonable interpretation of these provisions is that only a contract that was presented as a 'take-it-or-leave it' contract (as a whole) could be found to be a standard form contract. If the party receiving the contract negotiates changes to, say, only one clause, this would appear to mean that the contract is no longer a standard form contract since this is evidence that the party was not required to accept or reject the terms of the contract and evidence that the party was given an effective opportunity to negotiate the terms of the contract. This is not clear, however.

When the previous Federal Government was contemplating similar legislation in 2009, the law firm HWL Ebsworth noted that "*even if some of an agreement is negotiated, terms that a party imposes on a 'take it or leave it' basis may still be able to be challenged under the unfair contracts provisions".*

In the case of a shopping centre owner, if the lessor was not prepared to compromise on some particular clauses (such as, for example, the standard of presentation it requires in the fit-out of tenancies), but was prepared to compromise on others, does this mean that the contract could still be found to be a standard form contract? This is another example of the uncertainty in business that will be created by this new law.

This uncertainty is compounded by the guidance to the courts in section 27(2) which states that the court may also take into account "such matters as it thinks relevant". This wide discretion given to the courts adds further uncertainty. We noted earlier that it is vital for the efficient operation of a market economy that business relationships are able to be formed and operate within a legal framework that provides certainty and instils business confidence. It is also vital that bargains that are struck will endure and be enforceable and are not lightly put aside by courts.

We **recommend** if the UCT provisions are extended to business contracts that the legislation or the Explanatory Memorandum eliminates, or at least reduces, the uncertainties that will be created by providing guidance on the degree of negotiation that must occur before a contract falls outside the scope of being found to be a standard form contract. In our view once a single term of a lease is negotiated this means a contract can no longer be considered a standard form contract.

2.10 Unintended consequences

The Consultation Paper asks if there are any unintended consequences that might arise from Option 3 (see Question 36). We have already noted several such consequences. The Consultation Paper at no stage contemplates whether or not the regulation of unfair contract terms has a potential to introduce greater 'moral hazard' in business transactions. It is our strong view that the extension of UCT provisions to business contracts will inevitably lead to less consideration and assessment being given by small businesses to normal business risks, and will mean small businesses will be more inclined to take on additional business risks, because they now believe they are more insulated from the consequences of those risks or that the consequences will be borne or shared by the other party to the contract.

We also believe the Consultation Paper fails to consider the possibility that the UCT provisions will lead to active discrimination by large businesses against small businesses in the issuing of contracts. This is because a business may refuse to take the risk that a commercial bargain freely negotiated between the two parties will not endure and be enforceable since the other party is free to seek to have a key term of that contract set aside by a court. We can give a possible example in retail leasing, where two prospective tenants are competing for the same tenancy, one of which is a small business just starting out in retail while the other is a retail chain with a large number of similar stores. If we assume each is prepared to pay the same rent for that space, the lessor may well decide to 'play it safe' and enter into a lease with the larger retailer simply because the lessor knows the negotiated contract with that retailer will provide certainty, whereas there will always be an element of uncertainty about entering into a contract with a small retailer.

2.11 Exemptions

The existing UCT provisions include a number of exemptions, such as contracts for shipping (which are subject to a comprehensive legal framework) and insurance contracts which are regulated by the *Insurance Contracts Act).* In section 4 we present our reasons for excluding retail leases (which, like insurance contracts, are already regulated) from the extension of the UCT provisions.

Irrespective of whether this recommendation is accepted, the existing exemption for terms that are required or permitted by another law is drawn too narrowly to be covered by this exemption. A clause permitting the relocation of a tenant in a shopping centre in the event of a genuine redevelopment proposal, for example, is only valid if it meets the minimum protections for the tenant specified in the relevant retail tenancy legislation, such as adequate notice, relocation costs, option to end the contract etc. (Such a relocation can only occur if the tenant has agreed to a 'relocation clause' in its contract). While such a clause is contemplated by state and territory laws it would not appear to be a term that is "required" or "expressly permitted" by Commonwealth, State or Territory law.

We could therefore face a situation where a particular judge (without any commercial experience in retail leasing) at the federal level makes a ruling that cannot be appealed that a relocation clause is, in his or her subjective view, 'unfair'. This ruling would be despite the fact that experienced experts representing all parties to retail leases at the state level, following decades of reviews and debates (set out in section 4.1 of this submission), have recognised the need for such clauses in order to enable the orderly redevelopment and expansion of shopping centres (and retailing). This might also be despite the fact that the relevant clause at issue may have exceeded what those experts over several decades have agreed represent the 'fair' protections for tenants in the event of such relocations. Such a decision could create great uncertainty in the marketplace and thus impede the development or redevelopment of shopping centres in Australia and this would be to the ultimate detriment of retailers and consumers alike.

We therefore strongly **recommend,** if the UCT provisions are extended to business contracts, this general exemption be widened to also include the words: "*or which meets the minimum standards of a law of the Commonwealth, State or Territory".*

2.12 Cost burden on businesses

The Consultation Paper notes that there will be transition costs for Option 3, including "familiarisation costs"; "the costs of ensuring terms are compliant and revising terms (if necessary)"; and "the costs associated with change in business processes if costs are amended". While the first cost category is generally expected when laws are changed, we have no doubt that familiarisation costs will be higher in this case because of the vague nature of the laws and the difficulty that will be involved in training and educating staff.

We believe the Paper underestimates the costs of "ensuring terms are compliant and revising terms (if necessary)". This assumes that any such risk audit will readily establish and identify 'unfair contract terms'. We have noted in section 2.6 of this submission our view that this is almost an impossible task, which cannot be informed by relevant case law, and therefore the resources that will have to be directed at this task will need to be significant.

We stress that the identified costs will be additional costs on retail property landlords unless our recommendation for the exclusion of regulated retail leases is accepted. Retail property landlords already incur significant costs as a result of administering retail tenancy legislation (such as the costs of preparing and keeping up to date disclosure statements, cost of adhering to the regulation governing payment of operating expenses, cost of auditing outgoing statements etc.)

Some of the compliance costs of retail tenancy legislation have been identified by the Productivity Commission in its inquiry into the market for retail tenancy leases (discussed in section 4.10 of this submission below). These are outlined in Box 10.2 on page 221 of the Commission's report.

3. Option 4 – Legislation To Require Standard Form Contracts With Small Businesses To Be Negotiated On Request

We consider this Option to be unworkable and it would seem from the discussion in the Options Paper that Treasury has come to a similar conclusion.

The Option presupposes that a small business will know in advance, and will be able to recognise, an unfair contract term. There is no list of unfair contract terms, however. The UCT provisions include a non-exhaustive list of examples which may be unfair. As noted in section 2.7 of this submission, however, such terms are not prohibited and there is no legal presumption that they may be unfair. In order for this option to be workable, both the party issuing the contract, and the party receiving the contract, would need to be able to recognise such a term. This is ultimately in the hands of a court and would not be possible until a substantial consistent, reconcilable body of case law has been assembled (which, as we have noted in section 2.6 above, is unlikely ever to occur).

Any party to a contract such as a retail lease will regard some aspect of the contract as 'unfair' in the sense that they would prefer to have been able to negotiate, say, a lesser/greater rent (ignoring for the moment that the upfront price is not challengeable) or, say, a more favourable fit out allowance. This does not necessarily mean, however, that the contractual term is unfair in the statutory sense. (Nevertheless, this could subsequently be found by a judge to be unfair). This highlights not only the unworkability of this Option but the significant difficulties in attempting to legislate according to vague and subjective notions of fairness.

The Option does appear to acknowledge that once a single term is negotiated in the lease then the "*contract would no longer be a 'standard form contract' (as it is no longer offered on a 'take it or leave it' basis) and would become a negotiated contract".* This is not acknowledged in Option 3, however, particularly in the discussion of 'standard form contract'. This reinforces our recommendation in section 2.9 of this submission that, if the UCT provisions are extended, guidance must be given in the legislation or the Explanatory Memorandum that once a single lease clause is negotiated the contract is no longer a 'standard form contract'.

4. Exemption of Leases Already Regulated By State and Territory Retail Tenancy Legislation

The Options Paper asks the question (p.40): "Are there other options not considered in this paper that would effectively address the problem [of possible unfairness in business contracts]".

In the area of retail property leasing, there are industry-specific options which address the issue of fair contracting in an objective (rather than subjective) manner; which are easily understood; and which provide all parties with reasonable certainty in the contractual negotiations. One such example is the leasing of retail property space.

All states and territories extensively regulate retail leases. This legislation is long-standing; is industry-specific; and contains detailed provisions regulating all aspects of retail leasing. The general approach of this legislation is to outline minimum conditions which must apply in the lease entered into by the landlord and tenant; to lay down detailed rules on key aspects of the retail tenancy relationship; and to seek to resolve retail tenancy disputes by easily-accessible and cost-efficient mediation.

In other words, the legislation exists in order to ensure there is a *fair* relationship between landlords and small (and, even, medium-sized) tenants. In the event of a dispute, and if mediation is unsuccessful, either party is able to refer the matter to specialist tribunals for prompt and objective arbitration. In serious cases involving allegations of unconscionable conduct, retail tenants have the opportunity of bringing applications to the ACCC under the *Competition and Consumer Act* or to relevant state tribunals under the unconscionable conduct provisions of the relevant retail tenancy legislation.

There is, therefore, already in existence an extensive body of legislated rules about fair behaviour by retail property owners and their managers when dealing with their tenants and legislated rules about fair retail lease terms. These rules are quite specific and they do not rely on subjective interpretation by a judge as to whether they are 'fair' or 'unfair'. If a lease term fails to meet the minimum standards in the legislation, the lease term is void. Where a tenant claims an owner or manager has breached one of the rules there is adequate redress by low cost mediation or, as a last resort, legal proceedings in specialist tribunals.

We understand Australia is unique among western countries in having such detailed legislation governing retail leasing. We also believe there are very few other areas of commerce in Australia where business-to-business contracts are already so highly regulated by governments. Without an exemption for those retail leases already regulated by state and territory governments, the Federal Government's proposed extension of the UCT provisions to business to business contracts will impose an additional layer of business regulation. This will mean 'double regulation' of these contracts.

4.1 State and Territory retail tenancy legislation

There is throughout Australia extensive state and territory legislation regulating retail leases. Five of the six states, and both territories, have enacted specific retail tenancy legislation. The other state, Tasmania, regulates retail leasing by a compulsory code of practice adopted by regulation under the *Fair Trading Act*.

The industry specific legislation, and the date of introduction of the original retail tenancy legislation, is as follows:

- *Retail Shop Leases Act* (Queensland) (1984)
- *Commercial Tenancy (Retail Shops) Agreements Act* (Western Australia) *(1985)*
- *Retail Leases Act* (Victoria) (1986*)*
- *Retail Leases Act* (NSW) (1994)
- *Retail and Commercial Leases Act* (South Australia) (1995)
- *Fair Trading (Code of Practice for Retail Tenancies) Regulations* (Tasmania) (1998)
- *Leases (Commercial and Retail) Act* (ACT) (2002)
- *Business Tenancies (Fair Dealings) Act* (Northern Territory) (2002)

In the eastern mainland states, where retail leasing is the most competitive, this legislation has been in existence (in the case of Queensland and Victoria) for nearly three decades and, in NSW, for two decades. (Prior to 1994, retail leasing in NSW was governed by a voluntary code of practice.)

The legislation is now well-established and is reviewed at very regular intervals. The NSW *Retail Leases Act*, for example, was introduced in 1994; was reviewed in 1998, leading to amending legislation in 1999; was further reviewed in 2003-05, leading to amending legislation in 2006; was further reviewed in 2008, but the draft amending legislation did not proceed following the change of government in 2011; and is presently being reviewed again. We doubt that any other piece of legislation in NSW has been substantially reviewed four times in 20 years.

Each review leads to the introduction of amending legislation which inevitably increases the amount of regulation. To give one example, the original *Retail Tenancies Act* in Victoria, in 1986, had 26 sections and was 37 pages; the *Retail Tenancies Reform Act,* in 1998, had 52 sections and was 50 pages; the current *Retail Leases Act,* in 2003, has 121 sections and 128 pages. This is a near quadrupling of regulation in Victoria in less than two decades.

4.2 Coverage of retail tenancy legislation

Retail tenancy legislation was originally conceived to be a protection for small retailers who were considered to be at a disadvantage compared to the superior bargaining power of landlords. The legislation was therefore meant to apply to 'small' retailers and to exclude 'large' retailers who were considered not to require the protections of Parliament in their dealings with their landlords.

The retail tenancy legislation of each state therefore includes a 'threshold' for determining whether or not leases of retail premises are regulated by the legislation. The most common threshold – in Queensland, NSW, the ACT, Tasmania, the Northern Territory and Western Australia is the '1,000 square metres' rule which means that retail premises which have a lettable area which is larger than 1,000 square metres are excluded from coverage of the Act. (In Queensland and the ACT such premises have to be larger than 1,000 square metres *and* be leased to a public company or subsidiary to be excluded.) To give some idea of the generosity of this 1,000 square metre threshold, the average speciality store inside a shopping centre is usually only around 100 square metres.

In Victoria and South Australia the threshold is a monetary one. In Victoria, the Act applies unless the total occupancy cost of the premises (i.e. rent and marketing and operating expenses) exceeds $1 million a year. In SA the Act applies unless the rent for the premises exceeds $400,000 each year. These monetary thresholds, which are set by regulation, are subject to regular review when the regulations are due to expire and are to be renewed. Again these are generous thresholds. A recent regulatory impact statement in Victoria estimated that 97% of shops in Victoria are covered by the *Retail Leases Act*.

In addition, and absurdly, premises in Queensland, NSW, the Northern Territory and the ACT are covered by the relevant Act, even if they are leased to a public company or the subsidiary of a public company.

While the Acts in most States apply only to leases of retail premises (as opposed to other commercial premises), in some States the legislation also applies to commercial offices. Inside shopping centres, however, all premises are covered by the Acts, whether retail or non-retail premises, unless the premises exceed the specified thresholds.

It can therefore be said with some confidence that all small retail businesses are protected by retail tenancy legislation. If there are anomalies whereby small retail businesses do not have the protection of retail tenancy legislation then these would be few in number. In any event, we are not arguing that any such small businesses would not have the protection of the unfair contract terms legislation. We are seeking exemptions only for those small businesses whose leases are regulated by state and territory retail tenancy legislation.

4.3 Detailed provisions of retail tenancy legislation

We have supplied (separately) with this submission a copy of each of the pieces of legislation referred to in section 4.1 of this submission so Treasury can understand the volume and comprehensiveness of the regulation that applies to the retail tenancy relationship. We have, however, **attached** to this submission a copy of the latest Minter Ellison '*Retail tenancy legislation compendium'* which provides an overview of retail leasing regulation in each state and territory (**Attachment A**). This gives an appreciation of just how detailed is this regulation and an indication of the existing micromanagement of the retail leasing industry. The fact that this compendium is in its sixth edition (having only commenced in 1999) gives some indication of how regularly retail tenancy legislation is reviewed and updated.

Regulation begins even before a retail tenant enters into a lease with a landlord with legislation specifying what documentation must be provided to a prospective tenant. This includes a draft copy of the lease. The legislation also specifies the specific information that must be disclosed to a prospective tenant (in the lessor's disclosure statement) and even lays down a timetable as to when the prospective tenant must receive this information. Retail tenants are therefore well informed of the key provisions of their lease.

The regulation continues throughout the entire period of operation of the lease, specifying minimum protections in the event of matters such as tenant relocations in the event of shopping centre redevelopments, market rent reviews, disturbances to tenancies etc. Regulation also governs matters to do with end-of-lease issues with legislated protections for the tenant in the exercise of options, notification of landlord's intentions in relation to new leases etc.

Some of the key areas of regulation are listed below:

- Lease must be in writing;
- Copy of proposed lease must be given to tenant;
- Disclosure statement, and what must be included in the disclosure statement, to be given to the tenant by landlord;
- Termination rights arising from failure to deliver a disclosure statement or delivery of a defective disclosure statement;
- Further documents to be provided to tenant;
- Notification/registration of lease;
- Prohibition on payment of key money;
- Procedures and limitations on rent reviews;
- Limitations on turnover rent;
- Prohibition on early termination of lease for failure to achieve turnover;
- Minimum term of lease;

- Option clauses;
- Notice of last date for exercising option;
- Procedures for notification of intentions at end of lease term;
- Liability for costs associated with lease;
- Limitations on liability for outgoings (i.e. operating expenditures);
- Outgoings which may not be recovered from tenants;
- Recovery of land tax (prohibited in most states);
- Regulation of management fees;
- Estimate and statement of outgoings to be provided to tenants;
- Adjustment of contributions to outgoings at end of year;
- Regulation of promotion and advertising funds;
- Procedures for assignment, subletting;
- Requirements for fit out;
- Notice of works;
- Landlord's repair obligations;
- Urgent repairs;
- Damaged premises;
- Refurbishment;
- Compensation for disturbances etc.;
- Obligations of landlord to franchisees and subtenants;
- Unconscionable conduct;
- Misleading and deceptive conduct;
- Protections for tenants in event of relocation;
- Protections for tenants in event of demolition;
- Regulation of 'core' trading hours;
- Regulation of security deposits;
- Regulation of guarantees.

We stress that we are unaware of any other country which has such detailed and sophisticated protections for retail tenants. As an example New Zealand, which has a number of Australian shopping centre companies and many Australian retailers, has no retail tenancy legislation and nor does it have the equivalent of the unconscionable conduct law applying in its competition law.

Where identifiable gaps have occurred in retail tenancy legislation, the relevant parties have also negotiated codes of conduct in order to ensure harmonisation of regulation throughout Australia. An example is the *Casual Mall Licensing Code of Practice,* negotiated between the SCCA and the major retailer associations, and which has been authorised by the ACCC. Discussions are also taking place at present between the SCCA and major retailer associations over a possible code of conduct on sales and occupancy cost reporting in shopping centres.

4.4 Consultative nature of retail tenancy legislation reviews

It is important to stress the consultative nature of the retail tenancy legislation reviews and the fact that retailer associations have had plenty of opportunity to identify areas where protections of small retailers are necessary and to formulate those protections.

The current review of the Queensland *Retail Shop Leases Act* is an example of this. First, a Discussion Paper on the Act's provisions was publicly released by the Queensland Government and submissions were invited from the public. On the basis of the submissions received, an Options Paper was prepared and released by the Government and further submissions were sought. Once these submissions had been received, the Government established a Reference Group which met on six occasions to consider all proposals in the submissions. This Reference Group included four retailer associations and one body which represented small businesses generally. The number of retailer representatives was double the number of landlord representatives.

When its work was concluded a report of the Reference Group was prepared and submitted to the Government. In many areas (but obviously not all) consensus was reached between retailer and landlord representatives. We anticipate the next step in the process will be draft legislation which, again, will be subject to consultation with relevant stakeholders. This review, and similar reviews in other jurisdictions, was thorough, detailed and consultative. Undoubtedly this provides a much more detailed and focused protection for small retail tenants (both within shopping centres and without) than could be provided by the extension of the UCT provisions.

4.5 Disclosure requirements of retail tenancy legislation

In addition, as briefly noted in section 4.3 of this submission, landlords are required to make extensive disclosures to prospective tenants prior to the retailers entering into a lease. These disclosures cover not just key items of the lease (such as rent, operating expenses, promotion and marketing costs, term of the lease, commencement date of the lease; handover date of the premises; options and whether or not exclusivity is given in the use of premises). In addition landlords are required to disclose a range of other matters including alteration works; relocation and demolition; relevant details of the shopping centre; core trading hours. The relevant details of the shopping centre include the number of shops; gross lettable area; annual turnover (broken down into categories); expiry dates of major/anchor tenants leases; customer traffic flow; and casual mall licensing.

The lessor's disclosure statement in NSW (Schedule 2 of the *Retail Leases Act),* before it is populated, runs to 12 pages, excluding attachments. It is not uncommon for disclosure statements by major landlords to be much longer than this after all material information is included. We have **attached** to this submission **(Attachment B**) an actual NSW disclosure statement, issued by one of our members (with confidential material removed) to give Treasury an idea of how detailed is the information supplied to prospective tenants before they enter into a retail lease.

In addition to providing a prospective retail tenant with a disclosure statement, some states also require lessors to provide the tenant with a copy of the authorised retail tenancy guide which serves to educate the tenant about the major obligations and possible risks of entering into a retail lease.

We note that paragraphs 104-117 of the Consultation Paper raises the prospect of the extension of UCT provisions being a measure to reduce information failures in markets. The extensiveness of the information currently supplied in the disclosure statement, and the fact that the detailed information to be supplied to tenants is under regular review in retail tenancy legislation reviews, suggests this is unlikely to be applicable in relation to retail tenancy leases. The constant review of the provisions of the disclosure statement reduces the risk of tenants entering into retail tenancy leases being unaware of key contractual obligations.

4.6 Negotiation of retail leases

A typical negotiation process for a shopping centre lease begins with discussions between the leasing executive acting on behalf of the owner and the retail tenant. This is then followed by a brief confirmation letter setting out the major lease terms. If negotiations proceed, the lessor usually then provides a formal letter of offer and, at the same time, is required by law to provide a copy of the standard lease. Usually the lessor supplies the disclosure statement at the same time (and retail tenancy legislation requires the disclosure statement to be supplied at least seven days before the lease is entered into). If the prospective tenant decides to proceed with the tenancy it is then required to return the lessee's disclosure statement, generally acknowledging the receipt of the disclosure statement and confirming that the tenant has not relied on any additional representations by the lessor in deciding to

enter into the lease. Only once this process is completed is a detailed draft lease prepared.

Negotiations between both parties then begin in earnest over the terms of that lease. In reality these negotiations are between the legal representatives of the parties. It is unusual in business negotiations, unlike consumer negotiations, for the parties not to have legal representation. We are not aware of any examples of a 'take it or leave it' approach to lease negotiations and think it is unlikely that this has occurred in the shopping centre industry since the introduction of unconscionable conduct legislation in 1998. This has been reinforced by the difficult leasing conditions that have prevailed in the retail property industry in the last few years. Nevertheless, as noted previously in this submission (section 2.9), there may be particular clauses on which a lessor may not be prepared to compromise.

In the light of this negotiation process, it is difficult to envisage a retail tenancy lease being found to be a 'standard form contract' and, therefore, difficult to envisage an extension of the UCT provisions being a substantial protection for small retail tenants. Nevertheless this can't be said with certainty given the vagaries of judicial interpretation (see sections 2.6 and 2.7 of this submission). Nor will it prevent retail property landlords being loaded up with additional costs given they will be required to commission a legal audit of their existing leases (as well as contracts with service providers) to seek to determine whether or not they would fall foul of the new law.

4.7 Enforcement of retail tenancy legislation provisions

Many of the key provisions of retail tenancy legislation contain penalty provisions. The penalty provisions are usually attached to obligations on landlords. There are very few penalty provisions attached to obligations on tenants. These penalty provisions are reviewed on each occasion the retail tenancy legislation is reviewed.

Other provisions have natural consequences which flow from the failure to observe legislative requirements. If a landlord fails to provide a disclosure statement, for example, or if a landlord provides a disclosure statement which contains information that was incomplete or materially false or misleading, the tenant may terminate the lease at any time within 6 months of the lease being entered into.

The state and territory legislation also provides mechanisms to resolve retail tenancy disputes by easily accessible and low cost mediation. As an example, Part 10 of the Victorian *Retail Leases Act* ('Dispute Resolution') provides that any party to a retail lease may refer a dispute to the Small Business Commissioner for mediation and the Act also provides powers for the Commissioner in such mediations. Generally more than 80% of disputes referred to the SBC are successfully resolved. If the SBC certifies that mediation has failed, or is unlikely to resolve the dispute, the dispute is referred to the Victorian Civil and Administrative Tribunal (VCAT) which has jurisdiction to hear and determine a dispute and can make a variety of orders, including requiring a party to pay money by way of restitution or compensation.

The Productivity Commission found in its inquiry into the market for retail tenancy leases in 2008: "*The number of retail tenancy disputes lodged with State or Territory authorities is very low relative to the size of the market. . . The vast majority of disputes, once registered, are settled before escalation to a tribunal or court.*" (Report, pp. 194-195.)

Contrast these enforcement provisions with the consequences of the UCT provisions where the ACCC, state or territory consumer agencies or private parties are required to apply to a court for a declaration that a term of a contract is unfair (p.124). The enforcement provisions of retail tenancy legislation are far superior to the relief provided by an extension of the UCT provisions.

4.8 Unconscionable conduct and misleading conduct provisions of the Competition and Consumer Act and retail tenancy legislation

In addition to the penalty provisions in retail tenancy legislation, retail leasing is also subject to the 'unconscionable conduct' and 'misleading and deceptive conduct' provisions now contained in Schedule 2 of the *Competition and Consumer Act*. A law extending the unconscionable conduct provisions to small businesses was incorporated in the (then) *Trade Practices Act* in 1997 and became operative in July 1998. It was introduced following a Report in May 1997 by the House of Representatives Standing Committee on Industry, Science and Technology "*Finding a balance: towards fair trading in Australia*" (widely known as the Reid Report). The then Federal Minister for Workplace Relations and Small Business, the Hon Peter Reith MP, said this section would "*provide a new avenue for small and specialist retailers to pursue remedies against unconscionable conduct in the retail tenancy relationship*" (House of Representatives, 30 September 1997).

Following the introduction of section 51AC into the *Trade Practices Act*, the Federal Government subsequently passed the *Trade Practices Amendment (Operation of State and Territory Laws) Act 2001*. This enabled states and territories to extend the jurisdiction of their retail tenancy tribunals to ensure they could also consider matters of unconscionable conduct. This was done in order to provide retail tenants with a lower cost and more easily accessible tribunal to deal with allegations of unconscionable conduct. Most states and territories have now 'drawn down' this legislation into their own retail tenancy legislation. Despite assurances given to the SCCA at the time that this would involve no lessening of the standard of judicial administration of unconscionable conduct claims that applies at the federal level, these assurances have been watered down over time.

In determining whether conduct is unconscionable, courts and tribunals can take into account a range of matters and some of these overlap with matters a court may take into account in determining whether or not a contract is a standard form contract and whether or not a contract term is unfair. These include the relative bargaining strengths of the parties; the extent to which one party was prepared to negotiate the terms of the contract; and whether a party was required to comply with conditions not reasonably necessary for the protections of the interests of the other party.

In addition, all retail property lessors are subject to the federal misleading and deceptive conduct provisions, which are now contained in Part 2-1 of the *Competition and Consumer Act*. This is also replicated in some retail tenancy legislation. For example, section 62D of the NSW *Retail Leases Act* provides that "a party to a retail shop lease must not, in connection with the lease, engage in conduct that is misleading and deceptive to another party to the lease or that is likely to mislead or deceive another party to the lease". A party who suffers loss or damage by reason of misleading or deceptive conduct may lodge a claim for recovery. The NSW *Retail Leases Act* also has a provision (section 10) which provides for a right to compensation for damages suffered as a result of a false or misleading statement or representation prior to entering into a lease.

It could be said that these provisions of the *Competition and Consumer Act* already represent a second layer of regulation of retail leases and that if the UCT provisions are extended to retail leases then this would actually be a third layer of regulation.

4.9 Rent reviews

In the *Business Spectator* article of 5 February 2014, which appears to be based on an interview with the Minister, it is reported the Minister wants to see "*how existing regulations [governing retail tenancy leases] achieve the same objective [as the proposed unfair contract terms regulation], including matters like rights in rent review procedures".*

It is not clear what the Minister (or the journalist) is referring to here. Rents are 'reviewed' during the term of a retail shop lease according to two distinct procedures: by means of an automatic 'rent escalation' clause agreed by the parties when the lease is entered into; or by means of a 'market rent review' at an agreed time during the period of the lease. The method chosen is specified in the lease, having been agreed by both parties, and both methodologies are highly regulated by retail tenancy legislation. Without a rent review clause, agreed by the parties, the rent under the lease cannot be changed.

Under the first method the rent is escalated, usually each year, according to a rent formula agreed by the parties. Retail tenancy legislation is quite specific about how the rent can be escalated and the frequency with which it can be escalated. Section 18 of the NSW *Retail Leases Act*, for example, provides that a lease cannot apply an increase in rent more than once in 12 months, unless the increase is by a specified amount or a specified percentage. The same section also outlaws 'ratchet clauses' in leases, which are clauses which would prevent a rent decrease occurring if the methodology adopted had the potential to cause that rent to decrease. Section 17 of the same Act also provides that a tenant can't be charged rent if the tenant's obligation to pay rent commences when the tenant takes possession of the premises but the landlord has not completed its fit out obligations under the lease.

Under the second method the rent to apply for the remaining period of the lease is determined by a specialist retail valuer as the "current market rent" that would reasonably be expected to be paid for the shop if it was unoccupied and offered for rent for the same or a substantially similar use. Retail tenancy legislation specifies, among other things, the matters that the valuer must take into account or exclude in reaching the determination; the information that must be supplied to the valuer; and how a determination by a specialist valuer can be reviewed if there is disagreement. See, for example, sections 19 and 19A of the NSW *Retail Leases Act* for an example of this regulation.

In our view this conforms fully to the requirements concerning disclosure and transparency referred to earlier when discussing the exclusion of the 'upfront price' of the contract (see section 2.8 of this submission).

In addition, if the lease provides for the payment of rent by reference to turnover (i.e. 'percentage rent' or 'turnover rent'), this is also regulated by retail tenancy legislation. For example, section 20 of the NSW *Retail Leases Act* lists items that cannot be included in 'turnover' for the purposes of the payment of rent.

Incidentally the payment of outgoings (operating expenses) by tenants is also heavily regulated under retail tenancy legislation. Sections 22, 22A, 23, 24, 24A, 24B, 26, 27, 28, 28A, 29 and 30 of the NSW *Retail Leases Act* all ensure the payment of operating expenses by tenants is fair and reasonable.

4.10 Productivity Commission inquiry into the market for retail tenancy leases

The retail property industry is one of the few industries in Australia which has been the subject of a detailed investigation by the Productivity Commission. In 2007-2008 the Commission conducted an inquiry into the market for retail tenancy leases in Australia (*Productivity Commission Inquiry Report No. 43, 31 March 2008*). A major aspect of this inquiry was the 'fairness' of the market for retail tenancy leases. The terms of reference addressed such matters as "competition, regulatory and access constraints" on the efficient operation of the market; "any information asymmetry between landlord and tenants"; "the appropriateness and transparency of the key factors" in rent determination and rights when the lease ends; and any measures to "improve the overall transparency and competitiveness" of the market.

The Productivity Commission's assessment was that overall "*the retail tenancy market is operating well*" and that "*there is not a strong case for further detailed regulation of the retail tenancy market*". The Commission further found that "*it is unlikely that market tensions will be resolved or eliminated by government intervention into contracts through retail tenancy or other regulation. Regulation is not a good substitute for due diligence, the appropriate use of commercial lease advisory services and lease information – and sound business judgment".*

This is further justification for the exclusion from the UCT provisions of retail leases already regulated by state and territory legislation.

The Productivity Commission went further and recommended introducing a national code of conduct for shopping centre leases, in lieu of the existing detailed retail tenancy legislation. The Commission argued that "*less prescriptive legislation and greater harmony in legislation between jurisdictions could improve the efficiency of the retail tenancy market and lower compliance and administrative costs".*

There has been no movement by the Federal Government or by State Governments on this central recommendation by the Productivity Commission. The Shopping Centre Council considers it unlikely that the states and territories will surrender their powers to legislate in this area. Nevertheless we note that the Senate Economics References Committee has commenced an inquiry into "the need for a national approach to retail leasing arrangements to create a fairer system and reduce the burden on small to medium businesses with associated benefits to landlords".

5. Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents Australia's major shopping centre owners, managers and developers. Our members are AMP Capital Investors, Brookfield Office Properties, CFS Retail Property Trust Group, Charter Hall Retail REIT, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, Ipoh Management Services, ISPT, Jen Retail Properties, JLL, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Scentre Group (formerly Westfield Group and Westfield Retail Trust) and Stockland.

Contact

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Retail tenancy legislation compendium

Edition 6 – as at 17 April 2013

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Retail tenancy legislation compendium

Foreword

State and territory governments are responsible for commercial and retail tenancies, each having its own retail tenancy legislation and regulations. However, commercial operations – particularly in retail – are not bound by geographic boundaries. More often than not, our clients' retail operations are conducted on a national scale. This requires information on a national scale and the need to be familiar with the provisions of retail tenancy legislation both nationally and on a state-by-state basis.

With one of the largest and best retail leasing practices in Australia, Minter Ellison is proud to provide to you a copy of our national retail tenancy legislation compendium. Now in its sixth edition, this invaluable compendium is recognised throughout the property industry and provides a summary of retail tenancy legislation across all Australian states and territories as at 17 April 2013.

Applicable to landlords and tenants alike, this compendium has been presented in a format that enables you to compare the legislation relating to a specific issue such as rent reviews or assignments across all states and territories. We believe this will be of particular value to you when using this compendium as a reference guide on both a national and local basis.

The compendium is comprehensive and detailed, however, it is not exhaustive. Moreover, by paraphrasing the legislation, its meaning may be sometimes open to interpretation. Accordingly, this compendium must only be used to obtain a general overview and not as an exhaustive analysis of the finer legal points of the retail tenancy legislation in Australia. If you require detailed legal advice, please contact any of our retail tenancy experts listed on page iii of the compendium.

Legislation

STATE	LEGISLATION	COMMENCEMENT DATE
Victoria	*Retail Leases Act 2003* ('RLA')	1 May 2003
Queensland	*Retail Shop Leases Act 1994* ('RSLA')	28 October 1994
Tasmania	*Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* ('CPRT')	1 September 1998
South Australia	*Retail & Commercial Leases Act 1995* ('RCLA')	30 June 1995, excluding ss.63-66 which commenced 16 September 1996
Western Australia	*Commercial Tenancy (Retail Shops) Agreements Act 1985* ('RSA') incorporating the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998* ('RSAA') and the *Commercial Tenancy (Retail Shops) Agreements Amendments Act 2011* ('RSAA2011')	RSA: 1 September 1985 RSAA: 1 July 1999 RSAA 2011: Sections 1 and 2 on 14 December 2011. The balance on 1 January 2013.
New South Wales	*Retail Leases Act 1994* ('RLA')	1 August 1994, excluding Part 8 of the RLA which commenced on 25 November 1994
Australian Capital Territory	*Leases (Commercial and Retail) Act 2001* ('LCRA')	1 July 2002
Northern Territory	*Business Tenancies (Fair Dealings) Act 2003* ('BTA')	1 July 2004

Retail tenancy legislation compendium

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Important notes

This compendium is a summary of the retail tenancy legislation current in Australia as at 17 April 2013. All relevant amending legislation passed prior to this date is incorporated in the compendium. Any subsequent amendments are not included.

Please note the following riders, applicable as at the date of the compendium:

- Northern Territory – A review of the *Business Tenancies (Fair Dealings) Act* 2003 (NT) is currently being undertaken.
- Queensland – A review of the *'Retail Shop Leases Act 1994* (Qld) is currently being undertaken. Submissions have closed.
- Western Australia – The Western Australian government is committed to reviewing the *Commercial Tenancy (Retail Shops) Agreement Act 1985* (WA) every five years. Accordingly the next review is likely to occur sometime in 2017.

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Leases

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
All leases of 'retail premises' (including renewals) entered into on or after 1 May 2003 (s.11 RLA). See definition of 'retail premises' below. The RLA dispute resolution provisions (Part 10) apply to leases to which the RLA or previous retail legislation applies, and to leases of retail premises in Victoria to which no retail legislation applies (s.81(1) RLA).	All retail shop leases (s.12 RSLA) entered into or renewed before or after 28 October 1994 (s.13 RSLA). Note: Minimum lease standards and preliminary disclosure about leases do not apply to retail shop leases entered into prior to 28 October 1994. The *Retail Shop Leases Act 1984* (Qld), continues to apply to such leases. The RSLA does not apply to a retail shop lease for the carrying on of the business of a service station if the *Trade Practices (Industry Codes – Oilcode) Regulations 2006* (Cth) applies to the carrying on of the business under a franchise agreement within the meaning of that Act (s.17 RSLA). The RSLA (apart from Part 3 – Interpretation and Part 7 - Retail Shop Lease Trading Hours) will not apply to retail shop leases entered into from 3 April 2006, if the term and any right to extend (other than a holding over) is 6 months or less (s.13(8) RSLA). See definition of 'retail shop leases' below.	The CPRT applies to: (a) a lease of retail premises with a lettable area not exceeding 1000m^2 entered into on or after 1 September 1998; (b) a lease of retail premises with a lettable area not exceeding 1000m^2 entered into before 1 September 1998 if varied after that date in a manner not provided for in the original lease or agreement to lease; (c) a lease of retail premises resulting from the exercise of an option contained in a lease with a lettable area not exceeding 1000m^2 entered into before 1 September 1998 if the original lease is perpetually renewable or the new lease contains a variation not provided for by the original lease; and (d) a sub-lease of any such premises, (cl.2(1) CPRT). 'Lease' is broadly defined to mean any agreement providing for the occupation of retail premises (whether for a term periodically or at will). It includes an agreement for lease and a licence to use the common area in a shopping centre for a term of > 6 months (cl.1 CPRT). See definition of 'retail premises' below.	All retail shop leases entered into after 30 June 1995 including licences or other rights of occupation which are non-exclusive, express or implied, oral or written, but excluding: (a) leases where rent exceeds $400,000 per annum * (for all leases whenever made, per the decision of the SA Supreme Court in WST Pty Ltd –v- GRE Pty Ltd); (b) leases for 1 month or less; (c) occupation rights arising from a sale or purchase of property, mortgage or defined scheme; (d) leases for which the tenant is an ADI (approved deposit - taking institution), public company or subsidiary of a public company, insurance company, local council or the Crown, (s.4 RCLA). A lease is also excluded from the Act if: (a) the landlord is a body corporate and the tenant(s) have a controlling interest in the landlord; or (b) the landlord and the tenant are both bodies corporate and the same person(s) have a controlling interest in both bodies corporate, (r.4(2)(d) and (e) of the Regulations). See definition of 'retail shop' below.	RSAA 2011: Applies to: (a) all retail shop leases entered into after 1 January 2013; and (b) existing retail shop leases entered into or renewed pursuant to options before 1 January 2013 except that: (i) sections 12(3A) (contribution to landlord's fittings void), 14A (relocation) and 14C (refurbishment) of the RSA do not apply to existing retail shop leases; and (ii) sections 6 (disclosure) and 13 (right to at least five years tenancy) of the RSA as in force prior to 1 January 2013 continue to apply to existing retail shop leases (cl.4 Sch 1 RSA). RSAA 2011 does not apply to any existing leases, which were not retail shop leases prior to 1 January 2013 but because of RSAA 2011, are subsequently considered retail shop leases once the RSAA 2011 came into effect. (cl.5 Sch 1 RSA). *RSAA 1998: Applies to all retail shop leases entered into after 1 July 1999 except extensions or renewals pursuant to options granted prior to 1 July 1999.* *RSA: Applies to all retail shop leases entered into after 1 September 1985 but does not apply to a retail shop lease that was entered*	All retail shop leases entered into after 1 August 1994 unless the retail shop lease was entered into under an option or agreement made before that date. The RLA does not apply to retail shop leases: (a) for a term of < 6 months without any right for the tenant to extend the retail shop lease by way of an option to extend or renew the lease unless the tenant has been in possession without interruption for more than 1 year (either by way of a series of leases or extensions or renewal of the lease or leases); (b) for a term of 25 years or more including an option for the tenant to extend or renew the lease; or (c) assigned after 1 August 1994 to which the RLA would not otherwise have applied, (s.6 and 6A RLA). See definition of 'retail shop' below.	Leases entered into or renewed after 1 July 2002, or variations made after that date, relating to: (a) retail premises (other than premises over 1000m^2 which are leased to a listed public company or a subsidiary of one); (b) small commercial premises (ie <300m^2 not in a shopping centre); and (c) specified premises (eg premises leased to an incorporated association, charity, child care centre, sports centre etc), (s.12 LCRA). See definition of 'retail premises' below.	All retail shop leases entered into after 1 July 2004 including licences or other rights of occupation which are not exclusive, an agreement which is express or implied, an agreement which is oral or in writing, but excluding: (a) retail shops that have a lettable area of 1000m^2 or more; (b) retails shops used wholly or predominantly for the carrying on of a business by the tenant on behalf of the landlord; (c) retail shops within premises where the principal business carried on at the premises is the operation of a cinema or bowling alley and the retail shop is operated by the person who operates the cinema or bowling alley; (d) a retail shop that is leased to a listed corporation (within the meaning of s.9 of the *Corporations Act 2001* (Cth)) or a subsidiary (within the meaning of s.9 of the *Corporations Act 2001* (Cth)) of a listed corporation. See definition of 'retail shop' below.

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				into pursuant to an option granted or an agreement made before 1 September 1985. See definition of 'retail shop' below.			

Definition of 'retail premises' / 'retail shop'

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
'Retail premises' means premises, not including any area intended for use as a residence, used wholly or predominantly for the retail sale or hire of goods or services or the carrying on of a business type specified by the Minister, excluding: (a) premises where the occupancy costs (rent, other than percentage rent, plus prescribed outgoings, as estimated by the landlord) exceed $1,000,000 per annum; (b) premises operated by a tenant on behalf of a landlord; (c) premises leased to a corporation listed on a stock exchange that is a member of the World Federation of Exchanges or its subsidiary; (d) premises of a prescribed kind or used predominantly for the conduct of a business of a prescribed kind or leased to a tenant of a prescribed kind or leased under a prescribed kind of lease, each kind determined by the Minister; (e) premises leased for a term of < 1 year (except that if a tenant remains in possession for > 1 year after 1	'Retail shop' means premises: (a) in a retail shopping centre; or (b) used wholly or predominantly for a specified retail business, (s.5 RSLA). 'Retail shop lease' excludes: (a) premises with a floor area > 1000m^2 and leased by a listed corporation or subsidiary (s.5 RSLA); (b) a retail shop within the South Bank Corporation area if the lease is a perpetual lease or another lease for a term, including renewal options, of at least 100 years entered into or granted by the South Bank Corporation (s.5 RSLA); (c) premises in a theme or amusement park, flea market or temporary trade show or carnival stall (s.5 RSLA); (d) premises with a floor area of > 10,000m^2 (r.10 of the Regulations); or (e) from 3 April 2006, areas that, if not leased would be within a common area, if they are used for: (i) information, entertainment,	'Retail premises' means premises that are used wholly or predominantly for 1 or more of the businesses listed in Appendix C of the CPRT or for any business in a shopping centre (cl.1 CPRT). The CPRT does not apply to a lease for retail premises: (a) used wholly or predominantly for a business by a tenant on behalf of a property owner; or (b) within premises in which the principal business carried on is the operation of a business (including a cinema, bowling alley, skating rink, indoor cricket centre, basketball stadium or netball centre) if the business in the retail premises is carried on by a person who operates the principal business, (cl.2(4) CPRT).	'Retail shop' means business premises: (a) at which goods are sold to the public by retail; (b) or which services are supplied to the public, or to which the public is invited to negotiate for the supply of services; or (c) classified by regulation, (s.3(1) RCLA).	'Retail shop' means premises: (a) in a retail shopping centre used wholly or predominantly for carrying on a business; or (b) not in a retail shopping centre that are used wholly or predominantly for the carrying on of a retail business, but does not include any premises excluded by regulation, (s.3 RSA). The RSA excludes: (a) premises with a lettable area > 1000m^2; (b) leases where lease is held by a listed corporation or the subsidiary of a listed corporation; (c) leases where lease is held by a body corporate whose securities are listed on a stock exchange outside Australia, that is a member of the World Federation of Exchanges; (d) leases prescribed by the regulations as exempt, (s.3(1) RSA). Exempt leases are: (a) leases held by a body corporate or the subsidiary of a body corporate listed on the New Zealand stock	'Retail shop' means premises: (a) used or proposed to be used wholly or predominantly for carrying on of 1 or more Schedule 1 business; or (b) used or proposed to be used for the carrying on of any business in a retail shopping centre, (s.3 and Schedule 1 RLA) The RLA excludes: (a) shops that have a lettable area of 1000m^2 or more; (b) shops that are used wholly or predominantly for the carrying on of a business by the tenant on behalf of the landlord; (c) shops within premises where the principal business carried on in those premises is the operation of a cinema, bowling alley or skating rink and the shop is operated by the person who operates the cinema, bowling alley or skating rink; (d) premises in an office tower that forms part of a retail shopping centre; and (e) a class of business exempt by the Regulations, (s.5 RLA).	'Retail premises' means premises under a lease where the permitted use is a 'retail business' or if there is no permitted use in the lease, where the crown lease permits a retail business (s.7 LCRA). 'Small commercial premises' means premises with an area not > 300m^2 (dictionary) where the permitted use is for 'commercial business' or if there is no permitted use in the lease, where the crown lease permits a commercial business (s.7 LCRA). 'Commercial business' means a business not involving sale or hire of goods by retail or the supply of services by retail (s.7 LCRA). 'Retail business' means sale or hire of goods or services by retail or the supply of services by retail (s.7 LCRA).	'Retail shop' means premises that are used wholly or predominantly for: (a) the sale or hire of goods by retail or the retail provision of services (whether or not in a retail shopping centre); (b) the carrying on of a business in a retail shopping centre, (s.5 BTA). The BTA excludes: (a) leases for a term of < 6 months without any right for the tenant to extend the lease (by means of an option to extend or renew the lease); (b) leases for a term of 25 years or more (including an option to the tenant to extend or renew the lease); (c) leases entered into before the commencement of this section; (d) leases entered into under an option that was granted, or an agreement that was made before the commencement of this section; (e) a lease that is assigned to another person after the commencement of this section (Part 13 only of the BTA applies to such leases); and

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May 2003 as a result of a lease being renewed or continued, in which case, the RLA will apply on and from the date upon which the tenant's possession equalled 1 year); (f) premises which are used wholly or predominantly for the retail provision of services, other than premises located: (i) entirely on any 1 or more of the first 3 storeys in a building, excluding any basement levels; or (ii) in a shopping centre; (g) barristers chambers in some cases; (h) premises which are leased: (i) for a term of at least 15 years (not including options) or under a renewal of lease where the initial term was at least 15 years (not including options); and (ii) under a lease for which: (A) imposes an obligation to carry out substantial works; (B) imposes an obligation to pay for substantial works; or (C) disentitles a person from removing substantial works at lease end;	community or leisure facilities; (ii) tele-communications equipment; (iii) displaying advertisements; (iv) storage; or (v) parking, (s.5 RSLA).			exchange; and (b) leases for the sole purpose of operating an ATM or a vending machine, (r.3AB of the Regulations).			(f) a lease which is held over by the tenant after the end of the lease term (Part 13 only of the BTA applies to such leases), (ss.6 and 7 BTA).

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(i) premises that are entirely located within the Melbourne markets being 'market land' as defined by the *Melbourne Market Authority Act 1977* (Vic) and leased or subleased by the Melbourne market Authority; (j) leases by a Council under which the premises: (i) may be used wholly or predominantly for: (A) public or municipal purposes; (B) charitable purposes; (C) a resident of a practising minister of religion or for the education and training of persons to be ministers of religion; or (D) purposes relating to specific returned services personnel; or (ii) are used wholly or predominantly by a body that exists for the purposes of providing or promoting community, cultural, sporting, recreational or similar facilities or activities or							

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
objectives and that applies its profits in providing its objects and prohibits the payment of dividends or other amounts to its members; and (k) leases of premises the tenant of which is a body corporate whose securities are listed on the New Zealand Stock Exchange Limited or a subsidiary of such a body corporate, (ss.4 and 12 RLA and r.6 of the Regulations and Ministerial determinations dated 29 April 2003, 23 April 2004, 20 August 2004, 15 September 2005, 22 July 2008 and 20 December 2011).							
Definition of 'retail shopping centre'							
A cluster of premises: (a) at least 5 of which are retail premises; (b) under common ownership or if leased would have the same landlord or the same head landlord; (c) located in 1 building or buildings which are adjoining or separated only by common areas, other areas owned by the landlord or a road; and (d) promoted as or generally regarded as constituting a shopping centre, mall, court or arcade, (s.3 RLA).	For leases entered into before 3 April 2006, a cluster of premises: (a) at least 5 of which carry on specified retail businesses; and (b) which are under a common head landlord, but not a multistorey building except in relation to each storey that satisfies (a) and (b) (s.8 RSLA). For leases entered into from 3 April 2006, a cluster of premises: (a) at least 5 of which are used for a retail business; (b) which are owned by a common owner or comprise lots within a single community titles scheme; (c) which are located in 1 building or buildings separated only by common areas or a	A cluster of premises: (a) at least 5 of which are retail premises; (b) which are under a common property owner; (c) which are located in 1 building or adjoining buildings; and (d) which are generally regarded as a shopping centre, (cl.1 CPRT).	A cluster of premises: (a) at least 5 of which are retail shops; (b) which are owned by same person, or have the same landlord or head landlord, or comprise lots within a community plan under the *Community Titles Act 1996* (SA), or units within the same plan under the *Strata Titles Act 1988* (SA); (c) which are located in the 1 building or conjoined buildings; and (d) which are promoted as or generally regarded as a shopping centre, mall, court or arcade, (s.3(1) RCLA).	A cluster of premises: (a) at least 5 of which are used for the carrying on of a retail business; and (b) all of which: (i) have or upon being leased would have a common head landlord; or (ii) comprise lots on a single strata plan under the *Strata Titles Act 1985* (WA), but, if the premises are in a building with 2 or more floor levels, include only those levels of the building where a retail business is situated, (s.3(1) RSA).	A cluster of premises: (a) at least 5 of which are used wholly or predominantly for the carrying on of 1 or more of the businesses specified in Schedule 1; (b) which are owned by the same person or have the same landlord or the same head landlord or comprise lots within a single strata plan; (c) which are located in the 1 building or in 2 or more conjoined buildings; and (d) which are promoted as or generally regarded as a shopping centre, mall, court or arcade, (s.3 RLA).	A cluster of premises: (a) at least 5 of the premises are retail, small commercial or specified premises, or a mixture of those premises; (b) under common ownership or which have the same landlord or the same head landlord or comprise lots within a single strata plan managed by a single person/entity; (c) which are located in the 1 building or conjoined; and (d) which are promoted as or generally regarded as a shopping centre, mall, court or arcade, (s.8 LCRA). A group of premises may be prescribed to be a shopping centre (s.8 LCRA).	A cluster of premises: (a) at least 5 of which are used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services; (b) under common ownership or if leased would have the same landlord or the same head landlord or comprises lots within a single units plan under the *Units Titles Act 2001* (NT); (c) located in 1 building or buildings which are adjoining or separated only by common areas or other areas owned by the landlord; and (d) promoted as or generally regarded as constituting a shopping centre, mall, court or arcade, (s.5 BTA).

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	road; and (d) which are generally regarded or promoted as a shopping centre, (s.8 RSLA).						
Definition of 'entered into'							
On the first to occur of: (a) the tenant enters into possession; (b) the tenant beginning to pay rent for the premises; and (c) all parties signing the lease or assignment, (s.7 RLA).	For a lease means, the earlier of: (a) the lease becoming binding on the landlord and tenant; and (b) the tenant taking possession, (s.11 RSLA). For an assignment means when the landlord has consented to the assignment (s.5 RSLA).	No provision.	The earliest of: (a) both parties executing the lease; (b) a person entering into possession under the lease; and (c) a person beginning to pay rent as tenant under the lease or proposed lease but not advance payments to secure the lease, (s.6 RCLA).	When either of the following things happen: (a) the tenant takes possession or begins to pay rent; or (b) all parties sign the lease, (s.3(4) RSA).	The earlier of: (a) the tenant taking possession or beginning to pay rent; and (b) all parties signing the lease, (s.8 RLA).	The earlier of: (a) the tenant taking possession under the lease; or (b) all parties signing the lease, (s.5 LCRA).	The earlier of: (a) the tenant taking possession or beginning to pay rent; and (b) all parties signing the lease, (s.10 BTA).
Application to the Crown							
Act binds the Crown (s.14 RLA).	Act binds the Crown (s.10 RSLA).	*Australian Consumer Law (Tasmania) Act 2010* (Tas), under which the CPRT is taken to have been made, binds the Crown so far as the Crown carries on a business (s.14 *Australian Consumer Law (Tasmania) Act 2010* (Tas)).	Act is silent on binding the Crown as landlord. However, the Act does bind the Crown as landlord. Act does not apply if the Crown is the tenant, namely, if the tenant is the Crown or an agency or instrumentality of the Crown in the right of the State (s.4 RCLA).	The Act binds the Crown (s.5 RSA).	Act binds the Crown (s.83 RLA).	No specific provision. However, the Act does not bind the Crown (s.12(6)(b) LCRA).	Act binds the Crown (s.4 BTA).
Lease must be in writing							
Leases must be in writing and signed by the parties. Fine: 10 penalty units (s.16 RLA).	No provision.	No provision. However, it is implicit in other provisions of the Code that there will be a written lease: see for example (cl.5 CPRT).	No provision.	No provision.	No provision. However, the RLA contemplates that retail shop leases may be oral or in writing or partly oral and partly in writing (s.3 RLA).	No provision.	No provision.
Copy of proposed lease							
Must be provided to the tenant: (a) at the commencement of lease negotiations; and (b) at least 7 days before a new retail premises lease is entered into. Fine: 50 penalty units (s.15(1) and 17(1) RLA).	Must be provided to the tenant at least 7 days before a new retail shop lease is entered into (s.22 RSLA). If a copy of the draft lease is not given, the tenant may: (a) terminate the lease by notice in writing within 2 months of	Must be provided as early as practicable in the negotiations (cl.5 CPRT). A person must not make an offer to lease or invite an offer to lease unless the person has a copy of the proposed lease available for inspection by a prospective tenant (cl.5 CPRT).	A copy must be available to any prospective tenant as soon as they enter into negotiations. Penalty: $500 (s.11 RCLA).	No separate requirement to give a copy of the proposed lease, but a copy must be given with disclosure statement to satisfy the requirements of providing the disclosure statement (s.6 RSA).	Must be available in written form for inspection by prospective tenants as soon as they enter into negotiations (s.9 RLA). Maximum penalty: $5,500 (s.9 RLA).	Must be provided as early as practicable in the negotiations (s.28 LCRA). Does not apply where tenant provides the lease (s.28 LCRA).	Must be available in written form for inspection by prospective tenants and a copy must be available to any prospective tenant as soon as they enter into negotiations (s.17 BTA).

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Not required for renewals (s.15(2) RLA). If a copy of the proposed lease is not given 7 days before the new lease is entered into, the tenant may terminate the lease by notice in writing up to 28 days after the last of: (a) the tenant receiving a copy of the proposed lease; (b) the tenant receiving a copy of the disclosure statement; or (c) the lease being entered into, (s.17(5) and 17(6) RLA). A notice of termination under s.17(5) is effective 14 days after notice given unless the landlord gives the tenant notice of objection (s.18 RLA). A landlord may object to a notice of termination if: (a) the landlord believes it acted honestly and reasonably and ought fairly to be excused; and (b) the tenant is substantially in as good a position, (s.18(2) RLA). If the tenant does not accept the notice of objection, the matter is subject to dispute resolution procedures of the RLA (s.18(3) RLA). If: (a) the tenant accepts the objection; (b) the tenant does not notify the landlord within 14 days of whether or not it accepts it; or (c) the objection is upheld under the dispute	entering into the lease (from 3 April 2006, within 6 months of entering into the lease), and (b) claim reasonable compensation for any loss due to failure, (s.22 RSLA).						

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resolution procedures of the RLA, the lease will not terminate (s.18 RLA).							
Disclosure statement by landlord							
Must be in the form (but not necessarily the layout) set out in the Regulations (s.17(1)(a) RLA). Must be provided: (a) for new leases of retail premises, at least 7 days before the lease is entered into (s.17(1) RLA); (b) for option leases, at least 21 days before the end of the current lease if the tenant has exercised its option (s.26(1) RLA); (c) for renewals by agreement, no later than 14 days after an agreement to renew lease is entered into (s.26(1) RLA); and (d) if a lease for < 1 year is renewed or extended so that the tenant is in continuous occupation for 1 year or more, 60 days after the Act begins to apply to the lease (being the day upon which the tenant has been in occupation for 1 year) (s.12(3)(b)(i) RLA). Must be provided in respect of an assignment by a tenant, together with details of any changes that are known of or ought reasonably to be known of by the tenant, to a proposed assignee before requesting the landlord's consent for an assignment (s.61(3) RLA). A tenant who has been	Must be in the approved form and contain the information set out in the Regulations (s.5 RSLA). Must be provided at least 7 days before a new retail shop lease is entered into (s.22 RSLA). From 3 April 2006, landlords will be taken to have given a disclosure statement on time if: (a) the tenant is a major lessee (a major lessee is the lessee of 5 or more retail shops in Australia - s.5 RSLA); (b) the tenant gives the landlord written notice that it: (i) has received financial and legal advice; and (ii) waives the entitlement to a disclosure statement within the required period; and (c) the landlord gives the disclosure statement before the lease is entered into, (s.22(6) RSLA). Not required in the case of a periodic tenancy or renewal under option (s.21 RSLA). If consent to an assignment is sought, the landlord must provide to the assignee: (a) a disclosure statement (at least 7 days prior to the landlord consenting to the assignment); and (b) a copy of the lease (s.22C(1) RSLA).	Must contain information set out in Appendix B of the CPRT and be signed by or on behalf of the property owner and prospective tenant. Must be provided at least 7 days before the earliest of: (a) the signing of a written lease; (b) the signing of a written agreement for lease; (c) the tenant entering into occupation; and (d) the paying of rent by the tenant, (cl.6 CPRT).	Must be provided in a form complying with the Regulations, containing the information set out in s.12. Must be provided before a retail shop lease is entered into or renewed (s.12 RCLA). No disclosure statement is required of the landlord if the lease is assigned (s.12 RCLA).	Must be in the form prescribed by the Regulations (s.6(4) RSA). Must be provided at least 7 days before the lease is entered into (s.6(1) RSA). Must be duly completed and signed by or on behalf of the landlord and the tenant and must contain a statement notifying the tenant that they should seek independent legal advice (s.6(4) RSA). Not required to be given: (a) on a renewal of a retail shop lease under an option; or (b) on assignment of a retail shop lease, (s.6(6) RSA).	Must contain the information set out in Schedule 2 of the RLA. Must be provided at least 7 days before a new retail shop lease is entered into. If the retail shop lease is renewed, a written statement that updates the provisions of an earlier disclosure statement must be given to the tenant. Failure by a landlord to supply a disclosure statement may incur a maximum penalty of $5,500 (s.11 & Part 1 of Schedule 2 RLA). Before requiring the consent of the landlord to a proposed assignment, the tenant must furnish the assignee with a copy of any disclosure statement given to the tenant (s.41(b) RLA). The tenant is entitled to request the landlord to provide the tenant with a copy of the disclosure statement and if the landlord is unable or unwilling to comply with the request within 14 days the tenant need not provide a copy to the assignee (s.41(c) RLA).	Must be in the form prescribed (s.31 LCRA) but the form in use before 1 July 2002 was acceptable until 1 January 2003. Must be provided at least 14 days before a lease is entered into or renewed (s.30 LCRA) but the tenant may waive or reduce the period after independent lawyer's advice. Waiver of the 14 day grace period is provided by way of a Waiver Certificate pursuant to s.30(5) LCRA. Under s.30(5) a lawyer must certify that the tenant understands the time limits in which a disclosure statement is to be provided and chooses to waive or reduce those time limits. If the landlord becomes aware of a material change in the information in a disclosure statement before the lease is entered into, the landlord must quickly notify the tenant of the change in writing (s.34 LCRA). The tenant must return the disclosure statement signed and dated (with the date that the tenant received the disclosure statement) on the earlier of: (a) return of signed lease; and (b) 3 months after the lease is entered into, (s.32 LCRA). Before requesting the consent to an assignment, the tenant must provide a prospective assignee a copy	Must be in the form (but not necessarily the layout) prescribed by the Regulations. Must be provided to the tenant at least 7 days before the retail shop lease is entered into. The 7 day limitation imposed does not apply to the landlord if an independent lawyer certifies in writing that he or she has explained to the tenant the effect of this section and that the giving of the certificate will result in a waiver of the time limitation (s.19 BTA).

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given a disclosure statement concerning a head-lease is only required to give a sub-tenant a copy of that disclosure statement, together with details of any changes that are known of or ought reasonably to be known to the tenant (s.17(1A) RLA). If a tenant has been given a disclosure statement before entering into an agreement for lease, a further disclosure statement is not required to be given before the lease is entered into provided that the lease is substantially in accordance with the earlier agreement for lease (s.17(7) RLA). If requested by a tenant, a new disclosure statement must be provided by the landlord within 14 days of the tenant requesting one for the purpose of giving it to a proposed assignee (s.61 RLA). Must be provided in respect of a franchise by a tenant to the proposed franchisee together with details of any changes that are known of or ought reasonably to be known to the tenant, within 7 days before entering into a franchise arrangement (s.96 RLA). Adopted the national form of disclosure statement effective 1 January 2011. Replaced the national form of disclosure statement with separate statements to be used for: (a) new leases of premises located in a 'retail shopping centre' (see definition of 'retail shopping centre' on	From 3 April 2006, a landlord will be taken to have given a disclosure statement to an assignee on time if: (a) the assignee is a major lessee (see above); (b) the assignee gives the landlord written notice that it: (i) has received financial and legal advice; and (ii) waives the entitlement to a disclosure statement within the required period; and (c) the landlord gives the disclosure statement before the landlord consents to the assignment, (s.22C(2) RSLA). Definition of 'lease' (s.5 RSLA) means an agreement under which a person gives or agrees to give to someone else for valuable consideration a right to occupy premises whether or not the right is an exclusive right. Above obligation will apply to a licence/sub-lease granted by a tenant to a franchisee and the disclosure obligations under s.22 RSLA will apply to the tenant. Adopted the national form of disclosure statement effective 1 January 2011				Adopted the national form of disclosure statement effective 1 January 2011	of the disclosure statement given to the tenant together with any material change that has happened in the information since it was given to the tenant (s.93 LCRA).	

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page 5); (b) new leases of premises not located in a 'retail shopping centre'; and (c) 'renewals' of leases, effective 22 April 2013 (r.8 and Schedules 1-4 of the Regulations). The statements for new leases are similar but not identical to the national form. Note that 'renewal' is narrowly defined as a renewal of lease: (a) under an option; or (b) by agreement on substantially the same terms and conditions except as to rent, (s.9(1) RLA).							
Termination rights arising from failure to deliver a disclosure statement or delivery of a defective disclosure statement							
If not given a disclosure statement in respect of a new lease or a renewal within the prescribed time, the tenant may between 7 and 90 days after the lease is entered into give the landlord a written notice that no statement has been received (ss.17(2) and 26(3) RLA). If a notice is given, the tenant: (a) may withhold rent until the day on which a disclosure statement is provided; (b) is not liable to pay rent for the period before which the disclosure statement is provided; and (c) may terminate the lease until 7 days after the disclosure statement is provided, (ss.17(3) and 26(4) RLA). If the statement is misleading, false or materially incomplete, the tenant may terminate the lease by written notice within	If not given a disclosure statement at least 7 days before entering into a lease, the tenant may: (a) terminate the lease by notice in writing within 2 months of entering into the lease; and (b) claim reasonable compensation for any loss due to the failure, (s.22 RSLA). From 3 April 2006: (a) the 2 month period of termination is extended to 6 months; and (b) the above rights will also apply if a defective statement is given (s.22 RSLA). A defective statement is incomplete or contains information that is false or misleading in a material particular (s.22(8) RSLA).	The tenant has no specific right to terminate if a disclosure statement contains false or misleading information. However, a property owner must notify a tenant in writing of any material change in the information in the disclosure statement that occurs after the disclosure statement is given to the tenant but before the earlier of: (a) the lease being signed; and (b) the tenant entering into possession of the premises. If the property owner fails to give the notification, or the notification contains false or misleading information, the tenant may terminate the lease by notice in writing at any time within 3 months of the lease's commencement.	If a disclosure statement: (a) is not given in accordance with s.12(1) of the RCLA; or (b) is materially false or misleading at the time it is given, the tenant may apply to the Magistrates Court for orders: (c) avoiding the lease in whole or in part; (d) varying the lease; (e) requiring the landlord to repay monies; (f) requiring the landlord to pay compensation; and/or (g) dealing with incidental or ancillary matters, (s.12(5) RCLA). Such orders cannot be made if the landlord has acted honestly and reasonably and ought reasonably to be excused and the tenant has not been substantially prejudiced (s.12(6) RCLA).	If a disclosure statement is not given in respect of a retail shop lease within the prescribed time the tenant may, in addition to any other rights: (a) within 6 months after the lease was entered into, give the landlord written notice of termination; and/or (b) apply in writing to the Tribunal for an order that the landlord pay compensation to the tenant in respect of pecuniary loss suffered by the tenant as a result of a disclosure statement not being given, (s.6(1) RSA). If a disclosure statement given to a tenant is incomplete or contains false or misleading information, the tenant may, in addition to any other rights: (a) within 6 months after the lease was entered into, give the landlord	The tenant may terminate a retail shop lease by notice in writing at any time within 6 months after entering into a lease, if a disclosure statement: (a) was not given; (b) was incomplete; or (c) contained materially false or misleading information. The tenant cannot terminate if the disclosure statement is incomplete or contains information that is materially false or misleading but: (a) the landlord acted honestly and reasonably and ought reasonably to be excused for the failure concerned; and (b) the tenant is in substantially as good a position as the tenant would have been if the failure had not occurred, (s.11 RLA).	If a disclosure statement is not properly given, is misleading in a material way or omits a material matter, the tenant may terminate the lease by giving 14 days notice within 3 months of the date the lease is entered into (ss.117 and 118 LCRA). If the landlord does not contest a termination notice within 14 days after the notice was served on the landlord, the notice takes effect 15 days after service (s.120 LCRA). The landlord may within 14 days after being served with a termination notice, contest the termination by application to the Magistrates Court. However, the only grounds for contesting termination are: (a) if the landlord acted honestly and reasonably and ought reasonably	The tenant may terminate a lease by notice in writing at any time within 6 months after entering into a lease, if a disclosure statement: (a) was not given; (b) was incomplete; or (c) contained materially false or misleading information. The tenant cannot terminate if the landlord's disclosure statement is incomplete or contains information that is materially false or misleading if: (a) the landlord acted honestly and reasonably and ought reasonably to be excused for the failure concerned; and (b) the tenant is in substantially as good a position as the tenant would have been if the failure had not occurred, (s.20 BTA).

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28 days after the last of: (a) receiving a copy of the disclosure statement; (b) in respect of new leases, receiving a copy of the proposed lease; and (c) the lease being entered into or renewed, (ss.17(5) and 26(5) RLA). A notice of termination under ss.17(3) or (5) or ss.26(4) or (5) is effective 14 days after notice given unless the landlord gives the tenant notice of objection (ss.18 and 26(6) RLA). A landlord may object to a notice of termination if: (a) the landlord believes it acted honestly and reasonably and ought fairly to be excused; and (b) the tenant is substantially in as good a position (s.18(2) RLA). If: (a) the tenant accepts the objection; (b) the tenant does not notify the landlord within 14 days of whether or not it accepts it; or (c) the objection is upheld under the dispute resolution procedures of the RLA, the lease will not terminate (s.18(3) and (4) RLA).	However, a tenant may not terminate on the grounds of defective statements if: (a) the landlord acted honestly and reasonably and ought reasonably to be excused; and (b) the tenant is in substantially as good a position as it would have been in if the statement were not defective, (s.22(5) RSLA). If the landlord fails to provide a disclosure statement and a copy of the lease to an assignee, the assignee may (within 2 months after the assignment was consented to) ask QCAT for an order requiring the landlord to provide the documents (s.22E RSLA).	Termination will occur on the day that notice is given. A property owner may contest the termination on grounds set out in cl.7(5) of the CPRT. The property owner may contest a notice of termination by invoking the dispute resolution procedures in Part 4 of the CPRT (cl.7(6) CPRT). If the property owner successfully challenges a notice of termination, the notice is taken never to have been served (cl.7(7) CPRT).		written notice of termination unless s.6(3) prevents termination; and/or (b) apply in writing to the Tribunal for an order that the landlord pay compensation to the tenant in respect of pecuniary loss suffered by the tenant as a result of the disclosure statement being incomplete, false or misleading, (s.6(1) RSA). However, a tenant cannot terminate under s.6 on the ground that the tenant was given an incomplete, false or misleading disclosure statement if: (a) the landlord acted honestly and reasonably and ought reasonably to be excused for the failure concerned; and (b) the tenant is in substantially as good a position as the tenant would have been if the statement had been complete, not false and/or not misleading, (s.6(3) RSA).		to be excused for doing the thing that constituted the ground for termination; and (b) the tenant is substantially in as good a position as the tenant would have been in had the landlord not done the thing, (s.119 LCRA). If a termination notice is contested: (a) the notice does not have effect unless it is confirmed by the Magistrates Court; and (b) if the notice is confirmed, the notice has effect on a day stated by the court or else on confirmation, (s.121 LCRA).	

Further documents to be provided to tenant

An information brochure about retail leases (if any is prescribed) must be given to the tenant at the commencement of lease negotiations. Fine: 50 penalty units (s.15 RLA). An information brochure has been prescribed.	No provision.	A copy of the CPRT must be provided to the tenant as early as practicable in the negotiations (cl.5(2) CPRT).	If the landlord of a retail shopping centre has a casual mall licence policy, a copy of the policy and the casual mall licensing code must be given to a new tenant at the same time as the disclosure statement (Schedule RCLA). (See further section below, entitled 'Casual Mall	A retail shop lease must incorporate a tenant guide in the form prescribed by the Regulations and located in the prescribed position, which is currently at the front of the lease (s.6A(1) and (4) RSA). Essentially the Tenant Guide is a summary of the tenant's rights under the	A retail tenancy guide prescribed by the Regulations must be made available to a prospective tenant at the commencement of lease negotiations (s.9 RLA). Maximum penalty: $5,500 (s.9 RLA).	The landlord must tell the tenant about the existence of the approved handbook as early as possible in negotiations (s.35 LCRA).	No provision.

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			Licences').	RSA. If a retail shop lease does not incorporate the tenant guide, the tenant may, in addition to exercising any other right: (a) within 60 days after the retail shop lease is entered into, give to the landlord written notice of termination; and/or (b) apply in writing to the Tribunal for an order that the landlord pay compensation to the tenant in respect of pecuniary loss suffered by the tenant as a result of the failure to incorporate the tenant guide, (s.6A(1) RSA). A notice of lease termination under s.6A(1) is effective 14 days after notice is given (s.6A(2) RSA). In addition to the rights above, the tenant may after expiry of the 60 day period, apply in writing to the Tribunal for an order that the retail shop lease be terminated (s.6A(1) RSA). A tenant guide is not required to be included: (a) on a renewal of a retail shop lease under an option; or (b) on assignment of a retail shop lease, (s.6A(6) RSA).			

Disclosure statements by tenant

If premises will continue to be used for the carrying on of an ongoing business following an assignment, the tenant must give any assignee a disclosure statement in the form required by the Regulations (s.61(5A) RLA). In this case, if a disclosure	A disclosure statement must be given by the tenant to the landlord before a tenant enters into a lease (s.22A RSLA). Disclosure statement must be in the approved form and contain the information set out in the Regulations (s.5 RSLA).	No provision.	There is no requirement for the tenant to serve a disclosure statement upon the landlord at the time of entering into the lease. In relation to a tenant's (assignor's) disclosure statement at the time of assigning the lease see further section below	No provision.	The tenant must complete, sign and provide to the landlord a disclosure statement (in the form contained in Part 2 of Schedule 2) within 7 days of receiving the landlord's disclosure statement (or within any agreed further period).	No provision.	The tenant must complete, sign and provide to the landlord a disclosure statement (in the form prescribed by the Regulations) within 7 days of receiving the landlord's disclosure statement (or within any agreed further period).

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statement is provided, the tenant and any guarantor are released upon assignment (s.62 RLA). Effective 22 April 2013, the form of the disclosure statement is prescribed by r.8(3) of the Regulations. Previously there was no form prescribed.	Disclosure statement must be given by the assignee to the landlord before the landlord consents to the assignment (s.22C(3) RSLA). Disclosure statement must be given by an assignor to an assignee at least 7 days before a landlord's consent to an assignment is sought (s.22B RSLA). Disclosure statement must be given by an assignee to an assignor before the landlord is asked to consent to the assignment (s.22B RSLA). If the disclosing person fails to give to the receiving person a disclosure statement, the receiving person may (within 2 months after the lease/assignment was entered into) ask QCAT for an order requiring the disclosing person to provide the statement (s.22E RSLA). From 3 April 2006, if a tenant, an assignor or assignee makes a false or misleading statement or representation in a disclosure statement, the disclosing person is liable to pay the affected person reasonable compensation for loss or damage suffered (s.43A RSLA).		entitled 'Assignment, subletting'.		Failure by a tenant to supply a disclosure statement may incur a maximum penalty of $5,500 (s.11A & Part 2 of Schedule 2 RLA). Assignor's disclosure statement may be provided by the tenant to the assignee before requesting the consent of the landlord to a proposal assignment (s.41(b) RLA). The tenant may provide the landlord with a copy of the assignor's disclosure statement as provided to the assignee (s.41(a) RLA).		If a lease is entered into by way of renewal, a tenant's disclosure update that updates the earlier tenant's disclosure statement must be completed, signed and provided to the landlord (s.21 BTA).

Other information to be supplied by tenant

No provision.	Prior to 3 April 2006, financial and legal advice certificates had to be supplied before a tenant entered into a lease if the tenant: (a) was the tenant of <5 retail shops in Australia; and	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.

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	(b) used each shop wholly or predominantly for carrying on 1 or more retail businesses, (s.22D(1) RSLA). From 3 April 2006, financial and legal advice reports must be supplied before a tenant enters into a lease if the tenant is not a 'major lessee' (s.22D(1) RSLA). A major lessee is a lessee of 5 or more retail shops in Australia (s.5 RSLA). Financial advice reports must be in the approved form containing the information set out in the Regulations and signed by a person who is a 'qualified accountant' as defined in the *Corporations Act 2001* (Cth) (s.5 RSLA). Legal advice reports must be in an approved form, signed by a lawyer, stating that the lawyer has given advice about the lease and the disclosure statement and containing the information set out in the Regulations (s.5 RSLA). If the tenant fails to give a financial and/or legal advice report, the landlord may (within 2 months after the lease was entered into) ask QCAT for an order requiring the tenant to provide the report (s.22E RSLA). Prior to 3 April 2006, financial and legal advice certificates had to be given by an assignee to the landlord before an assignment is consented to if the assignee: (a) was the tenant of < 5 retail shops in Australia; and						

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	(b) used each shop wholly or predominantly for carrying on 1 or more retail business, (s.22D(2) RSLA). From 3 April 2006, financial and legal advice reports must be given by an assignee who is not a major lessee (see above) (s.22D(2) RSLA). See above for requirements of providers of financial and legal advice reports. If the assignee fails to give a financial and/or legal advice report, the landlord may (within 2 months after the assignment was consented to) ask QCAT for an order requiring the assignee to provide the statement or report (s.22E RSLA).						

Copy executed lease

A tenant must be given a copy of lease signed by the landlord within 28 days, or such other period as is agreed in writing between the landlord and tenant, of the landlord receiving a copy of the lease signed by the tenant (s.22 RLA). If copy lease not given, the tenant may terminate up to 28 days of the last of: (a) entering into lease; or (b) tenant receiving a copy of the lease signed by the landlord and tenant, (s.22(2) RLA). Notice of termination effective 14 days after the notice is given (s.22(3) RLA). A landlord may object to a notice of termination within	A tenant must be given a certified copy of the lease within 30 days of the lease being signed by the parties (s.23 RSLA). Penalty for failure, but no right of termination (s.23 RSLA).	A tenant must be given a fully executed copy of the lease as soon as practicable after it is signed by the tenant (cl.11 CPRT). There is no right of termination if the tenant does not receive a copy of the lease.	If the lease is not to be registered, the tenant must be given an executed copy of the stamped lease within 1 month of the lease being returned to the landlord or the landlord's lawyer after stamping (s.16(a) RCLA). If the lease is to be registered, it must be lodged within 1 month of stamping and the tenant must receive their copy within 1 month of registration (s.16(b) RCLA).	No provision.	If the retail shop lease is not to be registered, the tenant must be given an executed copy of the stamped lease within 1 month of the lease being returned to the landlord or the landlord's lawyer after stamping. The periods specified above can be extended for delays attributable to the need to obtain consent from a head landlord or mortgagee (s.15 RLA).	A tenant must be given an executed copy of the lease within 21 days of registration or, if lease is not to be registered, within 21 days after the lease is signed by the landlord and tenant (s.25 LCRA). There are no express statutory repercussions for non compliance with s.25 LCRA.	If the lease is not to be registered, the tenant must be given an executed copy of the stamped lease within 1 month of the lease being returned to the landlord or the landlord's lawyer after stamping. If the lease is to be registered, it must be lodged within 1 month of stamping and the tenant must receive their copy within 1 month of registration. The periods specified above can be extended for delays attributable to the need to obtain consent from a head landlord or mortgagee (s.25 BTA).

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14 days if: (a) the landlord believes it acted honestly and reasonably and ought fairly to be excused; and (b) the tenant is substantially in as good a position, (s.22(4) RLA). If: (a) the tenant accepts the objection; (b) the tenant does not notify the landlord within 14 days of whether or not it accepts it; or (c) the objection is upheld under the dispute resolution procedures of the RLA, the lease will not terminate (s.18(3)-(4) RLA).							
Notification/registration of lease							
Prior to 21 November 2012 a landlord was required to notify the Small Business Commissioner, within 14 days of a lease being signed by all parties or renewed (or within such other period as was agreed between the landlord and the Small Business Commissioner) of basic specified lease details (s.25 RLA and r.9 of the Regulations). This requirement was abolished by the *Retail Leases Amendment Act 2012* (Vic).	A lot or part of a lot may be leased by registering an instrument of lease for the lot or part of the lot (s.64 *Land Title Act 1994* (Qld) ('LTA')). A landlord holds its interest in a lot subject to any registered interests affecting the lot (ie leases) (s.184 LTA). The landlord will not be affected by actual or constructive notice of an unregistered interest affecting the lot. However, under s.185 LTA, a landlord will hold its interest subject to any 'short leases' in existence. Schedule 2 LTA defines 'short lease' to mean a lease for a term of 3 years or less (but will not extend to any option to renew or extension of the term under that lease (s.185(2)(b) LTA). A lease will be valid against	There is no requirement under the CPRT to register a lease under the *Land Titles Act 1980* (Tas) ('LTA'). A lease for a term exceeding 3 years may be registered under the LTA. A lease for a term not exceeding 3 years is not registrable under LTA. As a matter of practice, most leases in respect of retail premises in shopping centres are not registered. In Tasmania, an unregistered lease exceeding 3 years takes effect in equity only (s.40(3)(d)(iii) LTA).	The lease need not be notified to any body or tribunal. There is no requirement for any lease to be registered.	A lease for a term > 3 years may be registered under s.91 of the *Transfer of Land Act 1893* (WA). There are no circumstances in which a lease must be registered.	If the retail shop lease is to be registered, it must be lodged within 1 month of stamping and the tenant must receive their copy within 1 month of registration (s.15(1) RLA). The periods specified above can be extended for delays attributable to the need to obtain consent from a head landlord or mortgagee (s.15 RLA). For a tenant to have indefeasibility of title, any lease for a term of > 3 years must be registered (s.41(d) of the *Real Property Act, 1900* (NSW)).	A lease may be registered under s.82 of the *Land Titles Act 1925* (ACT) (s.23 LCRA).	The lease need not be notified to any body or tribunal. There is no requirement for any lease to be registered.

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	any mortgagee only if the mortgagee consents to the lease before its registration (s.66 LTA). An unregistered lease of a lot or part of a lot is not invalid merely because it is unregistered (s.71 LTA).						
Key money							
'Key money' means money paid or benefit given by a tenant by way of, or in the nature of, a premium to procure the grant, variation, renewal, assignment or subleasing of a lease, where there is no true consideration (s.3 RLA). A landlord may not seek or accept the payment of: (a) key money; or (b) any consideration for goodwill. Fine: 50 penalty units (s.23(1) RLA). Any payment made can be recovered (s.23(4) RLA).	'Key money' means money paid or benefit given to, or at the direction of, the landlord to procure the grant, renewal or assignment of a lease (s.5 RSLA). Landlord cannot seek or accept key money or any consideration for goodwill. Penalty: $10,000 (s.39(1) RSLA). Any payment made can be recovered (s.39(3) RSLA).	'Key money' means money paid or benefit given by a tenant to procure the grant, renewal, extension or assignment of a lease (cl.1 CPRT). Key money must not be required (cl.9(1) CPRT). However, the prohibition does not apply to a property owner and a proposed assignee agreeing to a new lease or a rent review, refurbishment or refitting (cl.9(3) CPRT). Penalty: $1,300 (r.4 of the Regulations). Any payment made can be recovered (cl.9(2) CPRT).	Landlord cannot seek or accept payment of a 'premium' in connection with the grant of a retail shop lease. 'Premium' means money paid, or a benefit given, to or as directed by the landlord or its agent in connection with the grant, renewal or assignment of a lease. Any provision of a retail shop lease is void to the extent it requires payment of a premium. Penalty: $10,000. Any premium paid made can be recovered (s.15 RCLA).	'Key money' means: (a) money that is to be paid by, or at the request or direction of, a tenant; or (b) any benefit that is to be conferred by, or at the request or direction of, a tenant, by way of a premium or something of a like nature in consideration of the granting of, or agreeing to grant a lease or the renewal of a lease or the consenting to an assignment of a lease or the subletting of premises the subject of a lease (s.3 RSA).	'Key money' means: (a) money paid to or at the direction of a landlord, by way of a premium, non-repayable bond or otherwise; or (b) any benefit conferred at the direction of a landlord to procure the granting, renewal, extension or assignment of a retail shop lease, (s.3 RLA). The landlord cannot seek or accept key money in connection with the granting of: (a) a retail shop lease (s.14 RLA); (b) a consent to assignment of a retail shop lease (s.40 RLA); or (c) a renewal or extension of a retail shop lease (s.45 RLA). Maximum fine: $11,000 (ss.14, 40 & 45 RLA). Any key money payment made by the tenant can be recovered by the tenant as a debt owing by the landlord (s.14 RLA).	'Key money' means any money paid by or on behalf of a tenant to a landlord, other than rent, goodwill for a business sold by the landlord to the tenant, a security bond or deposit, money on account of outgoings, money in relation to preparation of documents, or money for goods or services to be provided to the tenant (dictionary). Payment by the tenant of key money, and requests for or acceptance by the landlord of key money, is prohibited. The prohibition extends to a grant of lease, renewal, extension of lease under an option, assignment, sublease and mortgage of lease. Any payment made by the tenant can be recovered as a debt owing by the landlord (s.38 LCRA).	'Key-money' means money paid or benefit given by a tenant by way of premium or something of a like nature to procure the grant, renewal, extension or assignment of a retail shop lease (s.5 BTA). The landlord cannot seek or accept key-money. Any payment made can be recovered from the landlord as a debt (s.24 BTA).

Rent reviews

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A lease must specify the: (a) time rent reviews are to occur; and (b) basis or formula on which rent reviews will be made, (s.35(1) RLA).	A lease must specify the: (a) time rent reviews are to occur; and (b) basis on which rent reviews will be made, (s.27 RSLA). For leases entered into after 30 April 1999, other than in the first 12 months of a lease, a rent review is invalid if it occurs > once every 12 months (s.27(2) RSLA). If a rent review is invalid because it occurred within 12 months of the previous review, the rent remains the same (s.27(7) RSLA).	A lease must state the method by which the rent is to be reviewed on each occasion (cl.12(1) CPRT).	A lease must not provide for a change to base rent within 12 months of: (a) the lease being entered into; or (b) any previous change to that rent, unless the change is by a specified amount or percentage (s.22 RCLA).	A rent review provision is void unless the lease specifies a single basis on which the review is to be made (s.11(1) RSA). Unless specific provision is made in the retail shop lease for the time at which a market review may be initiated, a party may not > 3 months before the date on which the market review is to be carried out and not > 6 months after that date, initiate the review by notice in writing (s.11(2)(b) RSA).	A lease must not provide for a change to base rent within 12 months of: (a) the lease being entered into; or (b) any previous change to that rent, unless the change is by a specified amount or percentage (s.18(2) RLA).	If rent is to be reviewed the lease must state the date of each rent review or provide a mechanism by which the rent is to be reviewed (s.50 LCRA). A lease must not provide for a change in rent more frequently than once every 12 months after the first anniversary of the lease (s.47 LCRA). However, note exceptions in s.47(2) LCRA.	A lease must specify the: (a) time rent reviews are to occur; and (b) basis or formula on which rent reviews will be made, (s.28(1) BTA).
A rent review may only be made on the basis of 1 of: (a) a fixed percentage; (b) an independently published index of prices or wages; (c) a fixed annual amount; (d) current market rent; or (e) a basis permitted by the Regulations (none permitted to date), (s.35(2) RLA).	A rent review may only be made on the basis of 1 of: (a) a fixed percentage; (b) an independently published index of prices, costs or wages; (c) a fixed actual amount; (d) the premises' current market rent; (e) a basis permitted by the Regulations; or (f) for leases entered into after 1 July 2000, a single basis formed by a combination of the above bases (other than current market rent), (s.27(5) RSLA). For leases entered into from 3 April 2006 (a) rent may also be reviewed to the average base and turnover rent paid over previous years (s.27(5) RSLA); and (b) nothing prevents a lease limiting the amount by which the rent may be increased (s.27(10) RSLA).	A rent review may only be made on the basis of 1 of: (a) a fixed percentage; (b) CPI (All Groups Hobart) or other agreed CPI issued by the Australian Bureau of Statistics; (c) a fixed amount; (d) current market value rent; or (e) in accordance with an agreed formula (other than a formula that involves a combination of any 2 or more of the methods in paragraphs (a), (b) or (d)), (cl.12(2) CPRT).					A rent review may only be made on the basis of 1 of: (a) a fixed percentage; (b) an independently published index of prices or wages; (c) a fixed annual amount; (d) current market rent; or (e) a basis permitted by the Regulations, (s.28(2) BTA).

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A rent review clause that does not specify how the review is to be made is void (s.35(6) RLA). If a clause is void, the rent is to be as agreed or, failing agreement within 30 days, as determined by a valuer appointed by the Small Business Commissioner. The valuer's fees must be jointly borne by the landlord and tenant (s.35(7) and (8) RLA). A rent review must be conducted as early as practicable within the time provided by the lease. If the landlord has not initiated the review within 90 days after the end of that time, the tenant may initiate the review (s.35(5) RLA).	For leases entered into after 1 July 2000, if a rent review provision is invalid for any other reason, the rent will be calculated on a single basis chosen by the tenant from the bases specified in the lease (s.27 RSLA).	A provision in a lease is invalid if it permits any 1 adjustment of the rent by reference to > 1 of the permitted methods or if it reserves a discretion to apply > 1 of the methods (cl.12(4) CPRT). A provision in a lease is invalid if it allows an adjustment to be made to the rent during the first 12 months of the lease or more frequently than 12 monthly intervals after the first anniversary of the commencement of the lease (cl.12(5) CPRT).	A provision of a lease is void if it: (a) reserves to a party a discretion as to which of 2 or more methods of calculating a change of base rent is to apply; (b) reserves to a party a discretion as to whether rent is reviewed on a review date; or (c) provides for rent to be changed to the higher of 2 or more methods of calculating.	A provision in a retail shop lease purporting to preclude the increase or reduction of that market rent or to limit the extent to which that market rent may be increased or reduced is void (s.11(2)(c) RSA).	A provision of a lease is void if it: (a) reserves to a party a discretion as to which of 2 or more methods of calculating a change of base rent is to apply; (b) reserves to a party a discretion as to whether rent is reviewed on a review date; or (c) provides for rent to be changed to the higher of 2 or more methods of calculating, (s.18(3) RLA).	Discretionary rent review clauses are void (s.46 LCRA). A discretionary rent review clause is a clause that: (a) has the effect of reserving to a party a discretion as to which of 2 or more methods of calculating a change in rent is to apply; (b) provides for rent to change in accordance with whichever of 2 or more methods of calculating the changes would result in the highest rent; (c) has the effect of reserving to a party complete discretion about the rate of rent to apply; (d) has the effect of preventing, or gives a party power to prevent, a decrease in rent, (dictionary LCRA).	A rent review clause that does not specify how the review is to be made is void (s.28(6) BTA). If a clause is void, the rent is to be as agreed or, failing agreement within 30 days, as determined by a valuer appointed by the Commissioner of Business Tenancies. The valuer's fees must be jointly borne by the landlord and tenant (s.28(7) and (8) BTA). A rent review must be conducted as early as practicable within the time provided by the lease. If the landlord has not initiated the review within 90 days after the end of that time, the tenant may initiate the review (s.28(5) BTA).
A rent review clause must not preclude or limit a rent reduction on a market review (s.35(3) RLA).	For leases entered into after 4 April 2011, a 'ratchet rent provision' in a retail shop lease is void. A 'ratchet rent provision' means any provision to the extent that it: (a) prevents the rent from decreasing under a rent review; (b) limits or specifies the amount by which rent may decrease under a rent review; or (c) prevents or allows the avoidance of a rent review, for the purpose of preventing or limiting the amount of a rent decrease (s.36A RSLA) . For leases entered into from 3 April 2006, if:	A provision in a lease which prohibits a decrease in rent is invalid (cl.12(8) CPRT).	A provision preventing rent from decreasing is void (s.22 RCLA).	A provision in a retail shop lease purporting to preclude the increase or reduction of that market rent or to limit the extent to which that market rent may be increased or reduced is void (s.11(2)(c) RSA).	If a provision provides for a change to base rent in a way that has the potential to cause that rent to decrease, it is void to the extent that it: (a) prevents or enables the landlord or any other person from preventing the decrease; or (b) limits or specifies, or allows the limitation or specification of, the amount by which the base rent is to decrease, (s.18(4) RLA).		A rent review clause must not preclude, limit or prevent a rent reduction (s.28(3) BTA) but this does not apply to rent review clause by a fixed percentage, independently published index or a fixed annual amount (s.28(3) BTA).

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	(a) the tenant is a major lessee (s.5 RSLA) (see above); (b) before the tenant enters into the lease the tenant gives the landlord written notice that the tenant has had financial and legal advice; and (c) the lease provides for the timing and basis for each review, then: (a) the prohibition on more than 1 rent review per year (other than the first year); (b) the prohibition on reviewing rent using more than 1 basis; and (c) the restriction on the type of permissible rent reviews, do not apply (s.27(8) RSLA). For leases entered into from 3 April 2006, s.27(9) RSLA makes it clear that an adjustment of rent to allow the recovery of GST or a rent concession are not treated as rent reviews.						
'Current market rent' (if a market rent is be used as the basis of a rent review) is taken to be the rent obtainable at the time of the review in a free and open market for the premises between a willing landlord and a willing tenant in an arm's length transaction having regard to the: (a) lease terms; (b) rent that would reasonably be expected to be paid for the premises if they were unoccupied and to be used for a substantially similar use; (c) the landlord's outgoings payable by	Current market rent (if to be used as a basis of a rent review) is the rent obtainable if the shop were unoccupied and available for substantially similar use, calculated on the basis of gross rent less outgoings and on an effective rent basis (s.29 RSLA). In determining the current market rent, the specialist retail valuer must: (a) not have regard to the value of the goodwill of the tenant's business or the tenant's fixtures and fittings; and (b) have regard to submissions from the	Market value rent means a rent determined in accordance with the principles set out in Appendix A to the CPRT (cl.13 CPRT). If a lease provides for a market value adjustment of the rent, the tenant may write to the property owner asking the property owner to state the amount which the property owner believes is the market value rent for the premises at the date the adjustment is due (cl.13(4) CPRT). The tenant's request is to be given to the property owner no < 4 months and no > 6 months before the date on which	Current market rent is the rent that, having regard to the terms of the lease and other relevant matters, would be reasonably expected for the shop if it were unoccupied and offered for renting for the permitted use set out in the lease. In relation to a current market rent review: (a) the value of the tenant's goodwill and the tenant's fixtures and fittings is to be ignored; (b) if the parties do not agree on the rent, either party can require the appointment of an independent valuer to	If a retail shop lease provides for a market rent review then that market rent shall be taken to be the rent obtainable at the time of that review in a free and open market as if, all the relevant factors, matters or variables used in proper land valuation practice having been taken into account, that the retail shop was vacant and let on similar terms contained in the current retail shop lease and is not to take into account the value of: (a) the goodwill of the business carried on in the retail shop; (b) any stock, fixtures or fittings in the retail	Current market rent (if used as the basis of a rent review) means rent that would reasonably be expected to be paid for the shop as between a willing landlord and tenant in an arm's length transaction where the parties are acting knowledgeably, prudently and without compulsion, determined on an effective rent basis, having regard to the following matters: (a) the provisions of the lease; (b) the rent that would reasonably be expected to be paid for the shop if it were unoccupied and offered for renting for	'Current market rent' (if used as the basis of a rent review) is the amount that could reasonably be expected to be paid in rent for vacant possession of the premises on the open market if: (a) the premises were let by a willing but not anxious landlord to a willing but not anxious tenant; (b) both parties acted knowledgeably and prudently; (c) the permitted use is taken into consideration; (d) the amount is worked out in accordance with the considerations	'Current market rent' (if a market rent is to be used as the basis of a rent review) is taken to be the rent obtainable at the time of the review in a free and open market for the premises between a willing landlord and a willing tenant in an arm's length transaction having regard to the: (a) lease terms; (b) rent that would reasonably be expected to be paid for the premises if they were unoccupied and to be used for a substantially similar use; (c) the landlord's outgoings payable by

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the tenant; and (d) rent concessions and other benefits offered to prospective tenants of unoccupied retail premises, but not taking into account the tenant's goodwill or its fixtures and fittings (s.37(2) RLA). If landlord and tenant cannot agree on current market rent, a valuation must be carried out by specialist retail valuer appointed by agreement between the parties or, failing agreement, by the Small Business Commissioner (s.37(3) RLA).	landlord and tenant about the market rent of the shop, (s.29(c) RSLA). For leases entered into after 3 April 2006, the specialist retail valuer must also have regard to the terms of the lease (s.29(c) RSLA). Current rent may be as agreed or, failing agreement within 1 month, as determined by a specialist retail valuer agreed upon by the landlord and tenant, otherwise nominated by the chief executive (s.28 RSLA). For leases entered into from 3 April 2006, the landlord and tenant may make written submissions to the specialist retail valuer, within a reasonable submission period decided by the valuer. A party making a submission must give a copy of the submission to the other party. The other party may reply within a reasonable period decided by the valuer (s.28A RSLA).	the adjustment is due (cl.13(2) CPRT). If the tenant makes the request, or the property owner wishes to adjust the market value rent, the property owner must give the tenant written notice of the amount the property owner believes would be the market value rent no < than 3 months before the date on which the adjustment is due. If the property owner does not give the notice, the property owner may not seek the adjustment (cl.13(5) CPRT). Within 21 days of receiving the property owner's notice, the tenant must notify the property owner that the tenant: (a) agrees with the rent proposed; (b) does not agree with the rent proposed but wishes to negotiate the rent; or (c) requires the rent to be determined in accordance with cl.21 of the CPRT, (cl.13(6) CPRT).	undertake the assessment of current market rent; (c) the independent valuer must give detailed reasons for the determination, specifying the matters taken into account; (d) the parties must pay the valuer's costs equally, (s.23 RCLA).	shop that are not the property of the landlord; or (c) any structural improvement or alteration of the retail shop carried out, or paid of, by the then current tenant, (s.11(2)(a) RSA). If landlord and tenant cannot agree on market rent, the question shall be resolved either by: (a) a licensed valuer agreed to by each of the parties; or (b) 2 licensed valuers, 1 appointed by the landlord and 1 of whom is appointed by the tenant, (s.11(3) RSA). If : (a) the 2 valuers fail to reach an agreement on rent to be paid; or (b) a party has not acted to agree to appoint a valuer or appointed his own valuer and the leave of the Tribunal has been obtained, a party may refer the issue to the Tribunal for determination, (s.11(5) RSA). A landlord must assist in determining the rent payable as a result of the review by responding within 14 days of written notice of a request from a valuer and give the valuer such relevant information as is requested, including any of the following information about leases for comparable retail shops in the same building or retail shopping centre: (a) current rental for each lease	the same or a substantially similar use; (c) the gross rent, less the landlord's outgoings payable by the tenant; (d) rent concessions and other benefits that are frequently or generally offered to prospective tenants of unoccupied retail shops, (s.19(1)(a) RLA). Current market rent does not include the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings on the retail shop premises, (s.19(1)(a) RLA). If a landlord and tenant cannot agree on the actual amount of current market rent, the amount is to be determined by valuation carried out by a specialist retail valuer appointed by the parties, or failing agreement, by the Tribunal (s.19 & 31 RLA).	specified in Schedule 1, (Schedule 1 LCRA). If landlord and tenant cannot agree on current market rent either party may ask the Magistrates Court to refer a dispute to mediation if the parties cannot agree within 14 days after either party tells the other party that it disputes the proposed rent. If mediation does not work or if the Magistrates Court is of the view it would not be productive then they must appoint a valuer to work out the current market rent (s.52 LCRA).	the tenant; and (d) rent concessions and other benefits offered to prospective tenants of unoccupied retail premises, but not taking into account the tenant's goodwill or its fixtures and fittings, (s.29(1)(a) and (b) BTA). If landlord and tenant cannot agree on current market rent, a valuation must be carried out by a specialist retail valuer appointed by agreement between the parties or, failing agreement, by the Commissioner of Business Tenancies (s.29(1)(c) BTA).

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	For leases entered into from 3 April 2006, the valuer must give a determination within 1 month of: (a) being asked to make the determination; (b) the end of the period for submissions; (c) if a submission is made, the end of the period for reply to submissions; or (d) if the landlord is to give the valuer information, when the landlord gives the information, (s.32 RSLA). Valuers' fees must be borne jointly by the landlord and tenant (s.34 RSLA). For leases entered into from 3 April 2006, the landlord and tenant must each pay to the valuer 1 half of the valuer's fees (s.34 RSLA). A valuer's determination of current rent must state in writing: (a) the location of the leased shop and the matters taken into consideration (s.31(1) RSLA); (b) whether the current market rent includes GST; and (c) if the rent does include GST, the GST amount, (s.31(2) RSLA). For leases entered into from 3 April 2006, the valuer's determination must provide detailed reasons (s.31(1)(d) RSLA).	If the tenant does not give the notice within 21 days, the rent proposed by the property owner is the rent payable by the tenant from the date the adjustment is due (cl.13(7) CPRT). The property owner and the tenant may agree the market rent at any time before the adjustment is due. If the property owner and tenant cannot agree on the market rent payable either may initiate an independent valuation in accordance with cl.21 at any time before the adjustment is due (cl.14(2) CPRT).		(b) rent free periods or any other form of incentive; (c) recent or proposed variations of any lease; (d) outgoings for each lease; and (e) any other prescribed information , (s.11(3B) RSA). If the landlord fails to comply with a request under s.11(3B) without reasonable excuse, the valuer must inform the tenant of the landlord's failure to comply and the tenant may apply to the Tribunal for an order that the landlord comply with the request made under s.11(3B) (s.11(3C) RSA)			

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'Specialist retail valuer' means in the case of a valuation of: (a) retail premises located in a shopping centre, a valuer having not < 5 years' experience in valuing retail premises located in regional or sub-regional shopping centres; or (b) any other retail premises, a valuer having not < 5 years' experience in valuing retail premises, (s.3 RLA). A landlord must, within 14 days of a request, provide the valuer with information to assist in valuation. Fine: 50 penalty units (s.37(4) RLA).	'Specialist retail valuer' means a person whose name is recorded on the list of specialist retail valuers kept under the *Valuers Registration Act 1992* (Qld) (s.5 RSLA). A landlord must, within 14 days of a request, provide the valuer with information to assist in valuation (s.30 RSLA). If the landlord does not give the information to the valuer, the valuer must give the tenant written notice of the landlord's failure within 7 days (s.30(2) RSLA). If the tenant is given such a notice, a retail tenancy dispute exists between the landlord and the tenant (s.30(3) RSLA).	An independent valuation is initiated by the appointment of valuers in accordance with cl.21(3). An independent valuation is to be made: (a) by a valuer selected by both parties; (b) by 2 valuers, 1 being selected by each party; or (c) (if the valuers cannot agree on a valuation or if a party fails to select a valuer) by a third valuer appointed by the Director of Consumer Affairs after consulting with President of the Institute of Valuers and Land Economists. However, the Director cannot appoint a valuer unless requested by the property owner or the tenant and the parties agree that the valuer's decision is binding (cl.21(4) CPRT). The effect of these provisions appears to be that there can be no market value adjustment of the rent where the tenant: (a) does not agree to the rent proposed by the property owner; (b) requires the rent to be determined by an independent valuation; (c) fails to select a valuer; and (d) does not agree that the decision of a valuer appointed by the Director is binding, (cl.21(4) CPRT). Each party is to pay the costs of the valuer it selects. The costs of a third valuer are to be shared evenly. The Code is silent as to who pays the costs of				'Valuer' means a person who is competent in retail and commercial market rental valuations (dictionary LCRA). If requested by the valuer, a landlord must provide information about any relevant concessions it has given to another tenant. The landlord is not required to provide information that is otherwise readily available to the valuer (s.59 LCRA). Each party has a right to make a submission in relation to the valuation. (Schedule 1 LCRA).	'Specialist retail valuer' means a valuer having not < 5 years' experience in valuing retail shops (s.5 BTA). A landlord must, within 14 days of a request, provide the valuer with information to assist in valuation (s.29(1)(e) BTA).

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		a valuer appointed by both parties - presumably these costs would also be shared evenly (cl.21(6) CPRT).					
Turnover rent							
Turnover does not include: (a) discounts allowed in the usual course of business; (b) losses on resale or disposal of goods purchased as trade-ins; (c) uncollected, written off credit accounts; (d) payments for goods or services which are refunded; (e) refunded instalments for cancelled lay-bys; (f) purchase, receipt or similar taxes (including GST); (g) delivery charges; (h) goods exchanged between stores; (i) returns to shippers, wholesalers or manufacturers; (j) sales of tenant fixtures and fittings; (k) lottery ticket sales; or (l) any amount which the parties agree to exclude, (s.33(4) RLA).	Turnover does not include: (a) discounts allowed in the usual course of business; (b) losses on resale; (c) uncollected, written off credit accounts; (d) payments for goods or services which are refunded; (e) refunded deposits and instalments; (f) instalment amounts refunded for cancelled lay-bys; (g) taxes (including GST) imposed at point of sale/hire; (h) delivery charges; (i) goods exchanged between stores; (j) returns to shippers, wholesalers or manufacturers; (k) sale of fixtures and fittings; (l) for leases entered into prior to 3 April 2006, lottery sales (other than commissions); (m) for leases entered into from 3 April 2006, sales made on a commission basis (for example, lottery sales, postage stamp sales, public transport ticket sales, telephone card sales) (other than commissions), (s.9 RSLA).	Turnover does not include: (a) discounts allowed in the usual course of business; (b) losses on resale; (c) uncollected/written off credit accounts; (d) payments for goods or services which are refunded; (e) refunded deposits and instalments; (f) finance charges associated with credit to customers (other than commission on credit or store cards); (g) purchase receipts or similar taxes; (h) delivery charges; (i) goods exchanged between shops; (j) returns to shippers, wholesalers or manufacturers; (k) sale of fixtures and fittings; (l) lottery sales (other than commissions), (cl.15(1) CPRT).	Turnover does not include: (a) discounts allowed in the usual course of business; (b) losses on resale; (c) uncollected, written off credit accounts; (d) payments for goods or services which are refunded; (e) refunded deposits and instalments; (f) finance charges associated with credit to customers (other than commission on credit or store cards); (g) delivery charges; (h) goods exchanged between shops; (i) returns to shippers, wholesalers or manufacturers; (j) sale of fixtures and fittings; (k) lottery sales; (l) amounts of a prescribed class; (m) the net amount paid on account of GST, (s.24 RCLA).	Turnover does not include: (a) discounts allowed in the usual course of business; (b) losses on resale; (c) uncollected written off credit accounts; (d) payments for goods or services which are refunded; (e) refunded instalments for cancelled lay-bys; (f) purchase, receipt or similar taxes (including GST); (g) delivery charges; (h) goods exchanged between stores; (i) returns to shippers, wholesalers or manufacturers; (j) sales of tenant fixtures and fittings; or (k) lottery ticket sales, (s.7(4) RSA).	Turnover does not include: (a) discounts allowed in the usual course of business; (b) losses on resale; (c) uncollected, written off credit accounts; (d) payments for goods or services which are refunded; (e) refunded deposits and instalments; (f) finance charges associated with credit to customers (other than commission on credit or store cards); (g) delivery charges; (h) goods exchanged between stores; (i) returns to shippers, wholesalers or manufacturers; (j) sale of fixtures and fittings; (k) lottery sales; (l) the amount payable as GST, (s.20(1) RLA). Turnover does include: (a) gross takings; (b) gross receipts; (c) gross income; and (d) similar concepts, (s.20(4) RLA).	Turnover does not include: (a) any loss incurred in the resale/disposal of goods reasonably purchased in the ordinary course of business from a customer as a trade-in; (b) deposits/instalments for lay-by, hire purchase or credit sale that are refunded; (c) refund proceeds on a transaction; (d) interest charges on provision of credit to customers; (e) returns to wholesalers or manufacturers; (f) proceeds of sale of the tenant's fixtures and firings after their use in the conduct of the tenant's business ; (g) discounts allowed to customers; (h) write offs; (i) GST and purchase, receipt or similar taxes; (j) delivery charges; (k) proceeds of goods sold on consignment; (l) the price of merchandise exchanged between tenant's premises if done only for convenience and not for a concluded sale made at the premises; and (m) lottery sales (other than commissions), (s.64 LCRA).	Turnover does not include: (a) any loss incurred in the ordinary course of business; (b) deposits/instalments for lay-by or hire purchase that are refunded; (c) refunds if the proceeds have been included as part of turnover; (d) service, finance or interest charges on provision of credit to customers; (e) goods exchanged between stores; (f) returns to shippers, wholesalers or manufacturers; (g) proceeds from sale of fixtures and fittings; (h) discounts allowed to customers; (i) write offs; (j) amounts payable as GST; (k) delivery charges; and (l) lottery sales (other than commissions), (s.32(1) BTA).
If turnover rent is payable the tenant must give the landlord: (a) within 14 days of the end of each month	If turnover rent is payable the tenant must give the landlord: (a) at the end of each month (unless the		If underpayment or overpayment of rent occurs (because actual turnover differs from projected or presumed turnover) rent must	If turnover rent is payable the tenant must give the landlord: (a) within 14 days of the end of each month (unless the lease allows	If underpayment or overpayment of turnover rent occurs (because actual turnover differs from projected or presumed	Adjustments are to be made to turnover rent, but not > once every 12 months unless otherwise agreed (s.63 LCRA).	If underpayment or overpayment of rent occurs (because actual turnover differs from projected or presumed turnover) rent

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(unless longer period allowed by the lease), a statement of turnover for that period; and (b) within 28 days after the end of each lease year (unless longer period allowed by the lease) and at the termination or assignment of the lease, a statement of turnover for the expired period supported by an auditor's statement, (s.33(2) RLA).	lease otherwise provides) a statement of turnover for that month; (b) at the end of each year (unless the lease otherwise provides) and at the termination of the lease a statement of turnover for the expired period supported by a registered auditor's statement, (s.25 RSLA).		be adjusted within 1 month after: (a) the tenant requests such adjustment from the landlord in writing; and (b) provides the landlord with information reasonably required to make the adjustment. A tenant may request an adjustment only once in the first 12 months of the lease term and thereafter at intervals of not < 12 months (unless the lease provides otherwise) (s.24 RCLA).	longer), a statement of turnover for that month; and (b) within 42 days after the end of each calendar year or each financial year of the business, and at termination a statement of turnover of the business certified by an accountant to truly and accurately represent the turnover of the business, (s.7(2)(b) RSA). The landlord may engage an accountant to audit turnover figures. The landlord must bear audit costs except where audit discloses turnover is understated during relevant period by > 5% (s.7(3) RSA). If a retail shop lease contains a provision to the effect that the rent is to be determined in whole or in part by reference to turnover and: (a) the tenant did not, by notice in writing in the prescribed form given to the landlord before the provision was included in the lease, elect that the rent be so determined; and (b) the tenant, by notice in writing to the landlord, objects to the rent being so determined, the provision is void from the date the tenant gave notice (s.7(1) RSA).	turnover) the turnover rent must be adjusted within 1 month after: (a) the tenant requests such adjustment from the landlord in writing; and (b) provides the landlord with information reasonably required to make the adjustment. A tenant may request an adjustment only once in the first 12 months of the lease term and thereafter at intervals of not < 12 months (unless the lease provides otherwise)(s.20 RLA).	The landlord may charge a combination of base rent and turnover rent (s.61 LCRA). The landlord cannot ask for turnover figures unless the lease provides for rent to be worked out by reference to turnover (s.129 LCRA).	must be adjusted within 1 month after: (a) the tenant requests such adjustment from the landlord in writing; and (b) provides the landlord with information reasonably required to make the adjustment. A tenant may request an adjustment only once in the first 12 months of the lease term and thereafter at intervals of not < 12 months (unless the lease provides otherwise) (s.32(2) and (3) BTA).

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
				A turnover rent provision is void if it does not specify the formula by which the amount of rent is to be determined (s.7(2) RSA). Where a turnover rent provision is void, the rent shall be as agreed between the parties or determined by the Tribunal (s.7(5) RSA).			

Early termination for failure to achieve turnover

A lease cannot provide for early termination by a landlord on the grounds that a shopping centre tenant has failed to achieve specified sales or turnover performance (s.73 RLA).	No provision.	A lease cannot provide for early termination by a landlord on the grounds that a shopping centre tenant has failed to achieve specified sales or turnover performance (cl.36 CPRT).	A lease cannot provide for early termination by a landlord on the grounds that a shopping centre tenant has failed to achieve specified sales or turnover performance (s.58 RCLA).	No provision.	A lease cannot provide for early termination by a landlord on the grounds that a shopping centre tenant has failed to achieve specified sales or turnover performance (s.58 RLA).	A provision in a shopping centre lease that allows the landlord to terminate for inadequate sales or turnover is void (s.142 LCRA).	A lease cannot provide for early termination by a landlord on the grounds that a shopping centre tenant has failed to achieve specified sales or turnover performance (s.73 BTA).

Turnover rent - confidentiality

Turnover figures for tenants of retail shopping centres are confidential and cannot be divulged except: (a) with the tenant's consent; (b) as part of a centre's aggregate sale figures in a way which does not disclose the turnover of a particular tenant; (c) to a court, tribunal or the Small Business Commissioner; (d) to comply with any Act; (e) to the landlord's professional advisers; or (f) to a mortgagee; or (g) to a prospective purchaser. Penalty: 20 penalty units (ss.65 and 67 RLA).	If a lease does not oblige the tenant to pay turnover rent, turnover figures can still be required. Turnover figures are confidential and cannot be divulged except: (a) as part of a centre's aggregate sale figures; (b) to a court, mediator or tribunal; (c) to the landlord's professional advisers; (d) to a valuer employed under RSLA; or (e) to a prospective purchaser or mortgagee (or adviser thereof), (s.26(2) RSLA). If confidentiality is breached, compensation must be paid as agreed or, failing agreement, as determined under the dispute resolution provisions and/or a fine may be payable (s.26(5) RSLA).	If a lease does not oblige the tenant to pay turnover rent, turnover figures cannot be required (cl.10(6) CPRT). A property owner cannot disclose turnover figures except: (a) with the tenant's consent; (b) as part of a centre's aggregate sale figures; (c) to a court/arbitrator in the course of any mediation or valuation under the CPRT or a lease; (d) to comply with the CPRT; (e) in good faith to the property owner's legal or financial advisers or to a proper officer of a financial institution; (f) to a prospective purchaser of the retail premises, (cl.10(7) CPRT).	If a lease does not oblige the tenant to pay turnover rent, the landlord can not require the tenant to disclose its turnover figures. Penalty: $1,000 (s.24(5) RCLA). The landlord of a shopping centre cannot disclose turnover figures except: (a) with the tenant's consent; (b) as part of a centre's aggregate sale figures; (c) to a court/arbitrator or for the purposes of any mediation or valuation under the RCLA or the lease; (d) to comply with any Act; (e) to the landlord's professional advisers or to the proper officer of a financial institution; or (f) to a prospective purchaser of the shop or centre, (s.51 RCLA).	A provision in a retail shop lease that: (a) obliges the tenant to furnish, or permit the landlord or his agent to gather, figures or statements relating to the turnover of the business; or (b) entitles the landlord, to be furnished with figures or statements relating to the turnover of the business, is void unless the figures or statements are required for the purpose of determining rent either in whole or in part by reference to turnover (s.8(1) RSA).	A landlord of a shopping centre cannot disclose turnover figures except: (a) with the tenant's consent; (b) as part of a centre's aggregate sale figures; (c) to a court/arbitrator or for the purposes of any mediation or valuation under the RLA or the retail shop lease; (d) to comply with any Act; (e) to the landlord's professional advisers or to the proper officer of any financial institution; or (f) to a prospective purchaser of the retail shop or the building which it forms part. It is an offence if a landlord contravenes this section. Maximum fine: $2,200 (s.50 RLA).	The landlord of a shopping centre cannot disclose turnover figures except: (a) with the tenant's consent; (b) as part of a centre's aggregate sale figures; (c) to a court or tribunal; (d) for a mediation, a hearing or valuation for the LCRA; (e) as required by law; (f) to the landlord's professional advisers or to the proper officer of any financial institution; or (g) to a prospective purchaser of the shopping centre. (s.129 LCRA).	A landlord of a shopping centre cannot disclose turnover figures except: (a) with the tenant's consent; (b) as part of a centre's aggregate sale figures; (c) to a court/ Commissioner of Business Tenancies or for the purposes of any mediation or valuation under the BTA or the lease; (d) to comply with any Act; (e) to the landlord's professional advisers or to the proper officer of any financial institution; or (f) to a prospective purchaser of the retail shop. It is an offence if a landlord contravenes this section (s.66 BTA).

Minimum term

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Term of a lease (including options) must be at least 5 years (s.21(1) RLA). If a lease for <5 years is granted, the term is deemed to extend for 5 years (s.21(4) RLA). Minimum 5 year term does not apply if: (a) tenant obtains a certificate from the Small Business Commissioner and gives the certificate to the landlord; (b) lease is a renewal; or (c) lease is a sublease (in which case the term must be 1 day < the term of the head lease), (s.21 RLA). If the term of a lease is extended to the statutory minimum and no provision is made in the lease for a review of the rent payable in respect of the extended period, there will be a market rent review at the beginning of the extension (s.21(7) RLA).	No minimum term. However, for leases entered into before 3 April 2006, if a lease does not contain an option, the tenant has right to request renewal (by notice not < 2 months and not > 1 year before the end of the lease) and the landlord has an obligation to respond in the approved form and stating the terms on which the landlord will renew the lease by the later of 1 month after tenant's notice or 6 months before the existing lease ends. If the landlord fails to respond, the tenant is entitled to a 6 month holdover (s.46 RSLA). For leases entered into from 3 April 2006, if a retail shop lease contains no option to renew, the landlord must between 6 and 12 months before the lease ends (or for leases of a year or less, between 3 and 6 months before the lease ends), give the tenant notice: (a) offering a renewal or extension on the terms in the notice; or (b) telling the tenant that the landlord does not intend to offer a renewal or extension, (s.46AA RSLA). The offer cannot be revoked for 1 month (s.46AA(3) RSLA).	Term of a lease must be at least 5 years (cl.10(3) CPRT). However, a lease may be for a term of < 5 years if the prospective tenant's legal adviser gives a certificate verifying that the legal adviser has explained to the tenant the effect of a reduced lease period (cl.10(4) CPRT).	Term of a lease (including options) must be at least 5 years (s.20B RCLA). Minimum 5 year term does not apply if: (a) the lease is a short term lease for a fixed term of 6 months or less; (b) the lease is as a result of holding over and does not exceed 6 months; (c) the lease contains a certified exclusionary clause (lawyer's certificate); (d) the tenant has been in possession of the shop for at least 5 years; (e) in the case of a sublease, the lease term is as long as the headlease allows; or (f) the lease is of a class excluded by regulation, (s.20B RCLA). The minimum 5 year term also does not apply if the tenant is the landlord's spouse, domestic partner, parent, grandparent, step-parent, child, grandchild, step-child, brother or sister, or the spouse or domestic partner of the landlord's child, grandchild, step-child, brother or sister (r.7(a) of the Regulations).	Term of a lease (including options) must be at least 5 years (s.13(1) RSA). Minimum 5 year term does not apply if: (a) the lease term is 6 months or less; (b) tenant occupied the premises as a retail shop for a period ending immediately before the commencement of the current term and the aggregate of that prior period of occupation and the option term (if any) totals 5 years or longer; (c) the lease is a sublease and renewal for a term longer than the option term, would be inconsistent with the head lease; or (d) the tenant obtains an order from the Tribunal that an option of renewal under s.13 does not arise, (s.13(1), 13(2) and s.13(7b) RSA). For the purposes of s.13(1), a lease for a term of more than 6 months includes a tenancy where the tenant has been continuously in possession of the retail shop for more than 6 months as a result of either: (a) the lease being renewed one or more times; or (b) the lease being continued, (s.13(2A) RSA).	Term of a lease (including options) must be at least 5 years (s.16(1) RLA). If a lease for < 5 years is granted the term of the lease is automatically extended by the period required to make the term equal to 5 years (s.16(2) RLA). No automatic term extension arises where: (a) the tenant waives the right having obtained a certificate within the first 6 months of the lease from a lawyer (not acting for the landlord) or a licensed conveyancer who has explained the minimum term provisions to the tenant; (b) the retail shop lease is an extension of an earlier lease under an option; or (c) renewal would be inconsistent with a headlease binding upon the landlord, (s.16 RLA).	Term of a lease (including options) must be at least 5 years (s.104 LCRA). If a lease for < 5 years is granted, the tenant can (not later than 90 days after expiry of the lease) exercise a right to extend the lease to a 5 year term (s.104 LCRA). Minimum 5 year term does not apply if: (a) a tenant has waived their right under s.104 by receiving independent legal advice and providing to the landlord a Waiver Certificate signed by a lawyer pursuant to s.104 LCRA; (b) the total term is 5 years or more; or (c) a 5 year minimum term would be inconsistent with the headlease (so long as the landlord draws this to the attention of the tenant) or unlawful, (s.104 LCRA).	Term of a lease (including options) must be at least 5 years (s.26 BTA). No statutory option arises where: (a) a lawyer or accountant (not acting for the landlord) certifies in writing that he or she has explained the minimum term provisions to the tenant; (b) the lease is an extension of an earlier lease under an option; and (c) renewal would be inconsistent with a headlease binding upon a landlord, (s.26 BTA).

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	If the landlord fails to notify the tenant, before the lease expires the tenant may give written notice to the landlord requiring an extension of the lease until 6 months after the landlord gives the notification required (s.46AA(4) and 46AA(4A) RSLA). The tenant may terminate the lease before this extended period ends, on at least 1 months notice (s.46AA(5) RSLA).		A lease is not invalidated by contravention of the 5 year term requirement but the term of the lease is extended to bring the term (or aggregate term) to 5 years (s.20B RCLA).	If a lease is for less than 5 years is granted the tenant has an option commencing immediately after the expiry of the current term and ending on a day specified by the tenant that is not later than 5 years after the day of commencement of the current term (s.13(1) RSA). If the lease does not provide for review of the amount of rent, the lease for the option shall be taken to provide that the rental payable during the term for which the lease is renewed shall be determined having regard to the market rent of the premises ascertained as provided in s.11(2) (s.13(5)(b) RSA).	Provisions regarding the mechanism for rent increases during the additional period (being, annual adjustments to CPI) are set out in the event that the lease does not provide for them (s.21A RLA).	If a lease is extended under s 104 of the LCRA the lease has the same provisions as it had before the extension unless the landlord and tenant agree otherwise or the Magistrates Court orders otherwise (s.105 LCRA).	

Option clauses

A lease containing an option to renew must specify: (a) the date until which the option is exercisable; (b) how the option is exercisable; and (c) the terms and conditions (including the rent) upon which the lease is renewable, (s.27(1) RLA).	For leases entered into from 3 April 2006, if the lease provides for an option to renew or extend the lease at current market rent, the tenant is entitled to request a determination of the current market rent at any time within the period that begins 6 months before and ends 3 months before (or for leases less than 1 year – that begins 3 months	A lease which includes an option must specify the period of the option (cl.20(1) CPRT).	No provision.	During the last 12 months of the term of the lease, the tenant may request the landlord to advise whether or not the landlord proposes to renew the lease if there is no option. The landlord must provide the tenant with a response within 30 days of the tenant's request. If the landlord fails to respond then the lease is extended by the period of the	If a retail shop lease provides for an option to renew or extend the lease at current market rent, the tenant is entitled to request a determination of the current market rent at any time within the period that begins 6 months before and ends 3 months before the last day on which the option may be exercised (s.32 RLA).	No provision.	No provision.

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	before and ends 1 month before) the last day on which the option may be exercised (s27A(2) RSLA). If a determination is requested, the last day to exercise the option will be varied to be the earlier of: (a) 21 days after the tenant gets notice of the determined market rent; or (b) the day the lease ends, (s.27A(6) RSLA). This provision does not apply if the tenant is a major lessee (see above), gave the landlord written notice that it received financial and legal advice before it entered into the lease and the lease contains the timing and basis for each review (s.27A(1A) RSLA).			landlord's non-compliance. If the landlord intends to renew the lease the landlord must advise the terms and conditions of the renewal however, the landlord is not required to specify the rent proposed to be charged until 3 months before the expiry of the lease (s.13B RSA). A lease may be terminated during a period by which it is deemed to be extended under s.13B(3) by the tenant giving written notice to the landlord (s.13B(4A) RSA). If a lease is renewed because of s.13B(3) after the term of the lease ends, the lease for the further term commences on the expiry of the previous lease (s.13B (4C) RSA).			

Options lost

An option will only be lost if the tenant has: (a) not remedied a default of which written notice has been given; (b) persistently defaulted despite written notice having been given (s.27(2) RLA).	No provision.	A property owner may refuse to grant a new lease if: (a) the tenant does not exercise the option by the required date; or (b) at the time of exercising the option or before the commencement of the new lease, the tenant is in default under the existing lease, (cl.20(10) CPRT). However, if the rent for the option period is to be the market value rent, and the date for the exercise of the	No provision.	No provision.	No provision.	No provision.	No provision.

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
		option passes while an independent valuation is being carried out, the date for exercising the option is to be deferred until 1 month after the tenant receives written notice of the rent. Within 1 month of receiving the valuation, the tenant must give the property owner 1 months notice of whether it wishes to exercise the option (cl.21(7) and (8) CPRT).					
Notice of last date for exercising option							
If a lease contains an option exercisable by the tenant, the landlord must notify the tenant not > 12 nor < 6 months before the last date on which an option can be exercised failing which the last date for exercising the option is extended until 6 months after notice has been given and the lease is extended accordingly unless it is terminated by the tenant at any time after the lease would otherwise have ended (s.28 RLA).	For leases entered into from 3 April 2006, if the lease provides for an option to renew, the landlord must give the tenant written notice of the last date for exercising the option. The notice must be given between 6 months and 2 months before the date by which the tenant must exercise the option (s.46 RSLA).	No provision.	No provision.	If a lease contains an option exercisable by the tenant, the landlord must notify the tenant not > 12 nor < 6 months before the last date on which an option can be exercised failing which the last date for exercising the option is extended until 6 months after notice has been given and the lease is extended accordingly unless it is terminated by the tenant at any time after the lease would otherwise have ended (s.13C RSA).	No provision.	No provision.	No provision.
Notice of term end							
If a lease does not contain an option, not > 12 nor < 6 months before the term end, the landlord must either: (a) offer the tenant a renewal on terms specified in writing; or (b) advise the tenant that no renewal is available, (s.64(1) and (2) RLA). An offer cannot be revoked for 60 days (s.64(3) RLA). If the landlord does not comply, the lease continues until 6 months notice has been given unless it is terminated by the tenant with effect from any time	For leases entered into before 3 April 2006, if the lease does not contain an option, the tenant has right to request renewal (by notice not < 2 months and not > 1 year before the end of the lease) and the landlord has an obligation to respond in the approved form by the later of 1 month after tenant's notice or 6 months before the existing lease ends. If the landlord fails to respond, the tenant is entitled to a 6 month holdover (s.46 RSLA). For leases entered into from 3 April 2006, if the lease does not contain an option, the landlord must between 6	Not < 3 months before the expiry of a lease, the property owner must give the tenant a notice stating: (a) the conditions on which the property owner is prepared to renew the lease; (b) that the lease will not be renewed; (c) that the tenant may continue as a periodical tenant; or (d) that the tenant may continue as a monthly tenant for the time being on terms to be agreed, (cl.29(2) CPRT). If the property owner fails to give the information, the	Between 6 and 12 months before the lease ends, the landlord must by written notice to the tenant either: (a) offer the tenant a renewal of the lease on terms specified in the notice; or (b) inform the tenant that it does not propose to offer a renewal of the lease. A landlord is not required to give notice to the tenant towards the end of the lease if, either: (a) the tenant has a right of renewal; or (b) the tenant has preferential rights, which apply for	If a retail shop lease does not provide whether directly or by operation of s.13 (statutory option) an option for renewal and the tenant within 12 months before the expiry of the lease in writing requests from the landlord a statement of the intentions of the landlord as to renewal the landlord must within 30 days after receiving the request: (a) give a statement in writing of the landlord's intentions to the tenant; and (b) where he intends to offer a renewal, specify in that statement the terms	If a retail shop lease contains no option to renew, the landlord must between 6 and 12 months before a lease ends, give the tenant notice that it: (a) intends to offer the tenant a renewal or extension of the lease on terms specified in the notification (including terms as to rent); or (b) does not propose to offer the tenant a renewal or extension of the lease, (s.44(1) RLA). An offer cannot be revoked for 1 month after being made (s.44(2) RLA).	The tenant may, in writing, ask the landlord to tell the tenant whether the landlord intends to renew the lease if: (a) for a lease for longer than 1 year - the lease is due to end in not less than 6 months and not longer than 1 year; or (b) in any other case - the lease is due to end in not less than 3 months and not longer than 6 months. If the landlord receives a request the landlord must tell the tenant in writing within 1 month after the request day that:	Between 6 and 12 months before the lease ends, the landlord must by written notice to the tenant either: (a) offer the tenant a renewal of the lease on terms specified in the notice; or (b) inform the tenant that it does not propose to offer a renewal of the lease. If the landlord does not give the requisite notification, the tenant may serve its own notice requesting an extension. If the tenant serves that notice, the existing lease is extended until the end of 6 months after the landlord

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
after the lease would otherwise have ended (ss.64(4) and (5) RLA).	and 12 months before the lease ends (or for leases less than 1 year between 3 and 6 months before the lease ends), give the tenant notice: (a) offering a renewal or extension on terms specified in the notice; or (b) informing the tenant that no renewal or extension is available, (s.46AA RSLA). An offer cannot be revoked for 1 month (s.46AA(3) RSLA). If the landlord fails to notify the tenant, before the lease expires the tenant may give written notice to the landlord requiring an extension of the lease until 6 months after the landlord gives the notification required (s.46AA(4) and s.46AA(4A) RSLA). The tenant may terminate the lease before this extended period ends, on at least 1 months notice (s.46AA(5) RSLA).	term of the lease can be extended at the election of the tenant until 3 months after that information is given. Tenant's election must however, be exercised within 2 weeks after the last date on which a property owner may give the notice (cl.29 (6) and (7) CPRT).	shopping centre leases (see below), (s.20J RCLA). An offer cannot be revoked for 1 month (s.20J RCLA). If the landlord does not give the requisite notification, the tenant may serve its own notice requesting an extension. If the tenant serves that notice, the existing lease is extended until the end of 6 months after the landlord gives the requisite notice (but the tenant may terminate the lease by 1 months notice during that extended period) (s.20J RCLA). If the lease is for 12 months or less, the periods of 6 and 12 months are reduced by 1 half (s.20J RCLA).	and conditions proposed, (s.13B(1) RSA). A landlord is not required to specify the rent proposed until 3 months prior to expiry (s.13B(2) RSA). A landlord is bound by an offer made if the tenant, within 30 days after receiving the offer, accepts the offer in writing (s.13B(4) RSA). Where the landlord fails to comply with s.13B(1) or (2), the expiry of the term of the lease is deemed to be extended by a period equal to the period of non-compliance (s.13B(3) RSA). A lease may be terminated during a period by which it is deemed to be extended under s.13B(3) by the tenant giving written notice to the landlord (s.13B(4A) RSA). If a lease is renewed because of s.13B(3) after the term of the lease ends, the lease for the further term commences on the expiry of the previous lease (s.13B(4C) RSA).	If the landlord fails to notify the tenant, as required, the retail shop lease is extended until 6 months after the landlord gives the notification required but only if the tenant requests an extension by notice in writing before the lease expires (s.44(3) RLA). During such extension of the lease, the tenant may terminate the lease by giving at least 1 months written notice of termination to the landlord (s.44(4) RLA). If a retail shop lease is for 12 months or less, the notification must be given between 3 and 6 months before the lease ends (s.44(6) RLA). The landlord is prohibited from publicly advertising the availability of retail premises during the term unless: (a) an offer for renewal is not accepted by the tenant; (b) the tenant is told that there will be no renewal and is not otherwise entitled to remain in possession; (c) the tenant informs the landlord that it does not wish to negotiate to renew; (d) the tenant agrees in writing to vacate or has vacated; or (e) the tenant consents in writing, (s.44A RLA).	(a) the landlord proposes to renew the lease; or (b) the landlord does not propose to renew the lease, (s.107 LCRA). If the landlord fails to notify the tenant the lease is extended by a period equal to the period starting 1 month after the request day and ending when the landlord gives the tenant a notice (s.107 LCRA).	gives the requisite notice (but the tenant may terminate the lease by 1 months notice during that extended period) (s.60 BTA). If the lease is for 12 months or less, the periods of 6 and 12 months are reduced by 1 half (s.60 BTA).

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
Implementation of preferential right							
No provision.	No provision.	No provision.	The tenant of a shopping centre lease has a preferential right to extend the term of a lease. The landlord must presume that the tenant requires a renewal or extension of the term unless the tenant has otherwise notified the landlord in writing within 12 months of the end of the term (s.20D RCLA). The right does not arise if: (a) the lease is for 6 months or less; (b) the lease contains a certified exclusionary clause (lawyer's certificate); (c) the lease is a sublease, and the term of the headlease would be exceeded; or (d) the lease is of a class excluded by regulation, (s.20C(2) RCLA). The preferential right need not be given if the: (a) landlord requires a change in the tenancy mix; (b) tenant is guilty of a substantial breach or persistent lease breaches; (c) landlord requires vacant possession for the purposes of demolition etc; (d) landlord does not propose to relet the premises within 6 months of the end of the term; (e) renewal of the lease would substantially disadvantage the landlord; or (f) tenant's right of preference is excluded	No provision.	No provision.	No provision.	The tenant under a shopping centre lease which commenced on or after 1 July 2002 has a preferential right to renew or extend the term of its lease. The landlord must presume the tenant requires a renewed or extended lease unless the tenant has notified the landlord in the last 12 months of the lease that the tenant does not want to renew or extend (s.108 LCRA). Preferential rights need not be given if: (a) it would be substantially more advantageous for the landlord to lease the premises to another person; (b) the landlord wants to change the tenancy mix; (c) the tenant has breached the lease substantially or persistently; (d) the landlord requires the premises for its own use and does not propose to re-let them for at least 6 months; or (e) the tenant has agreed to a certified exclusionary clause in the lease after taking independent legal advice to waive its preferential rights, (s.108 LCRA).	No provision.

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
			by regulation, (s.20D RCLA). Landlord must between 6 and 12 months before the end of a term (or in the case of a 1 year lease between 3 and 6 months) begin negotiations with the tenant for renewal and must: (a) make a written offer to renew on terms no less favourable than those of the proposed new lease to be offered to any third party; and (b) provide the existing tenant with a copy of the proposed new lease and disclosure statement, (s.20E RCLA). The landlord's offer must remain open and be accepted in writing by the tenant within 10 working days (s.20E RCLA). If a tenant in a shopping centre does not have a right of preference, the landlord must, at least 6 months but not > 12 months before the end of the lease, by written notice: (a) notify the tenant of that fact; and (b) state why there is in the circumstances no right of preference, (s.20F RCLA). If the term of the lease is 12 months or less, the periods of 6 and 12 months are reduced by 1 half (s.20F RCLA). The right of preferential treatment includes that the landlord must negotiate, in good faith, with the tenant with a view to entering into a new lease for the shop premises				

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
			(s.20E RCLA). If the landlord fails to negotiate or give notification as required, the tenant may serve its own notice on the landlord before the lease ends, requesting an extension of the lease. The lease is then extended until 6 months after the landlord begins the requisite negotiations or gives the required notice (but the tenant may terminate by giving 1 months notice during the extended period) (s.20G RCLA).				
Certified exclusionary clause							
No provision.	No provision.	No provision.	A certified exclusionary clause may be used to: (a) exclude the statutory 5 year term; or (b) exclude the tenant's right of preferential treatment, in a shopping centre, (s.20K RCLA). A certified exclusionary clause comprises the 3 requirements that: (a) there be a provision in the lease which excludes the 5 year term/right of preferential treatment; (b) a lawyer (acting for the tenant) has explained the effect of that provision to the tenant (including that the lawyer is given apparently credible assurances that the tenant is not acting under coercion or undue influence); and	No provision.	No provision.	A certified exclusionary clause is a provision of a lease in relation to which a certificate signed by an independent lawyer is endorsed on the lease to the effect that before the lease was signed and at the tenant's request, the lawyer explained the effect of the provision and how s.108 (relating to premises in the retail area of a shopping centre where the landlord proposes to re-lease the premises and the tenant wants to renew or extend the lease) would apply in relation to the lease if the lease did not include the provision (s.111 LCRA).	No provision.

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
			(c) the lawyer signs a certificate which is then endorsed on (attached as part of) the lease, (s.20K RCLA).				
Liability for costs associated with lease							
A tenant is not liable for: (a) the landlord's lease preparation expenses; (b) expenses incurred in obtaining a mortgagee's consent; or (c) the landlord's costs of complying with the RLA, (s.51 RLA). However, a tenant may be liable for some landlord's costs with respect to an assignment or sublease (s.51 RLA).	A tenant is not liable for the landlord's lease preparation expenses. However, the tenant may be liable for: (a) survey fees(s.48 RSLA); (b) expenses incurred in obtaining a mortgagee's consent (s.48 RSLA); (c) stamp duty (s.48 RSLA); (d) lease registration fees (s.48 RSLA); and (e) landlord's costs with respect to an assignment (s.39(2) RSLA). For leases entered into from 3 April 2006, tenants are liable for the landlord's reasonable legal expenses incurred in responding to a request by the tenant for: (a) a variation to the lease; and (b) consent to a sublease or licence, (s.24(1)(c) RSLA).	Each party must pay its own costs incurred in the preparation of a lease. The property owner may charge the tenant the cost of any alterations that the tenant requires to be made to the lease during negotiations (cl.8(2) CPRT). A prospective tenant who withdraws from lease negotiations may be responsible for the property owner's lease costs where: (a) the prospective tenant gives a written authority for the preparation of a lease; and (b) the authority contains a provision stating that if the prospective tenant withdraws from the lease negotiations, the prospective tenant is responsible for the costs of preparing the lease, (cl.8(3) CPRT). The parties are to negotiate the payment of disbursements such as stamp duty and the cost of obtaining any mortgagees consent (cl.8(4) CPRT).	A tenant can be liable to pay half of the landlord's preparatory costs and the full amount of any stamp duty and government fees but only when provided with a copy of any account given to the landlord for the expenses (s.14 RCLA). Preparatory costs include mortgagee production and consent fees and the costs of attendances on the tenant by the landlord or its lawyer or a registered conveyancer (s.14 RCLA). This section does not limit recovery of preparatory costs from a person who subsequently withdraws from negotiations (s.14 RCLA).	A tenant is not liable for: (a) the landlord's lease preparation expenses; (b) expenses incurred in obtaining a mortgagee's consent; or (c) the landlord's costs of complying with the RSA, (s.14B RSA). However, a tenant may be liable for a landlord's costs with respect to an assignment or sublease (s.14B RSA).	In respect of a any lease entered into on or after 1 July 2005, a landlord is prohibited from recovering the costs of preparing and entering into the lease from the tenant unless the costs are incurred in connection with making an amendment to a proposed lease that was requested by a tenant (s.14 RLA).	A tenant cannot be required to pay the landlord's costs. 'Landlord's costs' means lease preparation costs, stamp duty and mortgagee's consent fees (s.23 LCRA). If a party requires the lease to be registered, that party must pay any fee for registration of the lease.	A tenant is not liable to pay any amount to the landlord in respect of legal or other expenses incurred by the landlord in connection with preparation of a lease unless the landlord provides the tenant with a copy of accounts in respect of those expenses and the amount of those expenses or the method of calculation is included in the landlord's disclosure statement (s.23 BTA). A tenant is not liable to pay > a reasonable sum in respect of lease preparation costs (s.23 BTA). A landlord is entitled to recover a reasonable sum in respect of lease preparation costs from a person who withdraws from lease negotiations (s.23 BTA).
Definition of 'outgoings'							
'Outgoings' means a landlord's outgoings on account of: (a) the expenses directly attributable to the operation, maintenance or repair of: (i) the building in	'Outgoings' means: (a) reasonable expenses directly attributable to the operation, maintenance or repair of the centre or building and areas used in association therewith; and	No definition.	'Outgoings' means the expenses of operating, repairing or maintaining the retail shop or a retail shopping centre (including rates, taxes, levies, premiums or charges payable by the landlord) but does not include	'Operating expenses' means expenses in operating, repairing or maintaining: (a) a building of which a retail shop forms the whole or a part; or (b) if the retail shop is in a retail shopping centre, the building of which	'Outgoings' means: (a) reasonable expenses directly and reasonably attributable to the operation, maintenance or repair of the centre or building and areas used in association	'Outgoings' means: (a) reasonable expenses of repairing or maintaining, or directly related to the operation of, the building or shopping centre in which the premises are located;	'Outgoings' means a landlord's outgoings on account of: (a) the expenses directly attributable to the operation, maintenance or repair of: (i) the building in

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which the retail premises are located or any other building or area owned by the landlord and used in association with the building in which the retail premises are located; or (ii) in the case of retail premises in a retail shopping centre, any building in the centre or any areas used in association with a building in the centre; or (b) rates, taxes, levies, premiums or charges payable by the landlord because the landlord is: (i) the owner or occupier of a building referred to in paragraph (a) or of the land on which such a building is erected; or (ii) the supplier of a taxable supply in respect of any such building or land, (s.3 RLA).	(b) charges, levies, premiums, rates or taxes (including GST) payable by the landlord, (s.7(1) RSLA). If GST is included in the definition of 'outgoings', it is a 'specific outgoing' (s.24A(2)). Landlords are not required to supply tenants with estimates of specific outgoings (s.37 RSLA).		outgoings directly proportional to the level of a tenant's consumption or use for which the tenant is required to reimburse the landlord under the lease (s.3(1) RCLA).	a retail shop forms the whole or a part and the common area, and includes strata levies, (s.12(3) RSA).	therewith; and (b) charges, levies, premiums, rates or taxes (including GST) payable by the landlord, (s.3 RLA).	(b) rates, taxes, levies or other statutory charges payable by the landlord; (c) (for shopping centres), the reasonable costs of advertising or promoting the shopping centre; (d) expenses for collecting statistical information, (s.70 LCRA).	which the retail shop is located; or (ii) in the case of retail shops in a retail shopping centre, any building in the centre or any areas used in association with a building in the centre; or (b) rates, taxes, levies, premiums or charges payable by the landlord because the landlord is the owner or occupier: (i) of the building in which the retail shop is located; and (ii) if the retail shop is in a retail shopping centre - of any building in the retail shopping centre or the land on which the building is erected, (s.5 BTA).

Liability for outgoings

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A tenant is not liable to pay an amount to a landlord in respect of outgoings except in accordance with provisions of the lease that specify: (a) the outgoings that are to be regarded as recoverable; (b) in a manner consistent with the Regulations, how the amount of those outgoings will be determined and how they will be apportioned to the tenant; and (c) how those outgoings or any part of them may be recovered by the landlord from the tenant, (s.39(1) RLA). The amount of outgoings recoverable from a retail shopping centre tenant is limited to the proportion of the total outgoing which the lettable area of the premises bears to the total lettable area of the premises which benefit from the outgoing (s.39(2) RLA). A tenant in a retail shopping centre is not liable to contribute towards an outgoing that benefits specific premises unless the tenant's premises benefits from the outgoing (s.40 RLA).	If a tenant is liable for a share of outgoings, a lease must specify: (a) outgoings payable by the tenant; (b) how the tenant's share is calculated; and (c) how the tenant's share will be recovered, (s.37 RSLA). Liability for outgoings incurred outside core trading hours is limited (s.53 RSLA). Tenant's share of non-specific outgoings must be based on the total floor area of the retail premises as a percentage of the total floor area of all the premises sharing the benefit of the outgoing (s.38 RSLA).	In relation to outgoings that are directly attributable to the operation of premises, a lease must state in detail: (a) which outgoings are recoverable and how unforeseen outgoings are to be dealt with; (b) the method used to calculate outgoings payable by the tenant; and (c) the time for payment of outgoings, (cl.18(1) CPRT). The proportion of outgoings payable by a tenant may be calculated using either of the following methods: (a) the ratio of the lettable area of the tenant's premises to the lettable area of all lettable premises sharing the benefit of the outgoing; or (b) the ratio of the assessed annual value of the tenant's premises to the assessed annual value of all lettable premises sharing the benefit of the outgoing, (cl.18(3) CPRT).	If a tenant is liable for a share of outgoings, a lease must specify: (a) outgoings payable by the tenant; (b) how the tenant's share is calculated; and (c) how the tenant's share will be recovered, (s.26 RCLA). For a lease in a shopping centre, a tenant is not liable to contribute to non-specific outgoings: (a) unless the shop enjoys or shares the benefit of that outgoing; or (b) in excess of the ratio that the lettable area of the shop bears to the total lettable area of all shops enjoying the benefit of the outgoing, (s.34 RCLA).	A tenant is not liable to pay operating expenses if the lease does not specify: (a) how the amount is to be determined and, where applicable, apportioned to the tenant; and (b) how and when that amount is to be paid, (s.12(1)(a) RSA). Subject to section 12(1e), the proportion of operating expenses payable by a tenant must not exceed the relevant proportion unless the Tribunal approves a greater proportion (s.12(1)(b) RSA). The relevant proportion is the proportion that the lettable area of the premises bears to the total lettable area of the retail shopping centre (s.12(3) RSA). If the premises is part of a group of premises and an operating expense is incurred as a result of other premises in the group of premises opening outside of standard trading hours, the landlord cannot recover such expenditure from premises not open outside of standard trading hours (s.12(1)(c) RSA).	If a tenant is liable for a share of outgoings, the retail shop lease must specify: (a) each item of outgoings to which the tenant is required to contribute; (b) how the tenant's share is to be calculated and apportioned; and (c) how the tenant's share will be recovered, (s.22 RLA). A tenant is not required to contribute to outgoings not specifically referrable to the shop (s.30 RLA).	A tenant is not liable to pay any amount to a landlord in respect of outgoings except: (a) in accordance with the provisions of the lease which must specify their nature, how they are determined, how they are apportioned and how they are recoverable; and (b) where their nature is specified in a properly given disclosure statement, (s.71 LCRA). Payment of outgoings (and rent) must not commence before the date of handing over the premises and not before all works to be provided by the landlord are substantially provided (ss.48 and 69 LCRA). Under a shopping centre lease, non-specific outgoings are not recoverable unless referable to the premises, in which case recovery is limited to the proportion of lettable area of the premises to the total lettable areas of all the premises in the centre to which the outgoings are referable (s.134 LCRA). An outgoing is 'referable' to premises if the premises benefit from or share the benefit resulting from the outgoings (s.134 LCRA).	A tenant is not liable to pay an amount to a landlord in respect of outgoings except in accordance with provisions of the lease that specify: (a) the outgoings that are to be regarded as recoverable; (b) how the outgoings will be determined and apportioned to the tenant; and (c) how the outgoings may be recovered by the landlord from the tenant, (s.38 BTA).

Prohibited outgoings

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Tenants cannot be asked to contribute to: (a) capital costs (s.41 RLA); (b) depreciation (s.42 RLA);	Tenants cannot be asked to contribute to: (a) land tax; (b) capital expenditure; (c) a depreciation or sinking fund;	Tenants cannot be asked to contribute to: (a) capital expenditure; (b) a depreciation or a sinking fund; (c) any contribution by	Outgoings do not include costs associated with the advertising or promotion of a retail shop or centre for the purposes of this section (s.26 RCLA).	Tenants cannot be asked to contribute to: (a) operating expenses not specifically referable to any particular shop (s.12(1e)(a) RSA);	Tenants cannot be asked to contribute to: (a) the cost of any finishes, fixtures, fittings, equipment or services unless the	Tenants can only be required to refit premises or to contribute to finishes, fixtures, fittings, equipment and services that are specified in the disclosure	Outgoings do not include the costs associated with the advertising or promotion of a retail shop, retail shopping centre or of a business carried on there

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(c) contributions to a sinking fund to provide for capital works (s.43 RLA); (d) interest or other charges on a landlord's borrowings (s.44 RLA); or (e) land tax from 1 July 2003, (s.50 RLA). See also 'Land Tax' and 'Management Fees' (below).	(d) loss of income insurance; (e) a landlord's contributions to a merchants' association, promotion or other such fund; (f) interest and charges on money borrowed by the landlord; (g) any other item prescribed by regulation, (s.7 RSLA).	the property owner to promotion or advertising; (d) interest on money borrowed by the property owner; (e) loss of income insurance; (f) outgoings not specified in the lease that were reasonably foreseeable at the time the lease was entered into, (cl.18(2) CPRT).	Depreciation and capital expenditure are not recoverable (s.13 RCLA). See also 'Land Tax' (below).	(b) an amount in excess of an amount calculated by multiplying the total amount of that operating expense by the proportion that the lettable area of the shop bears to the aggregate of the lettable areas of all the retail shops in the retail shopping centre to which the operating expense is referable without the approval of the Tribunal (s.12(1e)(b) RSA); (c) the costs of the construction of a retail shopping centre (s.12(2)(a) RSA); (d) any extension of a retail shopping centre or structural improvement to the centre (s.12(2)(b) RSA); or (e) any plant or equipment that is or becomes the property of the landlord of a retail shopping centre (s.12(2)(c) RSA).	tenant's requirement to contribute was disclosed in the landlord's disclosure statement (s.12 RLA); (b) capital expenditure (s.23 RLA); (c) depreciation (s.24 RLA); (d) interest and charges incurred by a landlord on borrowings (s.24A RLA); or (e) rent and other costs associated with land not used by or for the benefit of the shopping centre (s.24B RLA). Sinking funds to fund major items of repair or maintenance for which contributions are required are limited to: (a) repair or maintenance of a building or plant and equipment of a building in which the retail shop is situated; and (b) buildings, plant and equipment and areas used in association with the shopping centre, (s.25 RLA). A tenant is not liable to contribute an amount to a sinking fund: (a) that is > 5% of the total landlord's estimated outgoings for the year; (b) if the amount outstanding to the credit of the sinking fund > $250,000, (s.25A RLA). It is an offence if a landlord contravenes this section. Maximum penalty of $5,500 (s.25A RLA).	statement (s.75 LCRA). Depreciation costs are not recoverable (s.77 LCRA). Tenant cannot be required to pay any amount in respect of the capital costs of the building or shopping centre in which the premises are located (s.76 LCRA).	(s.38(2) BTA). Leases cannot require the tenant to pay an amount in respect of rent and other costs associated with unrelated land, namely land on which the building or retail shopping centre is not situated (s.34 BTA). Non-specific outgoings are not recoverable from the tenant of a retail shopping centre (s.42 BTA). Depreciation and capital expenditure are not recoverable (ss.43 & 44 BTA). Interest and charges incurred by a landlord on borrowings are not recoverable (s.45 BTA). Sinking funds to fund major items of repair or maintenance for which contributions are required are limited to: (a) repair or maintenance of a building or plant and equipment of a building in which the retail shop is situated; and (b) buildings, plant and equipment and areas used in association with a shopping centre, (s.35 BTA). Tenant not liable to contribute an amount to a sinking fund: (a) that is >5% of the total landlord's estimated outgoings for year; or (b) if the amount outstanding to the credit of the sinking fund exceeds $250,000, (s.36 BTA).

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					Landlords must keep full and accurate accounts of all money received or held by the landlord and provide an annual sinking fund statement (s.25 RLA). If the building or shopping centre is destroyed, demolished or ceases to operate, the landlord must repay to each tenant liable to contribute to the sinking fund that proportion of the total amount outstanding to the credit of the sinking funding that is equal to the proportion that the lettable area of the retail shop bears to the total lettable area of all shops which are required to contribute to the fund (repayment only applies to persons who were landlord and tenant under the lease immediately before the destruction or demolition of the building or immediately before the shopping centre ceased to operate) (s.25B RLA).		If the building or shopping centre is destroyed, demolished or ceases to operate, the landlord must repay to each tenant liable to contribute to the sinking fund that proportion of the total amount outstanding to the credit of the sinking funding that is equal to the proportion that the lettable area of the retail shop bears to the total lettable area of all shops which are required to contribute to the fund (repayment only applies to persons who were landlord and tenant under the lease immediately before the destruction or demolition of the building or immediately before the shopping centre ceased to operate) (s.37 BTA).

Land tax

With effect from 1 July 2003, land tax can not be recovered (s.50 RLA).	Tenants cannot be asked to contribute to land tax (s.7(3) RSLA).	No provision.	Land tax cannot be recovered from any tenant (s.30 RCLA).	Landlord can recover relevant proportion of notional land tax (s.12(1g) RSA). 'Notional Land Tax' means land tax and metropolitan region improvement tax assessed on a single ownership basis (s.12(3) RSA).	The liability of the tenant to contribute to land tax payable by the landlord is not to exceed the amount of that liability had the amount of land tax payable by the landlord been assessed on the basis that: (a) the land was the only land owned by the landlord; (b) the land was not subject to a special trust; and (c) the landlord was not a company classified under s.29 of the *Land Tax Management Act 1956* (NSW) as a non-concessional company, (s.26 RLA).	The landlord may recover rates, taxes, levies or other statutory charges payable by the landlord including land tax (s.70(1)(b) LCRA).	No provision.

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Management fees							
Management fees are not recoverable unless: (a) the fee relates to the management of the building or centre in which the premises are located; and (b) the lease or disclosure statement specifies the amount of the management fee and the rate or method by which it is calculated, (s.49(1) RLA). If a tenant is obliged to contribute to management fees, the amount cannot exceed the previous year's fees increased by the CPI (s.49(2) RLA), except for premises in a shopping centre if the majority of retail tenants agree (s.49(4) RLA). The cap on increases in management fees does not apply to salaries or other administrative costs related to the operation of the building or centre (s.49(6) RLA).	No provision.	No provision.	No provision.	Management fees are not recoverable by a landlord (s.12(1f) RSA).	No provision.	The landlord may recover outgoings the nature of which are stated in the disclosure statement including management fees (ss.70(1)(a) and 71 LCRA).	No provision.
Estimate and statement of outgoings							
A tenant is not required to contribute to any outgoings in respect of which an estimate is required until the tenant is given the estimate (s.46(4) RLA). A landlord must: (a) provide a written and itemised estimate of outgoings to which the tenant must contribute before a lease is entered into and at least 1 month before the start of each outgoings period (s.46(2) and (3) RLA);	A landlord must provide an annual estimate in the approved form of outgoings (but not specific outgoings) to which the tenant must contribute when the lease is entered into and at least 1 month before the start of each outgoings period (s.37(2) RSLA). The landlord must within 3 months after the end of each accounting period give the tenant an audited annual statement in the approved form of the outgoings (s.37(2) RSLA).	If a tenant requests, the property owner must provide a detailed list of estimated recoverable outgoings for the next accounting year for the premises at least 1 month before the start of the accounting year and a statement showing expenditure for a specified period of the accounting year (cl.18(6) CPRT). Tenant may require the property owner to appoint an auditor to provide an audit report in relation to	A tenant must be given: (a) a written estimate of the tenant's liability for outgoings before a lease is entered into and 1 month prior to each accounting period; (b) an auditor's report within 3 months after the end of each accounting period (except where the only outgoings covered are statutory rates and charges and insurance), (ss.31 & 32 RCLA).	A tenant is not required to make any payment of operating expenses until at least 1 month after the landlord has given the tenant annual estimates of expenditure under each item of operating expenses in respect of the year (s.12(1)(d)(i) RSA). The landlord is required to give the tenant an 'operating expenses statement' that details all expenditure by the landlord in each accounting period of the landlord during the	The tenant may withhold payment of contributions for outgoings if the landlord has failed for 10 business days to give the tenant the estimate or outgoings statement after being requested to do so by the tenant. The tenant must pay the withheld contributions within 28 days after receiving the estimate or statement (s.28A RLA). The landlord must: (a) provide a written and	Tenant must be given: (a) a written estimate itemising the outgoings in the disclosure statement at least once each year and at least 1 month before the start of each accounting period; (b) a statement of actual outgoings at least once a year and within 1 month after the end of the relevant accounting period (s.65 LCRA); (c) a written report (usually audited)	The tenant must be given a written estimate of the tenant's liability for outgoings before a lease is entered into and 1 month prior to each accounting period. The landlord must make available a written expenditure statement of the outgoings to which the tenant contributes under the lease. The estimate of outgoings must be made available to the tenant: (a) at least twice in each of the landlord's

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and (b) at least once during each accounting period make available to a tenant a written statement in accordance with relevant accounting principles detailing the landlord's expenditure (ss.47(3) and (5) RLA). A landlord must provide to a tenant within 3 months of the end of each outgoings period a written statement in accordance with relevant accounting principles which is: (a) accompanied by a report prepared by a registered company auditor confirming whether in the auditor's opinion, the statement correctly states the landlord's expenditure and each individual outgoing that comprises > 10% of the total amount of outgoings; or (b) if outgoings are limited to rates, insurance, fire services property levies, owners corporation fees and other outgoings prescribed by regulation (none have been prescribed to date), accompanied by receipts, (ss.47(3), (5) and (6) RLA). When auditing the outgoings, an auditor must give the tenant a reasonable opportunity to make a written submission to the auditor on the accuracy of the outgoings statement (s.47(7) RLA).	The outgoings shown in the annual estimate/statement must be itemised so that the amount for each item is not > 5% of the total outgoings shown, unless the amount shown is for: (a) a charge, levy, rate or tax payable under an Act; or (b) a particular outgoing that can not be broken up to comply (s.37(4) RSLA). The audited annual statement must: (a) be prepared by an approved auditor in accordance with approved accounting standards; (b) contain the auditor's opinion on whether the statement presents fairly the landlord's outgoings in accordance with the landlord's financial records and the RSLA; (c) compare the annual estimates of the landlord's outgoings with the amount actually spent by the landlord; and (d) compare the total amount actually spent by the landlord with the total amounts actually paid by tenants, (s.37 RSLA). For leases entered into from 3 April 2006, the audited statement must be prepared by an auditor registered under the *Corporations Act 2001* (Cth), in accordance with auditing standards generally accepted in the Australian accounting profession (s.37(5) RSLA).	the outgoings within 3 months of the end of each accounting year. The cost of the audit is to be paid by the tenant if the statement is found to be at least 95% accurate (cl.19(1) and (4) CPRT).		term of the lease on account of operating expenses to which the tenant is required to contribute (s.12(1)(d)(ii) RSA). A landlord must provide to a tenant within 3 months after the end of the accounting period to which it relates an operating expenses statement in accordance with relevant principles and disclosure requirements of the applicable accounting standards which is accompanied by a report prepared by a registered company auditor as to whether or not: (a) the operating expenses statement correctly states the landlord's expenditure; and (b) the total amount of estimated operating expenses for the period exceeded the total expenditure by the landlord in respect to those operating expenses, (s.12(la) RSA). If the landlord fails to give a statement satisfying the above requirements, the Tenant is not liable to pay the operating expenses until the landlord has complied (s.12(1d) RSA).	itemised estimate of outgoings to which the tenant must contribute before a lease is entered into and at least 1 month before the start of each accounting period; (b) produce a written outgoings statement in accordance with relevant accounting principles detailing the landlord's expenditure in each accounting period and must provide the written statement to the tenant within 3 months after the end of the accounting period to which it relates; (ss.27 & 28 RLA). The written outgoings statement must be accompanied by a report prepared by a registered company auditor confirming whether or not the statement correctly states the landlord's expenditure and whether or not the total amount of estimated outgoings exceeded the total actual outgoings (s.28(e) and (f) RLA). The tenant must be given the opportunity to make written submissions to the auditor on the accuracy of the landlord's proposed outgoings statement and the auditor must consider any written tenant submissions (s.28(2) and (3) RLA). The written outgoings statement need not be accompanied by an	within 3 months after the end of the relevant accounting period (s.66 LCRA).	accounting periods during the term of the lease and (b) in each case must be made available within 1 month after the end of the 6 month period to which it relates, (s.39 BTA).

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					auditor's report if the statement does not relate to any outgoings other than: (a) land tax; (b) water; (c) sewerage and drainage rates and charges; (d) local council rates and charges; (e) insurance and strata levies, and it is accompanied by copies of proof of payment (s.28(h) RLA). In relation to shopping centre leases, the estimate of outgoings is to include a broken down statement of: (a) management fees; (b) cleaning costs; and (c) other prescribed particulars, (s.27(c) RLA), and the outgoings statement is to include a statement of the total: (a) management fees paid; (b) cleaning costs paid; and (c) other prescribed particulars, (s.28(b1) RLA).		
Adjustment of contributions to outgoings							
An adjustment of estimated as against actual outgoings must take place within the earlier of: (a) 1 month after a final outgoings statement is provided; and (b) 4 months after the end of an accounting period, (s.48(3) RLA). In the final adjustment, the tenant is only required to pay outgoings properly and reasonably incurred by the landlord (s.48(4)(b) RLA).	No provision.	A lease may provide for adjustments to be made at the end of the period for which estimated outgoings payments have been made (cl.18(5)(b) CPRT).	Adjustment between actual and estimated expenditure must be made within 3 months after the end of each accounting period (s.33 RCLA). Contributions by a tenant toward repairs and maintenance are not taken into account where such contributions are paid into a sinking fund (s.33 RCLA).	No provision.	Adjustments for actual outgoings must be made within 1 month after an outgoings statement is issued to the tenant and must in any event take place within 4 months after the end of that period (s.29(a) RLA). Contributions by a tenant toward repairs and maintenance are not taken into account where such contributions are paid into a sinking fund (s.29(c) RLA).	Adjustments for actual outgoings must be made within 3 months after the end of the relevant accounting period (s.67 LCRA).	Adjustments for actual outgoings must be made within 1 month after an outgoings statement is issued to the tenant and must in any event take place within 4 months after the end of that period (s.41 BTA). Expenditure by the landlord in respect of repairs and maintenance are not taken into account where such expenditure is in respect of contributions paid into a sinking fund (s.41 BTA).

Promotion and advertising funds

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
A shopping centre tenant cannot be required to undertake advertising or promotion of a tenant's business, but can be required to reimburse the landlord for advertising or promotion costs (s.69 RLA). If a shopping centre tenant is required to contribute to advertising or promotion costs, the landlord must: (a) at least 1 month before the start of each accounting period provide to the tenant a written estimate of the landlord's proposed expenditure on advertising and promotion (s.70 RLA); (b) at least once during each accounting period make available to the tenant a written statement in accordance with relevant accounting principles detailing the landlord's expenditure on advertising and promotion (ss.71(3) and (4) RLA); and (c) within 3 months of the end of each accounting period, provide to the tenant a written statement in accordance with relevant accounting principles which is accompanied by a statement from a registered company auditor confirming whether the statement correctly states the landlord's expenditure, (s.71(3)(c) RLA). Any unspent tenant	A landlord must provide an annual estimate in the approved form of outgoings (which includes promotion amounts) to which the tenant must contribute when the lease is entered into and at least 1 month before the start of each outgoings period (s.37(2) RSLA). The landlord must within 3 months after the end of each accounting period give the tenant an audited annual statement in the approved form of the outgoings (which includes promotion amounts) (s.37(3) RSLA). For leases entered into from 3 April 2006, the audited statement must be prepared by an auditor registered under the *Corporations Act 2001* (Cth), in accordance with auditing standards generally accepted in the Australian accounting profession (s.37(5) RSLA). If under the lease the promotion amounts are not treated as outgoings, the landlord must only apply them for promotion and advertising directly attributable to the centre (this may include joint promotions and advertising with other centres) (s.41 RSLA).	In connection with a shopping centre lease, a property owner cannot charge the tenant for advertising or promotion costs incurred in the promotion of the property owner only (cl.34(1) CPRT). If advertising is charged, an annual marketing plan and budget must be provided (cl.34(2) CPRT). If a tenant requests, the property owner is to provide an unaudited advertising, promotion and expenditure statement within 1 month of the end of each 6 months in an accounting year (cl.34(3) CPRT). Within 3 months of the end of each accounting year, the property owner is to provide an audited report showing how promotion costs have been charged and expended (cl.34(5) CPRT). A property owner cannot require a tenant to undertake advertising in addition to the tenant's contribution to outgoings for advertising and promotion specified in the lease (cl.34(8) CPRT).	A lease provision is void to the extent that it requires the tenant to advertise or promote the tenant's business. However, landlords can require that tenants make a payment toward costs incurred or to be incurred by the landlord in advertising or promotion of the centre (s.53 RCLA).	In a retail shopping centre lease, the purpose of any fund must be specified in the lease (s.12A(2) RSA). All payments to a fund must be paid into the landlord's interest bearing account (s.12A(3)(a) RSA). The landlord may only apply amounts within the fund for: (a) the purpose specified in the lease; (b) taxes and imposts payable on the fund; (c) costs of auditing the fund; (d) accounting legal and other professional costs reasonably incurred in the preparation and approval of any scheme of repayment, (s.12A(3)(b) RSA). If a shopping centre tenant is required to contribute to a fund, the landlord must: (a) keep full and accurate accounts of all money received or held by the landlord in respect of the fund; (b) keep the accounts in such manner that they can be conveniently and properly audited; (c) at the end of the each accounting year cause the accounts to be audited by a registered company auditor; and (d) within 3 months after the end of each accounting year deliver a copy of the audited report to the tenant, (s.12A(3)(c) RSA). The landlord is liable to pay into the fund any	If a landlord requires a tenant to pay any amount to the landlord in respect of advertising and promotion costs, the landlord must make a marketing plan available to the tenant at least 1 month before the start of each accounting period of the landlord (s.53(a) RLA). The plan must provide details of the landlord's proposed expenditure on advertising and promotion during that accounting period (s.53(a) RLA). If payment relates to an opening promotion, the landlord must provide details of proposed expenditure on that promotion at least 1 month before the promotion (s.53(b) RLA). A landlord must also provide: (a) a written half yearly and annual advertising and promotion expenditure statement; and (b) an auditors report on advertising and promotion expenditure within 3 months after the end of the relevant accounting period, (s.54 RLA). The tenant must be given the opportunity to make written submissions to the auditor on the accuracy of the landlord's proposed advertising statement and the auditor must consider any written tenant submissions (s.55(3) and (4) RLA).	A written estimate must be given to a shopping centre tenant before any advertising or promotion costs can be levied. The estimate must be given at least 1 month before the start of each accounting period (ss.131-132 LCRA). If a landlord fails to substantially comply with s.131, the tenant is not liable to pay any advertising and promotion costs (s.132 LCRA). Any moneys paid under an advertising and promotion levy that are not expended within the accounting period are to be retained by the landlord in a marketing fund for future expenditure on advertising or promotion of the shopping centre (s.133 LCRA).	A shopping centre tenant cannot be required to undertake advertising or promotion of a tenant's business, but can be required to reimburse the landlord for advertising or promotion costs (s.68 BTA). If a shopping centre tenant is required to contribute to advertising or promotion costs, the landlord must: (a) at least 1 month before the start of each accounting period provide to the tenant a marketing plan of the landlord's proposed expenditure on advertising and promotion (s.69 BTA); (b) at least twice during each accounting period make available to the tenant a written statement in accordance with relevant accounting principles detailing the landlord's expenditure on advertising and promotion (s.70 BTA); and (c) within 3 months of the end of each accounting period, provide to the tenant a written statement in accordance with relevant accounting principles which is accompanied by a statement from a registered company auditor confirming whether the statement correctly states the landlord's expenditure (s.71 BTA). Any unspent tenant contributions must be carried forward by the landlord (s.72 BTA).

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contributions must be carried forward by the landlord (s.72(1) RLA). Within 4 months of the end of the lease, an adjustment must be made on a pro rata basis between the landlord and tenant to account for any underpayment or overpayment by the tenant in respect of advertising or promotion costs (s.72(2) RLA).				deficiency attributable to the failure of the landlord or any predecessor in title of the landlord to comply with s.12A(3)(a) or (b) notified to the landlord within 3 years of the tenant receiving the auditor's statement showing the deficiency (s.12A(3)(d) RSA).	The tenant may withhold the payment of advertising contributions or promotional costs if the landlord fails to make available to the tenant any of the required marketing or promotional expenditure information for a period in excess of 10 business days after a request by the tenant for such information. The tenant must pay its advertising contribution or promotional costs within 28 days of the required information being furnished (s.55A RLA). Any unspent tenant contribution must be carried forward by the landlord (s.56 RLA).		

Assignment, subletting

A landlord may only withhold consent to assignment if: (a) there is to be a change of use in a way that is not permitted under the lease; (b) the landlord considers the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease; (c) the tenant has not complied with the reasonable assignment provisions of the lease; or (d) the assignment is in connection with a lease of premises that will continue to be used for the carrying on of an ongoing business and the tenant has not provided the assignee with business records for the previous 3	See 'Disclosure Statement by Landlord' and 'Disclosure Statement by Tenant' (ss.22B and 22C RSLA). If a tenant: (a) requests consent to an assignment; and (b) gives the landlord 'full particulars', the landlord must give/withhold consent within 30 days (s.50(1) RSLA). The landlord must not impose on an assignee a new obligation, withdraw from any assignee an existing right or impose a condition which the tenant considers is unreasonable (s.50(2) RSLA). For leases entered into from 3 April 2006, if the assignor, landlord and assignee comply with their obligations to give disclosure statements (and	A property owner must not unreasonably withhold consent to the assignment (cl.28(2) CPRT). A property owner may reject an assignment if: (a) the assignee intends to change the use of the premises; (b) the assignee does not have the financial standing to conduct the business; (c) the assignee does not have the necessary business skills to conduct the business; (d) the assignee does not enter into a written agreement with the property owner in accordance with some or all of the terms of the lease or as otherwise reasonably requested by the property owner, (cl.28(7) CPRT).	A landlord is entitled to withhold consent to an assignment if (and only if): (a) the assignee proposes to change the use of premises; (b) the assignee is unlikely to be able to meet its financial obligations as tenant under the lease; (c) the assignee's retailing skills are inferior to the assignor's; (d) the tenant has not complied with procedural requirements for obtaining landlord's consent, (s.43 RCLA). A landlord is required to deal with a request expeditiously and is deemed to have given consent after 42 days (s.45 RCLA). A landlord cannot seek or accept a premium for an assignment (s.44 RCLA).	Despite any other written law, a retail shop lease shall be taken to grant to the tenant a right to assign the lease, subject only to a right of the landlord to withhold consent to an assignment on reasonable grounds (s.10(1) RSA). If a tenant has in writing requested the landlord to consent to: (a) an assignment of the lease; or (b) if the lease provides for a sublease of the premises by consent, a sublease of the premises, and the landlord fails to give notice consenting or withholding consent within 28 days after receipt of the request, the landlord is deemed to have consented to the assignment or sublease, as the case may be (s.10(2) RSA).	To request consent to an assignment, a tenant must first have furnished the proposed assignee with a copy of any disclosure statement given to the tenant in respect of the lease, together with details of any changes that have occurred in respect of the information contained in that disclosure statement. For this purpose, the tenant is entitled to request the landlord to provide a copy of the disclosure statement concerned and the landlord must comply with such a request within 14 days (s.41 RLA). The tenant may also provide the proposed assignee with an assignor's disclosure statement as set out in Schedule 2A if the assignment is in connection with the lease of a retail shop that will continue to be an ongoing business (s.41 RLA).	Owner can only withhold consent to a sublease/assignment of the lease where it is reasonable to do so in all the circumstances (s.100 LCRA). Owner may within 14 days of the tenant's request for assignment, request certain information in relation to the proposed assignee (s.96 LCRA). Owner must give notice of its consent or refusal within 28 days of receiving the request or, if information is requested, within 21 days after receiving the information requested. If the owner fails to give notice of consent or refusal of consent within the prescribed time, the owner's consent is deemed to be given (s.99 LCRA).	A landlord may only withhold consent to assignment if (s.53 BTA): (a) there is to be a change of use in a way that is not permitted under the lease; (b) the landlord considers the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease; (c) the tenant has not complied with the reasonable assignment provisions of the lease and s.56 of the Act; or (d) the tenant has not provided the assignee with prior business information concerning the financial standing and business experience of the proposed assignee, (s.57 BTA).

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years or any shorter period that the tenant has carried on business at the premises, (s.60(1) RLA).	the statements are not defective) the assignor is released from future liability under the lease (s.50A RSLA).						
A request for assignment must be in writing. A tenant must provide the landlord with such information as the landlord reasonably requires about the financial resources and business experience of the proposed assignee (s.61(2) RLA).		A request for an assignment must be in writing (cl.28(1) CPRT). Within 14 days of receiving a request for consent, the property owner must advise the tenant in writing of the information that the property owner requires to make a decision concerning the assignment (cl.28(3) CPRT).	The assignor and any guarantor of the assignor will be released from liability under the lease if the assignor provides a disclosure statement, which is not materially false or misleading, to: (a) the assignee, before requesting the landlord's consent; and (b) the landlord, when requesting the landlord's consent.	A provision to the effect that the landlord may recover from the assignor or guarantor of the assignor any moneys payable by assignee is void (s.10(4) RSA).	The tenant: (a) must also provide the landlord with such information as the landlord may reasonably require concerning the financial standing and business experience of the proposed assignee; and (b) may provide the landlord with a copy of the assignor's disclosure statement, (s.41 RLA).	The tenant and its guarantors are relieved from further obligations under a lease upon assignment of the lease (s.103 LCRA).	A request for assignment must be in writing and the landlord must deal expeditiously with the request. The landlord is taken to have consented to an assignment if the tenant has complied with ss.56 & 57 and the landlord has not made a decision within 42 days of the request (s.55 BTA).
Before requesting the landlord's consent to an assignment, a tenant must give a proposed assignee a copy of the disclosure statement that the tenant received and details of any changes of which the tenant is aware or could reasonably be expected to be aware (s.61(3) RLA). The tenant may request that the landlord provide the tenant with a new disclosure statement for this purpose. The landlord is liable to a fine of up to 10 penalty units if the landlord does not provide a new statement within 14 days of a request (s.61(5) RLA).		A property owner may require a tenant to provide: (a) information about the financial standing of the assignee and any approval for finance; (b) information on the relevant business skills of the prospective assignee; (c) information on the financial standing of the prospective guarantors; (d) information as to the proposed use of the premises by the prospective assignee; and (e) 2 references, (cl.28(4) CPRT).	In this case, the assignor will be released from sooner of: (a) 2 years after the assignment date; (b) the date on which the lease expires; and (c) the date of commencement of a renewal or extension made after the assignment, (s.45A RCLA). The assignor's disclosure statement must contain the information required under the Regulations (see Form 2 in Schedule 1 of the Regulations) (s.45A RCLA).		The landlord must deal expeditiously with a request for consent and if a landlord has not given notice in writing to the tenant either consenting or withholding consent to an assignment within 28 days after the request was made, the landlord is taken to have consented to the assignment (s.41 RLA).		Before requesting the landlord's consent to an assignment, a tenant must: (a) give a proposed assignee a copy of the disclosure statement that the tenant received and details of any changes of which the tenant is aware or could reasonably be expected to be aware (s.56(a) BTA); or (b) request that the landlord provide the tenant with a new disclosure statement for this purpose. The landlord must comply with this request within 14 days of the request (s.56(e) BTA).
A landlord must deal expeditiously with a request for assignment and is deemed to have consented if the landlord has not given written notice consenting or withholding consent within 28 days of the request		Property owner is to give written notice of the approval or rejection of the assignment within 21 days of receiving all of the information that the tenant is required to give (cl.28(5) CPRT).	A lease may contain a provision allowing a landlord to refuse at the landlord's absolute discretion, consent to the grant of a sublease, licence, concession or parting with possession of the premises (s.46 RCLA).		A landlord may withhold consent to the assignment if: (a) the assignee proposes to change the use to which the shop is put; (b) the assignee has financial resources or retailing skills that are inferior to the assignor;		If premises will continue to be used for carrying on an ongoing business following an assignment and the tenant gives the assignee a disclosure statement which is not false, misleading or incomplete, the tenant and any guarantor are released

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(s.61(6) RLA). If premises will continue to be used for the carrying on of an ongoing business following an assignment, the tenant must give any assignee a disclosure statement in the form required by the Regulations (s.61(5A) RLA). In this case, if a disclosure statement is provided, the tenant and any guarantor are released upon assignment (s.62 RLA). Effective 22 April 2013, the form of the disclosure statement is prescribed by r.8(3) of the Regulations. Previously there was no form prescribed. The assignment of a retail premises lease is taken to be a continuation of the lease (s.8 RLA). A landlord may give or withhold consent to a sublease at its absolute discretion.		If no objection is made within the 21 day period, the property owner is taken to have approved the application (cl.28(6) CPRT).			(c) the tenant has not complied with the procedure for obtaining consent to assignment, (s.39 RLA). A landlord may reserve the right to refuse to: (a) consent to the grant of a sublease, licence or concession in respect of the whole or any part of the shop; or (b) consent to the tenant parting with possession of the whole or any part of the shop, (s.42 RLA). If the outgoing tenant provided an assignor's disclosure statement in the prescribed form at least 7 days before the assignment is effective, the outgoing tenant and any guarantor will be released from future obligations under the lease unless it is found that the information contained in the assignor's disclosure statement is false or misleading or the statement was incomplete (s.41A RLA).		on assignment (s.58 BTA). A landlord may give or withhold consent at its absolute discretion to the grant of a sublease, licence, the parting of possession of the premises or giving of consent to mortgaging, charging or otherwise encumbering the property or lease (s.59 BTA).

Fit out

A tenant is not required to pay or contribute towards the cost of any fit out unless the liability to make the payment or contribution is set out in the disclosure statement (s.20 RLA). A lease in a shopping centre which requires the tenant to pay for alterations to enable fit out in respect of any of the following: (a) electrical reticulation or automatic sprinklers; (b) power and gas supply; (c) layout of air-	No provision.	No provision.	A tenant is not liable to pay rent where the landlord has unfulfilled fit out obligation (s.21 RCLA).	A provision in a retail shop lease that obliges a tenant to contribute towards the cost of any landlord's finishes, fixtures, fittings, equipment or services is void unless notification of such is given in the disclosure statement (s.12(3A) RSA).	The landlord may charge a special rent to cover the cost of fit out and equipment installed or provided by the landlord or at the landlord's expense (s.21 RLA). The maximum amount (or a formula for its calculation) payable by the tenant for works carried out by the landlord to enable the tenant's proposed fit out must be agreed between the parties before the lease is entered into (s.13 RLA).	A lease provision is void if it requires the tenant to pay for or contribute towards the cost of a finish, fixture, fittings, equipment or service unless the requirement to make the payment or contribution was in the disclosure statement (s.75 LCRA).	Tenant is not liable to pay rent where the landlord has unfulfilled fit out obligations (s.27 BTA).

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conditioning ducts or registers; (d) location of exhausts; (e) telephone or electrical cabling; or (f) other matters prescribed by Regulations, is deemed to provide that the work must be carried out by suitably skilled and experienced persons engaged or approved by the landlord (s.30(1) and (2)). Note: to date no other matters have been prescribed by regulation. The maximum cost or a basis or formula with respect to those costs must be agreed in writing before the works begin or, failing agreement, determined by an independent quantity surveyor agreed between the parties or, failing agreement, appointed by the Small Business Commissioner (ss.30(3) and (4) RLA). The tenant is not liable to pay any amount exceeding the amount agreed or determined (s.30(5) RLA).					If a prospective landlord in a shopping centre requires a particular standard for the fit out it must provide the tenant with a tenancy fit out statement containing all relevant information otherwise the tenant is not liable to carry out the fit out to the extent that it is not covered by the statement (s.13A RLA).		
Payment of rent during landlord's fit out							
A tenant is not liable to pay rent or any other amount under the lease before the landlord has substantially complied with its fit out obligations (s.31 RLA).	No provision.	Unless otherwise agreed, rent and outgoings are to commence from the date of handing over of possession with all finishes provided by the property owner in accordance with the lease (cl.17 CPRT).	A tenant is not liable to pay rent where the landlord has unfulfilled fit out obligations (s.21 RCLA).	No provision.	A tenant is not liable to pay rent or any other amount until the landlord has substantially complied with its fit out obligations (s.17 RLA).	Payment of rent (and outgoings) must not commence before the date of handing over the premises and not before all works to be provided by the owner are substantially provided (ss.48 and 69 LCRA).	A tenant is not liable to pay rent or any other amount until the landlord has substantially complied with its fit out obligations and the landlord is not entitled to deny the tenant possession merely because the landlord has not complied with fitout obligations (s.27 BTA).
Notice of works							
A landlord must not start to carry out any alteration or refurbishment of the building or retail shopping centre which is likely to	No provision.	Property owner is to give reasonable notice (being not < 6 months) before the commencement of any major alteration or	A landlord must provide 1 months written notice of any proposed alteration or refurbishment to a building or centre, to any tenant	No provision.	A landlord must provide 2 months written notice of any proposed alteration or refurbishment to a building or shopping centre, to any	A landlord must advise a tenant likely to be materially affected by alterations or refurbishment to a shopping centre or	A landlord must provide 2 months written notice of any proposed alteration or refurbishment to a building or centre, to any tenant

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adversely affect the business of the tenant unless: (a) the landlord has notified the tenant in writing of the proposed alteration or refurbishment at least 60 days before it is started; or (b) the alteration or refurbishment is necessary because of an emergency and the landlord has given the tenant the maximum period of notice that is reasonably practicable in the circumstances, (ss.53 RLA).		refurbishment of a building which includes the premises and which is likely to affect the tenant (cl.22(1) CPRT). In the case of minor repairs, the property owner must give reasonable notice of the proposed alteration or refurbishment (cl.22(2) CPRT).	whose business is likely to be affected (s.37 RCLA).		tenant whose business is likely to be adversely affected (s.33(a) RLA). 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 (s.33(b) RLA).	building in which the premises are located not < 2 months before the commencement of the alterations or refurbishment (s.79 LCRA). If the alterations or refurbishment is as a result of an emergency the landlord must give notice that is reasonable in the circumstances (s.80 LCRA). A landlord must not redevelop a shopping centre or part of a shopping centre without consultation with the majority of tenants in the centre or that part of the centre which will be affected (s.135 LCRA).	whose business is likely to be affected (s.46 BTA).
Landlord's repair obligations (see also 'compensation for disturbance', etc)							
A lease is taken to provide that a landlord must maintain in a condition consistent with condition of the premises when the retail premises lease was entered into: (a) the structure of, and fixtures in, the premises; (b) plant and equipment at the premises; and (c) appliances, fittings and fixtures provided by the landlord relating to gas, electricity, water, drainage or other services, unless: (e) the need for repair arises out of misuse by the tenant; or (d) the tenant is not entitled or required to remove those items at the end of the lease, (s.52 RLA).	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.

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Urgent repairs							
If there is a fault or damage which has a substantial effect on the tenant's business, the landlord is responsible to repair under the terms of the lease or the Act, and the tenant is unable to get the landlord to effect the repairs despite having taken reasonable steps, the tenant may undertake any urgent repairs and recover the cost from the landlord (ss.52(4) and (5) RLA). The tenant must give the landlord written notice of the repairs within 14 days of their being carried out but the tenant's right to reimbursement is not conditional upon the tenant doing so (s.52(5) RLA).	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
Damaged premises							
If a premises or building in which the premises are located is damaged: (a) except where the tenant caused the damage, rent and other outgoings abate until the premises can again be used (proportionately if appropriate); (b) if the landlord reasonably considers that the extent of damage makes repair impractical or undesirable and notifies the tenant of that, the landlord or tenant may terminate on 7 days notice; and (c) if the landlord fails to repair within a reasonable time after the tenant has asked the landlord to do so, the tenant may terminate on 7 days notice, (s.57(1) RLA).	No provision.	A tenant is not required to pay rent and outgoings if the premises are unusable or inaccessible due to damage unless the tenant: (a) is responsible for the damage; (b) contributes substantially to the damage; or (c) takes some action which results in the termination of the property owner's insurance, (cl.25(1) CPRT). If premises that are damaged are usable for the purposes described in the lease, the rent and outgoings are to be reduced having regard to the nature and the extent of the damage (cl.25(2) CPRT). The CPRT is unclear regarding whether the reduction is applied when the tenant has caused the	If a shop or building is damaged, the lease is taken to include the following provisions: (a) the tenant is not liable to pay rent or contribute to outgoings, in respect of the period during which the shop cannot be used or is inaccessible (this does not apply if the damage results from the wrongful act or negligence of the tenant or its employee or agent, unless the landlord has appropriate insurance and the tenant contributes to the premium); (b) if the shop is partially usable, the tenant's liability for rent and outgoings is reduced proportionately (this does not apply if the	No provision.	If a retail shop or the building in which the retail shop is located is damaged: (a) rent and any amount payable to the landlord as outgoings abate until the premises can again be used or accessed (proportionately if appropriate); (b) 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 7 days notice; and (c) if the landlord fails to repair within a reasonable time after the tenant has asked the landlord to do so, the tenant may terminate on 7 days notice,	If leased premises are, or a building that contains the premises is, damaged in a material way, the landlord must tell the tenant in writing, within 2 months after the day, or last day, the damage happened: (a) that the landlord reasonably considers repair of the premises or building is impracticable, and intends not to repair the premises or building; or (b) that the landlord intends to repair or reinstate the premises or building between starting and finishing dates approximately stated in the notice, (s.88 LCRA). The parties' respective termination rights are set out at ss.89- 90 LCRA. If the premises or building	If a shop or building is damaged, the lease is taken to include the following provisions: (a) the tenant is not liable to pay rent or contribute to outgoings, in respect of the period during which the shop cannot be used or is inaccessible; (b) if the shop is partially useable, the tenant's liability for rent and outgoings is reduced proportionately; (c) if the landlord notifies the tenant that it considers the damage to make repair impracticable or undesirable, either party may terminate the lease by 7 days notice (and no compensation is payable for the termination); (d) the tenant may

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		damage. If the property owner fails to repair the damage within a reasonable time, the tenant may terminate the lease (cl.25(3) CPRT).	damage results from the wrongful act or negligence of the tenant or its employee or agent, unless the landlord has appropriate insurance and the tenant contributes to the premium); (c) if the landlord notifies the tenant that it considers the damage to make repair impracticable or undesirable, either party may terminate the lease by 7 days notice (and no compensation is payable for the termination); (d) the tenant may terminate the lease by 7 days notice, if the landlord fails to repair the damage within a reasonable time; and (e) either party may recover damages for the damage or destruction, according to common law or other contractual entitlements, (s.40 RCLA).		(s.36(a)-(d) RLA). The landlord may recover damages from the tenant in respect of any damage caused by the tenant, (s.36(e) RLA).	are damaged and the premises: (a) cannot be used for their normal purpose the tenant is not required to pay rent or outgoings while the premises cannot be used unless the Magistrates Court decides otherwise; (b) can be used (in whole or in part) for their normal purpose the tenant must not refuse to pay rent or outgoings unless the Magistrates Court decides or the parties agree otherwise, (ss.84 - 85 LCRA).	terminate the lease by 7 days notice, if the landlord fails to repair the damage within a reasonable time; and (e) either party may recover damages for the damage or destruction, according to common law or other contractual entitlements, (s.50 BTA).

Tenant's employees

A lease cannot limit a tenant's choice of employees or contractors (s.59(1) RLA) but may: (a) specify minimum standards of competence; (b) prohibit work from being carried out on specified items of landlord's property; and (c) in respect of shopping centre premises, require compliance with an award or	No provision.	A lease cannot limit a tenant's choice of contractors or staff (cl.26(1) CPRT) but may: (a) specify minimum standards of competence; (b) prohibit work from being carried out on specified items of owner's property; (c) in respect of shopping centre premises, require compliance with a construction site agreement or	A lease must not contain a provision that limits the tenant's right to employ persons of the tenant's own choosing, but may: (a) specify minimum standards of behaviour for person employed in the shop; and (b) require the tenant to comply with an award or agreement, (s.41 RCLA).	No provision.	A lease cannot limit a tenant's right to employ person's of the tenant's own choosing but may: (a) specify minimum standards of competence and behaviour; (b) prohibit work from being carried out on specified items of landlord's property; and (c) in respect of shopping centre premises, require compliance	A lease cannot limit a tenant's choice of employees but may: (a) specifying reasonable minimum standards of competence and behaviour; (b) prohibit work being carried out on specified items of the landlord's property; (c) in respect of shopping centre premises, require compliance with an award or agreement,	A lease must not contain a provision that limits the tenant's right to employ persons of the tenant's own choosing, but may: (a) specify minimum standards of behaviour for person employed in the shop; (b) require the tenant to comply with an award or agreement; and (c) prohibit work from being carried out on specified items of the landlord's property.

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agreement, (s.59(2) RLA).		industrial award; and (d) require work to be carried out in accordance with the law, (cl.26(2) CPRT).			with an award or agreement, (s.37 RLA).	(s.73 LCRA).	(s.52 BTA).
Refurbishment							
A tenant can be required to refurbish or refit only if the lease indicates generally the nature, extent and timing of the refurbishment or refitting (s.58 RLA).	No provision.	A tenant can be required to refurbish or refit only if the lease states the general form and timing of the refurbishment or refitting (cl.27 CPRT).	A tenant may be required to fit or refit the shop, or to provide fixtures, plant or equipment, if the disclosure statement discloses the obligation and contains sufficient details to enable the tenant to obtain an estimate of the likely cost of complying with the obligation (s.13(1) RCLA).	A tenant can only be required to refurbish or refit if the lease specifies the nature, extent and timing of the refurbishment or fitout (s.14C RSA).	A tenant can be required to refurbish or refit only if the lease specifies the nature, extent and timing of the refurbishment or refitting (s.38 RLA).	A tenant can be required to refurbish or refit only if the lease specifies the nature, extent and timing of the refurbishment or refitting (s.74 LCRA).	A tenant can be required to refurbish or refit only if the lease specifies the nature, extent and timing of the refurbishment or refitting (s.51 BTA).
Compensation for disturbance etc							
The landlord is liable to pay a tenant reasonable compensation if the tenant suffers loss or damage as a result of the landlord: (a) substantially inhibiting the tenant's access to the premises; (b) unreasonably taking action that substantially inhibits or alters the flow of customers to the retail premises; (c) unreasonably taking action that causes significant disruption to the tenant's trading; (d) fails to take reasonable steps to prevent or stop significant disruption within the landlord's control to the tenant's trading; (e) fails to rectify any breakdown of plant or equipment, not under the tenants care or any defect to the building; or (f) neglects adequately to clean, maintain or repair any common area,	Compensation may be payable if the landlord: (a) relocates the tenant's business and the lease was entered into before 3 April 2006 (for leases entered into from 3 April 2006, see ss 46C – 46G summarised below); (b) restricts tenant's access in a substantial manner; (c) substantially alters or restricts the flow of customers to or past the premises; (d) fails to make reasonable efforts to avoid trade disruption; (e) fails to rectify a breakdown; (f) does not adequately clean, maintain or repair any common area; (g) causes tenant to vacate before end of lease because of extension, refurbishment or demolition of building; (h) caused the tenant to enter into the lease (or renewal) on the basis	Compensation may be payable if the property owner: (a) inhibits tenant's access in any substantial manner; (b) substantially alters or inhibits the flow of customers to the premises; (c) fails to make reasonable efforts to avoid trade disruption; (d) fails to rectify a breakdown; (e) acts in a manner which, in all the circumstances, is unconscionable; (f) terminates a lease dishonestly, maliciously or for a purpose that is not genuine; (g) in relation to a shopping centre, fails to maintain any common area; (h) fails to take reasonable steps to ensure the premises are kept in good order and repair; (i) relocates the tenant's business to other	Compensation may be payable if the landlord: (a) inhibits tenant's access in a substantial manner; (b) substantially alters or inhibits the flow of customers to the shop; (c) unreasonably takes action that causes significant disruption of trading; (d) fails to take reasonable steps to prevent disruption and adverse effect on a tenant's business; (e) fails to rectify the breakdown of plant and equipment; (f) fails to adequately clean, maintain or repair a retail shopping centre (including common areas), and fails to rectify the matter as soon as reasonably practicable after being requested in writing by the tenant (s.38 RCLA). A lease may include a provision preventing or limiting a claim for	Where a retail shop lease provides for occupation of a retail shop situated in a retail shopping centre, the lease shall be taken to provide that if the landlord: (a) inhibits the access of the tenant to the retail shop in any substantial manner; (b) takes any action that would substantially alter or inhibit the flow of customers to the retail shop; (c) causes, or fails to make reasonable efforts to prevent or remove, any disruption to trading within the centre which disruption causes loss of profits to the tenant; (d) fails to have rectified as soon as practicable any breakdown of plant and equipment under his care and maintenance which breakdown causes loss of profits to the tenant; or (e) fails to adequately clean, maintain or	Compensation may be payable if the landlord: (a) inhibits tenant's access in a substantial manner; (b) substantially alters or inhibits the flow of customers to the shop; (c) unreasonably takes action that causes significant disruption of trading; (d) fails to take all reasonable steps to prevent or put a stop to anything that significantly disrupts or adversely effects the tenant's trading and that is attributable to causes within the landlord's control; (e) fails to rectify any breakdown of plant or equipment; or (f) fails to adequately clean, maintain or repair any common areas, and fails to rectify the matter as soon as reasonably practicable after being requested in writing by the tenant (s.34(1) RLA).	Compensation may be payable if the owner: (a) materially inhibits tenant's access to the premises; (b) materially inhibits or alters the flow of customers to the premises; (c) fails to rectify any breakdown of plant or equipment under the owner's care and maintenance as soon as practicable; (d) neglects to adequately clean maintain or repair the shopping centre in which the premises are located; or (e) adversely affects the trade of a tenant without reasonable cause. Note that compensation for (a) and (b) does not apply if the owner's action was a reasonable response to an emergency, compliance with a statutory requirement or a lawful direction of a government entity not due to any	Compensation may be payable if the landlord: (a) inhibits tenant's access in a substantial manner; (b) substantially alters or inhibits the flow of customers to the shop; (c) unreasonably takes action that causes significant disruption of trading; (d) fails to take all reasonable steps to prevent or put a stop to anything that significantly disrupts or adversely effects the tenant's trading and that is attributable to causes within the landlord's control; (e) fails to rectify any breakdown of plant or equipment; (f) fails to adequately clean, maintain or repair any common areas; and fails to rectify the matter as soon as reasonably practicable after being requested in writing by the tenant (s.47 BTA).

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(s.54(2) RLA). The tenant must give the landlord written notice of any loss or damage as soon as practicable after it is suffered but a failure to do so does not affect the tenant's right to compensation (s.54(3) RLA).	of a misrepresentation; (i) did not make the shop available for trade on the date specified in the disclosure statement, (s.43 RSLA). Provisions do not apply to periodic tenancies and tenancies at will (s.42 RSLA). For leases entered into from 3 April 2006, the above provisions apply to: (a) tenants holding over; and (b) sublessees or franchisees entitled to occupy the retail shop under the lease or with the landlord's consent, (s.5 RSLA). The amount of compensation is as agreed or failing agreement, as determined under the dispute resolution provisions (s.44 RSLA). An agreement in a lease about compensation is void (s.44 RSLA). For leases entered into from 3 April 2006, if a tenant, an assignor or assignee makes a false or misleading statement or representation in a disclosure statement, the disclosing person is liable to pay the affected person reasonable compensation for loss or damage suffered (s.43A RSLA).	premises during the term of the lease or any renewal of it; (j) fails to take reasonable steps to ensure that any defect in the shopping centre or retail premises is rectified; (k) causes the tenant to vacate the premises before the end of the lease or any renewal of it because of any extension, refurbishment or demolition. (cl.23(1) CPRT). A lease cannot limit liability for compensation: (a) in relation to paragraphs (a)-(d) or (g) unless details of the specific disturbance were given to the tenant before execution of the lease which specifies a formula for compensation; (b) in relation to paragraphs (e) or (f), (cl.23(2) and (3) CPRT). The enlargement of a shopping centre or a change in its tenancy is not of itself grounds for compensation (cl.23 (4) CPRT).	compensation in respect of any particular occurrence if the likelihood of the occurrence was specifically drawn to the attention of the tenant in writing before the lease was entered into (s.38 RCLA).	repaint the building or buildings of which the centre is comprised or any common area connected with the centre, and after being given by the tenant notice in writing requiring him to rectify the matter does not do so within such time as is reasonably practicable then despite any provision contained in the lease, the landlord is liable to pay the tenant reasonable compensation as is agreed in writing between the parties or determined by the Tribunal (s.14 RSA).	A retail shop lease may include a provision preventing or limiting a claim for compensation in respect of any particular occurrence if the likelihood of the occurrence was specifically drawn to the attention of the tenant in writing before the lease was entered into (s.34(3) RLA). This provision does not apply to the actions of the landlord in the case of an emergency or when complying with a duty imposed under an Act or by a public authority (s.34(4) RLA).	neglect or failure of the landlord (s.81 LCRA). In determining the amount of reasonable compensation, regard is to be had to any concession given to the tenant (such as reduced rent) (ss.81-82 LCRA).	A lease may include a provision preventing or limiting a claim for compensation in respect of any particular occurrence if the likelihood of the occurrence was specifically drawn to the attention of the tenant in writing before the lease was entered into (s.47 BTA). This section does not apply to the actions of the landlord in the case of an emergency or when complying with a duty imposed under an Act or by a public authority (s.47 BTA).

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Obligations of landlord to franchisees and subtenants							
Nil.	For leases entered into from 3 April 2006, compensation may be payable by the landlord to a franchisee or subtenant if the landlord: (a) restricts the franchisee's or subtenant's access in a substantial manner; (b) substantially alters or restricts the flow of customers to or past the premises; (c) fails to make reasonable efforts to avoid trade disruption; (d) fails to rectify a breakdown; (e) does not adequately clean, maintain or repair any common area; (f) causes the franchisee or subtenant to vacate before the end of the lease because of the extension, refurbishment or demolition of the building; (g) causes the franchisee or subtenant to enter into the lease or occupancy agreement on the basis of a misrepresentation; (h) did not make the shop available for trade on the date specified in the disclosure statement, (s.5 & s.43 RSLA and definition of 'Lessee' in Dictionary RSLA). Note the above provisions do not apply to periodic tenancies and tenancies at will (s.42 RSLA). The amount of compensation is as agreed or failing agreement, as determined under the	Nil.	Nil.	Nil.	Nil.	Nil.	The definition of 'tenant' (in relation to a retail shop) includes any person who has a right to occupy a retail shop and specifically refers to a subtenant (s.5(1) BTA). This definition would apply to franchisees. Subtenants and franchisees therefore have all of the protections given to tenants under the BTA.

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	dispute resolution provisions (s. 44 RSLA). An agreement in a lease about compensation is void (ss. 44 RSLA).						
Unconscionable conduct							
Neither a landlord nor a tenant under a lease or a proposed lease may engage in conduct that is 'in all the circumstances' unconscionable (s.77(1) and s.78(1) RLA). The factors to be considered in assessing whether unconscionable conduct has occurred include the following: (a) relative bargaining power; (b) whether as a result of the a party's conduct the other party was required to comply with conditions that were not reasonably necessary for the legitimate protection of the first party's interests; (c) whether the parties were able to understand any documents related to the lease; (d) the use of undue influence, pressure or unfair tactics; (e) the amount for which an identical or equivalent lease could have been obtained; (f) the consistency of the parties' conduct when compared to their conduct in similar transactions with third parties; (g) any applicable industry code; (h) the requirements of any other industry code if 1 of the parties acted on the	Neither a landlord nor a tenant may engage in conduct that is 'in all the circumstances' unconscionable (s.46A(1) and s.46A(2) RSLA). Note: this provision only applies to conduct engaged in after 24 June 2001. The factors to be considered in assessing whether unconscionable conduct has occurred include the following: (a) relative bargaining power; (b) whether a party's conduct was reasonably necessary for the legitimate protection of that party's interests; (c) whether the parties were able to understand any documents related to the lease; (d) the use of undue influence, pressure or unfair tactics; (e) the amount for which an identical or equivalent lease could have been obtained; (f) the consistency of the parties' conduct when compared to their conduct in similar transactions with third parties; (g) any applicable industry code; (h) the requirements of any other industry code if 1 of the parties acted on the reasonable belief	A person must not engage in conduct that is harsh, unjust or unconscionable (cl.3(1) CPRT). Unconscionable conduct by a property owner may include a threat: (a) to subsidise a competitor to the tenant in nearby premises; (b) not to renew the lease unless the tenant agrees to a proposal by the property owner or is prepared to pay a rent in excess of the market value rent, (cl.3(2) CPRT). A complaint must be made within 3 years from when the matter of complaint arose and within 6 months from the time when the matter of complaint came to the attention of the Director of Consumer Affairs and Fair Trading (s.26(1)(b) *Justices Act 1959* (Tas)).	A party to a lease must not, in connection with the exercise of a right or power under the Act or the lease, engage in conduct that is (in all the circumstances) vexatious. Penalty - $5,000 (s.75 RCLA). A landlord may not require a premium for a renewal nor threaten a tenant to prevent them from exercising a right to renewal or a right under the Act (ss.20L-M RCLA). A prosecution for an offence against this Act must be commenced within 2 years after the date the offence is alleged to have been committed (s.79 RCLA).	Neither the landlord nor the tenant may engage in unconscionable conduct in connection with a retail shop lease (s.15C and 15D RSA). The factors to be considered in assessing whether unconscionable conduct has occurred include the following: (a) relative bargaining power; (b) whether a party's conduct was reasonably necessary for the legitimate protection of that party's interests; (c) whether the parties were able to understand any documents related to the lease; (d) the use of undue influence, pressure or unfair tactics; (e) the amount for which an identical or equivalent lease could have been obtained for; (f) the consistency of the parties' conduct when compared to their conduct in similar transactions with third parties; (g) any applicable industry code; (h) the requirements of any other industry code if 1 of the parties acted on the reasonable belief that the other would comply with that code;	Neither the landlord nor the tenant may engage in unconscionable conduct in connection with a retail shop lease (s.62B RLA). The factors to be considered in assessing whether unconscionable conduct has occurred include the following: (a) relative bargaining power; (b) whether a party's conduct was reasonably necessary for the legitimate protection of that party's interests; (c) whether the parties were able to understand any documents related to the lease; (d) the use of undue influence, pressure or unfair tactics; (e) the amount for which an identical or equivalent lease could have been obtained for; (f) the consistency of the parties' conduct when compared to their conduct in similar transactions with third parties; (g) any applicable industry code; (h) the requirements of any other industry code if 1 of the parties acted on the reasonable belief that the other would comply with that code; (i) any failure to make	A party to a lease, or a party to negotiations for a proposed lease, must not, in dealings with another party to the lease or negotiations, engage in conduct that is unconscionable or harsh and oppressive (s.22 LCRA). Without limiting the foregoing the Magistrates Court may consider when making an order in relation to a dispute arising from alleged contravention of s.22 in relation to unconscionable conduct, a Court may consider any of the following matters: (a) relative bargaining power; (b) whether, because of conduct engaged in by a party to the lease or negotiations, the other party was required to comply with conditions that were reasonable necessary for the protection of legitimate interests of the party who engaged in the conduct; (c) whether the party to the lease or negotiations who do not prepare the lease or another document relating to the lease could understand the lease or other document; (d) whether undue influence or pressure was exerted on, or unfair tactics were used against, a party to the lease or negotiations (or an agent) by the other party to the lease or	Neither the landlord nor the tenant may engage in unconscionable conduct in connection with a retail shop lease (ss.79 & 80 BTA). The factors to be considered in assessing whether unconscionable conduct has occurred include the following: (a) relative bargaining power; (b) whether a party's conduct was reasonably necessary for the legitimate protection of that party's interests; (c) whether the parties were able to understand any documents related to the lease; (d) the use of undue influence, pressure or unfair tactics; (e) the amount for which an identical or equivalent lease could have been obtained for; (f) the consistency of the parties' conduct when compared to their conduct in similar transactions with third parties; (g) any applicable industry code; (h) the requirements of any other industry code if 1 of the parties acted on the reasonable belief that the other would comply with that code;

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reasonable belief that the other would comply with that code; (i) any failure to make disclosure especially about intended future conduct; (j) willingness to negotiate lease terms including rent; (k) the extent to which parties acted in good faith; (l) the use of a tenant's turnover figures; and (m) reasonableness of fit out costs and preparedness to incur them, (s.77(2) and s.78(2) RLA). The initiation of legal proceedings, a failure to renew or a failure to agree to an independent valuation of current market rent will not, without more, constitute unconscionable conduct (s.79 RLA). A claim for compensation must be lodged within 6 years of the alleged unconscionable conduct (s.80 RLA).	that the other would comply with that code; (i) any failure to make disclosure especially about intended future conduct; (j) willingness to negotiate lease terms including rent; and (k) the extent to which parties acted in good faith, (s.46B(1) RSLA). The initiation of legal proceedings, referral to arbitration or a failure to renew lease will not, without more, constitute unconscionable conduct, (s.46A(3) RSLA). A retail tenancy dispute cannot be referred to QCAT if the retail shop lease ended (whether by expiry, surrender or termination) more than 12 months before the dispute notice was lodged (ss.63(b) and 64(2) RSLA). The parties would also need to consider the provisions of the *Limitation of Actions Act 1974* (Qld) or the *Competition and Consumer Act 2010* (Cth).			(i) any unreasonable failure to make disclosure especially about intended future conduct; (j) willingness to negotiate lease terms; (k) the extent to which parties acted in good faith; (l) willingness to negotiate rent; (m) any unreasonable use of turnover information to negotiate the rent; and (n) any incurring of unreasonable refurbishment or fit out costs, (ss.15C and 15D RSA). The initiation of legal proceedings, a failure to renew or enter into a new lease, or a person not agreeing to have an independent valuation of current market rent carried out will not without more, constitute unconscionable conduct (s.15E RSA) A claim for compensation by a landlord or tenant, or former landlord or tenant, under a retail shop lease who suffers loss, or is likely to suffer loss, must be lodged within 6 years of the alleged unconscionable conduct (s.15F RSA).	disclosure especially about intended future conduct; (j) willingness to negotiate lease terms including rent; and (k) the extent to which parties acted in good faith, (s.62B(3) and (4) RLA). A covenantor may make an unconscionable conduct claim (s.62B(8) & 71A RLA). The initiation of legal proceedings or a failure to renew will not, without more, constitute unconscionable conduct (s.62B(5) and (6) RLA). A claim for compensation must be lodged within 3 years of the alleged unconscionable conduct (s.71A(2) RLA).	negotiations (or an agent) in relation to the lease or negotiations; (e) the circumstances under which the tenant could have acquired a lease on similar terms over similar premises from someone other than the landlord; (f) the extent to which the landlord's conduct towards the tenant was consistent with the landlord's conduct in similar lease transactions between the landlord and similar tenants; (g) the requirements of the LCRA; (h) the extent to which a party to the lease or negotiations (the failing party) unreasonable failed to disclosure to the other party (the uninformed party): (i) any intended conduct of the failing party that might affect the interests of the uninformed party; or (ii) any risk to the uninformed party arising from the failing party's intended conduct that the failing party should have foreseen would not be apparent to the uninformed party; and (i) the extent to which the landlord and the tenant acted honestly, (s.22(2) LCRA). The LCRA does not provide a time limit for lodging claims.	(i) any failure to make disclosure especially about intended future conduct; (j) willingness to negotiate lease terms including rent; and (k) the extent to which parties acted in good faith, (s.79 BTA). The initiation of legal proceedings or a failure to renew will not, without more, constitute unconscionable conduct (s.81 BTA).

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Misleading and deceptive conduct							
	Compensation may be payable if the landlord causes the tenant to enter into the lease (or renewal) on the basis of a misrepresentation (s.43(2)(a) RSLA). For leases entered into from 3 April 2006, if a tenant, an assignor or assignee makes a false or misleading statement or representation in a disclosure statement, the disclosing person is liable to pay the affected person reasonable compensation for loss or damage suffered (s.43A RSLA). For leases entered into from 4 April 2011, compensation may also be payable if the landlord makes a false or misleading statement or misrepresentation to an assignee that causes loss and damage to be suffered by the assignee (s.43(4) RSLA).			A party to a retail shop lease must not in connection within the lease engage in conduct that is misleading or deceptive or that is likely to mislead or deceive another party to a lease (s.16C RSA). A party or former party who suffers or is likely to suffer loss or damage because of another party or former party's misleading and deceptive conduct may apply in writing to the Tribunal for an order that the other party pay compensation or for other appropriate relief (s.16D RSA)			No provision.
Warranty of fitness for purpose							
No provision.	No provision.	No provision.	Lease is deemed to include a warranty of fitness for purpose if the landlord had notice that the premises were required for a particular business, before entering into the lease. Warranty may be excluded if the notice of exclusion is given in writing, and is specifically drawn to the attention of the tenant at the time that the disclosure statement is served. It is a defence to prove the premises were structurally suitable for the purpose or that any change in the structural suitability of the premises is not attributable to the landlord (s.18 RCLA).	No provision.	No provision.	No provision.	No provision.

Relocation

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
A tenant cannot be required to relocate unless the landlord gives the tenant: (a) details of a genuine proposal for a refurbishment, redevelopment or extension to be carried out within a reasonably practicable time and which cannot be practicably carried out without vacant possession of the premises (s.55(2) RLA); and (b) at least 3 months notice, offering the tenant reasonably comparable alternative premises (s.55(3) RLA). A tenant is entitled to a lease of reasonably comparable alternative premises on the same terms and conditions as the existing lease except that (unless the parties agree otherwise): (a) the minimum term is the remainder of the term of the existing lease; and (b) the rent is to be the same as the existing rent adjusted to take into account the difference in the commercial values of the premises at the time of relocation, (s.55(4) RLA). Within 1 month of being given a relocation notice, a tenant may give notice terminating its lease with effect from 3 months after the relocation notice was given or such other time as the parties agree (s.55(5) RLA). If the	For leases entered into before 3 April 2006: A landlord must not relocate the tenant's business without giving at least 3 months written notice of the relocation, stating the premises to which the tenant's business is to be relocated (s.46C RSLA). No compensation is available to periodic tenancies or tenancies at will (s.42 RSLA). A tenant is entitled 'reasonable compensation' as agreed between the parties or, failing agreement, as determined through the dispute resolution process. In deciding the amount of compensation, how much notice of the relocation was given is taken into account (s.44 RSLA). An agreement under the lease about compensation is void to the extent that it limits the amount of compensation payable (s.44 RSLA). For leases entered into from 3 April 2006: Sections 46D to 46G RSLA apply to leases which entitle landlords to relocate a tenant because: (a) the landlord proposes refurbishing, redeveloping or extending; and (b) the works cannot be carried out practicably without vacant possession, (s.46C RSLA).	Property owner can only invoke a relocation clause in a lease after presenting to the tenant plans for the redevelopment or extension of the shopping centre which show a genuine proposal which cannot practicably be carried out without vacant possession of the premises (cl.35(1) CPRT). Clause 35(2) of the CPRT contains detailed provisions as to the matters to be provided for in a relocation clause. Among other things, a relocation clause must: (a) provide for the tenant to be compensated for any actual reduction in or loss of profit during the relocation; (b) require the property owner to give at least 6 months notice of the relocation; (c) provide for the tenant to remain at the existing premises unless the tenant is satisfied that the new premises are equivalent or the tenant will be returned to the existing premises within a mutually agreed period; (d) include the right for the tenant to terminate the lease if the alternative premises or the terms and conditions for the lease of those premises are not acceptable to the tenant; (e) provide for the property owner to pay the tenant's reasonable	If a lease contains a relocation clause, the tenant cannot be relocated unless the landlord has: (a) provided the tenant with details of the proposed refurbishment, redevelopment or extension sufficient to indicate a genuine proposal that cannot be carried out without the vacant possession of the shop; (b) given at least 3 months written notice of relocation giving details of an alternative shop; (c) offered a lease of the alternative shop on the same terms, excluding rent, for the remainder of the term, (s.57 RCLA). The tenant may, by giving notice to the landlord within 1 month of receiving the relocation notice, terminate the existing lease (and not relocate). If so the existing lease is terminated 3 months after the relocation notice unless the parties agree otherwise. If the tenant does not give a notice of termination, the tenant is taken to have accepted the offer of relocation, unless the parties agree otherwise (s.57 RCLA). The tenant is entitled to payment of the reasonable costs of relocation, including legal costs (s.57 RCLA).	A provision of a retail shop lease about the relocation of the tenant's business is void unless: (a) it is in the form prescribed; (b) it is in a form approved by the Tribunal; or (c) if 5 years of the term of the lease (including any period during the extension of the term under an option) have already expired, it contains provisions to the following effect: (i) the tenant's business cannot be required to relocate unless the landlord has given the tenant at least 6 months written notice; (ii) the notice gives details of an alternative shop, and if the existing premises is in a retail shopping centre, the alternative shop is situated in that centre; (iii) the tenant is offered a new lease of the alternative shop: (A) on the same or better terms and conditions as the existing lease except that the term of the new lease is not shorter than the remainder of the existing term; and (B) the rent for the alternative shop is no	If a retail shop lease contains a relocation clause, the lease will impliedly prevent the tenant being relocated unless the landlord has: (a) provided the tenant with details of the proposed refurbishment, redevelopment or extension sufficient to indicate a genuine proposal that cannot be carried out without the vacant possession of the tenant's shop; (b) given at least 3 months written notice of relocation giving details of an alternative shop; and (c) offered a lease for the remaining term of the existing lease on the same terms, excluding rent, for the remainder of the term, (ss.34A(a)-(c) RLA). The rent for the alternative shop is to be the same as the rent for the existing retail shop, adjusted to take into account the difference in the commercial values of the existing retail shop and the alternative shop at the time of relocation (s.34A(c) RLA). The tenant may terminate the lease within 1 month of receiving the written relocation notice by giving notice of termination to the landlord in which case, the lease is terminated 3 months after the relocation notice unless the parties agree otherwise (s.34A(d) RLA). If the tenant does not give a	Under a shopping centre lease, a relocation clause must require the owner to give the tenant at least 3 months notice. It must require that a relocation notice include an offer for alternative comparable premises, state the right of the tenant to terminate the lease within 1 month of a relocation notice being given, require a grant of a new lease and provide for reasonable compensation of payment and reasonable relocation costs (s.136 LCRA). A relocation clause can only be invoked after the tenant is given the plan of the refurbishment or redevelopment or the extension of the shopping centre to be carried out within a reasonable time after relocation. A relocation clause cannot be invoked unless the refurbishment or other activity cannot practically be carried out without vacant possession of a tenant's premises (s.138 LCRA).	If a retail shop lease contains a relocation clause, the lease will impliedly prevent the tenant being relocated unless the landlord has: (a) provided the tenant with details of the proposed refurbishment, redevelopment or extension sufficient to indicate a genuine proposal that cannot be carried out without the vacant possession of the tenant's shop; (b) given at least 3 months written notice of relocation giving details of an alternative shop; (c) offered a lease for the remaining term of the existing lease on the same terms, excluding rent, for the remainder of the term. The rent for the alternative shop is to be the same as the rent for the existing retail shop, adjusted to take into account the difference in the commercial values of the existing retail shop and the alternative shop at the time of relocation (s.48 BTA). Tenant may terminate the lease within 1 month of receiving the written relocation notice by giving notice of termination to the landlord in which case, the lease is terminated 3 months after the relocation notice unless the parties agree otherwise (s.48 BTA). If the tenant does not give

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tenant does not give a notice terminating its lease within the specified time, the tenant is taken to have accepted the alternative lease offered (s.55(6) RLA). A tenant is entitled to payment of its 'reasonable costs of the relocation' including relocating fit out and legal costs as agreed between the parties or, failing agreement, as determined by an independent quantity surveyor but the tenant may agree to a lesser amount (s.55(7) RLA).	To relocate the tenant, the landlord must give written notice containing: (a) details of the proposed refurbishment, redevelopment or extension to indicate a genuine proposal that: (i) is to be carried out within a reasonably practicable time after the tenant is relocated; and (ii) cannot be carried out practicably without vacant possession; (b) details of the alternative premises; and (c) the day by which the tenant must vacate, (s.46D(2) RSLA). The tenant must be given at least 3 months notice of relocation (s.46D(3) RSLA). Within 1 month of receiving the relocation notice, the tenant can terminate the lease: (a) on an agreed day; or (b) 3 months after the relocation notice is given, (s.46E(2) RSLA). If the tenant does not give a notice, the tenant is deemed to have accepted the landlord's offer to relocate and must lease the alternate premises, on terms and conditions: (a) as agreed; or (b) on the same terms and conditions as the existing lease, but: (i) the term of the new lease is to be the balance term of the existing	costs of relocation, (cl.35(2) CPRT).		more than the rent for the existing retail shop, adjusted to take into account any difference in commercial values; (iv) the landlord agrees to pay the tenant 's reasonable costs of the relocation; and (v) if the landlord does not offer the tenant an alternative lease the landlord is liable to pay the tenant compensation (s.14A(1) & (2) RSA). The landlord may apply to the Tribunal to approve a relocation provision in an alternative form (s.14A(3) RSA).	notice of termination, the tenant is taken to have accepted the offer of relocation, unless the parties have agreed otherwise (s.34A(e) RLA). The tenant is entitled to payment of the reasonable fit out and legal costs of relocating (s.34A(f) RLA). If the landlord and tenant do not agree as to what the actual amount of reasonable costs of the relocation are to be, the amount of the costs is to be determined by a quantity surveyor (s.34A(g) RLA).		a notice of termination, the tenant is taken to have accepted the offer of relocation, unless the parties have agreed otherwise (s.48 BTA). The tenant is entitled to payment of the reasonable costs of relocating (s.48 BTA).

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
	lease; and (ii) the rent for the new shop is to be the same as the rent for the existing shop, adjusted to take into account the difference in the commercial values of the shops, (s.46E(3) and s.46(F) RSLA). The tenant is not prevented from accepting other arrangements when the details of the relocation are negotiated (s.46F RSLA). The tenant is entitled to the tenant's reasonable costs of relocating, including (but not limited to): (a) the costs of dismantling and reinstalling any fixtures and fittings and modifying or replacing any fixtures and fittings to the standard before the relocation; and (b) legal costs, (s.46G(1) RSLA). The Tenant is not prevented from accepting other arrangements when the details of the relocation are negotiated (s.46F RSLA). If the landlord and tenant cannot agree on the amount of compensation, the amount must be decided under the dispute resolution process (s.46G(2) RSLA). A landlord must also pay reasonable compensation						

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
	for loss suffered by a tenant because the landlord causes the tenant to vacate the shop before the end of the lease because of the extension, refurbishment or demolition of the centre or building. This provision applies to tenants, including tenants holding over or to a sub-lessee, or franchisee entitled to occupy under the lease or with landlord consent (s.43(1)(f) RSLA). Whilst it is not specified in the RSLA, we consider that s.43(1)(f) of the RSLA should be read subject to the specific compensation obligations in s.46G and s.46K of the RSLA.						
Demolition							
A demolition clause is only effective if a landlord: (a) gives the tenant details of the proposed demolition sufficient to indicate a genuine proposal to demolish the building within a reasonably practicable time; and (b) gives the tenant at least 6 months notice of the termination date, (s.56(2) RLA). 'Demolition' is defined as including any substantial repair, renovation or reconstruction of the building that cannot practicably be carried out without vacant possession of the premises (s.56(7) RLA). Having received a demolition notice, a tenant can terminate the lease at	No provision for leases entered into before 3 April 2006. For leases entered into from 3 April 2006, see further below.	A demolition clause in a lease cannot be invoked unless the property owner produces to the tenant a firm proposal for the demolition which affects the premises (cl.24(1) CPRT). Six months written notice of termination is required (cl.24(2) CPRT). If the property owner gives notice of termination under a demolition clause, the tenant may terminate the lease by 1 months notice at any time before the lease is terminated by the property owner's notice (cl.24(3) and (4) CPRT).	If a lease provides for termination on the grounds the proposed demolition, the lease includes the following implied terms: (a) the lease cannot be terminated unless and until the landlord has provided the tenant with details of the proposed demolition sufficient to indicate a genuine proposal to demolish within a reasonably practicable time after the lease is terminated; (b) at least 6 months notice of termination must be given to the tenant; and (c) if notice is given to the tenant, the tenant may terminate the lease by giving the landlord at least seven days written notice (at any time within 6 months of the	No provision.	If a retail shop lease contains a demolition clause, the lease will impliedly prevent the lease from being terminated unless the landlord has: (a) provided the tenant with details of the proposed demolition sufficient to indicate a genuine proposal to demolish the building within a reasonably practicable time after the lease is terminated; and (b) given at least 6 months written notice of demolition, (s.35(1) RLA). 'Demolition' is defined as including any substantial repair, renovation or reconstruction of the building that cannot practicably be carried out without vacant possession of the premises	A lease that provides for termination of the lease because of the proposed demolition of the building containing the premises must include provisions to the effect of all of the following: (a) the lease cannot be terminated because of the proposed demolition unless the landlord has given the tenant sufficient details of the proposed demolition to indicate a genuine proposal to demolish the building within a reasonable time after the lease is to be terminated; (b) the lease cannot be terminated by the landlord because of the proposed demolition unless: (i) if the lease is for a term of up to 1 year - the	If a lease provides for termination on the grounds the proposed demolition, the lease includes the following implied terms: (a) the lease cannot be terminated unless and until the landlord has provided the tenant with details of the proposed demolition sufficient to indicate a genuine proposal to demolish within a reasonably practicable time after the lease is terminated; (b) at least 6 months notice of termination must be given to the tenant; and (c) if notice is given to the tenant, the tenant may terminate the lease by giving the landlord at least seven days written notice (at any time within 6 months of the

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
any time on 7 days notice (s.56(3) RLA).			landlord's notice), (s.39 RCLA). If the lease is for a term of 12 months or less, the period of 6 months is reduced by half (s.39 RCLA).		(s.35(4) RLA). Having received a demolition notice, a tenant can terminate the lease at any time during the 6 month notice period on not < 7 days notice. (s.35(1)(c) RLA)	landlord has given the tenant at least 3 months written notice of the landlord's intention to terminate; or (ii) in any other case - the landlord has given the tenant at least 6 months written notice of the landlord's intention to terminate; and (c) the provisions listed below concerning compensation, (s.78 LCRA).	landlord's notice), (s.49 BTA). If the lease is for a term of 12 months or less, the period of 6 months is reduced by half (s.49 BTA).
A landlord must pay a tenant reasonable compensation for: (a) the tenant's fit out to the extent that it was not provided by the landlord (s.56(4)(b) RLA); and (b) if the demolition does not proceed because there was no genuine proposal, the damage suffered as a consequence of the early termination of the lease (s.56(4)(a) and (5) RLA). The amount of compensation payable is that agreed between the parties or failing private agreement, as agreed or determined under the dispute resolution provisions of the RLA (s.56(6) RLA).	A tenant is entitled to 'reasonable compensation' as agreed between the parties or, failing agreement, as determined through the dispute resolution process (s.43 and s.44 RSLA). For leases entered into from 3 April 2006, 'tenant' includes a tenant holding over or to a sub-lessee or franchisee entitled to occupy under the lease or with landlord consent. An agreement under the lease about compensation is void to the extent that it limits the amount of compensation payable (s.44 RSLA). For leases entered into from 3 April 2006, the following additional provisions apply to leases entitling landlords to terminate because the building containing the leased shop is to be demolished (s.46H RSLA).	The property owner may be required to pay compensation (cl.23(1)(k) CPRT). The right to compensation may be excluded.	If a lease is terminated on the ground of a proposed demolition which is not carried out as stated in the landlord's notice, the tenant is entitled to reasonable compensation for damage suffered as a consequence of the early termination (unless the landlord establishes that it did have a genuine proposal to demolish at the time of giving notice) (s.39 RCLA).		A landlord is liable to pay a tenant reasonable compensation for: (a) the tenant's fit out to the extent that it was not provided by the landlord; and (b) if the demolition does not proceed because there was no genuine proposal, the damage suffered as a consequence of the early termination of the lease, (s.35(3) and (3A) RLA).	If the lease is terminated because of the proposed demolition before the end of the term of the lease, the landlord must pay the tenant reasonable compensation for any loss of the tenant arising from the termination of the lease whether or not the landlord goes ahead with the demolition of the building. In working out reasonable compensation regard must be had to any concession given to the tenant (for example, reduced rent) because of the existence in the lease of the clause allowing for termination because of the proposed demolition (s.78 LCRA).	

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
	'Demolish' includes carrying out substantial repair, renovation or reconstruction of the building that cannot practicably be carried out without vacant possession of 1 or more leased shops in the building (s.5 RSLA). To be able to terminate, landlords must give a termination notice stating: (a) sufficient details to indicate a genuine proposal to demolish within a reasonably practicable time; and (b) the day the lease terminates, (s.46I(2) RSLA). The tenant must be given at least 6 months notice of termination (s.46I(3) RSLA). Having received a termination notice, the tenant can terminate at any time on at least 7 days notice (s.46J RSLA). The landlord must pay reasonable compensation for loss or damage suffered by the tenant: (a) for the fitout of the shop not provided by the landlord, whether or not the demolition is carried out; and (b) the early termination of the lease, if the demolition is not carried out and there was no genuine proposal to demolish the building within a reasonably practicable time, (s.46K(1) RSLA). If the landlord and tenant cannot agree on the amount of reasonable compensation, it is decided						

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
	under the dispute resolution process (s.46K(3) RSLA). Whilst it is not specified in the RSLA, we consider that s.43(1)(f) of the RSLA should be read subject to the specific compensation obligations in s.46G and s.46K of the RSLA.						

Merchants' associations

A landlord must not prevent a tenant from joining a tenants' association, chamber of commerce or similar body (s.75(1) RLA). A landlord must not treat or propose to treat a tenant who: (a) forms or joins; or (b) proposes to form or join, a tenants' association, chamber of commerce or similar body less favourably than a tenant in similar circumstances who does not do or propose to do any of those things (s.75(2) RLA).	A tenant cannot be required to, or prevented from, joining a merchants' association (s.49 RSLA).	A person must not take any action to discourage or prevent a tenant from forming or joining a tenants' association (cl.37 CPRT).	Lease cannot contain a provision having the effect of preventing or restricting a tenant from joining, forming or taking part in activities of a tenants' association. A tenant may be accompanied and represented by another member of such an association except where such person is a tenant in the same shopping centre (s.60 RCLA).	A tenant cannot be prevented, or restricted from forming, joining or taking part in any activities of a tenant's association, chamber of commerce or similar body (s.12D(1) RSA).	The tenant cannot be prevented from joining, forming or taking part in any activities of any tenants' association or other similar body (s.60 RLA).	A party to a lease, or a party to negotiations for a proposed lease, must not, in dealings with another party to the lease or negotiations, engage in conduct that is unconscionable or harsh and oppressive. A landlord is taken to have engaged in harsh and oppressive conduct if: (a) the landlord discriminates against a tenant because the tenant is a member of, or intends to become a member of, an association to represent or protect the interests of tenants, or intends to form such an association; or (b) the landlord's conduct has the effect of preventing a tenant from forming or joining, or compelling a tenant to form or join, an association to represent or protect the interests of tenants, (s.22(3) LCRA).	Tenant cannot be prevented from joining, forming or taking part in any activities of any tenants' association or other similar body (s.133 BTA).

Dispute resolution - For each jurisdiction, these provisions are lengthy and are not set out in detail in this summary.

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
The RLA applies to disputes between a landlord and tenant: (a) arising under or in relation to a retail premises lease to which RLA or the previous retail legislation applies; (b) arising under a provision of the previous retail legislation in relation to a lease covered by that legislation; or (c) arising under a lease not covered by the retail legislation but which provides for the occupation of retail premises in Victoria (s.81(1) RLA), but not disputes concerning valuations or relating solely to the payment of rent (s.81(2) RLA). A party to a lease may to refer a retail tenancy dispute to the Small Business Commission for mediation (s.86 RLA). Mediation is a precondition to bringing VCAT proceedings (except for injunctions or where the Small Business Commission certifies that mediation or another form of alternative dispute resolution has failed or is unlikely to resolve the dispute) (s.87 RLA). The parties must bear their own costs of VCAT proceedings unless VCAT determines that the proceeding is vexatious in a way that unnecessarily disadvantaged a party or a party refused to take part in mediation (s.92 RLA).	The RSLA applies to any dispute under or in relation to a retail shop lease, about the use or occupation of a leased shop under a retail shop lease whenever entered into (s.5 RSLA). A party to a dispute may lodge notice of dispute for mediation, except where the dispute relates to: (a) an issue currently the subject of arbitration, previously the subject of an award in an arbitration, or that is before or has been before a court; (b) arrears of rent, amount of rent payable or amount of landlord's outgoings under retail shop lease; or (c) a lease for carrying on business of a service station if the *Trade Practices (Industry Codes – Oilcode) Regulations 2006* (Cth) applies (s.97(1) RSLA), however a mediator does have jurisdiction in relation to the procedure of calculating rent payable, basis and procedure of charging landlord's outgoings, and whether an outgoing has been reasonably incurred (s.97(3) RSLA). Disputes must be referred to QCAT by a mediator where the retail shop lease has not ended > 1 year before the dispute notice was lodged, and where they are within the jurisdiction of QCAT and: (a) parties do not reach a	A property owner and a tenant must attempt to resolve any dispute by direct negotiation. If this fails, either party may request the Office of Consumer Affairs to investigate the dispute and attempt to negotiate a mutually acceptable solution. If the dispute remains unresolved, either party may refer the dispute to the Retail Tenancies Code of Practice Monitoring Committee for conciliation. If the dispute remains unresolved, either party may refer the dispute to a court of competent jurisdiction (cl.39 CPRT).	Parties to a lease may refer a dispute to the Small Business Commissioner for mediation. The Commissioner may intervene in proceedings before a Court concerning a dispute about a lease. An order may be sought from the Magistrates Court (Part 9 RCLA). A matter may be referred to the District Court if the claim exceeds $40,000 (Part 9 RCLA).	A party to retail shop lease may refer to the Tribunal any question between the parties which the party believes to be a question arising under the lease and the Tribunal shall: (a) determine whether or not the question referred to the Tribunal is a question arising under the lease; and (b) if it is such a question, hear and determine it, (s.16(1) RSA). A question arising under a retail shop lease includes: (a) whether or not a lease exists or has existed, including a question as to forfeiture; or (b) a question whether or not a lease is or was a retail shop lease; or (c) arising: (i) in relation to any communication, including a disclosure statement under s.6 of the RSA between the parties to the retail shop lease prior to their entry into the retail shop lease, which communication was material to the terms and conditions of the retail shop lease; or (ii) in relation to the retail shop lease under a provision of the RSA; (d) a matter that is in dispute between the landlord and the tenant under s.12 of	Parties to a retail shop lease may refer a retail tenancy dispute to the Registrar of Retail Tenancy Disputes for mediation (s.66(1) RLA). If mediation is unsuccessful, a claim may be lodged with the Administrative Decisions Tribunal (s.71(1) and s.71A(1) RLA).	All disputes are to be resolved using Part 14 of the LCRA which sets out a process of preliminary hearings, mediation and court hearings in the Magistrates Court (Part 14 LCRA). If the Magistrates Court considers it likely that the parties may resolve the dispute, the court: (a) must promote settlement of the dispute; and (b) may adjourn the proceeding to a stated date, or for a stated period, to allow the parties to settle the dispute, (s. 148 LCRA).	Parties to a retail shop lease or former parties to a former retail shop lease may apply to the Commissioner of Business Tenancies for determination of a retail tenancy claim. A party to an application for determination of a retail tenancy claim may appeal to the local court against a retail tenancy order (ss.86 & 119 BTA).

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
VCAT may: (a) require a party to do or not to do anything (including to provide facilities, services, fixtures or fittings or to return fixtures or fittings); (b) require a party to pay money; (c) rectify a lease; (d) require surrender; or (e) exercise any other powers it holds under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), (s.91 RLA).	mediated solution; or (b) 1 party does not attend mediation; or (c) the dispute is not settled within 4 months after lodgement of notice of dispute (s.63 RSLA). A party to a dispute may apply to QCAT where the retail shop lease has not ended > 1 year before the dispute notice was lodged, and where: (a) a party claims another party has not complied with a mediated agreement within the specified time, or within 2 months of signing where no time has been specified; (b) the mediator has refused to refer the dispute on the basis it is not within QCAT's jurisdiction; or (c) a court orders a dispute to be removed to QCAT or another tribunal, (s.64 RSLA). The jurisdiction of QCAT is the same as that for mediation, except that QCAT may not hear disputes: (a) where the amount in dispute is > the monetary limit within the meaning of the *District Court of Queensland Act 1967* (Qld); or (b) in relation to any retail shop lease for the business of a service station if the *Trade Practices (Industry Codes – Oilcode) Regulations 2006* (Cth) applies (s.103 RSLA).			the RSA in relation to: (i) operating expenses of the landlord; (ii) an allocation made of the proportion of those operating expenses; or (iii) a determination of the relevant proportion for the purposes of s.12 of the RSA; or (e) any other matter in dispute between the landlord and the tenant in connection with the retail shop lease, (s.3(3) RSA).			

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
	QCAT has jurisdiction to hear a dispute about arrears of rent if the dispute is also about the payment of compensation by the landlord (s.103(2) RSLA). QCAT may make an order: (a) for a party to the dispute to do or not do anything; (b) requiring a party to pay or not to pay an amount; (c) setting aside the mediation agreement; (d) that an outgoing was or was not reasonably incurred; (e) the amount of compensation is reasonable; (f) giving effect to a settlement agreed between the parties; (g) for provision of documents; (h) for payment because of unconscionable conduct; (i) an order to rectify the lease (with consent of the parties to the dispute); and (j) if in making a determination of current market rent, the valuer did not comply with s.29 RSLA, an order setting aside that determination and for a further determination to be made, (s.83 RSLA).						

Trading hours

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
If a lease requires a shopping centre tenant to trade during the core hours of the centre, the hours cannot be changed without the agreement of the majority of tenants in the shopping centre who hold a retail premises lease (s.66 RLA). Note: The *Shop Trading Reform Act 1996* (Vic) states that an obligation is void to the extent that it purports to require the shop to be open: (a) between the hours of 5pm (or 1pm for shops outside a metropolitan municipal district) and midnight on a Saturday; or (b) at any time on a Sunday or public holiday. Any disputes must be determined under the dispute resolution provisions of the RLA (s.7 *Shop Trading Reform Act 1996* (Vic)).	A lease cannot require a shopping centre tenant to trade outside the 'core hours of the centre' (s.53 RSLA). 'Core trading hours for a centre' must be allowable under the *Trading (Allowable Hours) Act 1990* (Qld) and are: (a) the hours resolved by the tenants (by a majority of 75% of tenants who voted); or (b) if there has been no tenant's resolution, as nominated by the landlord, (s.51 RSLA).	The trading hours for a shopping centre are to be divided into core trading hours, centre trading hours and special trading hours. Core trading hours are the minimum times of trading during which all shops must be open and may be negotiated with individual tenants. Centre trading hours are hours during which all centre facilities are to be available and any shop may trade. Special trading hours are times outside centre trading hours and may be negotiated with individual tenants and are not compulsory. The property owner may set the trading hours for a new shopping centre. A property owner is not to change the centre trading hours without the approval of tenants. Clause 38(8) sets out the procedure for obtaining the tenants' approval to any change (cl.38 CPRT).	A lease in a shopping centre may only regulate trading hours if: (a) the shop is within an 'enclosed shopping complex'; (b) the lease does not reduce the trading hours (for which the shop is permitted to be open) to < 50 hours per week; and (c) the core trading hours (during which the shop must be open) do not exceed 54 hours a week, and have been approved by the centre's tenants in a secret ballot by a majority of at least 75% of the votes cast, (s.61 RCLA). An 'enclosed shopping complex' is a group of 3 or more retail shops with common ownership or management with a common area through which public access is obtained and which is locked to prevent access when the shops are closed (s.3 RCLA).	A provision in a retail shop lease which requires a tenant to open at specified hours or specified times is void (s.12C(1) RSA). If: (a) a landlord has refused to renew a retail shop lease; and (b) the tenant under the retail shop lease believes that the refusal was because the tenant did not open at specified hours or times, the tenant may apply in writing to the Tribunal for an order that the landlord pay compensation to the tenant for pecuniary loss suffered by the tenant as a result of the failure to renew the retail shop lease (s.12C(2) RSA).	After the initial fixing of trading hours in a new shopping centre, a landlord is not entitled to change the core trading hours of the shopping centre except with the approval in writing of the tenants of a majority of retail shops in the shopping centre regardless of whether the leases for those shops are regulated by the RLA (s.61 RLA).	The landlord is not entitled to change the core trading hours of the shopping centre without the approval in writing of the majority of tenants who have premises in the retail area of the shopping centre (whether or not the premises are premises to which the LCRA otherwise applies). The initial fixing of core trading hours in a new shopping centre is not a change to core trading hours and is not affected by the LCRA (s.139 LCRA).	A retail shop lease is void to the extent that it requires the tenant to trade at a time when trading would be unlawful (s.62 BTA). After the initial fixing of trading hours in a new shopping centre, a landlord is not entitled to change the core trading hours of the shopping centre except with the approval in writing of the tenants of a majority of retail shops in the shopping centre regardless of whether the leases for those shops are regulated by the BTA (s.75 BTA).

Security deposit

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
Security deposits must be paid into an interest bearing account held by the landlord on behalf of the tenant, and the landlord must account to the tenant for interest earned but the landlord is entitled to keep the interest and deal with it as if it were part of the security deposit (s.24(1)(a) and (b) RLA). The landlord cannot unreasonably refuse to accept a bank guarantee as security (instead of a security deposit)	No provision. Non-refundable bonds are deemed to be key money and are therefore unlawful (s.5 RSLA).	A security deposit must not be > 3 months rent and must be held in an interest bearing account on trust for the tenant. A property owner must account to the tenant for interest earned on the deposit. Interest may be retained and treated as a part of the deposit. A property owner may accept, and must not unreasonably refuse to accept, a bank guarantee instead of a security deposit (cl.30 CPRT).	A landlord must not: (a) require > 1 'security bond' for a lease; or (b) require the payment of a security bond in excess of 4 weeks' rent (maximum fine: $1,000). A security bond must be paid to the Small Business Commissioner within 28 days of receipt by a registered agent, or within 7 days in any other case (s.19 RCLA). *In practice, no landlord of*	No provision.	Part 2A of the RLA establishes a Government scheme to administer security bonds. From 1 January 2006 security bonds must be deposited with the Director General within 20 business days after the later of: (a) the date of receipt of the security bond; and (b) the date the lease becomes binding, (s.16C(2) RLA). Any security bonds existing at 1 January 2006 must be	'Bond' means an amount paid or payable by a tenant as security for the performance of its obligations under the lease (dictionary LCRA). A bond must not be > 3 months rent. The landlord may accept a guarantee and indemnity instead of, or as well as, a bond. The landlord may not unreasonably refuse a bank guarantee instead of a bond (ss.39-41 LCRA).	A retail shop lease is taken to include the following: (a) money paid to the landlord as security for the tenant's obligations under the lease must be placed into an interest bearing account by the landlord; and (b) the landlord must account to the tenant for interest earned on a security deposit but may retain it as part of the security deposit, (s.63 BTA).

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
(s.24(1)(c) RLA). If the tenant performs all of the tenant's obligations under the lease, the landlord must return the security deposit to the tenant as soon as practicable after the lease ends (s.24(1)(d) RLA).			*a shopping centre requires a 'security bond' from a tenant given that it cannot be for even 1 months rent (it must be limited to 4 weeks rent) and it must be paid to the Commissioner and not kept by the landlord.*		deposited with the Director General by 1 April 2006 (s.16D RLA). Mechanisms are provided for the payment of security bonds on application by either or both parties to a lease. The amount available to be paid out is to include an amount equivalent to interest at a prescribed rate (s.16G to 16M RLA).	A bond must be held by the landlord in trust for the tenant in an account that attracts interest, and the landlord must account to the tenant for interest earned on the bond, but the landlord is entitled to keep the interest and deal with it as an amount paid by the tenant to the landlord as part of the bond (s.42 LCRA). A bond must be repaid in full or a separate guarantee returned to the tenant within 30 days after the end of the lease or the tenant vacating the premises (whichever is the later) except for any deductions for amounts owed to the landlord that are not contrary to the LCRA (ss.43, 44 and 45 LCRA). The landlord must not unreasonably refuse to accept a bank guarantee in satisfaction of a requirement to provide a bond (s.41 LCRA).	The landlord cannot unreasonably refuse to accept a bank guarantee as security (s.63 BTA).

Personal guarantees

A landlord must not unreasonably refuse to accept a bank guarantee in place of a third party guarantee (s.24(1)(c) RLA).	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	A landlord must not unreasonably refuse to accept a bank guarantee in place of a third party guarantee (s.63 BTA).

Statistical information

If a shopping centre tenant is required to contribute to the cost of collating statistical information, the landlord must, at the tenant's request, make that information available to the tenant (s.68 RLA).	No provision.	No provision.	If a shopping centre tenant is required to contribute to the cost of collating statistical information, the landlord must make that information available to the tenant (s.52 RCLA).	No provision.	If a shopping centre tenant is required to contribute to the cost of collating statistical information, the landlord must make that information available to the tenant (s.51 RLA).	If a shopping centre tenant is required to contribute to the cost of collating statistical information, the landlord must make that information available to the tenant in a form that does not identify a particular tenant (s.130 LCRA).	If a shopping centre tenant is required to contribute to the cost of collating statistical information, the landlord must make that information available to the tenant (s.67 BTA).

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
Geographical restrictions							
A provision that precludes a shopping centre tenant from trading elsewhere is void (s.74 RLA).	No provision.	No provision.	A provision that precludes a shopping centre tenant from trading elsewhere is void (s.59 RCLA). This does not prevent a lease from precluding the tenant from using the name of the shopping centre elsewhere.	No provision.	A provision that precludes a shopping centre tenant from trading elsewhere is void (s.59 RLA).	A provision of a lease that has the effect of preventing or restricting the tenant from carrying on business outside the shopping centre containing the tenant's premises during, or after the end of, the lease is void (s.141 LCRA).	No provision.
Indemnities							
A provision in a retail premises lease is void to the extent that it purports to indemnify, or require the tenant to indemnify, the landlord against any action, liability, penalty, claim or demand for or to which the landlord would otherwise be liable or subject (s.93(1) RLA). A provision in a retail premises lease is void to the extent that it purports to make the tenant liable for or subject to any action, liability, penalty, claim or demand in respect of any act, matter or thing done or omitted to be done by the landlord or any other person if the tenant would not otherwise be liable for or subject to that action, liability, penalty, claim or demand (s.93(2) RLA). The landlord must indemnify the tenant for any amount recoverable from the tenant by a public statutory authority for charges, rates or taxes payable under any Act for the retail premises except for excess water or charges, rates and taxes which the tenant is liable for under the lease (ss.93(3) and (4) RLA).	No provision.	A provision is void if it requires a tenant to indemnify a property owner against any action, liability, penalty, claim or demand to which the property owner would otherwise be liable (cl.31(1) CPRT).	No provision.	No provision.	No provision.	No provision.	No provision.

GST provisions

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
No provision.	For the purposes of calculating turnover rent, turnover does not include GST (s.9 RSLA). Nothing in the RSLA prohibits the landlord from requiring the tenant to pay an amount directly or indirectly attributable to the GST payable on a supply made by the landlord to the tenant under the lease (s.24A(1) RSLA). A lease may include GST in the definition of 'outgoings' (s.24A(2) RSLA). Note: s.24A RSLA does not apply to 'existing retail shop leases' (s.13(2) RSLA). See s.5 for a definition of this term. An adjustment of rent merely to enable the landlord to recover GST from the tenant is not a rent review (s.27(9) RSLA). A valuer's determination of current rent must state: (a) whether the current market rent includes GST; and (b) if the rent does include GST, the GST amount, (s.31(2) RSLA).	No provision.	No provision.	No provision.	A retail shop lease may include GST in the definition of 'outgoings' (s.3 RLA). Turnover rent does not include GST (s.20 RLA).	Nothing in the LCRA prohibits the recovery of GST by one party from the other (s.21 LCRA).	No provision.

Casual mall licences

No provision.	No provision.	No provision.	A landlord cannot grant a casual mall licence in a retail shopping centre unless the landlord complies with the Casual Mall Licensing Code (see s.62A RCLA and Schedule). A casual mall licence is an agreement under which	No provision.	No provision.	No provision.	No provision.

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
			the landlord grants a right to occupy part of a mall area: (a) for the purpose of the sale of goods or the supply of services to the public; and (b) for a term not exceeding 180 days, (Schedule RCLA). The Code requires that a landlord: (a) prepare a casual mall licence policy; (b) give existing tenants a copy of the policy and the Code, and the contact details of a person who will deal with complaints about licences; (c) give new tenants the same information (at the time of service of the disclosure statement); (d) ensure a licence does not interfere with the sightlines to a tenant's shopfront; (e) not grant a licence that results in the unreasonable introduction of an external competitor to an adjacent tenant; (f) subject to certain exceptions, not grant a licence that results in the unreasonable introduction of an internal competitor to an adjacent tenant; (g) reduce the amount of the non-specific outgoings recovered from the centre's tenants generally, by a specified formula which reflects the size and duration of licenses granted during a year; and (h) not amend the casual mall licence policy,				

VIC	QLD	TAS	SA	WA	NSW	ACT	NT
			unless existing tenants are notified and copies of the amended policy are made available, (Schedule RCLA). A casual mall licence policy must include: (a) a floor plan showing the centre court and mall areas; (b) the number of sales periods in each accounting period; and (c) a statement of whether the landlord reserves the right to grant licences in respect of special events other than in accordance with the Code, (Schedule RCLA). The expressions 'adjacent tenant', 'centre court', 'external competitor', 'internal competitor', 'mall area', 'sales period' and 'special event' (and other expressions) are all defined terms (s.62A RCLA and schedule).				

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DISCLOSURE STATEMENT

Retail Leases Act 1994 (as amended) **(NSW)**

SHOP:

PART 1 – LESSOR'S DISCLOSURE STATEMENT

Advice to lessees

1 Before signing agreements to a lease or leases, lessees should ensure they fully understand the documents.

2 If there is any doubt, lessees should seek independent legal advice.

Note. If there is insufficient space on this form please attach additional sheets and appropriate documents.

SHOP AND LEASE DETAILS	
Lessor	Name: Address: ACN:
Lessee	Name: Address: ACN:
Personal Guarantee	If the Lessee is a company, each director and principal shareholder (Guarantors) must provide a written personal guarantee and indemnity to the Lessor in the standard form for the Centre.
Address of the Premises / Shop No.	
Permitted Use of the Premises	**Please note the Permitted Use does not imply any form of exclusivity. The Lessor may, at its discretion, lease other premises in the Centre to lessees selling the same or similar merchandise as the Lessee.**
Trading name of the Premises	.
Lease Period *(see Note 1)*	.

Lettable Area *(See Note 2)*	).
Option Periods	☒ No **Option Period(s):** Not Applicable.
Lessor's requirements as to quality and standard of fittings in the Premises *(See Note 3)*	The Lessor's requirements as to the quality and standard of fittings in the Premises are detailed in the document entitled "###", a copy of which is attached to this Disclosure Statement as Annexure F.
Finishes, fixtures, fittings, equipment and services to be provided by the Lessor	The Premises will be serviced in accordance with Scope of Lessor/Lessee Works attached. Any amendments to the Lessor's standard works will be at the Lessee's cost.
Lessee has to pay for the finishes, fixtures, fittings, equipment and services to be provided by the Lessor	☒ Yes ☐ No
If Yes, to what extent?	

Finishes, fixtures, fittings, equipment and services to be provided by the Lessee	On or before the Commencement Date, the Lessee is required to fitout the Premises in accordance with the the "**Fitout Guide**" subject to any amendments, variations or relaxations made or permitted by the Lessor. The Lessee acknowledges and accepts that the Lessor may allow any other lessee of the Centre a relaxation of any requirements in the Fitout Guide and the Lessee shall not object or make any claim in that event. **The Lessee is required to complete the fitout works prior to ###**
Hours of access to the Premises outside trading hours	One (1) hour before and one (1) hour after the Core Trading Hours of the Centre.
Date on which Premises will be available for occupation by the Lessee	

RENT	
Base Rent	$### (plus GST) per annum, payable monthly in advance. Rent must be paid by electronic funds transfer to the Lessor's nominated account.
Method or formula for calculating Base Rent	.
Percentage Rent	In addition to the Base Rent, the Lessee is to pay an amount equal to ###% of gross sales to the extent that such amount exceeds the Base Rent in the relevant financial year.
Rent in Advance	$
Bank Guarantee	### which must be in favour of ###, have no expiry date, be unconditional, note the Premises and be in the name of the Lessee.
Lease Commencement Date	The earlier to occur of: 1. ###; 2. four (4) weeks after the Handover Date; or 3. commencement of trade. NB: Any dates are estimated only and are subject to change due to delay in alterations of the Lessor's works and handover of the Premises.
Rent Commencement Date	The earlier to occur of: 1. ###; 2. four (4) weeks after the Handover Date; or 3. commencement of trade. NB: Any dates are estimated only and are subject to change due to delay in alterations of the Lessor's works and handover of the Premises.
Lease Expiry Date	.
Rent reviews	**Frequency:** Annually on the anniversary of the Commencement Date. **Nature:** Fixed at ##% increases.
Payment	The Base Rent, promotion fund contribution, outgoings, operating expenses and rates and taxes must be paid

	on or before the first day of the month.
Details of any current legal proceedings in relation to the lawful use of the Premises/Centre	At the time of issue of this Disclosure Statement, the Lessor is not aware of any current legal proceedings of this nature.
Insurance	The Lessee must take out and maintain throughout the lease term public risk insurance (for an amount not less than $Ax million), plate glass insurance and insurance over fittings and stock (for replacement value).
GST Provision	If GST is imposed or levied in respect of any supply by the Lessor to the Lessee under or in accordance with the agreement and/or the lease (including the supply of the Premises or the supply of any goods, services, rights, benefits or things) to the extent the consideration otherwise provided for that supply is not stated to already include an amount in respect of GST on the supply then the Lessor may recover the amount of GST from the Lessee.
Legal and Other Costs	The Lessee is responsible and must pay for (if applicable): • Registration fees on the lease; • Stamp duty on the lease; • Lessor's legal fees associated with the negotiation of the lease in accordance with the *Retail Leases Act 1994 (as amended)* (NSW)*;* • Mortgagee's consent fees; • Survey fees (if any); • The Lessor's legal fees arising out of any default by the Lessee of its obligations under the Lease; • The Lessor's costs of considering any request by the Lessee for consent under the Lease; • After hours trading expenses (if applicable); • Outgoings (if applicable).

OUTGOINGS TO BE PAID BY THE LESSEE		
Services to the public	**Details of Outgoings**	**Estimate Per Annum**
	Car parking	$x
	Child minding	$x
	Public address/music	$x
	Security	$x
	Signs	$x
	Telephones (public)	$x
	Uniforms	$x
Administration costs	Audit fees	$x
	Management Fees (administration costs to run Centre)	$x
	Management Fees (paid to management company)	$x
Waste management costs	Sewage disposal and sullage	$x
	Waste disposal and removal maintenance	$x
Costs to run Centre	Air conditioning/ventilation	$x
	Building intelligence and emergency systems	$x
	Cleaning (consumables)	$x
	Cleaning (other)	$x
	Electricity	$x
	Energy management systems	$x

	Fire protection	$x
	Gardening	$x
	Gas and oil	$x
	Insurance	$x
	Lifts and escalators	$x
	Pest control	$x
	Repairs and maintenance	$x
	Sinking fund for repairs and maintenance	$x
	Strata levies	$x
Government charges	Land tax	$x
	Local government rates and charges	$x
	Water, sewerage and drainage rates and charges	$x
Others	Not applicable	$x
	TOTAL	$x
Formula for apportionment of outgoings if Lessee not liable for total amount	The Lessee is required to pay the Lessee's proportion (being the gross lettable area of the Premises in comparison with the gross lettable area of the Centre) of outgoings for the Centre and all outgoings directly assessed on the Premises. These are payable monthly in advance with any variation accounted for at the end of each financial year and are estimated at $##### (plus GST) per annum for the financial year ending ### *(This estimate is based upon the post development GLA assessments, charges and expenses and while allowance has been made for normal increases in such assessments, charges and expenses the estimate does not take into account any abnormal assessments, charges or expenses or any abnormal increases in current assessments, charges and expenses)*.	
Additional outgoings to be borne by Lessee	Refer Above	

DETAILS AS TO INTEREST OF LESSOR

Is the Lessor:

☒ **Owner** of the Premises or ☐ **Lessee** of the Premises

Give any details of the rights and obligations of lessor under that lease that may affect the Premises: Not applicable.

DETAILS AS TO AGREEMENTS OR REPRESENTATIONS

Give details of any other agreements between Lessor and Lessee, or representations made by Lessor or Lessee including those relating to exclusivity or limitations on competing uses:

Details:

1. The Lessee will not be permitted to commence trading from the Premises until the Lessee provides to the Lessor or its solicitor:

   a) the signed Lease and any ancillary documentation;
   b) Bank Guarantee;
   c) one month's gross Rent In Advance;
   d) legal fees in accordance with the Retail Leases Act 1994 *(as amended)* (NSW), stamp duty and registration fees;
   e) certificate of currency / public liability insurance for minimum $x million for any single event; and
   f) evidence of Regulatory (Council / Private Certifying Authority PCA) approvals relevant for the Premises.

2. From the commencement of the Lessee's fitout, the Lessee shall be deemed to be bound by the provisions in the draft lease as licensee only, for the period of such access. From the date the lease commences, notwithstanding that the lease documentation has not been executed, the Lessee shall pay the rents and other monies referred to in the draft lease on a day by day basis, unless otherwise agreed.

3. The tenancy mix applies as at the date of this disclosure statement but may vary at any time in the future at the Lessor's discretion. Potential lessees should be aware that all leases (including those of the major stores) have clauses allowing lessees to assign their leases and assignments may occur without any instigation by the Lessor. Some of the existing leases of tenants and major tenants may expire during the term of your lease. The Lessor does not give any assurance that the lease of any such existing tenant will be renewed.

4. During the term of the Lease the Lessor may carry Centre improvements, alterations or maintenance works and promotional and casual leasing activities.

5. The Lessee is responsible for any additional costs (including air-conditioning costs) incurred in operating the Centre during any time the Lessee trades outside the Core Trading Hours. When more than one lessee trades during any such period, the costs will be apportioned.

6. Bank guarantees must be in a form acceptable to the Lessor, drawn payable to #### must be assignable, irrevocable, have no expiry date, note the Premises and be in the name of the Lessee. The Bank Guarantee must state that it secures the Lessee's obligations under the Lease of the Premises. The Bank Guarantee will be returned after expiry of the Lease, and within one (1) month of all terms and conditions have been complied with.

7. If the Lessee is a franchisor, the Lessee may franchise the use of the Premises subject to the terms of the Lease. The terms of the franchise agreement must be consistent with the terms of the Lease.

8. It is the Lessor's policy to offer the Premises to alternative parties if the Lessee has not completed and returned legal documentation within 14 days of receipt of the same.

9. There is no guarantee of the Lease being renewed at the end of the term or that the Lessee will be granted a new lease or a lease of new shop in the redeveloped Centre (if the Centre is redeveloped).

10. The terms of this letter and the negotiations between the parties are strictly confidential.

11. Before signing any Lease or any associated document, the Lessee should ensure that it obtains its own independent legal, financial, business management and other professional advice in regard to the financial viability of the Lessee's business, its obligations under the lease and the Lease terms.

12. The grant of this Lease is subject to:

    a) approval being obtained from relevant statutory authorities;
    b) the Lessor obtaining vacant possession of the Premises; and
    c) final Lessor's Board approval.

13. The Lessee hereby acknowledges that in making the decision to enter into the Lease, it is not relying on any representation, promise, warranty or undertaking made by the Lessor or its representatives other than those set out in:

    a) the Lease; or
    b) the Lessee's Letter of Offer or Invitation to Lease; or
    c) any counter offer made by either party as part of the negotiation process (prior to the lease being issued); or
    d) the Lessor/Lessee Disclosure Statements.

14. The Lessee is to promptly pay or reimburse the Lessor on demand for all reasonable expenses or charges (including legal fees or an equivalent administration fee, costs and disbursements) incurred or charged in connection with negotiating, stamping and registering this Lease, subject to the Retail Leases Act 1994 *(as amended)* (NSW), and any subsequent consent, agreement, approval, waiver or amendment relating to this Lease.

15. The Lessor will contribute up to $#### (exclusive of GST) towards the costs incurred by the Lessee in undertaking the Lessee's works.

If the Lessee is in breach, parts with possession of or ceases (as a result of the breach) to occupy the Premises for any reason during the Lease Term, the Lessee must pay to the Lessor a refund of part of the fitout contribution (inclusive of GST), being the prorated amount for the balance of the Term.

The Lessor agrees to delete the words "assigns or transfers" from this clause.

Payment of the contribution will be made on the later of:

- the receipt of the executed documents in a format acceptable by the Lessor;
- receipt of itemised Tax Invoice from the Lessee, which must be an original (faxes or photocopies will not be acceptable and may delay payment).
- copy of the receipt of works carried out by tradespeople up to the above amount;
- Bank Guarantee (if any);
- Certificate of Currency for public liability insurance;
- receipt of any fees;
- completion of the fitout including correction of any defects;
- Premises are fully stocked and open for trade as at the Commencement Date agreed by both parties and set out in the lease.

Payment of the contribution will be withheld until the above conditions are met. Should the Lessee not meet the above conditions within 12 months from the lease commencement date, the contribution will be forfeited.

16. Provided that the Lessee performs all obligations under the lease and is not in breach of the lease, the Lessor will permit the Lessee to grant a licence to a licensee in accordance with the following:

(a) the Lessee warrants to the Lessor that:

(i) the terms of the licence agreement are not inconsistent with the terms of this lease and contains an acknowledgement from the licensee that the licence agreement does not create any proprietary rights in the licensee;

(ii) the licence agreement terminates on or before termination of the lease;

(iii) the licence agreement does not grant any rights to the licensee as a lessee or sublessee; and

(iv) the licensee is a respectable and responsible person or persons capable of carrying on the business upon the terms and conditions contained in the lease and the licence agreement; and

(b) the lessee indemnifies the Lessor against any loss, damage, expense or claim:

(i) in relation to or arising from any claim or action for possession of the Premises or any part of them made or brought against the Lessor by the licensee; and

(ii) to the extent that the loss, damage, expense or claim has not been caused by the Lessor's negligence or wilful default in relation to the use of the Premises by the licensee.

DETAILS OF ANY ANTICIPATED DISTURBANCE TO TRADING

Give details of any disturbance likely to occur during the term of the lease, where known, where this will have a significant adverse effect on trading:

A schedule of anticipated disturbances is attached to this Disclosure Statement as **Annexure A**.

Section 34 (3) of the Retail Leases Act 1994 (as amended) (NSW) may limit a lessee's claim for compensation if an event disturbing a lessee's trade was brought to the attention of the lessee in writing, before the lease was entered into. A general written statement made to the lessee before the lease is entered into will not be enough to limit liability of the lessor. A statement must specifically describe the nature of the disturbance, include an assessment of the likelihood of the disturbance taking place (including an indication of the basis on which the assessment was reached) and have regard to its timing, duration and effect during the lease term. Lessees should have to be aware that it is not always possible to predict the timing and the duration of disturbances with certainty.

CURRENT CENTRE DETAILS	
Name of the Centre	
Address of the Centre	**Street Address:** **Postal Address:**
Number of retail shops in the Centre	Approximately ###
Estimated Gross Lettable Area	### square metres subject to change upon completion of the proposed redevelopment of the Centre. Refer to Annexure A for the proposed increase in the Gross Lettable Area to: Retail Shopping Centre: ### sq metres (approximately). Retail Park: ### sq metres (approximately).
Parking facilities at the Centre	
Number of bays available for customers	650 approximately
Number of bays reserved for the Lessee	Nil
Facilities and services provided by the Lessor	Public male and female, parents room, disabled toilets, public telephones, rubbish bins, garbage disposal, recycling equipment and loading dock area
Annual turnover of the Centre (to the extent collected by the Lessor) for the previous accounting period *(See Note 4)*	Refer Annexure D
Annual turnover for specialty shops, on a per square metre basis, for the previous accounting period. Minimum aggregation is to be on the basis of three types of categories (to the extent	Refer Annexure D

collected by the Lessor) *(See Note 5)*	
Expiry date of the leases of retailers with a lettable area more than 1,000 square metres	Refer Annexure D
Total Centre traffic count (where available) for the previous accounting period	Not applicable - due to the nature of the Centre, the Lessor is unable to install traffic counters.
Cost of (or basis or formula for) Lessor's works to prepare the Premises for fit out *(See note 6)*	Refer Annexure E
Changes or developments planned by Lessor for:	**The Centre:** ☐ No ☒ Yes - Refer to details attached to this Disclosure Statement as Annexure A. **Surrounding Roads:** ☐ No ☒ Yes - Refer to details attached to this Disclosure Statement as Annexure A.
Core trading hours (the times when retail shops in the Centre are required to be open for business)	Monday 9:00 am to 5:30 pm Tuesday 9:00 am to 5:30 pm Wednesday 9:00 am to 5:30 pm Thursday 9:00 am to 9:00 pm Friday 9:00 am to 5:30 pm Saturday 9:00 am to 5:00 pm Sunday 10:00am to 4:00 pm (Unless prohibited by law) except Christmas Day, New Year's Day, Easter and Anzac Day. Subject to alterations from time to time, as approved by the Lessor and the majority of lessees in the Centre in accordance with the Retail Leases Act 1994 *(as amended)* (NSW).
Tenant mix (attach floor plan showing existing tenancy and proposed tenancy mix of the precinct and the location of common areas and kiosks within the precinct)	Information in respect of the tenant mix is attached to this Disclosure Statement as **Annexure B**. This arrangement applies as at the date of this statement but may be changed from time to time. Subject to agreements or representations details of which are given in this disclosure statement. Whilst every care has been taken in its preparation, we

	recommend an on-site inspection.
Is the Lessor able to assure the Lessee that the current tenant mix as shown on the attached floor plan will not be altered through the introduction of a competitor or any other type of tenant?	☒ No ☐ Yes
Tenant/Merchant Association	☒ No ☐ Yes (attach details of constitution, voting rights, contributions)
Contribution to the Centre advertising and promotion	☐ No ☒ Yes Lessee's contribution $x per annum payable monthly in advance at the same time as the Base Rent and reviewed annually on the anniversary of the Commencement Date of the lease by x%.
Opening Promotional Fund	The Lessee is required to pay a one-off centre opening promotion contribution of $x.

SIGNED FOR AND ON BEHALF OF THE LESSOR:

…….
Signed

Name

…….
Date

Note: Section 11A of the Retail Leases Act 1994 *(as amended)* (NSW) requires a Lessee's disclosure statement to be provided to the Lessor within 7 days (or any agreed further period) of the Lessee receiving the Lessor's disclosure statement. The Lessee may be liable to a penalty for an offence under that Act if the Lessee's disclosure statement is not so provided.

NOTES

Note 1.

Section 16 of the Retail Leases Act 1994 (as amended) (NSW) provides for a minimum term of 5 years for a retail shop lease. The 5 year term can be made up of an initial term and any combination of options. If the parties to the lease agree to a term of less than 5 years, the lessee must provide the lessor with a certificate from the lessee's solicitor or conveyancer indicating that:

(a) the lessee's rights under Section 16 have been explained to them, and
(b) the lessee has made an informed decision to accept a term of less than 5 years.

*Making an informed decision about the viability of a retail business with a less than 5 year term should form part of the lease negotiation. A pro forma Section 16 Certificate is available for download from **www.retailtenancy.nsw.gov.au**. It can be provided to the lessor within 6 months of entering into the lease. Without a Section 16 Certificate, the lessee has the choice of extending the term of the lease to 5 years.*

Note 2.

Required only for shops in shopping centres or if the rent and/or outgoings is calculated on a "per square metre basis".

Note 3.

If the lessor requires a particular standard of construction for fit-out, the lessee is to be provided with a fit-out guide, setting out this information, with this disclosure statement.

Note 4.

The lessor is not liable for a claim under Division 2 of Part 7A of the Act for misrepresentation for any error in the annual turnover of the retail shopping centre if the error is the result of inaccurate information provided to the lessor by the lessee(s).

Note 5.

This breakdown is not to identify an individual lessee. For example, if there are only one or two food lessees in a centre, the food category would be excluded from disclosure, or incorporated in non-food or services and noted. The lessor is not liable for a claim of misrepresentation under Division 2 of Part 7A of the Act for any error if this error is the result of inaccurate information provided to the lessor by the lessee(s).

Note 6.

Lessor's works are the works which must be done by the lessor's trade contractors or employees prior to the commencement of the fit-out by the lessee. The cost of lessor's works is to be agreed before works are carried out and if actual cost exceeds the agreed cost, the lessee is not liable to bear the difference.

APPENDIX TO PART 1 OF SCHEDULE 2

Information for the lessee to consider when entering into a retail shop lease

Before signing a lease:

- You should have detailed discussions with the lessor/agent and also seek advice from business associations, your solicitor and your accountant. Also consult your local Council about any regulations, permitted use or development applications affecting the shop.
- Information on these topics is included in the retail tenancy guide.
- Ensure that all agreements arrived at with the lessor are included in the lease. Documentation is critical to avoiding and managing disputes about the lease.

Rent—be clear about the following issues:

- What the starting rent is, and on what basis it is calculated.
- How the rent will increase during the lease.
- If you have agreed to pay turnover rent, be clear as to how you will give this information to the lessor.
- If there is an option as part of the lease, find the clauses of the lease that tell you how and when you must exercise the option and that explain how the rent will be set.

Lease establishment—check:

- That you have read the lease and asked for advice on what it means.
- That the description of the Premises in the lease is accurate and covers any rights you will have to use common areas or car parking for you, your staff or visitors.
- Whether statements you have relied on in agreeing to the lease have been documented in the Lessee's Disclosure Statement, so as to avoid disagreements later.
- Whether you need to provide a security bond or personal guarantee to secure the lease, and how much this will be. If a cash security bond is agreed to, be sure it is lodged under the NSW Government's retail bond scheme.
- What expenses you will have to meet to fit-out the shop ready for trading, and whether you will have to meet any of the costs incurred by the lessor in preparing the shop for you to occupy it.

The Premises—you will need to be sure that:

- The location and building suit the proposed use you will make of the leased Premises and to check whether you will have to renovate to enable the shop to operate.
- The hours you can access the shop and open it to trade, as allowed by the lessor and the Council, will be sufficient to allow you to trade profitably.
- You have, or can readily obtain, all the permits and licences required to operate the type of business you have chosen, and that the Council's zoning for the Premises does not restrict you from operating this type of business.
- You have a condition report or photos to document the state of the Premises when taking possession, to prevent or address disputes at the end of the lease. Agreements about equipment should also be documented.

Outgoings and expenses—you need to understand:

- The extra expenses you will have to meet as outgoings, and how they may change over the term of the lease. These are set out in the Lessor's Disclosure Statement.
- The information that the lessor will provide and your rights to receive estimates to allow you to plan for these expenses.
- The insurance costs you will have to meet, including any contribution to the lessor's insurance.

When you want to sell the business

If you want to sell your business, you need to be aware of the process set out in the Retail Leases Act 1994 *(as amended)* (NSW) for assigning the lease. The lessee becomes the assignor of the lease, and the potential new lessee becomes the assignee. In brief, these are the steps:

1. Get an updated copy of the lessor's disclosure statement. If an updated disclosure statement has not been issued during the term of your lease, request one in writing from the lessor. If it is not provided within 14 days, provide the latest version of the disclosure statement you have to the assignee (or if none exists, this requirement does not apply to you).

2. Give a copy of the assignor's disclosure statement to the assignee (and to the lessor at least 7 clear days before the assignment if you want to be protected from on-going liability under the lease).

3. Gather, from the assignee, the following information to provide to the lessor:

    (a) The assignee's name and contact details.
    (b) Documentation to indicate the assignee's financial standing.
    (c) Business experience of the assignee.
    (d) Written records of statements made by the assignor or lessor which influenced the assignee in deciding to enter the assignment.

4. Provide information in point 3 to the lessor in writing, by:

    (a) delivering it personally; or
    (b) leaving it at or posting it to the last known residential or business address of the lessor, or in any other manner referred to in Section 81A of the Act.

5. The lessor must respond to the request for assignment of the lease within 28 days from the time all the required information is received, or the assignment is deemed to have taken place.

6. The reasons the lessor can refuse a request for assignment of a lease are:

    (a) If the use of the Premises is to change;
    (b) If the assignee (new lessee) has inadequate retail skills compared to the assignor (current lessee).
    (c) If the assignee has inferior financial resources to the proposed assignor.
    (d) If the lessee has not complied with the procedure for obtaining consent to the assignment, as set out in Section 41 of the Act.
    (e) It the shop is in airside premises at Sydney (Kingsford-Smith) Airport and the lessor exercises the right to withhold consent to the assignment under Section 80E of the Act.

General

- Check with your accountant the most tax effective way to structure the payment of rent, fit-out costs and GST.
- Make sure that all negotiated agreements are written into the lease.
- Inspect the property and take notes and photographs prior to moving in.
- Section 11A of the Retail Leases Act 1994 *(as amended)* (NSW) requires a lessee's disclosure statement to be provided to the lessor within 7 days (or any agreed further period) of the lessee receiving the lessor's disclosure statement. The lessee may be liable to a penalty for an offence under that Act if the lessee's disclosure statement is not provided.

ANNEXURES TO PART 1 OF SCHEDULE 2	
Annexure A	Schedule of Anticipated Disturbances
Annexure B	Tenancy Mix Plan and Information
Annexure C	Lessee's Disclosure Statement
Annexure D	Turnover and Majors' Lease Expiry Information
Annexure E	Category 1 Works Costs
Annexure F	Design + Fitout Guide

Annexure A – Schedule of Anticipated Disturbances

Specific description of the nature of the disturbance	Statement assessing the likelihood of the disturbance occurring	Basis on which the assessment of likelihood was reached	Statement of timing, duration and effect so far as can be predicted

Annexure B – Tenant Mix Plan and Information

Existing Tenant Mix

Existing Tenant Mix

Note, this tenancy mix is current as at the date of this Disclosure Statement only and may be changed by the Lessor in its absolute discretion at any time without notice to the Lessee.

Shop Number	Tenant	Usage
	Discount Department Store	
	Household	

Services - Continued		

Proposed Tenant Mix

“Refer attached plan”

Annexure C – Lessee's Disclosure Statement

PART 2 – LESSEE'S DISCLOSURE STATEMENT

Advice to the lessor

1. The lessee acknowledges that the attached Part 1, Lessor's Disclosure Statement, was received from the lessor prior to entering into the lease.
2. The lessor has made available to the lessee a copy of the proposed retail shop lease and a copy of a retail tenancy guide as prescribed by or identified in the regulations.
3. The lessee has **sought/not sought** independent advice in respect of the commercial terms contained in the Lessor's Disclosure Statement and the obligations contained in the proposed retail shop lease.
4. The lessee believes that the lessee will be able to fulfil the obligations contained in the lease, including the payment of the proposed rent, outgoings and other amounts, based on the lessee's own business projections for the business.
5. In entering into the retail shop lease, the lessee has relied on the following statements or representations made by the lessor or the lessor's agents:

Note. *Matters such as agreements or representations relating to exclusivity or limitations on competing uses, sales or customer traffic should be detailed.*

6. Apart from the statements or representations set out above, no other promises, representations, warranties or undertakings (other than those contained in the lease) have been made by the Lessor to the Lessee in respect of the Premises or the business to be carried out on the Premises.

   Should more space be required please detail on another page.

Signed for and on behalf of the Lessee: _____

Signature

Date: _____

Full Name (please print)

Annexure D – Turnover and Majors' Lease Expiry Information

Annual turnover of the Centre (to the extent collected by the Lessor) for the previous accounting period	Not applicable.
Annual turnover for specialty shops, on a per square metre basis, for the previous accounting period. Minimum aggregation is to be on the basis of three types of categories (to the extent collected by the Lessor)	Year to ### Sales per square metre Food Non – Food Services
Expiry date of the leases of retailers with a lettable area more than 1,000 square metres	**Retailer** **Lease Expiry** **Options?**

Annexure E – "Category 1 Works" Costs

(Section 13 Retail Leases Act 1994)

This document is to be read in conjunction with the document titled "Design and Fitout Guide". Where an inconsistency arises between this document and the "Design and Fitout Guide" document, this document takes precedence to the extent of the inconsistency. Whilst all care is taken when compiling this document – costs presented are subject to actual onsite conditions of the premises. Prices noted herein are subject to review every 3 months. Prices presented are correct as presented to at time of issue.

1. Item:	Description:	Rate (excluding GST)
Services		
Air Conditioning	♦ Extra Diffusers – cost per diffuser – supply and install	$x
	♦ Return air grille – cost per grill – supply and install	$x
	♦ Flexi Duct - supply and install	$x
	♦ Rigid ductwork – supply and install	$x
	♦ Make Up Air – subject to lessee's supply requirements	Price on Request
	♦ Additional call-out charge if subcontractor is not already on site	$x
Hydraulic	♦ Cold water point capped within ceiling or at slab level within 10m radius of existing water point (including core hole, Remove concrete and make good and waterproofing):	$x
	♦ Cold water point capped within ceiling or at slab level beyond 10m radius of existing water point (including core hole, Remove concrete and make good and waterproofing):	$x
	♦ Trade waste point capped at slab level within 10m radius of existing point (including core hole, Remove concrete and make good & waterproofing):	$x
	♦ Trade waste point capped at slab level beyond 10m radius of existing point (including core hole, Remove concrete and make good & waterproofing):	$x

	♦ Drainage point capped at slab level (within 10m of existing drainage point) (including core hole, Remove concrete and make good and waterproofing):	$x
	♦ Drainage point capped at slab level (beyond 10m of existing drainage point) (including core hole, Remove concrete and make good and waterproofing):	$x
	♦ Additional call-out charge if subcontractor is not already on site + time onsite:	$x

2. Item:	Description:	Rate (excluding GST)
Services – Con't		
Fire Protection	♦ Relocate sprinkler head (within 5m radius of existing head):	$x
	♦ Cap off sprinkler head directly above ceiling line:	$x
	♦ New standard chrome sprinkler head:	$x
	♦ New standard bronze sprinkler head:	$x
	♦ New high temperature bronze sprinkler head:	$x
	♦ New standard anti-freeze coolroom sprinkler head:	$x
	♦ New concealed space sprinkler head:	$x
	♦ Supply, install & certification of Fire Extinguisher (if required)	$x
	♦ Supply, install & certification of Fire Blanket (if required)	$x
	♦ Associated draindown and recharge of the system:	$x
	♦ Additional call-out charge if subcontractor is not already on site+ time onsite:	$x
Gas	♦ Gas point capped within ceiling or at slab level (within 10 m of existing gas point and excluding meter) up to 300 MJ:	$x
	♦ Gas point capped within ceiling or at slab level (within 10 m of existing gas point and excluding meter) up to 700 MJ:	$x
	♦ Additional call-out charge if subcontractor is not already on site + time onsite:	$x

Electrical	♦ Power supply upgrade from Single Phase 63amps	Price on request
	♦ Provision of alternative distribution board:	Price on request
	♦ Relocation of distribution board (within 10 m of existing board) – cabling approx: $x:	Price on request
	♦ Additional call-out charge if subcontractor is not already on site + time onsite:	$x
Tele – Communications	♦ Communications upgrade from 10 pair cable:	Price on request
	♦ Relocation of the communication point (within a 10m radius) – subject to requested supply:	$x

3. Item:	**Description:**	**Rate (excluding GST)**
Operational		
Rubbish Removal	♦ Disposal / tipping costs will be dictated by the landfill operator and lessee's volume	Price as per volume and weight
Hoardings	♦ Full height hoarding (incl. door and paint):	$x
	♦ Low height hoarding (incl. paint):	$x

4. Item:	**Description:**	**Rate (excluding GST)**
Labour		
Trade	♦ Mechanical Services Technician	$x per hour
	♦ Hydraulic / Plumber Tradesman	$x per hour
	♦ Fire / Sprinkler Technician	$x per hour
	♦ Electrician / Communications Tradesman:	$x per hour
	♦ Gas Technician	$x per hour

Note:

- The above represents costs likely to be incurred, however, it does not include the cost of any works necessary as a result of the Lessee's fitout or the hire of any specialty hire equipment. The extent of these works will depend on the Lessee's fitout and will be determined once appropriate drawings have been provided by the Lessee.
- Once plans are received and reviewed, the Lessor will provide a costing for Category One works. The Lessee must advise the Lessor of any special requirements that may affect the Category One works.
- The Lessee will be required to execute a Category One costs agreement (prior to the lease being entered into) and return it to the Lessor before the Lessor will undertake these works. Delays in the Lessee returning the agreement to the Lessor will not affect the agreed Lease and/or Rent Commencement Date.
- All rates noted are for works undertaken during normal working hours.

SHOPPING CENTRE
COUNCIL OF AUSTRALIA

Exposure Draft – Treasury Legislation Amendment

(Small Business and Unfair Contract Terms) Bill 2015

Submission by the

Shopping Centre Council of Australia

12 May 2015

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EXECUTIVE SUMMARY

The Shopping Centre Council of Australia (SCCA) has a significant interest in the Draft Bill. Unless and until the *Competition and Consumer Act* provides an exemption from the new law for those retail leases already regulated by state or territory retail tenancy laws, shopping centre owners face the prospect of 'double regulation' of contracts. The proportion of specialty tenant contracts that will be subject to 'double regulation', on the basis of the thresholds specified in the draft Bill, could be as high as 20% for some shopping centre owners. This is in contrast to most other businesses, whose contracts are currently unregulated by governments, and who will not have an additional layer of regulation imposed on them.

The Draft Bill adopts a 'minimalist' approach by seeking to "extend" the current unfair contract terms (UCT) provisions in the Australian Consumer Law (ACL) to include 'small business contracts'. The word "extend" is used several times in the Explanatory Memorandum (EM) (see pp. 10 and 11). It is our firm view that it is inappropriate to simply extend the provisions in the ACL to small business contracts through minor amendments to the ACL. Many of the existing provisions in the ACL, while sensible in a business-to-consumer context, are not applicable in a business-to-business context. The relationship between business and consumers is quite different to that between business and business. In a competitive market small businesses have a much greater opportunity to negotiate terms than do consumers. Small businesses are much more commercially sophisticated, have a much greater understanding of the goods and services they are contracting and have greater knowledge of contractual terms. Small businesses also have greater access to legal and other specialist advice and, indeed, should be encouraged by governments to seek such advice. Businesses, whether large or small, must do their homework if they are to succeed and must take responsibility for the business decisions they make. Passing a law which effectively equates the commercial sophistication of small businesses with that of an ordinary consumer will inevitably be damaging in the long term to the small business sector of the economy.

The Draft Bill must therefore take into account the vastly different circumstances of a business-to-business relationship compared to a business-to-consumer relationship. The SCCA has therefore made a number of recommendations for amendments to the draft Bill and these are listed in section 1. The fact that we have nominated 17 recommendations reflects our view that consequential amendments, some of them complex, need to be made to the ACL in order to make it more relevant to small business contracts.

In this submission we have directed our comments to the relevant provisions of the *Competition and Consumer Act 2010*, as amended by the draft Bill, although many of our comments are equally relevant to equivalent provisions of the *Australian Securities and Investment Commission Act 2001* as amended by the draft Bill. References in this submission to sections of the Act are references only to the *Competition and Consumer Act 2010*.

EXEMPTION OF RETAIL LEASES ALREADY SUBJECT TO REGULATION

Even with the suite of recommendations for amendments we have proposed, we doubt the new law can adequately take into account the complexities of the retail tenancy relationship. A retail lease, unlike most other business contracts, is not a one-off transaction but a contract that is actively on foot seven days a week, for more than 360 days a year, and usually for a minimum of five years.

We are therefore disappointed that the argument we made in our submission on the Consultation Paper released in May 2014 – for the exclusion from the new law of retail leases already regulated by state or territory retail tenancy legislation – has been ignored. We are particularly disappointed by the desultory consideration given to our submission in the Decision Regulation Impact Statement (RIS).

As we noted above the shopping centre industry is one of the few industries which will now be subject to 'double regulation' of its contracts. In addition to the costs which our members presently incur to ensure their retail leases (and associated documents, such as disclosure statements) comply with the requirements of state and territory retail tenancy legislation they will now incur significant costs to ensure they comply with a law which relies heavily on judicial discretion and has no case law for guidance.

We are encouraged, however, that that the legislation will provide a mechanism whereby the Commonwealth Minister may exempt by regulation a law that "*provides enforceable protections for small businesses that are equivalent to those provided by [the unfair contract terms and associated enforcement provisions of the Act]*". We consider, however, this provision sets the bar impossibly high and will only benefit industry-specific laws which contain an 'unfair contract terms' provision (such as those nominated on page 57 of the RIS). The proposed provision, in its current form, will discriminate against laws, such as state and territory retail tenancy legislation, where the emphasis is on 'fairness' rather than on 'unfairness'. This legislation does this by setting out minimum standards which apply in a range of otherwise contentious areas and which are implied in lease terms. If the term of a lease fails to meet these minimum standards, the lease term is void and the legislated provisions prevail. We have noted in section 3 of this submission that, without such an exemption, a Federal Court judge could rule as 'unfair' (and therefore void) a contract term which a State Parliament has considered as 'fair' by implying certain protections into that contract term. This is an outcome which must be avoided.

Retail tenancy legislation is long-standing, is reviewed regularly (four state and territory reviews are underway at present) and retailer associations and retail tenancy officials have sought to ensure the legislation 'covers the field'. (The *Retail Leases Acts*, in NSW and Victoria, have more than quadrupled in size since the original legislation was introduced.) We have therefore recommended (see recommendation 4) that the wording of the proposed new section 139G(2A)(a) of the Act be amended to provide "fair and adequate protections" for small businesses". The Minister would still have to take into account, in considering whether to prescribe a law, the matters specified in section 139G(2A)(b) and, indeed, we have recommended an additional measure in this section to reinforce these matters.

CONSULTATION

The SCCA looks forward to working constructively with the Minister and the Federal Treasury in relation the Exposure Draft Bill.

Please do not hesitate to contact the SCCA on the contact details provided at section 9 on page 19.

1. Summary of recommendations

Definition of standard form contract

1) **Section 27(2) of Schedule 2 be amended to provide: "A small business contract is considered to be standard form if one of the parties has not had the opportunity to negotiate or change the terms of the contract before executing the contract."**

2) **The present Section 27(2) of Schedule 2 be deleted for small business contracts.**

Exemptions from the new law

3) **Section 26(1)(c) of Schedule 2 be amended to provide: "is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, State or a Territory".**

4) **The proposed section 139G(2A)(a) of the Act be amended to require that "the Commonwealth Minister must be satisfied that the law provides fair and adequate protections for small businesses". In addition a new paragraph (iv) be added to section 139G(2A)(b): "whether the law under consideration was introduced to provide fair and adequate protections for small businesses".**

5) **The words "or non-prescription" be inserted after "prescription" in the proposed section 139G(2A)(b)(ii) of the Act.**

Calculation of upfront price

6) **Section 26(2) of Schedule 2 be amended to provide: "The upfront price payable under a contract is the consideration that: (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and (b) is disclosed, or the formula for its calculation is disclosed, at or before the time the contract is entered into". Alternatively, if the Government is reluctant to remove the words after the semi-colon in the proposed section 26(2), we recommend the following words after our suggested revised section 26(2): "; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event beyond that for which any estimate is provided."**

7) **Section 25(f) of Schedule 2 be amended to exclude an agreed price escalation term of a contract.**

8) **The new law should clarify that a CPI-based increase in a contract price is regarded as part of the consideration and not contingent on the occurrence of a particular event.**

Meaning of unfair

9) **Section 24(4) of Schedule 2 be deleted in the case of small business contracts so that the normal onus of proof applies in relation to section 24(1)(b).**

10) **The word "detriment" in section 24(1)(c) of Schedule 2 be replaced by "material detriment" in the case of small business contracts.**

11) **The words "having regard to the nature of the contract;" be added after "expressed in reasonably plain language" in section 24(3)(a).**

Restore usual onus of proof for small business contracts

12) Restore the usual onus of proof in section 27(1) of Schedule 2 for small business contracts so that the party challenging the contract term is required to prove that the contract is a standard form contract.

Definition of small business

13) Section 23(4) of Schedule 2 be amended to include an aggregation provision so that a contract is not a small business contract if the small business is a party to more than one contract with another business and the combined value of the contracts exceed the thresholds.

14) Amend the proposed new section 3A of Schedule 2 to read: "A business is a small business if it, or any related body corporate, employs fewer than 20 persons".

15) A safe harbour arrangement must be included in the legislation allowing businesses to rely on what they are told by the other business about the number of persons that business employs.

Other necessary amendments

16) The new law should not apply to a small business contract renewed after the Commencement Date under an option granted prior to the Commencement Date. The new law should also not apply to a small business contract which is assigned to another party after the Commencement Date.

17) A new section ((5)) should be added to section 28: "This Part does not apply to a contract when both parties to the contract are small businesses within the meaning of section 3A of Schedule 2".

2. Amend the definition of standard form contract

The ACL does not include a definition of a 'standard form contract'. Section 27 of Schedule 2 lists a series of matters which the court "*must take into account"*, although the court is also able to take into account "*such matters as it thinks relevant*." This section will be unchanged by the Draft Bill.

By not defining a standard form contract, the ACL intentionally casts the net as widely as possible. In a business-to-consumer context that is understandable. In a business-to-business context, however, there needs to be defined parameters so that the new law does not substantially increase the cost of doing business in Australia; does not introduce widespread 'moral hazard' in small business decision-making; and also gives some certainty to large businesses.

The RIS does include a definition: "*Standard form contracts are pre-prepared contracts typically offered on a 'take it or leave it' basis by a party with greater bargaining power. Generally, a contract is considered to be standard form if one of the parties has not had the opportunity to negotiate or change the terms of the contract when agreeing to it.*" (p.1) Similarly the EM notes that "*small businesses, like consumers, are vulnerable to unfair terms in standard form contracts as they are offered contracts on a 'take it or leave it' basis and lack the resources to understand and negotiate terms."* (p.3) It is obvious from the RIS and the EM that the market failure that the Draft Bill seeks to correct is one where contracts are offered on a 'take it or leave it' basis.

We propose, therefore, that this definition of a standard form contract which is included in the RIS be the definition to be included in section 27(2) of Schedule 2 in the case of small business contracts and we have recommended this below.

The indicia which are currently listed in Section 27(2) of Schedule 2 have no relevance in a business-to-business context and are unnecessary in the light of the definition of 'standard form contract' we have recommended. To take one example, subsection 2(b) provides that a court must take into account "*whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties"*. Preparation of a draft or pro-forma contract, particularly when multiple transactions are to occur, is a sensible and efficient way of doing business. In the case of retail leases, retail tenancy law requires that a draft contract be made available to a prospective tenant even before negotiations commence. For example, section 9(1) of the *Retail Leases Act* (NSW) provides: "*A person must not, as a lessor or on behalf of a lessor, offer to enter into a retail shop lease, invite an offer to enter into a retail shop lease or indicate by written or broadcast advertisement that a retail shop lease is for lease, unless: (a) the person has in his or her possession a copy of the proposed lease . . . for the purpose of making the lease available for inspection by a prospective lessee, and (b) the person makes . . a copy of the proposed lease . . . available to any prospective lessee as soon as the person enters into negotiations with the prospective lessee concerning the lease."* It would be nonsensical for retail property lessors to be effectively penalised (by section 27(2)(b)) because they are obeying the law of a state or territory. Similarly a business issuing multiple cleaning contracts, for example, should not be penalised because, for efficiency reasons, it issues a copy of a standard contract with the relevant tender documentation.

We recommend that the current section 27(2) be deleted for small business contracts.

Recommendations

1. **Section 27(2) of Schedule 2 be amended to provide: "A small business contract is considered to be standard form if one of the parties has not had the opportunity to negotiate or change the terms of the contract before executing the contract".**
2. **The present Section 27(2) of Schedule 2 be deleted for small business contracts.**

3. Widen exemptions from the new law

The Bill proposes two areas for exemptions to the proposed new law relating to small business contracts.

The first is the exemption for certain contract terms nominated in section 26(1) of Schedule 2. This already exists for consumer contracts and will now be extended to small business contracts. Section 26(1)(c) provides that the unfair contract terms law does not apply to a contractual term to the extent (and only to the extent) that the term, *"is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory."* State and territory retail tenancy law does not expressly require particular lease terms but it does specify minimum protections which must apply in a whole range of areas of the retail tenancy relationship. Lease terms which do not meet these minimum standards are void. It can be argued, but not with certainty, that state and territory retail tenancy law "expressly permit" certain lease terms, provided that those lease terms conform to the minimum protections specified in the retail tenancy law. This argument should be put beyond doubt by amending section 26(1)(c) to state: "*is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, a State or a Territory"* (the words underlined have been added). It would be a bizarre outcome, and one that must be avoided, if a lease term which is expressly permitted by, say, the Parliament of NSW (and is therefore regarded as 'fair' by that Parliament) is deemed to be unfair and declared void by a Federal Court judge. If our recommendation is adopted, the outcome is still the same: if the lease term in question does not meet the standards of fairness laid down by the NSW Parliament it is void.

The second area for exemptions is introduced by the Bill and will become section 28(4) of Schedule 2 of the Act. This will read: "This Part does not apply to a small business contract that is covered by a law of the Commonwealth, a State or a Territory that is a law prescribed by the regulations". A new subsection of the Act (s.139G(2A)) specifies the steps that must be taken by the "Commonwealth Minister" before a regulation is made prescribing such a law. The Minister must be satisfied that the law "*provides enforceable protections for small businesses that are equivalent to [the unfair contract term and associated enforcement provisions.]* In addition, the Minister must take into consideration: (i) any detriment to small businesses resulting from the prescription of the law; and (ii) the impact on business generally resulting from the prescription of the law; and (iii) the public interest. We have addressed this specifically in the Executive Summary on page 4 of this submission. We consider this provision is too restrictive and sets the bar far too high. We doubt any law could be prescribed if these provisions are taken literally. The provision removes any discretion that may be needed by the Minister in making a judgment about whether the provisions of another law are "equivalent" to the unfair contract terms provisions. We suggest that the new subsection 2A(a) of section 139G be amended to require that the Minister must be satisfied that the law under consideration was introduced in order to provide "fair and adequate protections" for small businesses. This could be reinforced by introducing a new paragraph (iv), in section 139G(2A)(b) of the Act, requiring the Commonwealth Minister to take into consideration, when making a regulation, whether the law was introduced to provide fair and adequate protections for small businesses.

One of the other matters which the Commonwealth Minister must take into consideration when making a regulation (under the proposed new section 139G(2A)(b) of the Act) is "the impact on business generally resulting from the prescription of the law". We are concerned this may be read too literally and the harmful consequences of some industries being subjected to 'double regulation', if they remain subject to the UCT provisions, is not taken into account. We believe the words "or non-prescription" must be inserted after "prescription" in the proposed new section 139G(2A)(b)(ii) of the Act.

Recommendations

3. **Section 26(1)(c) of Schedule 2 be amended to provide: "is a term required by, or expressly permitted by, or meets the minimum standards of, a law of the Commonwealth, a State or a Territory".**
4. **The proposed section 139G(2A)(a) of the Act be amended to require that "the Commonwealth Minister must be satisfied that the law provides fair and adequate protections for small businesses." In addition a new paragraph (iv) be added to section 139G(2A)(b): "whether the law under consideration was introduced to provide fair and adequate protections for small businesses".**
5. **The words "or non-prescription" be inserted after "prescription" in the proposed section 139G(2A)(b)(ii) of the Act.**

4. Calculation of 'upfront price'

The Drafdt Bill uses the existing ACL concept of 'upfront price' as the basis for inclusion in the coverage of the new law. The transaction thresholds (of $100,000 single year and $250,000 multiple years) refer to the upfront price payable under the contract. The concept of upfront price is currently used in the ACL (in section 26(1) of Schedule 2) as one of the terms of a consumer contract which cannot be challenged as unfair. A term which sets the 'upfront price' of a 'small business contract' will also be immune from challenge.

While we see the logic of using the 'upfront price' as the basis for defining the thresholds for inclusion in the coverage of the new law, determination of the 'upfront price' in a small business contract will inevitably be more complex than it is for a consumer contract.

Section 26(2), as it will be amended, provides: *"The upfront price payable under a contract is the consideration that: (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and (b) is disclosed at or before the time the contract is entered into; but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event."*

For most consumer contracts the determination of the "consideration" provided under the contract is usually relatively straightforward and often calculated in monthly terms which can be multiplied over the number of months of the contract. For most commercial contracts this is far from straightforward. In the case of a retail lease, for example, the consideration usually comprises:

- Rent
- Rent increases usually escalated annually for each year of the contract. (This increase may be defined as a fixed dollar amount, a fixed percentage amount or an amount based on the CPI. To complicate matters further, some leases provide that at some point during the lease the new rent will be calculated by a valuer as a 'market rent').
- Operating expenses of the shopping centre ("outgoings") allocated according to a legislated formula. (These are the actual costs of the various statutory charges and operating expenses, such as cleaning).
- Promotion and marketing levy (based on a formula agreed by the parties in the lease and usually paid monthly).

In other cases some or all of these separate payments are bundled into a single 'gross rent' lease which has the advantage of providing reasonable certainty for the landlord and tenant but does not have the transparency advantage of the previous example (generally known as a 'net rent' lease). Obviously if some of the items listed above are excluded as consideration in determining the upfront price then an uneven playing field will exist between those operating a 'net rent' lease and those operating a 'gross rent' lease.

The disclosure statement provided to the prospective tenant (required by retail tenancy legislation) will, among many other things, specify: the annual base rent to be paid by the tenant in the first year; the means by which the base rent will be escalated; the estimated promotion and marketing costs in year one; and the estimated outgoings to be paid in year one.

The legislation needs to be more specific in how the "consideration" is to be calculated in the case of commercial contracts, such as retail leases. (All of the items listed above are matters for negotiation between the parties to the lease and are disclosed in advance to the prospective tenant and included in the lease. These are already regulated by state and territory retail tenancy legislation to ensure the tenant is fully aware. This is another reason why those retail leases which are already regulated by state and territory retail tenancy legislation should be excluded from the new law.)

Increases in rent in a retail lease (and prices in other commercial contracts) are usually negotiated between the parties when they enter into multi-year contracts. These provide for increases in rents and prices to occur on particular dates. In such cases the parties have voluntarily entered into a contract which permits the 'consideration' to be unilaterally varied according to an agreed formula. Such contractual terms could be regarded as a term that may be unfair according to section 25(f) of Schedule 2 i.e. "a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract." This subsection must be amended to ensure that such agreed escalation clauses are not inadvertently 'caught' by the sub-section.

The escalation of rents and prices in multi-year contracts is commonly based on the consumer price index and we therefore recommend that there is clarification in the legislation, perhaps by way of a note, that a CPI-based increase in a contract price is regarded as part of the consideration and is not contingent on the occurrence of a particular event.

Recommendation

6. **Section 26(2) of Schedule 2 be amended to provide: "The upfront price payable under a contract is the consideration that: (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and (b) is disclosed, or the formula for its calculation is disclosed, at or before the time the contract is entered into." Alternatively, if the Government is reluctant to remove the words after the semi-colon in the proposed section 26(2), we recommend the following words be added after our suggested revised section 26(2): ";but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event beyond that for which any estimate is provided."**
7. **Section 25(f) of Schedule 2 be amended to exclude an agreed price escalation term of a contract.**
8. **The new law should clarify that a CPI-based increase in a contract price is regarded as part of the consideration and is not contingent on the occurrence of a particular event.**

5. Amend the meaning of unfair

The Productivity Commission warned in 2008: "*Attempting to legislate what constitutes a 'fair transaction', and what does not, is inherently difficult and is likely to . . . potentially constrain the efficient operation of the market as returns to superior bargaining skills are eroded, costs of disputation are increased and the efficiency of investment is diminished by increasing uncertainty.*" Our market economy requires each business party to a commercial transaction to protect its own interests. The subjective concept of 'fairness', therefore, provides no meaningful guide as to how one business is to act in a particular transaction with another business. This needs to be borne in mind when simply 'extending' - from consumer law to business law – the concepts of 'unfairness' and 'examples of terms that may be unfair.'

Section 24(1), once amended by the Bill, will provide that a term of a small business contract is unfair if it:

(a) would cause a significant imbalance in the parties' rights and obligations under the contract; and

(b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Section 24(4) states: "*For the purposes of subsection 1(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless the party proves otherwise."*

These same provisions currently exist in the ACL.

It makes no sense, in a business-to-business relationship, for the party under challenge to have to prove that the term of a contract is necessary to protect its legitimate interests. This might be justified in a consumer contract but places an onerous burden on the supplier in a small business contract that cannot be justified. In the case of retail leases, for example, particular terms are included in a lease because years of operational and legal experience have found them necessary to protect the lessor's legitimate interests. They are not included simply to make the lease document as thick as possible. If it is to be left to the discretion of judges (most of whom lack commercial experience or expertise) to decide what is in the best interests of the owners or investors in a shopping centre (or any other large complex business), then the usual onus of proof should apply. It should be up to the party challenging the contract term to prove that the term is not reasonably necessary to protect the legitimate interests of the party advantaged by the term. Section 24(4) should therefore be deleted.

We also consider subsection (c) should include a materiality test. As this stands a court could find a term of a contract to be unfair even if the detriment is insignificant and even trivial. The words "material detriment" should be substituted for "detriment" in the case of small business contracts.

Section 24(2) gives extraordinarily wide discretion to the courts. In determining whether a small business contract is unfair a court "*may take into account such matters as it thinks relevant*". This wide discretion conflicts with the separation of powers doctrine which requires that all regulation should set down clear and identifiable standards, which are capable of being interpreted and applied correctly and consistently by the courts, without wide judicial discretion on subjects of subjective merit which require arbitrary or prerogative judgment. This subsection ignores this doctrine by including vague terms which give considerable discretion to judges to make determinations on the basis of their own perceptions and personal notions of 'fairness', rather than clear and consistent standards. While this might not be of great concern in the area of consumer law, this is a serious concern in business law.

Commercial parties require laws that, in any given situation, ensure both parties seeking legal advice as to their rights and obligations can expect reasonably clear and confident answers from their advisers. Those laws should ensure neither party is tempted to embark on lengthy and expensive litigation in the belief that victory depends on winning the sympathy of the court or winning the lottery of which judge may be sitting on the bench. The present law, if it is extended to small business contracts, will do exactly that.

This is compounded by the fact that it is not clear that an appeal would lie against a decision of the court in such cases. Appeals normally lie only in matters of law. Decisions by a court on whether a contract term is unfair will be very much a subjective decision, given the vagueness of these concepts. Provided a court does take into account the items listed in s.24(2)(a) and (b), it is difficult to see how an appeal can lie against the court's exercise of its discretion on "*such matters as it thinks relevant*".

We have made no recommendation on this matter but wish to draw the Federal Government's attention to the extraordinarily wide discretion this gives to the courts and the violence this section causes to the separation of powers doctrine.

Section 24(2)(a) also provides that the courts "*must take into account . . . the extent to which the term is transparent*". Section 24(3) provides that a term is transparent if, among other things, it is "*expressed in reasonably plain language*" and "*readily available to any party affected by the term"*. These provisions are unexceptional in the case of a business-to-consumer contract. In the case of a business-to-business contract, however, such a provision is naïve. Commercial transactions are usually very complex and it is nonsensical to assume that, say, a lease to rent premises for several years in a major shopping centre, which involves complex infrastructure, is a seven-day-a week operation, has hundreds of tenants and hundreds of millions of dollars in turnover, can be equated to, say, entering into a contract for the purchase of a mobile phone. If these provisions are to remain for small business contracts, the words "*having regard to the nature of the contract*" should be added after "*expressed in reasonably plain language*" in section 24(3)(a).

Recommendations

9. **Section 24(4) of Schedule 2 be deleted in the case of small business contracts so that the normal onus of proof applies in relation to section 24(1)(b).**

10. **The word "detriment" in section 24(1)(c) of Schedule 2 be replaced by "material detriment" in the case of small business contracts.**

11. **The words "having regard to the nature of the contract;" be added after "expressed in reasonably plain language" in section 24(3)(a).**

6. Restore the usual onus of proof for standard form contracts

The ACL (section 27(1) of Schedule 2) provides: "*If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise*". This section will not be amended by the draft Bill so this rebuttable presumption will be retained in the new business-to-business regulation. This reversal of the usual onus of proof may be justified in a business-to-consumer contract where a reasonable assumption can be made that a business would have greater resources than an ordinary consumer to prove a contract was not a standard form contract. Given the large volume of standard form contracts that exist in business-to-consumer relationships (such as mobile phone contracts) this rebuttable presumption is unlikely to be an onerous provision for such businesses since there is little doubt such contracts are standard form.

The business-to-business contract, unlike the business-to-consumer contract, is obviously commercial in nature and one on which both parties should be expected and encouraged to seek legal and other advice before concluding. Small businesses, unlike consumers, already have sufficient knowledge of the subject matter in respect of which they are contracting. They have ready access to legal and other specialist advice. Even if legal advice is not obtained, small businesses have greater knowledge of the impact and effect of contractual terms than ordinary consumers and have greater resources to enforce legal and contractual remedies than ordinary consumers. (The Government must also be alert to the possibility that the Draft Bill, including retention of this rebuttable presumption, may introduce greater 'moral hazard' in small business decision-making by discouraging small businesses from seeking specialist advice.)

Determination of whether or not a contact is a standard form contract is unlikely to be as straightforward in a business-to-business context. As well as leaving some businesses vulnerable to vexatious or whimsical litigation, fairness requires that the onus should be on the party challenging the term to prove that a contract is a standard form contract. If not, businesses will undoubtedly be involved in unnecessary litigation which will result in significant costs being incurred. These costs will inevitably have to be recovered from customers, thereby leading to higher prices for goods and services. It is also possible that some small businesses will 'game' the new law by not negotiating any of the terms of a contract (other than the upfront price). There is no justification therefore for retaining this rebuttable presumption when both parties to the contract are businesses.

As we noted in section 5, the Bill includes another dubious rebuttable presumption – that a term of a contract is not reasonably necessary in order to protect the legitimate interests of the party advantaged by the term – and we have addressed this in recommendation 9 of this submission.

Recommendation

12. Restore the usual onus of proof in section 27(1) of Schedule 2 for small business contracts so that the party challenging the contract term is required to prove that the contract is a standard form contract.

7. Clarify the definition of small business

We support the transaction thresholds contained in the Draft Bill. We note, however, that it would be possible for a small business to have multiple contracts, each of which is below the transaction thresholds, with one business and still receive the benefit of the new law for each contract. This is obviously not the intention of the Government and we suggest there should be an aggregation provision included in the proposed new section 23(4) of Schedule 2 of the Act.

When calculating the number of employees of a business to determine if it is a small business there is a need to add in related bodies corporate. Often the subdiary of a large company, or even a large company which operates businesses through a related service entity, may employ no employees or very few employees. Some large retailers, for example, undertake their leasing through a separate service company which often employs fewer than 20 persons. Similarly incorporated joint ventures often do not employ any employees. It would obviously be nonsensical if such entities were able to seek relief under the new law. The new section 3A of Schedule 2 needs to be amended to include any related body corporate. The Act already contains (in section 4A) an explanation of a related body corporate and this is already used in sections of the Act (see section 45(8) and section 6 of Schedule 2).

Considerable time and expense will be involved for large businesses (and also small businesses unless recommendation 17 in section 8B of this submission is adopted) in determining the number of employees of a party with which they are contracting. This is in addition to the other additional costs imposed by the new law. Businesses could be placed in a position where a counter party seeks relief under the unfair contracts terms provision even though the contractor had been told the counter party had more than 20 employees. A safe harbour arrangement needs to be included in the legislation to allow businesses to rely on what they are told by the other business about the number of people they employ.

Recommendations

13. **Section 23(4) of Schedule 2 be amended to include an aggregation provision so that a contract is not a small business contract if the small business is a party to more than one contract with another business and the combined value of the contracts exceed the thresholds.**

14. **Amend the proposed new section 3A of Schedule 2 to read: "A business is a small business if it, and any related body corporate, employs fewer than 20 persons".**

15. **A safe harbour arrangement must be included in the legislation allowing businesses to rely on what they are told by the other business about the number of persons that business employs.**

8. Other necessary amendments

A. Application Provisions

The new proposed new section 294 of the Act refers to contracts that are "renewed" after the commencement of the Bill, once it is enacted. We accept that contracts that are renewed (in the sense that an earlier contract comes to an end and a new contract is negotiated and entered into), after the Commencement Date, should be subject to the amendments. However these contracts should be distinguished from contracts that are renewed pursuant to an option which was granted prior to the Commencement Date. In such cases the decision to renew the contract can only be made by one party to the contract and this party has made a decision to renew the contract on the existing terms and conditions. In the case of a retail lease, for example, only the lessee can make the decision to renew the lease under an option previously negotiated and the lessee, if it decides to exercise the option, knowingly renews the lease under the terms and conditions that have previously applied.

Similarly the new law should not apply to a contract which was entered into before the Commencement Date and which is assigned after the Commencement Date since this is also not a new contract (in the sense of an earlier contract coming to an end and a new contract being entered into).

Recommendation

16. **The new law should not apply to a small business contract renewed after the Commencement Date under an option granted prior to the Commencement Date. The new law should also not apply to a small business contract which is assigned to another party after the Commencement Date.**

B. Small business-to-small business contracts

We are puzzled why the new law will apply even when both parties are small businesses. This is contrary to the justification for the new unfair contract terms law which is supposedly to protect small businesses from large businesses, which might have much greater bargaining power, exercising that power in an unfair manner. Inclusion of small business-to-small business contracts will increase costs for every small business in Australia since they will all be required to undertake the costly legal examination and review of their standard form contracts. This also has the potential to introduce 'moral hazard' on a widespread scale among Australia's small businesses. It also opens the possibility that some small businesses will 'game' the new law by deliberately challenging contractual terms in the knowledge that their supplier, another small business, will (unless our recommendation 12 is adopted) have to go to the time and expense of proving that the contract is not a standard form contract.

Recommendation

17. **A new section ((5)) should be added to section 28: "This Part does not apply to a contract when both parties to the contract are small businesses within the meaning of section 3A of Schedule 2".**

9. Contact details

The Shopping Centre Council of Australia (SCCA) represents Australia's major shopping centre owners, managers and developers. Our members own and manage shopping centres from the very largest ('super-regional') centres to the smallest ('neighbourhood') centres in cities and towns in every state and territory.

Our members are AMP Capital Investors, Blackstone Group (Australia), Brookfield Office Properties, Charter Hall Retail REIT, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, JLL, Lancini Group, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Novion Property Group, Perron Group, Precision Group, QIC, Savills, SCA Property Group, Scentre Group (owner and operator of Westfield shopping centres in Australia and New Zealand) and Stockland.

The SCCA would be happy to discuss any aspect of this submission. Please do not hesitate to contact:

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SHOPPING CENTRE
COUNCIL OF AUSTRALIA

Senate Economics References Committee –
Inquiry into the need for a national approach to retail leasing arrangements

A submission by the

Shopping Centre Council of Australia

28 August 2014

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1. Executive summary

A national approach to retail leasing arrangements makes eminent sense.

As an organisation that represents companies which operate in multiple jurisdictions across Australia, we would welcome the Senate Committee recommending a sensible pathway to achieve such a bold reform that would provide consistency and promote efficiency for business. The recommended pathway should be alert to, and seek to resolve, the challenges which have stymied the achievement of this outcome in the past. These include a lack of political will at all levels of government, the self-interest of the states and territories in retaining their own retail tenancy legislation and the general inability of federal, state and territory governments to successfully deliver previous harmonisation reforms, such as the largely failed attempts to harmonise retail lease disclosure statements, the abandonment of the National Occupational Licencing System and the unwillingness of all jurisdictions to adopt the *Model Work Health and Safety Act*.

In forming its recommendations we respectfully ask that the Senate Committee give due consideration to our submission. This includes taking on board our strong view that a national approach to the regulation of retail tenancies should come in place of, not in addition to, the present system of state and territory regulation. A failure on the Committee's behalf to acknowledge this will result in the potential duplication of regulation and red-tape for both landlords and tenants, thus defeating the purpose of a national approach.

Our general support is also conditional on the understanding that a national approach would not simply mirror the existing over-regulation which exists at the state and territory level and results in no greater encroachment of regulation into what should be a commercial negotiation between a landlord and tenant than currently exists. The development of a national approach should be an opportunity to wind back the scope of retail tenancy regulation which, in some jurisdictions, extends to over 100 detailed provisions. It would also be the chance to recalibrate the relationship between a landlord and a tenant as a commercial one where the terms and conditions of a retail lease are negotiated and agreed between the parties and not subject to excessive government regulation.

Despite our general support for a national approach and our willingness to urge the Senate Committee in this direction, we are sceptical that a national approach is going to be achieved. The possibility of a national approach to retail tenancy regulation has been recommended before, on no less than three occasions, and no action has been taken. This leads us to fear that the Committee's inquiry will simply be a platform to parade well-worn prejudices about retail tenancy issues and bash landlords.

In forming its finding and recommendations, the Senate Committee should be aware of the range of discussions already underway which have a bearing on the relationship between tenants and landlords. We are currently involved in two reviews of state-based retail tenancy legislation, those of NSW and Queensland, and we understand that reviews in Victoria and South Australia are imminent. The Productivity Commission is in the midst of a review into the cost of doing business with regard to retail trade, having completed a review in the market for retail tenancy leases (which comprehensively addressed many of the headings in this inquiry's terms of reference) as recently 2008. The Review of Australia's Competition Policy continues and submissions recently closed on a discussion paper seeking feedback on the Federal Government's proposal to extend unfair contract protections under the *Competition and Consumer Act* to business to business contracts.

We are pleased to provide this submission to the Senate Committee. It addresses each of the headings of the terms of reference and also provides detailed commentary on our general support for a national approach to retail leasing arrangements. The contact details of Shopping Centre Council of Australia (SCCA) staff members are available on page 28. We would be pleased to be of any assistance necessary to the Committee Secretariat or Committee members.

2. A national approach to retail leasing arrangements

2.1 General support for a national approach

The SCCA would be pleased to see the Senate Committee recommend the adoption of a national approach to retail leasing that winds back the current regulatory overreach of the states and territories and respects and promotes the primacy of commercial negotiations between a landlord and a tenant.

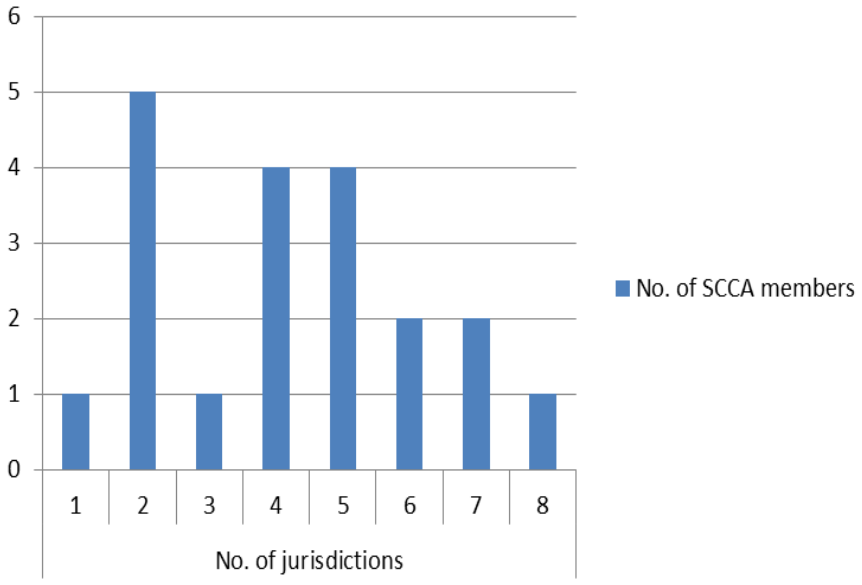
Retail leasing is now regulated by extensive state and territory legislation. Five of the six states, and both territories, have enacted specific retail tenancy legislation. The other state, Tasmania, regulates retail leasing by a compulsory code of practice adopted by regulation under the *Fair Trading Act*.

The legislation, and the date of introduction of the original retail tenancy legislation, is as follows:

- Retail Shop Leases Act (Queensland) (1984)
- Commercial Tenancy (Retail Shops) Agreements Act (Western Australia) (1985)
- Retail Leases Act (Victoria) (1986)
- Retail Leases Act (NSW) (1994)
- Retail and Commercial Leases Act (South Australia) (1995)
- Fair Trading (Code of Practice for Retail Tenancies) Regulations (Tasmania) (1998)
- Leases (Commercial and Retail) Act (ACT) (2002)
- Business Tenancies (Fair Dealings) Act (Northern Territory) (2002)

Many retail property owners operate in more than one jurisdiction, as do many major retailers. As evidenced below, 19 of 20 SCCA members are required to have systems in place to conform to two or more pieces of retail lease legislation (note that analysis excludes SCCA members which are exclusively shopping centre managers). One member has systems in place to meet the requirements of eight pieces of legislation (equivalent to over 650 pages of regulation).

Graph 1: Ownership in multiple jurisdictions – SCCA members



To provide the Senate Committee with a sense of scale, an SCCA member that has assets in seven jurisdictions has around 1,265 specialty tenants in their centres. This would be a reasonable proxy for the number of retail leases this member is managing from day to day. Although the number of leases in a single jurisdiction may be relatively small (for example, around 30 leases in one jurisdiction versus 600 in another), they still require the expertise and knowledge within their organisations to ensure conformity with the prevailing retail lease legislation. (Note that the figures used exclude large anchor tenants, including large supermarkets and discount department stores, that would not, typically, be captured retail lease legislation).

2.2 Cost of the status quo to business

The need to comply with up to eight different sets of laws, and the inability to have uniform national documentation, imposes unnecessary administrative and compliance costs on both retailers and retail property owners. These costs, experienced through business inefficiency, are above and beyond those which would be paid if there was a uniform approach to retail leasing. These additional costs are experienced through the need to (this list is not exhaustive):

- prepare and continually update different 'standard' documentation, including leases and disclosure statements, for each jurisdiction,
- provide unique staff training in each jurisdiction, and retraining of staff if they move interstate (eg. training for leasing staff and legal teams),
- adopt different processes to ensure conformity with different regulation governing, for example, the calculation of outgoings, dispute resolution processes and the timing and type of rent reviews,
- continually monitor and adopt legislative changes to avoid any unintended contravention of the prevailing Act, and
- observe regulatory requirements that only apply in some jurisdictions (eg. a retailer needing to obtain legal advice before they waive certain regulatory provisions).

2.3 Previous recommendations for a national approach have gone nowhere

Two parliamentary inquiries and the Productivity Commission have recommended a national system of retail tenancy regulation.

The Reid Report in 1997[1] recommended a uniform retail tenancy code, a recommendation which was not accepted by the then Australian Government or favoured by State and Territory Governments. This recommendation was repeated in 1999 by the Baird Report[2]. Neither of these reports gave much consideration to how such a uniform national code would be achieved and how it would operate in practice, given the existence of state retail tenancy legislation. (Since then both the ACT and the Northern Territory have also adopted retail tenancy legislation). Indeed the Australian Government, in its official response to the Baird Report, noted it had deliberately not adopted the Reid Report's recommendation for a national code and, in doing so, retail tenants "have also been spared the additional burden of compliance that would have been delivered by an additional layer of regulation."

The Productivity Commission in 2008[3] gave considerable thought to how Australia might negotiate its way out of the present disparate and inconsistent regulation of retail leasing. The Commission recommended a course of action that could ultimately lead to a more efficient operation of the retail tenancy market in Australia with considerably less, but better focused and more effective, regulation.

[1] House of Representatives Standing Committee on Industry, Science and Resources *Finding a Balance*: *Towards Fair Trading in Australia*, 1997.
[2] Joint Select Committee on the Retail Sector, *Fair Market or Market Failure*, 1999
[3] Ibid pp.239-242

As a first step, the Commission suggested an industry-developed national code of practice for shopping centres in recognition that "retail tenancy within shopping centres often involves quite different arrangements to retail tenancy in other settings". The Commission suggested this should be a voluntary code (in the sense that any retail landlord or tenant could agree to adhere to its provisions) although for those who 'sign up' to the code it would be enforceable under the *Competition and Consumer Act*, as is the case with the Franchising Code of Practice.

The Productivity Commission envisaged the code of practice as a means of *reducing* the amount of detailed regulation that currently governs the relationship between landlords and tenants in shopping centres and, ultimately, *removing* much of the prescription in state and territory retail tenancy regulation. The code of practice, according to the Commission, "should not include measures that prescribe possible outcomes of commercial negotiations, such as minimum lease terms. That is, it should act to improve the cost-effectiveness of practices of both landlords and tenants in shopping centres, but avoid undue interference in normal commercial relationships and associated bargaining between parties."

The Productivity Commission also noted that a code of practice for shopping centres "would also potentially benefit the broader community by enabling the more prescriptive aspects of the current state and territory regulation to become redundant and be repealed and by reducing the need for legislative reviews." In other words, for shopping centres the code of practice would ultimately be a *replacement* for retail tenancy legislation; it would not become an *additional* piece of regulation.

The Australian Government, in endorsing this recommendation, also made clear that its support was conditional upon the code "not [being] an additional layer of regulation" and that the code should only be pursued "if the current legislative arrangements can be reformed appropriately to avoid any increases in complexity, regulation and compliance costs for business, especially for small business."

The Productivity Commission proposed a three-step process leading ultimately to harmonisation of regulation around Australia. First, the code would be negotiated and come into operation; then, the states and territories "should remove those key restrictions in retail tenancy legislation that provide no improvement in operational efficiency"; and, finally, as these are removed, the states and territories "should seek . . . to establish nationally consistent model legislation for retail tenancies, available to be adopted in each jurisdiction."

The Commission did not specifically address whether shopping centres would immediately be released from the coverage of state and territory retail tenancy legislation once the code of practice had been negotiated and mandated under the *Competition and Consumer Act*. It would seem, however, that it envisaged that those who signed up for the code – and were then subject to Federal law – would cease to be covered by state and territory retail tenancy legislation.

This recommendation was referred for consideration to the Council of Australian Government's Better Regulation and Competition Working Group. We are not aware of what action, if any, has resulted from this referral. We believe, as a result of discussions with some state government officials, the matter has not progressed further.

While the idea of a shopping centre code of practice was immediately endorsed by some retailer associations, once these associations read the fine print and realised this would be a replacement for coverage by retail tenancy legislation, their support waned.

The notion of a code of practice, as envisaged by the Productivity Commission, holds some attractions for the shopping centre industry, both for owners/managers and for national retailers. It would be one way of achieving a common set of rules for shopping centre tenancy transactions throughout Australia, something that is clearly impossible while regulatory power rests solely in the hands of state and territory governments.

The code would also be a means of reducing the current level of prescription that is imposed on the retail tenancy relationship and, most importantly, a means of escaping the massive growth in the volume of regulation that occurs with each retail tenancy legislation review.

2.4 How a national approach could work

The SCCA supports a system of national regulation of retail tenancies but with an important proviso: only if such regulation is *in place of,* not *in addition to,* the present system of state and territory regulation. Further, as per the comments of the Productivity Commission in 2008, we would advise against a national approach that mirrors the jurisdictional penchant for regulating what should be commercial contractual negotiations between a landlord and a tenant, such as lease terms. We also wouldn't support a national approach which saw any greater encroachment of regulation than currently exists, for example, to require the disclosure of incentives or side agreements.

For this reason we would not support a uniform code of practice, as recommended by the Reid Inquiry, unless the states agreed to repeal their legislation. We doubt this would be satisfactory to retailer associations, which have always opposed the repeal of state legislation[4]. We also doubt that the states and territories could be convinced to repeal their existing legislation. A national code is therefore more likely to create an additional layer of regulation, not a uniform system. If so it is also likely to lead to 'jurisdiction shopping' and legal disputes over inconsistencies between the national code and state/territory legislation.

Similarly we doubt whether the Australian Government has the constitutional power to effectively legislate in this area to the exclusion of the states. Although the High Court decision in relation to Work Choices[5] would seem to pave the way for the Federal Government to again use the corporations power to legislate in this area, there are a very large number of unincorporated bodies involved in the retail tenancy market. In such circumstances, there would be little incentive for the states to repeal their legislation (and, indeed, strong arguments for them to retain the legislation). Once again, we would be more likely to find ourselves with another layer of regulation being added.

The sequence of implementation envisaged by the Productivity Commission would also pose difficulties for the SCCA in embracing the code. Without a specific commitment from the states and territories that shopping centres would be released from retail tenancy legislation upon adoption of the code, we doubt that any shopping centre owner would be prepared to take the plunge. Otherwise they might find themselves subject to the *Competition and Consumer Act*, for matters that are the subject of the code of practice, but still subject to state/territory retail tenancy legislation for matters not specifically covered by the code. This is not a situation that could be tolerated.

There are probably only three ways in which a national approach to retail leasing regulation can be achieved. These are:

- first, if the states and territories agreed to bring their legislation into conformity with each other (although, this is an approach that the national 'harmonisation' of the work health and safety (WHS) legislation has shown to be challenging);

- second, if the states and territories surrendered their powers in this area to the Federal Government; or

- third, retail property owners are offered the opportunity to 'opt-in' to a national code, backed by the *Competition and Consumer Act*, at which time the applicability of the relevant state or territory regulation falls away.

[4] The National Retail Association, in its submission in September 2003 to the Senate Inquiry into 'the effectiveness of the Trade Practices Act in protecting small business', stated it "would not support any industry code that derailed state-based tenancy legislation."

[5] New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia [2006] HCA 52 (14 November 2006).

We doubt that the *first approach* would ever be achieved. This would require state and territory government administrations to apply critical analysis to each provision where retail tenancy legislation differs from state to state (and that is most) and adopt a consensus approach, rather than simply adopting 'lowest common denominator' provisions or the most 'tenant friendly' provisions. The experience of the states and territories in seeking to achieve a uniform or common lessee's disclosure statement around Australia is not encouraging. Ultimately only Queensland, NSW and Victoria agreed on a harmonised disclosure statement (to operate from 1 January 2011) and, even after that was achieved, Victoria in 2013, unilaterally made changes to its disclosure statement and NSW is also currently considering making changes to the 'harmonised' disclosure statement.

This highlights another major barrier to achieving harmonised retail tenancy legislation. Even if the states and territories agreed upon, and ultimately achieved, uniform retail tenancy legislation, there would have to be continuing political will to ensure that this uniformity was maintained. The constant rounds of state reviews of retail tenancy legislation, which have seen states amend legislation without any regard for the need for harmonisation, would have to end. We doubt the ability of the states and territories to resist pressure from state-based retailer associations to pursue individual legislative solutions within their jurisdictions.

The *second approach* would require the states and territories to agree to surrender their powers in this area to the Australian Government. This is the approach that resulted in a uniform corporations law and uniform Australian Consumer Law around Australia. If a national system of retail tenancy regulation is to be achieved we believe the Australian Government would need to be the driver, probably through the Council of Australian Governments (COAG) process. A Commonwealth Bill would need to be drafted which would form the basis for negotiations with the states and territories, in consultation with relevant retailer associations and retail property owners' associations.

This would be an opportunity to critically scrutinise the existing legislation and to remove unnecessary regulation. As the Productivity Commission has noted[6], much of the regulation now being applied to the retail tenancy market has had the effect of imposing costs on landlords and tenants, without any real benefit for those it is supposed to protect. However, we do question whether the states and territories would agree to surrender their powers to the Australian Government.

The *third approach* is more akin to the model suggested by the Productivity Commission but would be backed by Federal legislation (the *Competition and Consumer Act*), would place the decision as to whether to observe the national code with the landlord and would guarantee that a landlord's decision to adopt the code is met with the 'switching off' of prevailing retail lease legislation. Placing the decision to participate with business, rather than having it imposed by Government, means that only those businesses which would find a benefit in adopting the code could do so. However, this approach presents the potential challenge of the variable application of rules within, as well as between, jurisdictions. For example, two different dispute resolution systems could operative. This approach would create a national system, but not necessarily a uniform system.

We are sceptical that any of the above, or any similar, approaches could be achieved. There is a lack of political will at all levels of government to drive the reform, the states and territories, which includes some independent statutory officials (eg. various Small Business Commissioners) have given no signal that they are willing to give up their role as regulators, advisors and mediators of retail leasing arrangements and there is general inability of federal, state and territory governments to successfully deliver harmonisation reforms.

[6] Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia,* No.43, 31 March 2008, pp.219-222 and p.234

3. Response to terms of reference

This section provides detailed responses to each of the headings in the terms of reference.

(a) The first right of refusal for tenants to renew their lease

As stated earlier in this submission, the SCCA would be pleased to see the Senate Committee recommend a national approach to retail leasing under certain conditions. One of which was that a national approach would not result in any greater encroachment of regulation than currently exists at the state and territory level. Allowing a 'first right of refusal' would extend the reach of regulation and should not be considered by the Senate Committee as part of its deliberations on a national approach.

A lease is an agreement by the owner of a property (lessor) and a tenant (lessee) for the use of the property for an agreed purpose, on agreed conditions, for an agreed term, at an agreed price. Like any other contract, a lease has a finite life and imparts no continuing right of occupancy when the lease ends.

The law of property in Australia dates back centuries and provides the critical framework for a stable economy and society. Fundamental to property law is the different forms of land ownership – freehold, leasehold, strata, company title and so on – each distinguished by the rights that accrue to that title. While governments have sometimes legislated to marginally alter these rights and principles, they have been very wary of in any way undermining the stability and certainty of property laws and titles because of their importance to the effective functioning of society as a whole.

Freehold title provides a property owner with much greater rights over the use and disposal of their property than a leasehold title does, including providing security of tenure. For this reason, freehold title comes at a greater cost and with greater responsibilities than a leasehold title. Providing retail tenants with an automatic or preferential right to renew their lease undermines these principles. On one hand, it would erode the owner's freehold right to use their property as they wish; on the other, it would provide leaseholders with a freehold right to continued occupancy when the lease ends.

Retail tenancy legislation in Australia has generally recognised that principle. This has been a matter which has been considered during the introduction of retail tenancy legislation around Australia in the 1980s and 1990s and during the many reviews of this legislation that have occurred over the last 20 years. In every case the Government of the State or Territory has declined to impose a continued right of occupancy when the lease has expired. (Preferential rights of renewal of retail leases in South Australia and the ACT were imposed by Opposition and minor parties in the Parliaments of that state and territory against the express wishes of the Government of the day.)

Any proposal that may restrict a lessors' freedom to deal with their own property as they wish after the lease has ended, either by imposing a 'right' or 'preference' to the tenant to renew the lease or though the imposition of 'third party' rent-setting for a renewed lease raise a number of fundamental concerns. The main concerns are that these restrictions:

- would provide tenants with the benefits of freehold title but without the cost and risk of freehold title, which is fundamentally unfair and undermines long accepted principles of property ownership;
- are based on the misconception that it is always the tenant who is in a disadvantageous bargaining position at the end of the lease;
- seriously impede a shopping centre manager's ability to successfully manage the centre, to the detriment of the owner/investor and the tenants;
- limits competition by restricting the entry of new retail tenants to the market which will inevitably discriminate against small retail tenants;
- reduces the value of property assets and therefore of property investments.

The benefits of leasehold for retailers

It is important for the Senate Committee to understand the benefits that leasehold brings to retailers and the reason why retailers prefer to rent shops rather than purchasing their own properties. This is because leasehold, unlike freehold, removes the property risk from retailers' business plans; means they have a smaller capital outlay (or a lower debt); and greater flexibility in locating their businesses.

Intuitively a retailer would prefer to hold freehold rather than leasehold over their shop. Retailers who purchase their own shop do not have to worry about whether their lease will be renewed or worry about what level of rent they will have to pay in the renewed lease. What they do have to worry about is the capital (or debt) required to acquire the shop and pay for the fit out, in addition to their business start-up costs. A tenant retailer, on the other hand, while still having to find the capital to launch the business (or purchase the business) and fit out the shop, does not have to find the significant additional capital (or go further into debt and pay the ongoing interest on that debt) in order to purchase the shop. The tenant retailer, therefore, obviously has a much smaller capital outlay and much less capital at risk than an owner retailer.

The relative advantages of freehold and leasehold are demonstrated in the **Table 1** below, which compares the position of the owner retailer and the tenant retailer (both in a shopping strip and a shopping centre).

Table 1. Owner Retailers v. Tenant Retailers

	Capital outlay required	***Risk being carried***	***Advantages***	***Disadvantages***
Owner retailer	• *purchase of shop, including financing costs* • *fit out of shop* • *business set up costs*	• *property risk* • *retailing risk*	• *security of tenure* • *no rent*	• *greater capital outlay* • *more capital at risk* • *unable to easily change locations (less mobility)* • *generally subject to mortgage*
Tenant retailer (shopping strip)	• *fit out of shop* • *business set up costs*	• *retailing risk*	• *less capital outlay* • *less capital at risk* • *greater mobility* • *lower rent (than a shopping centre)*	• *no security of tenure beyond term of lease* • *lower turnover* • *less control over location of competitors*
Tenant retailer (shopping centre)	• *fit out of shop* • *business set up costs*	• *retailing risk*	• *less capital outlay* • *less capital at risk* • *greater mobility* • *higher turnover and sales productivity* • *greater control over location of competitors*	• *no security of tenure beyond term of lease* • *higher rents (than a shopping strip)*

By definition, the security of tenure under a leasehold agreement is only provided for the term of the lease. However, leasehold is inherently more flexible than freehold as a tenant is not anchored to their current premises for any longer than the period of the lease. This is particularly important if the location turns out to be a poor one for their retail offer. It means that they can relocate to another centre or to another retail location at greater convenience at the end of the lease.

By purchasing a shop the owner retailer is anchored to that location. If they want to move from that location, they are exposed to the risk that any attempt to sell the shop will be (during poor trading periods) difficult and protracted. They have to find a buyer for the retail business (not an easy task if it is in a poor retail location) or, if they can't sell the business as a going concern, they have to find a buyer for the shop (which also might not be easy if it is a poor location for retail). Even if they find a buyer for the business, or just the shop, it is unlikely that they will be able to recoup the money they spent in fixtures and fittings setting up the retail business.

Leasehold removes the property risk from retailers

Although owner retailers and tenant retailers both carry the risk that their business plans will not be successful, a tenant retailer carries no property risk. As such, if a tenant retailer's business fails, that is the extent of their loss. They do not also carry the risk that property values will decline. That risk is being carried entirely by the owner of the shop or by the owners of the shopping centre.

Property risk is a very real risk. In the late 1980s and early 1990s, for example, shopping centre values were savagely slashed by the market and investment returns plummeted. Many owners went broke and shopping centres were sold off in a fire sale. The retailers in those shopping centres, however, generally survived. They did so largely because they were not carrying the property risk and did not have to service the debt on heavily mortgaged property that had declined substantially in value.

Property values fell again in the wake of the global financial crisis in 2008 and 2009 and many investors in shopping centres suffered significant losses. While retailers have struggled following the cycling of the financial and monetary stimulus, generally speaking most have survived the downturn. Once again they have not had to service debt on mortgaged property that had declined in value.

For the owner of the shop or shopping centre to accept the property risk they have to anticipate that they will get a reasonable return on their invested capital. One person's rent is another person's income. So often in the consideration of public policy issues in the retailing industry the interests of the owner of the rented shop or the investor in the shopping centre are completely overlooked. This means that public policy overlooks the interests of the members of the superannuation funds, life insurance funds, real estate investment trusts, property syndicates and other property investment vehicles which invest in property, including shopping centres. If the return to these investors is not compelling, they will take their money elsewhere.

End-of-lease restrictions are fundamentally unfair

The imposition of restrictions on the freedom of lessors to deal with their own property, at the end of the lease, by the inclusion of a 'right' or 'preference' to the tenant to renew the lease, are fundamentally unfair. The argument for 'security of tenure' is essentially an argument for having it both ways: gaining the relative security that comes from property ownership without taking on the cost or risks of property ownership. Such measures also increase the property risk for the owner because they can diminish the return to the owner for carrying the property risk or they increase the risk of having to retain under-performing retailers.

Such measures also place retail property at an unfair disadvantage compared to other property classes. Why should a small retailer (not to mention the large businesses, including listed retailers, which also have the protection of the retail lease legislation) gain the advantage of security of tenure beyond the period of the lease when this advantage is not available to other small businesses, such as an accountant or solicitor in sole practice in an office building?

End-of lease restrictions are unnecessary

Measures designed to increase a retail tenant's security of tenure are also unnecessary because the vast majority of tenants who have observed the terms and conditions of their lease and whose retail offer is still relevant to the customer base of that centre, do gain a new lease. Further, in circumstances where a lease is not renewed, in the vast majority of cases they are not renewed at the instigation of the tenant.

This was a clear 'finding' of the Productivity Commission's inquiry into the *Market for Retail Tenancy Leases in Australia*. Making particular reference to the renewal of leases in shopping centres, the Commission found that "the majority of retailers in centres are offered subsequent leases". This highlights the absolute lack of evidence of a market failure that needs to resolved through further regulation because, as the Commission states, the majority of retailers are offered a renewed lease.

At the heart of arguments for measures such as first right of refusal for sitting tenants is the idea that landlords capriciously refuse to renew leases. This is nonsense. It would be an irrational act for a landlord to drive out of his shopping centre a well-performing tenant whose retail offer is still relevant and attractive to customers and who has observed his obligations under the lease. This is because there is always a real risk that that retail space cannot be re-leased or be re-leased quickly. Automatic rights of renewal and similar measures become, almost by definition, protections for poorly performing or poorly managed tenants.

End-of-lease restrictions threaten viability

Measures designed to prolong a retail tenant's security of tenure beyond the term of their lease cannot be imposed without a cost to the shop or centre owner. They would be destructive to the vitality of shopping centres and are therefore harmful to the ongoing viability of those centres.

While, as noted above, the majority of leases are renewed, it is vital that landlords retain the discretion and flexibility not to renew leases. Shopping centres are vibrant and complex places. They must remain relevant to the constantly changing tastes of their customers. They must have broad cross-sectional appeal for all customers from young people to mature aged persons. They also have to constantly adapt to demographic changes in their catchment areas.

If a shopping centre doesn't maintain an appeal to all of its customers (i.e. have the right 'tenancy mix') it will lose customers and stagnate. That will be to the detriment of its tenants as much as its owners. Occasional changes to the tenancy mix of shopping centres, as well as fairly regular redevelopments, are therefore a very necessary fact of life in a shopping centre.

Management of the tenancy mix is a constant and evolving process designed to maximise the customer pulling power of the centre for the benefit of all retailers. An automatic or preferential right of refusal undermines the capacity of centre management to undertake this necessary fine-tuning of a shopping centre. Retailers who choose to locate in a shopping centre because of its attractiveness to customers must accept this fact.

There is no consistent position from retailers

Good retailers and good retailer associations distance themselves from calls for end-of-lease restrictions. They know that the retention of poorly-performing tenants drives down the overall quality of a shopping centre causing it to lose drawing power among its customers. This will directly affect their own sales performance and could do so even more directly if customer traffic flow to their part of the centre is reduced.

When prompted by the Presiding Commissioner during a public hearing in 2008 to inform its inquiry into the market for retail tenancy leases, the retail tenancy consultant representing the National Retail Association, Malcolm Macrae, stated: *'I think it may be going a step too far. I think the automatic right of lease - no, I don't support that at all. That perpetuates privilege and perhaps reduces capacity to change.'*

End-of-lease restrictions discriminate against small retailers

Such measures also, in the longer term, discriminate against small tenants. Security of tenure measures are likely to mean a greater propensity for owners to "play safe" and give preference to established or proven retailers or state or national retail chains when seeking new tenants. Faced with a choice between an established retailer and someone seeking to set up in business for the first time, the lessor will be less likely to take a risk on the small retailer or would-be retailer.

Because these measures increase the property risk for owners they would then have to compensate by seeking to lower their overall risk when they take on a new tenant. They do this by seeking a higher rent at the outset and/or greater requirements for bank guarantees or personal guarantees from tenants. It is the small retailer, or would-be retailer, who ultimately suffers from the adoption of so-called 'security of tenure' measures. This perverse outcome is frequently the consequence of regulatory approaches seeking to reduce risks faced by one party. This is because those risks are not eliminated by the regulation; they are simply shifted elsewhere.

End-of-lease restrictions are anti-competitive

National competition policy requires that legislation not restrict competition unless the public benefits outweigh the costs. There is no doubt that security of tenure measures are anti-competitive because they restrict the entry of new retailers into the market. In terms of the costs and benefits of security of tenure proposals, any benefits would obviously only accrue to those retail tenants who would not otherwise be offered a new lease by their shopping centre. The costs however, would be imposed on centre owners and managers, potential new retail tenants and, most importantly, shopping centre customers.

The costs imposed on centre managers and owners are significant. Essentially they are the restrictions on the owner/manager's ability to successfully manage a centre and the reduction in the value of the property as a result of the limitations on its use. The costs are particularly high for potential new entrants to the retail market. If existing tenants are, effectively, given a lease in perpetuity, opportunities for new entrants to the industry are severely restricted. Competition is therefore diminished.

Shopping centre customers would also bear the cost because competition between retailers would be reduced. For example, there may be a potential new retail tenant who would be able to offer the same goods as an existing retailer in a centre but at a reduced price. However, the customer would not be able to take advantage of this lower price unless the existing tenant decided to terminate the lease and leave the centre, allowing a lease to be granted to the new tenant.

Protections provided in state retail tenancy legislation

It should be noted that state retail tenancy legislation does provide protections to sitting tenants even where there isn't a preferential right of renewal. As an example, s. 44 of the NSW *Retail Leases Act* already provides that not less than 6 months and not more than 12 months before the expiry of a lease the landlord must by written notice to the tenant either:

(a) offer the tenant a renewal or extension of lease on terms specified in the notice; or

(b) inform the tenant that it does not propose to offer a renewal or extension.

An offer of renewal or extension is not capable of revocation for 1 month after it is made.

Whilst the landlord cannot revoke the offer for 1 month, if the tenant accepts the offer, the tenant may then delay negotiating, finalising and executing the new lease. If the tenant delays in executing the new lease and then decides not to execute and vacate, the landlord is disadvantaged as the landlord has not been in the market place seeking a replacement tenant because it had thought it had an "agreement" for a new lease with the tenant.

(b) Affordable, effective and timely dispute resolution processes

Each jurisdiction provides for relatively affordable, effective and timely dispute resolution processes that, typically, seek to have disputes resolved informally or mediated between parties before it can proceed to the relevant tribunal or court for deliberation. Indeed, in its 2008 report following its inquiry into The Market for Retail Tenancy Leases in Australia, the Productivity Commission summarised that "as a result of developments over the last two decades, retail tenants and landlords now have access to low-cost alternative arrangements for dispute resolution in each jurisdiction[7]". The Productivity Commission goes onto say "this is intended to be of particular value to small retail tenants and small landlords[8]".

In this regard, it is not clear what aspect of the existing dispute resolution processes the Senate Committee is seeking to investigate. Indeed, in many jurisdictions there are dedicated statutory officials, whose positions are enshrined in legislation separate to the prevailing retail lease legislation, charged with providing support to small businesses, including dispute resolution assistance.

For the benefit of the Senate Committee, following is a brief summary of the dispute resolution processes which currently operate in each jurisdiction. In line with the reference heading, we have, where readily available, provided an indication of the cost of the application fee and/or mediation process to provide an indication of the affordability of the process.

- In **NSW**, the *Retail Leases Act* outlines that a retail tenancy dispute may not be the subject of proceedings before any court until the Registrar who, in this case, is the NSW Small Business Commissioner, certifies in writing that the mediation was unsuccessful. There is no application fee for mediation and it costs $152 per hour (shared equally between parties). If unsuccessful, a dispute claim can be lodged with the NSW Civil and Administrative Tribunal (NCAT, formerly the Retail Leases Division of the Administrative Decisions Tribunal) for decision. The NCAT can also hear unconscionable conduct claims under the provisions of the *Retail Leases Act*.

- In **Queensland**, the *Retail Shop Leases Act* outlines that a party to a dispute is to lodge a 'notice of dispute' with the Queensland Civil and Administrative Tribunal, following which a mediation conference can be held. Parties cannot be compelled to attend mediation (although, in our submission to the current review of the Act, we have recommended that disputes should not be referred onwards until a mediator has certified that the mediation process has failed, or is unlikely to be resolved as per the process in NSW and Vic). If mediation did not take place or was unsuccessful, the mediator will refer the dispute to the Queensland Civil and Administrative Tribunal (QCAT). The fee for lodging a dispute notice is $295. The QCAT can also hear unconscionable conduct claims under the provisions of the *Retail Shop Leases Act*.

- In **Victoria**, the *Retail Leases Act* outlines that the Small Business Commissioner is to make arrangements for mediation (or alternative dispute resolution) of retail tenancy disputes. A dispute can only be referred to the Victorian Civil and Administrative Tribunal (VCAT) if the Small Business Commissioner has confirmed in writing that the dispute resolution has failed, or that the matter is unlikely to be resolved. The cost of mediation is $195 per party, per mediation session. (The website of the Victorian Small Business Commissioner notes that they subsidise the majority of costs and it is only "if the stakes are high" that a greater contribution may be sought from the parties[9].) The VCAT can also hear unconscionable conduct claims under the provisions of the *Retail Leases Act*.

[7] Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia,* No.43, 31 March 2008*,* p. 80
[8] ibid
[9] We don't know what this reference means.

- In **Western Australia,** *the Commercial Tenancy (Retail Shops) Agreements Act* allows for parties to a lease to refer a 'question' to the State Administrative Tribunal (SAT), but only following the receipt of a certificate from the Western Australian Small Business Commissioner which details that the matter is unlikely to be resolved through alternative dispute resolution, including mediation. Mediation costs $125 per party. The SAT can also hear unconscionable conduct claims under the provisions of the *Commercial Tenancy (Retail Shops) Agreements Act*.

- In **South Australia**, the *Retail and Commercial Leases Act* outlines that a party to a lease can apply to the South Australian Small Business Commissioner to mediate a dispute. A court may also refer a dispute to the Commissioner for mediation. Mediation costs $195 per party per day. Depending on the value of the claim, the Magistrates Court and / or the District Court can also hear retail lease disputes.

- In **Tasmania**, the *Code of Practice for Retail Tenancies* outlines parties to a lease must first attempt to resolve their dispute through direct negotiation. If unsuccessful, the Office of Consumer Affairs can be asked to investigate and negotiate a solution. If still unresolved, a party can refer the matter to a court for decision.

- In the **ACT**, the *Leases (Commercial and Retail) Act* outlines that the Magistrates Court must hold a case meeting and determine whether it is likely the dispute could be resolved before a hearing. The Magistrates Court can refer the matter for other dispute resolution mechanisms, including mediation. The Magistrates Court also hear claims of unconscionable conduct under provisions of the *Leases (Commercial and Retail) Act*.

- In the **NT**, the *Business Tenancies (Fair Dealings) Act* outlines that a party to a retail shop lease can apply to the Commissioner for Business Tenancies for the determination of a retail tenancy claim. Following a conciliation conference, if the Commissioner is satisfied that the dispute is unlikely to be resolved, including if a party did not participate in a conference, the Commissioner may issue a certificate following which time the dispute can proceed to court. A court can also hear unconscionable conduct claims under the provisions of the *Business Tenancies (Fair Dealing) Act.*

As evidenced above, every jurisdiction provides parties the opportunity to undertake alternative dispute resolution prior to seeking a decision from a tribunal or court. Our members advise that these processes work relatively well and, as outlined above with respect to the review of the Queensland retail tenancy legislation, we have no concern about jurisdictions mandating that parties attempt to mediate a dispute prior to a matter being progressed to a tribunal or court.

We note that mediation fees are absorbed into the relevant application fee, subsidised by the mediating party or split equally between by the participating parties. The cost of mediation (several hundred dollars at the maximum) are hardly cost prohibitive in the context of claims which can reach into the hundreds of thousands of dollars (eg. $400,000 in NSW) and, in relevant instances where a small business is seeking mediation with a landlord, including a shopping centre owner, the landlord must equally contribute to the cost of the mediation. It is also important to note that many jurisdictions champion their dispute resolution processes as being 'low-cost'.

With respect to effectiveness of dispute resolution processes, based on a review of various websites and Annual Reports across jurisdictions, we can say that (1) the number of disputes brought forward is extremely small relative to the number of leases on foot across Australia, (2) many disputes are able to be resolved prior to mediation, and (3) the majority of disputes which are mediated are able to be resolved successfully. It is also important to note that the low number of disputes brought forward doesn't reflect dissatisfaction with the process or service, but that the retail tenancy market is functioning well with, by and large, little need for disputes to be resolved with third party assistance.

- The NSW Small Business Commissioner reported that in 2012-13[10] they "managed a high volume of applications for the mediation of disputes", without detailing how many applications were received, nor the number that were progressed to mediation. The Commission's website also notes that "mediation is so successful that about 94% of all matters referred to us for mediation are resolved prior to having a court decide the matter[11]".

- The QCAT reports that in 2012-13[12] there were 130 claims lodged relating to retail shop lease matters, with a 115% clearance rate for the reporting period (presumably having also cleared cases from the previous reporting period). Although not broken down by area of claim, the QCAT also notes that there was a 44% mediation settlement rate in minor civil disputes in the reporting period.

- The Victorian Small Business Commissioner reported that in 2012-13[13] that they received 1,103 applications for dispute resolution related to the *Retail Leases Act*. Of these, only 594 progressed to mediation and the success rate was 80.3%. These numbers are consistent with information provided earlier in the report which details that about 42% of all applications received by the VSBC are resolved prior to mediation[14].

- The Western Australian Small Business Development Corporation reported that, in 2012-13[15], 132 cases were resolved through alternative dispute resolution that related to retail tenancy disputes, noting that 80% of these were "resolved directly, therefore removing the need to the disputing parties to seek a determination through the SAT".

- The South Australian Small Business Commissioner reported[16] that only 27% of formal cases received related to the *Retail and Commercial Leases Act* and that 88% of all formal cases are successfully resolved. Further, they report that 98% of disputes are resolved prior to mediation.

- The Tasmanian Government reported that in 2012-13[17] there was only one complaint received under the *Code of Practice for Retail Tenancies*.

- There is no readily available data from the ACT.

- The Commissioner of Consumer Affairs in the Northern Territory[18] reported that there were only four applications submitted in 2012-13.

The timeliness of dispute resolution would be dictated by the demand on the dispute resolution bodies, such as the various Small Business Commissions and tribunals. It should be noted that the jurisdiction of the courts and tribunals, in particular, extend past the prevailing retail lease legislation, and some Small Business Commissioners also perform dispute resolution functions under other Acts. For example, the Victorian Small Business Commissioner has a role with regard to the *Owner Drivers and Forestry Contractors Act* and the *Farm Debt Mediation Act*. The timeliness of resolution would also depend on whether the matter is resolved prior to mediation, following mediation or if it is necessary to seek resolution at court or a tribunal. Generally speaking, we understand that accessing mediation can take several weeks to a few months, while the mediation session itself should take no longer than a few hours.

[10] NSW Trade and Investment Annual Report 2012-13, p. 83
[11] NSW Small Business Commissioner website, 14 August
[12] QCAT Annual Report 2012-13, p.12-13
[13] Victorian Small Business Commissioner Annual Report 2012-13, p. 17
[14] Victorian Small Business Commissioner Annual Report 2013-14, p. 11
[15] Small Business Development Corporation Annual Report 2012-13, p. 22
[16] South Australian Small Business Commissioner Annual Report 2012-13, p. 12-13
[17] Department of Justice Annual Report 2012-13, p. 61
[18] Annual Report of the Commissioner of Consumer Affairs 2012-13, p. 27

Reflecting comments and recommendations earlier in this submission, considering the various bureaucratic power bases through which dispute resolution processes are provided in each jurisdiction, we doubt that the states and territories could be convinced to repeal their existing legislation to see the implementation of a national system of dispute resolution, remembering, of course, that the legislative tentacles of dispute resolution extend past retail lease legislation (eg. the *Small Business Commissioner Act* in NSW). This would make the challenge even harder.

(c) A fair form of rent adjustment

The inference of this heading is that the rent adjustment processes currently detailed in retail lease legislation across Australia are, in some way, 'unfair', presumably to tenants. If this is the case, we do not agree that the processes are 'unfair' to tenants and we are not aware of any evidence, beyond anecdotes, to suggest otherwise.

Every piece of retail lease legislation in Australia allows for rent adjustment during the term of a lease. This is evidence that rent adjustment provisions are a tool of flexibility both for the landlord and the tenant in the negotiation of other related lease terms, such as the base rent (for example, a low base rent may be provided in year one of a lease to allow the tenant to establish themselves in a new centre on the agreement that the negotiated rent adjustment would kick in in year two and beyond), or a side agreement (such as a fit-out contribution).

Rent adjustment provisions need to be considered in the context of the lease as a whole, not just in the context of an annual percentage or annual dollar figure increase. If viewed in isolation, the Senate Committee will receive a misleading view of the nature and role of rent adjustment provisions and be blind to the benefits that a tenant may be receiving under other terms of a lease or related side-agreement.

The applicable method and timing of rent adjustment is specified in a lease. This means that a lease spells out which of the acceptable forms of rent adjustment, whether it be fixed percentage, a fixed dollar amount, a market rent review, or other, will be used and when it is to occur. Generally speaking, rent adjustments are only to be undertaken annually unless there is, for example, an agreed provision for a bi-annual percentage or dollar increase in rent.

The need to specify the terms of rent adjustment in the lease is not a whim of landlords to lock tenants down, but is required by legislation. This means that rent adjustment is subject to negotiation and agreement between the landlord and tenant prior to a lease being entered into. A tenant has full visibility of this process and equal opportunity to direct the terms of the rent adjustment clause/s contained in their lease. Further, leases generally cannot contain a provision which prohibits reductions in rent as a result of a market rent review (eg. SA *Retail and Commercial Leases Act* s. 22(4)), but they can contain provisions which limit the amount of a rental increase as a result of a rent adjustment (eg. Qld *Retail Shop Leases Act s. 27(10)).*

The legislative parameters that sit around rent adjustment are very stringent. In the case of a market rent review, for example, if agreement cannot be reached between a landlord and a tenant on the prevailing market rent for a tenancy, an independent 'specialist retail valuer' can be brought into the negotiations. This valuer can effectively direct parties as to the 'fair' market rent for a tenancy. Failure on a landlords behalf to provide information to this 'specialist' can result in a financial penalty (for example, a landlord can be fined 50 'penalty units' under the *Victorian Retail Leases Act* for failure to provide information to the specialist within 14 days – s. 37(4)). There is even regulation in some jurisdictions that outlines how an individual is to be identified as a 'specialist'. In Victoria, for example, the required breadth of experience of a 'specialist' changes depending on whether the lease in question is inside or outside a shopping centre.

This legislative framework does not speak to a process that is 'unfair' to tenants. Rather, it speaks to a process that has been made incredibly cumbersome for a landlord in its attempt to make the process as 'fair' as possible for tenants.

The terms of rent adjustment are for negotiation and agreement between the parties of a lease. No further regulation is required, nationally or through state and territory based legislation. Indeed, as we recommended in our recent submission to the review of Queensland's *Retail Shop Leases Act,* there should be greater flexibility, not less, for parties to negotiate and agree on the terms of rent adjustment and that consideration be given to extending exemptions which currently exist in Queensland which see 'major lessees' exempt from the legislative constrains which exist around the negotiation of rent adjustment terms.

(d) Implications for statutory rent thresholds

We assume this refers to the use of the annual amount of rent paid by a retailer (or the retailer's total occupancy cost) as the threshold for deciding whether or not retail premises are covered by retail tenancy legislation. South Australia has a rent threshold ($400,000 per annum) and Victoria has an occupancy cost threshold ($1 million per annum) while all other states and the territories use a floor space threshold (1,000 square metres).

A threshold is necessary to ensure that the protection of retail tenancy legislation is limited only to small retailers whose bargaining power is generally considered to be less than that of the landlords with whom they negotiate. Large retailers and retail chains have a bargaining power that exceeds that of any individual landlord and should not have the protection of legislation. Providing large retailers with the coverage of retail tenancy legislation simply adds unnecessary business red tape for both the landlord and the retailer.

Floor space is a sensible threshold since it provides reasonable certainty, even though in our view the amount of 1,000 m2 (which is the equivalent of two standard suburban housing blocks) is excessive in delineating 'small' and 'large' retailers. To put this amount in context, the average floor space of most speciality retailers in shopping centres in Australia is only around 100 square metres. Shops with a floor space in excess of 400 square metres are classified as mini-majors (such as JB HiFi and Harvey Norman) and since these retailers have substantial bargaining power they do not need the protection of retail tenancy legislation[19].

Since rents and occupancy costs vary over time, a rent threshold can never deliver the relative certainty of a floor space threshold. Floor space or lettable area is an objective matter which can be easily ascertained by accepted industry standards (in this case, the Property Council of Australia's *Method of Measurement – Commercial*) prior to entry into a lease. Another major difficulty with a rent or occupancy cost threshold is that a premise can be below the threshold at the commencement of the lease but could exceed this threshold during and by the end of the lease. The problem of premises moving into or out of coverage rarely occurs with a fixed threshold such as the 1,000 square metre rule.

Victoria changed from a floor space threshold to an occupancy cost threshold when the current *Retail Leases Act* was passed in 2003. This is widely considered, including by retailer associations, to have been a foolish change. No justification was provided for the change. The then Labor Government had come to office in 2000 with an election pledge, made in the dying days of the election campaign, to abolish the floor space threshold. This had been pushed by Coles Ltd which wanted access to the benefits of retail tenancy legislation, despite Coles having vastly more bargaining power than any landlord with whom it negotiates over leases[20]. There had been no discussion or consultation with other stakeholders before this election undertaking was made. Once the then Minister for Small Business realised that the implications of her determination to abolish the floor space threshold could be to give the protection of retail tenancy legislation to the most powerful retailers in Australia, she had to put in place an alternative threshold which would allow her to 'save face'.

[19] Despite their considerable bargaining clout mini-majors in some states, such as NSW, still have the benefit of retail tenancy legislation.

[20] The push by Coles (which was not supported by Woolworths) made little sense since public companies in Victoria (unlike NSW) are excluded from the coverage of retail tenancy legislation. The change in threshold, however, means we now have the anomalous situation in Victoria where many Aldi stores are covered by retail tenancy legislation, despite having bargaining superiority over landlords.

The result was a radical change in retail tenancy regulation with absolutely no public policy justification. The result was a waste of time of government officials (and industry bodies) in seeking to determine an appropriate occupancy cost threshold, an exercise that was repeated in 2013 when the relevant regulation had to be reviewed.

It makes no sense for states and territories to have different thresholds for coverage by retail tenancy legislation. Given the floor space threshold is the most common around Australia, and given the difficulties posed by rent or occupancy cost thresholds, it would make sense for South Australia and Victoria to bring their legislation into line with the other states and the territories.

At the same time, however, those states (NSW, Queensland and South Australia) that do not exclude public companies from coverage of retail tenancy legislation should likewise exclude them. This would be a major step towards removal of the regulatory burden on businesses, and therefore the promotion of efficiency. It makes no sense that powerful listed retailers, such as the Premier Group, with over 800 stores among its major brands (Just Jeans, Jacqui E, Peter Alexander, Smiggles etc.), and whose market power and bargaining power exceeds that of landlords, should gain the benefits of the Act's provisions. Many of these Australian listed retailers also operate in countries in which there is no retail tenancy legislation. Leases to listed companies, and subsidiaries of listed companies, should be excluded from regulation by retail tenancy legislation in every state and territory.

(e) Bank guarantees

The provision of a security deposit is a common tool in most retail lease legislation across the country. This security can take a number of forms, including the provision of a bank guarantee drawn in favour of the landlord. It is entirely appropriate for a landlord to be provided with some form of security from a tenant in the event lease terms are broken (residential landlords would be up in arms of it was no longer a requirement for tenants to pay a bond as security; retail land lords should expect no less).

Bank guarantees are a common tool to provide the landlord with the security that funds are available in the event a tenant breaks one or more of their lease conditions. Bank guarantees are generally preferred by landlords over other forms of security available under legislation as they are a trusted and widely used form of security. We are not aware of any administrative issues that have arisen as a result of the use of bank guarantees as a form of security. Provisions regarding the draw down and return of a bank guarantee are matters for lease negotiation and for agreement with the relevant bank. Insolvency legislation already addresses key points in relation to when such guarantees may be called upon.

Security deposits, including bank guarantees, are there for the benefit of the landlord, and landlords don't want the additional regulation. There is no evidence of a policy failing regarding the use of bank guarantees, or the provision of security deposits more generally, has been provided through recent reviews of various retail tenancy legislation (namely NSW and Qld), either by Government or, as far as we are aware, retailer associations. In the absence of a problem there is no need to regulate the use of bank guarantees, nationally or otherwise, and we are not sure why the terms of reference for this inquiry specifically seek feedback on their use.

It should be noted that the use of bank guarantees as a preferred form of security has arising as a result of the over-regulation of cash security deposits now defined in some retail leasing legislation. While, historically, a landlord was able to hold a tenant's cash deposit relatively unencumbered, regulation is increasingly seeing landlords being required to deposit a security deposit into a government operated account or scheme, such as the Retail Bond Scheme in NSW. This has had the disadvantage that tenants now receive very little interest on their cash security deposit.

In addition to taking time and resources to implement (eg. for a landlord to collect, lodge and discharge security deposits) lessees can also challenge a landlord's legitimate attempt to draw on funds from the security deposit in the event a lessee breaks their lease conditions. This can result in the initiation of dispute resolution proceedings, including mediation and appearances before a tribunal, before the matter can be determined and the money received by the landlord. This introduces uncertainty and potential delay into a process whereby a landlord is seeking to access funds to remedy an action taken by a tenant in contravention of their lease agreement. Similar regulations should not be put around the use of bank guarantees, particularly considering the terms of the bank guarantee are able to be agreed through the negotiation of the lease.

An issue raised in the recent review of the *Queensland Retail Shop Leases Act* is the time period following which a bank guarantee must be paid by the lessor to the lessee following the end of a lease. Although we don't think that bank guarantees need to be regulated, and stress that there has been no evidence to suggest there is problem in this regard, we have no objection to a timeframe being included in regulation provided it is sensible and realistic and will ensure that any breaches of the lease have been notified and rectified. We consider the 30 day period currently provided for in the *ACT Leases (Commercial and Retail) Act* is not sufficient. We would recommend a period of at least 90 days after expiry of the lease, assuming the tenant has not exercised any option of renewal, is no longer in possession of the shop and has complied with all 'make good' obligations. In addition, any regulation of the return of a bank guarantee must be clear that such a provision does not apply (ie. the bank guarantee would not be returned) until the tenant has performed all obligations secured by the guarantee. For example, a landlord should not be required to return a bank guarantee after an arbitrary timeframe if the tenant has delayed completion of the removal of fit-out and any other 'make good' obligation required at the end of the lease.

(f) Need for a national lease register

The premise of lease registration and, indeed, the Senate Committee's interest in the need for national lease register, is an issue that is raised consistently in reviews of retail lease legislation. The Senate Committee needs to be cautious not to confuse the premise of lease registration, which relates to 'indefeasibility of title' under prevailing property laws, with the premise of a perceived information imbalance (or 'information asymmetry') between a landlord and a tenant. The perception of an information imbalance has led to some retailers seeking the full disclosure of all confidential, commercial terms or agreements between a landlord and tenant, including any side deals or incentive packages that have been struck. These are issues which are often mistakenly (and, occasionally, deliberately) conflated. For further information, please see the response to (g) full disclosure of incentives in page 22.

The establishment of a national lease register which would be in addition to existing land and property registers (explained further below) would extend the reach of regulation beyond what currently exists and should not be considered by the Senate Committee as part of its deliberations on a national approach to retail lease arrangements.

It is already outlined in some state and territory based legislation (both retail tenancy legislation and the prevailing Acts governing land and property tenure) including that of NSW and Queensland, that retail leases are able to be registered with the relevant land title office to ensure 'indefeasibility of title', (generally, a legal interest in the property). In jurisdictions where the legislation is silent about the registration of retail leases, we are not aware of anything precluding leases in other jurisdictions also being registered voluntarily, although registration is likely to be less common. Even though in NSW, for example, legislation outlines that leases greater than 3 years are to be registered, we are also not aware of any requirement which prohibits leases of a shorter duration from also being registered.

Registration of a lease effectively puts it in the public domain. This enables interested parties the ability to access and review retail leases (but not the confidential side deals or incentive agreements) for a small fee. We note that there are now sophisticated businesses that can be engaged by a prospective tenant to access and review leases on their behalf and then provide assistance during the lease negotiation process.

We agree with the Productivity Commission's 2008[21] observation that the information in the leases which is, upon registration, made public, is a "by-product" of lease registration, not the reason for lease registration, and that "it would not be appropriate to mandate the registration of leases" to, in effect, facilitate information sharing between prospective tenants.

However, the Productivity Commission left open the proposition of the lodgement of "lease information" with an "independent agency"[22] as an alternative to mandating the registration of leases through existing mechanisms. Although its reasoning is flimsy (it could 'boost the confidence' of smaller tenants in lease negotiations), and the Commission says elsewhere that "it does not appear that the lack of information has placed significant efficiency constraints on the market", this has fuelled an ongoing debate about the establishment of retail lease registers or databases separate to those which already exist in the context of jurisdictional property law.

We have consistently opposed requests by retailer associations to establish state-government sponsored retail lease registers (beyond those under property law which perform a specific purpose) as this would inevitably involve a cost to, and a huge administrative burden on, landlords.

The establishment of any new retail lease register or database should be the responsibility of retailer associations to compile. If they are convinced that their members want the service and the information, the retailer association should take on-board the risk, including the cost, associated with its establishment. If done well, they could also receive the benefit of, for example, selling the product (ie. access to the information) to their members. Leaving a register to the responsibility of a retailer association would also ensure that the specific needs of a particular retailer market could be satisfied in terms of how the information is gathered, maintained and presented. Governments should also find this to be an attractive proposition as it would mean the costs of establishment and maintenance of a register (eg. staff costs, office space, IT capacity etc) would be borne by a non-Government party.

In this regard, the Jewellers Association of Australia (JAA) has recently sought authorisation by the Australian Competition and Consumer Commission under the *Competition and Consumer Act* to establish a retail tenancy database for its members. This database is to include information about the terms and conditions associated with retail tenancies. We understand that the lease information would be sought from JAA members, de-identified, aggregated and added to the database that is able to be accessed by members through a secure website. When consulted by the ACCC about the JAA's proposal, we advised that we had no objection to the application for authorisation provided our members are not required to be involved in the provision of this information or are not required to be involved in verifying information supplied by JAA members.

Importantly, in 2008, the Productivity Commission also stated that "lodged lease information should not necessarily include information on incentives and 'side deals'. Such a requirement would be difficult to enforce and would not significantly add to market information"[23]. We agree with the Commission's view and oppose any requirement for the disclosure of information that is considered to be 'commercial-in-confidence'. More information on the full disclosure of incentives is provided under heading *(g)* (over page).

[21] Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia,* No.43, 31 March 2008*,* p. 175, p. 253
[22] Ibid, p.253, p 181
[23] Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia,* No.43, 31 March 2008*,* p. 253

(g) Full disclosure of incentives

Side deals and incentive packages are binding, confidential arrangements and obligations between the landlord and tenant. Such arrangements could be in the form of rent free periods, outgoings payable and provision of financial contribution to fit-outs. As the Productivity Commission noted in 2008[24], "incentives are a normal part of negotiating contracts and are common in many transactions (from commercial leasing to purchasing a car)". The Commission goes onto say that "most incentives are negotiated on a confidential basis as neither party – landlord nor tenant – want such details to be provided to the broader market".

The confidential nature of side deals and incentive packages benefits **both** parties to the agreement, not just the landlord.

Requiring the full disclosure of incentives would extend the reach of regulation well beyond what currently exists in the states and territories and would further encroach into the commercial negotiations and agreements that are struck between a landlord and tenant. Full disclosure of incentives should no be considered by the Senate Committee as part of its deliberations on a national approach to retail lease arrangements.

It is our understanding that there is no single, united voice from retailers calling for the disclosure of such confidential agreements with landlords. Indeed we have over many years held discussions with retailers who have advised us that they do not want their incentive information disclosed to other retailers. The public availability of side deals and incentives could expose the vulnerability of a retail tenant as it may, for example, bring to the attention of competitors and others that they are having financial difficulties. This is unlikely to be publicity which the retailer would wish to have generated. We also understand that some more sophisticated national retailers, and some franchisors, also consider the nature of their agreements with their landlords in various locations to be commercial-in-confidence, and the strength of this confidentially would outweigh access to any information on the deals struck by their competitors.

It is also worth noting that some landlords also already provide broad information on lease incentives during market updates, investor briefings and annual general meetings. Also, any retail leasing agent worth their salt would have a good sense of the market and would be able to advise prospective tenants on the nature of current incentives in the market, without divulging commercially sensitive information.

Any requirement for the confidential terms of agreements reached between a landlord and a tenant to be made public would also impair an owner's ability to manage a centre in the most effective way for shoppers and the most profitable way for other retailers. For example, a particular incentive package may have been offered to a specific retailer for a specific tenancy in order to optimise the tenant mix and retail offering available in a shopping centre. Maximising these outcomes would have flow on benefits to retailers in the near-by tenancies by attracting new customers, creating additional 'through-traffic' and, hopefully, generating more retail spend. It would not be appropriate, or commercially sensible, for a landlord to offer the same incentive package to a retailer that may act to simply replicate the existing tenant mix and retail offering in a centre. Shopping centre managers need the flexibility to make deals and, as such, attract new and different tenants that create the most profitable and attractive destination for shoppers.

Incentives can also be provided at the beginning of a redevelopment where a developer/landlord is seeking to lock in tenants at an early stage. These tenants, being the first to take space and at a greater level of risk, can commonly be offered an incentive. The final tenants to take up space, which have greater security knowing which other retailers have committed to the project, may not be provided with similar incentives.

[24] Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia,* No.43, 31 March 2008*,* p. 163-4

Requiring disclosure of the side deals or incentives would curtail this flexibility as it would set an (unrealistic) expectation in the tenancy market for that centre that every prospective tenant 'deserves' or 'has the right' to the same incentive package or deal. In other words, the disclosure of incentives would just set in motion a 'race to the biggest incentive'. This isn't commercially viable or, for that matter, a fair proposition for the landlord, and clear demonstration of why the terms of the agreements need to be confidential.

There also isn't consensus between the states and territories on the need for, or appropriateness of, the requirement to disclose currently confidential agreements between a tenant and a landlord. While the Queensland Government's recent Options Paper on the review of the *Retail Shop Leases Act* acknowledged that "it is not appropriate for the Act to override commercial confidentiality[25]", the sentiment in the NSW Government's recent discussion paper on the review of its retail lease legislation is almost the opposite. In this paper the author blatantly sought feedback on whether the disclosure of confidential financial arrangements between parties is "more important" than the public provision of the information[26]. It is concerning that this question is even being asked by a state government agency - an agency that would on occasion observe the requirement for confidentiality, whether it be through the Cabinet process or the contracting of third party to perform work on their behalf.

In the event that it is determined there is merit in having a national lease register with all financial arrangements made publically accessible, to the extent that this relates to the disclosure of incentives, there needs to be appropriate consideration given to the process for collection and release of information including safeguards for confidential information. We are specifically mindful of some of the Productivity Commission's comments on the provision of information "at a publicly accessible site" which should be considered. The following full suite of issues should be considered:

1. Non-mandatory

The first test to safeguard confidentiality is that it should not be mandatory. The Productivity Commission made a 'judgement' in its 2008 report referenced earlier that "it would not be appropriate to mandate the registration of leases" in the context of information provision. We agree with this statement. To overcome critical issues and concerns relating to commercial confidentiality, the provision of information for a public register should be voluntary so that parties who want to register their information can do so, and those who do not want to do so are not required.

There should be little concern with voluntary registration if, as some retailer representatives claim, there is widespread support from retailers in wanting to have such information accessible. Further, we assume there is broad support in voluntarily providing such commercial information through a copy of a signed lease and other side documentation to the relevant agency. If there is no such support in this regard, then the arrangements should not be disclosed as the proposal to make the information is primarily for the benefit of retailers.

2. Responsibility to disclose

Any new requirement must not place the responsibility to provide information on landlords. Given that the main group pushing for the availability of such information are retailer representatives and lease negotiators, we believe the administrative burden should be placed on retailers in providing such information to a register.

3. Restrictions on the release of information

If a voluntary approach is adopted as described above, we would support the removal of lease provisions which restrict the release of such confidential information on the condition it is only provided to the agency for registration purposes and may only be used in an aggregated form (see point 4 below).

[25] Review of the *Retail Shop Leases Act* 1994 Options Paper, p. 152
[26] 2013 Review of the *Retail Leases Act 1994* Discussion Paper, p. 11

4. Aggregation of data

It is critically important that commercial confidential information made publicly available is in an aggregated format, which does not enable the identification of an individual shop or tenant, or identify a category where there is a single shop or tenant. This would be similar to the summary of shopping centre turnover information which is broken down into broader categories.

5. Who runs the register?

We are mindful of the Productivity Commission's comments (at page 253) that lodgement should be with an "independent agency".

The Australian Small Business Commissioner, which is soon to be the Office of the Small Business and Family Enterprise Ombudsman (OSBFEO), could be an appropriate agency, so long as the register operates at arms-length from other activities.

However, a preferred option could be a public register run by one of, or a joint venture of, the retailer associations. This would have multiple benefits over a register within the OSBFEO.

It would prevent the Government from having to take on the cost of establishing and maintaining such a register (including staff, office space, IT equipment and operating procedures). The retailer associations are also 'not-for-profit' industry associations and therefore have a capacity to maintain an independent position for the benefit of the industry they serve. Similarly, it would have the benefit of the retailer associations directly being able to encourage their members to voluntarily submit information for the benefit of the broader industry. It would also have the benefit that if retailers are required to provide the information, they can have the advantage of subsidised access to that information as members of their association. The associations could also set a market value for accessing such information.

This approach would be no different to other critical industry research and benchmarks, all of which are based on voluntary disclosure of market information and undertaken by non-government entities.

This includes the Property Council of Australia's *Shopping Centre Benchmarks of Operating Expenses* (which includes itemised statutory and non-statutory expenses); the PCA/IPD Investment Performance Indexes which provides information on capital and rental returns; the *Shopping Centre News* Big Guns/Little Guns/Mini Guns editions which provides turnover information; the *Urbis Retail Averages* and *Retail Benchmarks* which provides information such as occupancy costs broken down into shopping centre type and retailer categories and; even the Westpac-Melbourne *Institute Survey of Consumer Sentiment*.

6. Establishment costs

If the OSBFEO was considered as the most appropriate agency to establish the register, there should be consideration given to the establishment and operational costs. It is our view that establishing such an independent register would be a costly exercise based on the resources we are aware of within Urbis, the PCA, and IPD that go into their research products (e.g. staff, desks, computers, other operating costs). It is worth noting these research products also have relatively smaller sample sizes than the retail tenancy market.

7. Context

The context of side deals and incentives would also need to be clarified to ensure that such information is not misinterpreted and reduces the potential for misinformed expectations. As an example, incentives can be provided at the beginning of a redevelopment where a developer/landlord is seeking to lock in tenants at an early stage. These tenants, being the first to take space and at a greater level of risk, can commonly be offered an incentive. The final tenants to take up space, which have greater security of knowing what other retailers have committed to the project, may not be provided similar incentives. If a shopping centre was identified on a register, there arguably should be a clarification such as whether the lease was entered into at the beginning of a redevelopment.

(h) Provision of sales results

The issue of the provision of retailers' sales results to landlords has been raised on many occasions during retail tenancy reviews and all state and territory governments have accepted that the continuing collection of this information is necessary for an efficient shopping centre industry.

This issue was also raised before the Productivity Commission in in its inquiry into the market for retail tenancy leases in 2007-08. The Commission found: "*Prohibiting the collection of turnover data, or mandating that it be provided at a store category level, could limit shopping centre owners' managing their assets optimally. This could limit the performance of centres, ultimately disadvantaging centre tenants and consumers. Also, while the reporting of turnover data was one of the most contentious issues raised during this inquiry, it is very unlikely that any means to prohibit the collection of turnover figures would materially ameliorate the expressed concerns. Given information on vacancy rates, and that it is likely shopping centre managers could gauge a tenant's performance and turnover through other means, it is not clear that prohibiting the provision of turnover data (or legislating the fashion in which it is provided) would materially affect occupancy costs. The Commission's assessment is that the provision of turnover data, and its use by landlords should be the subject of commercial negotiations between the parties to a lease.*"[27]

The SCCA has recognised that this is a contentious issue with some retailers and has therefore begun discussions with major retailer associations on a code of practice to govern the reporting of such information. We have addressed this further below. At the outset, however, it is important that the Committee understands the reasons why landlords require the disclosure of sales information and why this information is vital for both shopping centre landlords and for the retailers in those shopping centres.

Market share analysis

Turnover information is necessary for proper market share analysis – to determine the overall financial performance of a shopping centre; the strengths and weaknesses of the centre's retail offer according to various retail categories; and if it is losing sales to a competitor. This information is critical for decisions on expansions and refurbishments of the centre. Decisions on refurbishments and expansions are always major risks and to embark on these projects without proper market share analysis would be a case of 'flying blind'. To expect shopping centre companies to undertake such major capital expenditures without knowledge of the turnover of particular centres would be like expecting, say, David Jones to make similar decisions about its chain of department stores without knowing the turnover of individual stores or of individual departments within those stores.

Tenancy mix

If a shopping centre doesn't maintain an appeal to all of its customers (i.e. have the right 'tenancy mix') it will lose customers and stagnate. That will be to the detriment of its tenants as much as its owners. Occasional changes to the tenancy mix of shopping centres, as well as fairly regular redevelopments, are therefore a very necessary fact of life. Management of the tenancy mix is a constant and evolving process designed to maximise the customer pulling power of the centre for the benefit of all retailers. Sales results are therefore necessary to ensure a centre has a successful tenancy mix strategy to enable it to adapt to a constantly changing market place. Without turnover information it would not be possible to monitor the retail performance of individual shops and categories. Over time the tenancy mix strategy would become largely 'hit and miss' and ultimately detrimental to the customers' needs; to retailer turnover levels; and to the centre's retail profitability.

Marketing and promotional strategies

Turnover information is also vital to most effectively target shopping centre marketing and promotional strategies in order to ensure a centre gets maximum value for its marketing and promotional expenditure. A detailed assessment of turnover information enables the centre to direct its marketing funds to where they are needed most; to evaluate the success of marketing strategies; and, particularly, to boost those categories of retail experiencing difficult trading periods.

[27] Report, op cit. p. 148

Independent industry researchers

Turnover information is vital to industry researchers to, among other things, compare the relative performance of shopping centres. For example, the independent magazine *Shopping Centre News* publishes each year comparative performance tables based on turnover for shopping centres, which are important for investors, retailers and owners. Retailers use the tables to decide in which centres they will seek premises. The magazine relies on this information to compile its comparative lists (what it calls 'Big Guns', 'Middle Guns' and 'Little Guns') and this would not be possible if turnover figures were not disclosed. Leading retail research firms, such as Urbis and Macroplan, rely on turnover figures to prepare important industry data, including sales and occupancy cost analysis, which are used by both owners and retailers for benchmarking and location decisions.

Retailer benchmarking purposes

Turnover information is vital to individual retailers for benchmarking purposes. It enables the retailer to compare the performance of their store to the trend of that particular retail category and to the trend of all speciality shops in that centre. This can alert them to the need for corrective action. Major chain retailers now regularly request this information to enable them to benchmark the performance of their stores in various centres against the performance of other stores in the same category so they can make better business decisions. Major landlords, as a matter of course, now make this information available to retailers who request it, provided it can be aggregated so that it does not identify the sales performance of individual retailers.

Most major landlords now provide sales information to retailers for benchmarking purposes. This allows them to pinpoint the stores that are doing comparatively well and those that are doing comparatively poorly and enables them to take any necessary corrective action quickly. Armed with such information throughout the industry these retailers can also make informed decisions about states, locations and centres in which they wish to be located (or from which they wish to withdraw) and this is obviously valuable information for them at lease renewal time. Sales reports are particularly important to retailers who are making changes to their businesses or are operating in a changing industry or environment. In times of change the reports help retailers understand how quickly they are improving or declining and enables them to act at the earliest opportunity.

Code of Practice

The SCCA is currently in negotiations with the National Retail Association, the Australian Retailers Association and the Pharmacy Guild of Australia about a possible code of practice governing the provision of sales information by retailers which will ensure this is no longer a contentious issue within the industry[28].

The code, when finalised, will impose mutual obligations upon the parties. For landlords, this will include accepting that where shopping centres collect sales information they will be obliged to provide that information to retailers who request it. This information will be in a form which enables individual retailers to benchmark their performance against other retailers within their particular sales category, both within the shopping centre (if this can be done without identifying the individual sales performance of those other retailers) and within the owner's portfolio.

The draft code also recognises that sales information should be only one aspect of the provision of information within shopping centres. Where possible and available, other information collected by landlords (such as consumer spend and demographic analysis) should also be made available to retailers to assist retail performance.

This is an example of co-operative self-regulation within the shopping centre industry which should be applauded and encouraged by the Senate Committee.

[28] A similar code of practice governing the practice known as casual mall leasing has been negotiated between the SCCA and major retailer associations and has been authorised by the ACCC. This code has removed controversy over this practice inside shopping centres. Indeed, nearly seven years after this code of practice began operation, no disputes have been registered under the code.

(i) Contractual obligations relating to store fit-outs and refits

Once again it is not clear what aspect the Senate Committee is examining. As the heading makes clear this is a "contractual obligation", one which is freely negotiated between a landlord and a tenant. A landlord cannot impose upon a tenant a requirement for a store fit-out and refit which is not provided for in the lease. If such a provision is included in the lease, it means the landlord and the tenant have agreed to these provisions.

It is important that the Senate Committee understands why store fit-outs and refits are conditions of a lease since there is a misconception in some quarters that lessors impose excessive requirements for fit-outs and therefore impose excessive costs on tenants. A requirement to fit-out a tenancy to a certain standard is not a tax imposed by the landlord; it is an investment required of the tenant in order to take complete advantage of the retail custom the shopping centre will generate for the tenant. Good retailers know that making their shop attractive to prospective customers, and keeping it fresh and appealing to customers, is part and parcel of a successful retail business. That has never been more important than it is today when physical retailing is under challenge from new forms of retailing. Good retailers also know that an attractive fit-out is an investment that must be undertaken by them irrespective of whether they rent premises or own premises.

Lessors also know that excessive fit-out costs will retard rental growth so it makes no sense for a lessor to be imposing ridiculous costs on a tenant if that is going to jeopardise their ability to pay rent. It must also be recognised that fit-out standards vary significantly depending upon the location of premises. In strip centres and small shopping centres, fit-out standards are often non-existent or minimal. In high-end shopping centres, however, they are a factor contributing to the centre being classified as 'high-end' and retailers know, if they seek premises in such centres, they must expect to pay higher fit-out costs and that new fit-outs will almost certainly be a requirement of a new lease.

Even though fit-out requirements are part of the negotiations which occur over a lease, regulation has still been imposed by state governments in retail tenancy legislation. For example, the NSW *Retail Leases Act* (section 38) provides that a "*provision in a retail shop lease requiring the lessee to refurbish or refit the shop is void unless it gives such details of the required refurbishment or refitting as may be necessary to indicate generally the nature, extent and timing of the required refurbishment or refitting."*

In addition, section 12 of the *Retail Leases Act* provides that a "*a provision of a retail shop lease that requires the lessee to pay or contribute towards the cost of any finishes, fixtures, fittings, equipment or services is void unless the liability to make the payment or contribution was disclosed in a disclosure statement given to the lessee.*"

Similarly sections 13 and 13A provide further protections for tenants in requiring details in advance of any necessary works to be carried out by the lessor in order to enable the lessee's fit-out (often known as 'category 1 works') and requiring a lessor's fit-out guide to be included with the lessor's disclosure statement or the agreement for lease.

The lessor's disclosure statement in NSW (and similar provisions apply in other states) requires the lessor to advise the lessee, prior to the lease being entered into, of details of fit-out requirements, including whether the lessor has requirements as to the quality and standard of shop front and fit-out (see Part 3 'Works, fit-out and refurbishment' of the NSW Lessors Disclosure Statement).

(j) Any related matters

We have addressed all the items listed in the Committee's terms of reference. We do not believe it necessary to add further matters, given these are issues which are considered in every review of state and territory retail tenancy legislation. However, we respectfully request the opportunity to respond, via a supplementary submission if necessary, to any relevant 'related matters' which might be raised by other submitters to this inquiry. We also request the opportunity to present evidence to the Committee in the likely event public hearings are held.

Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents Australia's major owners, managers and developers of shopping centres. Our members are major owners, managers and developers of retail property across Australia. Our members include family businesses, private companies, industry superannuation funds and Australian Real Estate Investments Trusts (A-REITS) listed on the Australian Stock Exchange (ASX).

Our members are AMP Capital Investors, Brookfield Office Properties, Charter Hall Retail REIT, CFS Retail Property Trust Group, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, JLL, Lend Lease, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland and Scentre Group (formerly the Westfield Group and Westfield Retail Trust).

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